



Department of Energy
Washington, DC 20585

April 22, 2008

Via E-filing

The Honorable Anne K. Quinlan
Acting Secretary
Surface Transportation Board
395 E Street, S.W.
Washington, DC 20423-0001

Re: STB Finance Docket No. 35106
United States Department of Energy --
Rail Construction and Operation --
Caliente Rail Line in Lincoln, Nye, and
Esmeralda Counties, Nevada

Dear Secretary Quinlan:

Enclosed for filing in the above referenced matter is the United States Department of Energy's Reply to the State of Nevada's Motion to Reject DOE's Application, or alternatively, to Require Responsive Comments Only After Application Has Been Fully Completed by Proper Supplement.

Sincerely,

A handwritten signature in cursive script that reads "Mary B. Neumayr".

Mary B. Neumayr
Deputy General Counsel
for Environment & Nuclear Programs



UNITED STATES OF AMERICA

BEFORE THE
SURFACE TRANSPORTATION BOARD

Finance Docket No. 35106

UNITED STATES DEPARTMENT OF ENERGY
--RAIL CONSTRUCTION AND OPERATION--
CALIENTE RAIL LINE IN LINCOLN, NYE,
AND ESMERALDA COUNTIES, NEVADA

UNITED STATES DEPARTMENT OF ENERGY'S
REPLY TO THE
STATE OF NEVADA'S MOTION TO REJECT DOE'S APPLICATION,
or alternatively, TO REQUIRE RESPONSIVE COMMENTS ONLY AFTER
APPLICATION HAS BEEN FULLY COMPLETED BY PROPER SUPPLEMENT

Mary B. Neumayr
James B. McRae
Martha S. Crosland
Bradley L. Levine
United States Department of Energy
Office of the General Counsel
1000 Independence Avenue, S.W.
Washington, DC 20008
(202) 586-5857

Attorneys for Applicant
United States Department of Energy

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Pursuant to 49 C.F.R. § 1104.13, the United States Department of Energy (“the Department” or “DOE”) submits this response to the State of Nevada’s (“Nevada”) Motion To Reject DOE’s Application, or alternatively, To Require Responsive Comments Only After Application Has Been Fully Completed By Proper Supplement (“Motion”), filed with the Surface Transportation Board (“Board” or “STB”) on April 2, 2008.

I. INTRODUCTION

The Board should deny Nevada’s Motion. The Board has a statutory obligation to determine whether DOE’s proposed rail line is consistent with the public convenience and necessity, and Nevada identifies no ground that allows the Board to forgo that requirement. Each of the four respects as to which Nevada contends DOE’s Application is incomplete rests on a misreading of the Board’s regulations and seeks to impose conditions on submittal of the Application that those regulations do not require, namely:

- Nevada contends that DOE has not selected an operator for the rail line and therefore does not have an operation plan. The Board’s regulations recognize, however, that an applicant need not have selected an operator when it applies for a certificate of public convenience and necessity.
- Nevada contends that DOE has not finalized the environmental impact statements for the rail line, yet the Board’s regulations do not mandate DOE’s completion of an environmental impact statement. The Board’s regulations provide only that an applicant must provide the information on certain environmental topics that it has prepared as of the time it submits an

application. DOE has done precisely that, and Nevada does not contend otherwise.

- Nevada contends that DOE's Application should be rejected because DOE did not submit a Safety Integration Plan ("SIP"). However, the Board's regulations make plain that DOE's proposal is not the type of transaction that requires a SIP. A SIP is required for certain proposed railroad consolidations, mergers, acquisitions and amalgamations. DOE's proposal to construct a new rail line is not any of those.
- Nevada contends that DOE has not sufficiently considered terrorist threats, but Nevada identifies no regulation that requires DOE to provide any additional or different information on that topic with its Application.

In short, DOE has submitted a complete Application that contains thousands of pages of information about the proposed rail line and that complies with the Board's regulations. The extensive information provided by DOE allows meaningful comment on the Application and provides ample basis for the Board's determination on the public convenience and necessity.

If the Board identifies a need for additional pertinent information in the course of reviewing DOE's Application, the Board is authorized under 49 U.S.C. § 10901(c) to request such information. The Board is also authorized under the same statute to approve DOE's Application "with modifications, and may require compliance with conditions (other than labor protection conditions) the Board finds necessary in the public interest." Those are the means by which the Board should address any legitimate questions about

the public convenience and necessity of the proposed rail line, and not through summary rejection or dismissal of the Application.

II. BACKGROUND

The Nuclear Waste Policy Act of 1982, as amended (“NWPA”), 42 U.S.C. § 10101 *et seq.*, established a comprehensive framework for the federal government to provide for the disposal of the nation’s spent nuclear fuel and high-level radioactive waste, and initiated a process to select a site for a potential geologic repository. In 2002, Congress passed and the President signed the Yucca Mountain Development Act, Public Law 107-200, approving the site at Yucca Mountain for the Nation’s first permanent repository pursuant to the NWPA. To fulfill its responsibilities under those enactments, DOE must transport spent nuclear fuel and high-level radioactive waste from commercial and federal nuclear facilities to Yucca Mountain.

On March 17, 2008, DOE submitted an Application for a Certificate of Public Convenience and Necessity to construct and operate a common carrier rail line along the Caliente Corridor (“the Caliente Rail Line”).¹ The new rail line would be approximately 300 miles long, connecting an existing rail line near Caliente, Nevada to the Yucca Mountain site.² The line would not only permit DOE to transport construction materials, spent nuclear fuel, and high-level radioactive waste to the Yucca Mountain repository, but would also promote economic development in rural communities in Nevada along the

¹ *Application for a Certificate of Public Convenience and Necessity* filed March 17, 2008 (“Application”).

² *Id.* at 3.

Caliente Corridor by making the rail line available for common carriage rail service by commercial shippers.³

As set forth in the Application,⁴ in 2002 DOE issued a *Final Environmental Impact Statement for a Geologic Repository for the Disposal of Spent Nuclear Fuel and High-Level Radioactive Waste at Yucca Mountain, Nye County, Nevada* (DOE/EIS-0250), February 2002 (“Yucca Mountain FEIS”). On April 8, 2004, DOE announced its selection, both nationally and in the State of Nevada, of rail as the primary means of transporting spent nuclear fuel and high-level radioactive waste to the repository.⁵ DOE carefully examined and considered various alternatives to rail and chose rail as the safest mode of transporting the majority of spent nuclear fuel and high-level radioactive waste to the site.⁶ DOE also selected the Caliente Corridor for further evaluation for the construction and operation of a railroad in Nevada.⁷

In October 2007, DOE issued a *Draft Supplemental Environmental Impact Statement for a Geologic Repository for the Disposal of Spent Nuclear Fuel and High-Level Radioactive Waste at Yucca Mountain, Nye County, Nevada – Nevada Rail Transportation Corridor*, DOE/EIS-0250F-S2D (“Draft Nevada Rail Corridor SEIS”) and *Draft Environmental Impact Statement for a Rail Alignment for the Construction and Operation of a Railroad in Nevada to a Geologic Repository at Yucca Mountain, Nye*

³ *Id.* at 3-4.

⁴ *Id.* at 2.

⁵ 69 Fed. Reg. 18557 (April 8, 2004).

⁶ *Id.*

⁷ *Id.* at 18562.

County, Nevada, DOE/EIS-0369D (“Draft Rail Alignment EIS”).⁸ DOE has held hearings in Nevada, California and Washington, DC on these documents and has received public comments on them. DOE is currently evaluating those comments and will respond to them in the final Nevada Rail Corridor SEIS and the final Rail Alignment EIS, which DOE expects to issue in the summer of 2008.

The STB participated as a cooperating agency in the development of the Draft Nevada Rail Corridor SEIS and the Draft Rail Alignment EIS and participated in the public hearings. The STB is a cooperating agency too in preparing the final National Environmental Policy Act (“NEPA”) documents. The Board in its April 10, 2008 Decision on Notice of Construction and Operation and Adoption of Procedural Schedule (“Decision”), served April 11, 2008, acknowledged that: “The EISs (including the public comments) will serve as the basis for SEA’s recommendation to the Board regarding whether from an environmental perspective, DOE’s construction and operation application should be granted, denied, or granted with environmental conditions.” The Draft Nevada Rail Corridor SEIS and the Draft Rail Alignment EIS were submitted as Exhibit H to the Application.

Under the Board’s ordinary rules, comments on the Application would be due on or before April 21, 2008. However, the Board’s April 10, 2008 Decision extended the comment period. Pursuant to that schedule, the due date for notices of intent to participate as a party of record is now May 7, 2008; the due date for comments in support of or opposition to the Application is now July 15, 2008; and the due date for DOE’s reply is now August 29, 2008.

⁸ Application at 2-3.

III. ARGUMENT

A. The Board Has Jurisdiction Over the Application

It is not clear why Nevada discusses the Board's jurisdiction in its Motion. Nevada does not identify lack of jurisdiction as one of the four alleged causes for rejecting the Application. Moreover, as Nevada notes in its Motion, Nevada has repeatedly argued in various forums that DOE must obtain a certificate of public convenience and necessity from the STB to construct and operate a rail line to transport spent nuclear fuel and high-level radioactive waste to Yucca Mountain, thus conceding the Board's jurisdiction.⁹

In any event, the plain language of 49 U.S.C. § 10901 indisputably vested the Board with jurisdiction over DOE's Application when filed. That statute provides that an entity cannot construct a new line or an addition to a line, or provide transportation over, or in the case of a person other than an established railroad, build, acquire or operate an additional railroad line, without a certificate authorizing such activity from the Board.¹⁰ That statutory provision further provides that "[a] proceeding to grant authority under subsection (a) of this section begins when an application *is filed*," and that "[o]n *receiving the application*, the Board shall give reasonable public notice to the Governor of any affected State, *of the beginning of such proceeding*."¹¹

The import of these provisions is clear. The Board has jurisdiction to consider DOE's Application, and its jurisdiction over that Application commenced when DOE

⁹ Motion at 9.

¹⁰ 49 U.S.C. § 10901(a).

¹¹ 49 U.S.C. § 10901(b) (emphasis added).

filed the Application. Nevada's contrary suggestion that the Board's jurisdiction may not have yet "attached" lacks merit.

Equally meritless is Nevada's argument that DOE has not made a "determinative" decision or "commitment" to construct the Caliente Rail Line. Nevada nowhere explains what would constitute such a "determinative" decision or "commitment." Nor does Nevada identify any provision that requires such a "determinative" decision or "commitment" as a precondition to seeking authorization under 49 U.S.C. § 10901. Indeed, since this Board's authorization under 49 U.S.C. § 10901 is necessary before construction and operation of a subject rail line, no such final decision or commitment by an applicant would seem possible prior to the Board's approval. And even then, nothing obligates an applicant to actually construct and operate a rail line that the Board has approved.

The timing of DOE's Application is consistent with the overall planning process. As Nevada acknowledges in its Motion, DOE has identified construction of the Caliente Rail Line with the Shared-Use Option as its preferred alternative.¹² DOE seeks the Board's public convenience and necessity determination for the Caliente Rail Line in order to have in place the necessary regulatory approvals when DOE is in a position to proceed, if appropriate, after its final NEPA documents and a Record of Decision ("ROD") are issued. That is prudent planning and is no different than a private entity seeking to have its regulatory approvals in hand for a new rail line it is contemplating. That in no way deprives the Board of jurisdiction.

¹² Motion at 6.

B. The Matters Raised By Nevada Are Irrelevant to the Board's Determination

Nevada's Motion loses sight of the determination that the Board must make concerning DOE's Application, and therefore wrongly argues that DOE's Application is insufficient. The fundamental underpinning of the Board's regulatory regime is 49 U.S.C. § 10901(c), which mandates approval of applications, such as DOE's, unless the Board makes an express determination that an application is inconsistent with the public convenience and necessity. That section reads:

The Board *shall issue* a certificate authorizing activities for which such authority is requested in an application filed under subsection (b) unless the Board finds such activities are inconsistent with the public convenience and necessity. Such certificate may approve the application as filed, or with modifications, and may require compliance with conditions (other than labor protection conditions) the Board finds necessary in the public interest.¹³

The legislative history of this section clearly reveals Congress' broad policy intent to "reduce regulatory barriers to entry into ... the industry," and there is a "statutory presumption that rail construction is to be approved." *Mid States Coalition for Progress v. Surface Transp. Bd.*, 345 F.3d 520, 552 (8th Cir. 2003). See also *Tongue River Railroad Company, Inc.—Construction and Operation Western Alignment*, 2007 WL 29369132 at 7-8 ("Under 49 U.S.C. § 10901(c), the Board is directed to authorize the construction and operation of a proposed new line 'unless the Board finds that such activities are inconsistent with the public convenience and necessity' (PC&N). This permissive licensing policy reflects a statutory presumption adopted in the ICC

¹³ 49 U.S.C. § 10901(c) (emphasis added).

Termination Act of 1995 (ICCTA) that new rail lines and new rail operations should be approved.”).

Further, the scope of the Board’s inquiry into the public convenience and necessity is well-defined. The Board has indicated that while the Act “does not define ‘public convenience and necessity,’ the agency has traditionally looked at whether: (1) the applicant is financially able to undertake the project and provide rail service; (2) there is a public demand or need for the proposed service; and (3) the proposal is in the public interest and will not unduly harm existing services.” *Tongue River*, 2007 WL 29369132 at 48.

Nevada makes no showing that the issues raised in its Motion bear on the Board’s consideration of the above criteria which, because of the unique nature of the Yucca Mountain Project and its grounding in the NWPA, are more obviously satisfied here than in the typical case. That alone warrants rejection of the Motion.

C. DOE’s Application Complies With the Board’s Regulations

Nevada’s Motion should be rejected for the additional reason that it identifies no true shortcoming in DOE’s Application. The four alleged deficiencies that Nevada asserts fail against the plain language of the Board’s regulations and the actual content of the Application.

1. DOE has provided the necessary operating data.

Nevada argues first that the Application should be rejected because DOE “failed to include operating data and operating plan, *Exhibit D*, as required by 49 C.F.R. § 1150.5.”¹⁴ But its argument is based on an incorrect premise. Nevada assumes that the

¹⁴ Motion at 8.

Board's regulations require an applicant to have selected an operator before filing an application. However, the Board's regulations contain no such requirement. To the contrary, the Board's regulations specifically contemplate, in 49 C.F.R. § 1150.3(c), applications where the operator has not yet been selected. That regulation directs an applicant in those circumstances to provide merely a statement of "who is being considered."¹⁵

DOE has done precisely that. In the Application, DOE states its expectation that the rail line will be owned by DOE and operated by a DOE contractor, to be selected in a formal procurement process.¹⁶ What this means is that rail operators would be given notice of and opportunity to bid on the project through public, formal Request(s) for Proposal(s), and therefore potentially all rail operators are "being considered" by DOE. DOE's discussion in the Application of its operator-selection intentions is therefore consistent with 49 C.F.R. § 1150.3(c).

Clearly, the earliest point at which an applicant can designate an operator (and therefore be able to provide the information required by 49 C.F.R. § 1105.5 that is dependent on that selection) is after the selection process has been completed. Those topics dependent on selection of an operator are (i) the schedule of operations; (ii) information about the crews to be used and where the employees will be obtained; (iii) rolling stock requirements and where it will be obtained; and (iv) information about the operating experience and record of the proposed operator unless it is an operating railroad.

¹⁵ 49 C.F.R. § 1150.3(c).

¹⁶ Application at 6, § 1150.3(c).

In compliance with 49 C.F.R. § 1150.5, DOE has committed in the Application to provide that information when it has selected an operator. The Application states in § 1150.5 at page 37 that:

Once an operator has been selected, an operating plan would be developed that includes traffic projection studies; a schedule of the operations; information about the crews to be used and where employees will be obtained; the rolling stock requirements and where it will be obtained; information about the operating experience and record of the proposed operator unless it is an operating railroad; any significant change in patterns of service; any associated discontinuances or abandonments; and expected operating economies.¹⁷

DOE will thus provide an operating plan and all the additional information specific to the operator after DOE selects the operator, in conformity with the requirements of 49 C.F.R. §§ 1150.3(c) and 1150.5.

The Application which has been filed contains the operating information and data that can reasonably be presented prior to designation of an operator, and in fact provides the reviewer with a broad base of knowledge about the proposed railroad. Section 1150.5 of the Application, entitled “Operational Data” (pages 34-36) contains: (1) descriptions of trains transporting spent nuclear fuel and high-level radioactive waste to the proposed repository; (2) descriptions of trains transporting freight to support repository construction; and (3) descriptions of common carrier trains.

The Application also contains, in § 1150.4(b) at pages 14-18, summaries of traffic projection studies that DOE conducted. Under the title “Details about the amount of traffic and a general description of commodities,” the Application discusses: (1) the

¹⁷ Application at 37, § 1150.5.

amount of traffic on the proposed line; (2) commodities expected to be transported; (3) the estimated frequency of DOE trains (Application at 15, Table 1); and (4) potential commercial freight shipments/common carriage trains.

Further, the Application does not address certain topics identified for Exhibit D in the typical case because those topics have no relevance to the Caliente Rail Line. These irrelevant topics are (i) any associated discontinuance or abandonments; (ii) any significant change in pattern of service; and (iii) expected operating economies. Those topics are not pertinent to DOE's proposed construction of a new rail line and therefore do not need to be addressed in the Application.

In sum, DOE has provided the operating information and data specified in 49 C.F.R. § 1105.5 that both is relevant to the Caliente Rail Line and that also can be provided before an operator is selected. DOE has committed to provide the remaining information and data once an operator has been selected. Section 1150.5 requires no more.¹⁸

2. The Application provides the environmental information and data required by 49 C.F.R. § 1150.7.

Nevada wrongly argues that the Application does not comply with 49 C.F.R. § 1150.7. That regulation provides that an applicant shall include, “[a]s exhibit H,

¹⁸ Nevada argues that DOE should have sought a waiver under 49 C.F.R. § 1150.10 to forgo submitting an operating plan. Motion at 8. Section 1150.10 of 49 C.F.R. provides, however, that a waiver is not necessary to omit information that is inapplicable to an application. As noted above, an operating plan and the other information specified in 49 C.F.R. § 1150.5 are inapplicable to DOE's Application at this time, and thus there is no requirement from which to seek a waiver. If the Board believes that DOE's Application should contain additional information on any issue, whether raised by Nevada or not, the Board can request it. If it believes that such information should be part of the public comment process, it can provide opportunity for such comment. To the extent that the Board may consider that such information should have been included in DOE's Application, DOE requests that the Board consider this response to Nevada's Motion to include a request for a waiver pursuant to 49 C.F.R. § 1150.10(a). In such event, DOE would amend its Application in accordance with the Board's instructions.

information and data prepared under 49 C.F.R. Part 1105, and the ‘Revision of the Nat’l. Guidelines Environmental Policy Act of 1969,’ 363 I.C.C. 653 (1980), and in accordance with ‘Implementation of the Energy Policy and Conservation Act of 1975,’ 49 C.F.R. Part 1106.” DOE did precisely that.

DOE submitted as Exhibit H to its Application the Draft Nevada Rail Corridor SEIS and Draft Rail Alignment EIS. Those materials address each of the topics for environmental reports cross-referenced in 49 C.F.R. § 1105.7,¹⁹ specifically:

1. Proposed action and alternatives. *See* Draft Rail Alignment EIS, Chapter 2 at pp. 2-1 to 2-147.
2. Transportation system. *See* Draft Rail Alignment EIS, Chapter 2 at 2-80 to 2-113.
3. Land use. *See* Draft Rail Alignment EIS, Chapter 3 at pp. 3-36 to 3-105; 3-381 to 3-449; Chapter 4 at pp. 4-36 to 4-66; 4-401 to 4-426; Chapter 5 at pp. 5-20 to 5-25; 5-60 to 5-64.

¹⁹ *See generally* Draft Rail Corridor SEIS, Ch. 2 (Proposed Action and Alternatives); Ch. 3 (Affected Environment and Evaluation of Impacts); Ch. 4 (Cumulative Impacts); Ch. 5 (New Information Regarding Other Rail Corridors); *see also* Draft Rail Alignment EIS, Chapter 2 (Proposed Action and Alternatives); Ch. 3 (Affected Environment); Ch. 4 (Environmental Impacts); Ch. 5 (Cumulative Impacts); Ch. 6 (Statutory, Regulatory, and Other Applicable Requirements); Ch. 7 (Best Management Practices and Mitigation); Ch. 8 (Unavoidable Adverse Impacts; Short Term Uses and Long-Term Productivity; Irreversible and Irretrievable Commitment of Resources). The Draft Rail Corridor SEIS analyzes the following with respect to the corridor alternatives considered: Land Use and Ownership, Air Quality, Hydrology, Biological Resources and Soils, Cultural Resources, Occupational and Public Health and Safety, Socioeconomics, Noise and Vibration, Aesthetics, Utilities, Energy, and Material, Waste Management, and Environmental Justice. The Draft Rail Alignment EIS analyzes the following with respect to the alignment alternatives considered: Physical Setting, Land Use and Ownership, Aesthetic Resources, Air Quality, Surface-Water Resources, Groundwater Resources, Biological Resources, Noise and Vibration, Socioeconomics, Occupational and Public Health and Safety, Utilities, Energy, and Material, Hazardous Materials and Waste, Cultural Resources, Paleontological Resources, and Environmental Justice.

4. Energy. *See* Draft Rail Alignment EIS Chapter 3 at pp. 3-308 to 3-314; 3-665 to 3-671; Chapter 4 at pp. 4-328 to 4-350 ; 4-695 to 4-708; Chapter 5 at pp. 5-42; 5-79.
5. Air. *See* Draft Rail Alignment EIS, Chapter 3 at pp. 3-115 to 3-127; 3-460 to 3-475; Chapter 4 at pp. 4-95 to 4-122; 4-446 to 4-483; Chapter 5 at pp. 5-27; 5-66; Appendix E.
6. Noise. *See* Draft Rail Alignment EIS, Chapter 3 at pp. 3-269 to 3-278; 3-615 to 3-627; Chapter 4 at pp. 4- 242 to 4-262; 4-593 to 4-620; Chapter 5 at pp. 5-35; 5-73; Appendix I.
7. Safety. *See* Draft Rail Alignment EIS, Chapter 3 at pp. 3-299 to 3-307; 3-652 to 3-364; Chapter 4 at pp. 4-1 to 4-5; 4-289 to 4-327; 4-656 to 4-694; Chapter 5 at pp. 5-39 to 5-41; 5-77 to 5-78; Appendix K.
8. Biological resources. *See* Draft Rail Alignment EIS Chapter 3 at pp. 3-211 to 3-268; 3-557 to 3-614; Chapter 4 at 4-184 to 4-241; 4- 537 to 4-592; Chapter 5 at pp. 5-32 to 5-34; 5-69 to 5-72; Appendix H.
9. Water. *See* Draft Rail Alignment EIS Chapter 3 at pp. 3-128 to 3-210; 3-476 to 3-556; Chapter 4 at pp. 4-123 to 4-183; 4-484 to 4-536; Chapter 5 at pp. 5-28 to 5-30; 5-67 to 5-68; Appendix F; Appendix G.
10. Proposed mitigation. *See* Draft Rail Alignment EIS Chapter 7.
11. Additional information for rail construction. *See generally* Draft Rail Alignment EIS.

The Motion does not challenge the adequacy of this information or data. Accordingly, the Motion provides no basis to hold the Application deficient under 49 C.F.R. § 1150.7.

Nor is there any legitimate grounds for complaint under 49 C.F.R. §1150.7 that DOE has not yet finalized the two NEPA documents. Nothing in that regulation provides that a federal agency cannot file an application for public convenience and necessity until it has issued final NEPA document(s). DOE has provided, with its Application, all the environmental information required by 49 C.F.R. § 1150.7. The Board is not required to wait until DOE finalizes its NEPA documents or issues a ROD before entertaining the Application.

3. DOE is not required to submit a Safety Integration Plan under 49 C.F.R. Part 1106.

Nevada wrongly argues that DOE was required under 49 C.F.R. § 1106.3 to submit a Safety Integration Plan (“SIP”) with its Application. 49 C.F.R. § 1106.3 provides that a SIP “shall be filed by any applicant requesting authority to undertake a transaction as defined under § 1106.2 of this part.” A “transaction” for these purposes means:

an application by a Class I railroad that proposes to consolidate with, merge with, or acquire control under 49 U.S.C. 11323(a) of another Class I railroad, or with a Class II railroad where there is a proposed amalgamation of operations, as defined by FRA’s regulations at 49 C.F.R. 244.9. “Transaction” also includes a proceeding other than those specified above if the Board concludes that a SIP is necessary in its proper consideration of the application or other request for authority.²⁰

²⁰ 49 C.F.R. § 1106.2.

The plain language of those regulations makes clear that DOE was not required to file a SIP, as its Application does not request authorization for a transaction within the meaning of 49 C.F.R. § 1106.2. DOE is not a Class I railroad engaged in a consolidation, merger, or acquisition. Nor is it “a Class II railroad where there is a proposed amalgamation of operations, as defined by FRA’s regulations at 49 C.F.R. 244.9.”²¹ DOE, therefore, plainly had no requirement to submit a SIP.

Ignoring these facts, Nevada simply points, without argument or other support, to the language in the final sentence of the definition of “transaction,” as though to demonstrate that some undefined set of events other than mergers, consolidations, acquisitions of control, or amalgamations of operations may constitute a “transaction.” Plainly, the common thread of all events constituting a “transaction” under the Board’s regulations is an interorganizational event. There is simply no such event connected with DOE’s Application. Indeed, Nevada actually concedes that the Application is one for “construction under 49 U.S.C. § 10901, not consolidation under § 11323.”²²

Moreover, although 49 C.F.R. § 1106.2 provides the Board discretion to determine whether a SIP is necessary for proper consideration of an application in other circumstances, the type of application DOE has submitted is one specifically excluded from the definition of a “transaction” when the Board recently revised Part 1106.²³ When the Board and the Federal Railroad Administration (“FRA”) conducted a joint rulemaking for 49 C.F.R. Parts 244 and 1106, the FRA’s proposed rule would have

²¹ *Id.* (emphasis added).

²² Motion at 3.

²³ See generally 67 Fed. Reg. 11582 (March 15, 2002).

required that an applicant prepare a SIP in circumstances including “start-up operations on a rail line or lines in which the commencement of operations would involve passenger service or produce revenue in excess of the Class II threshold.”²⁴ The Board’s proposed rule excluded such start-ups.

In the final rule, both agencies agreed that a SIP would **not** be required for such start-ups, but rather only for transactions involving existing railroads. Additionally, the FRA and the Board expressed the policy rationale that “[o]nly the complexity and difficulty of these very large transactions [mergers, consolidations, acquisitions, and amalgamations] are now believed to present sufficient dangers to merit a SIP under these rules.”²⁵

Even if DOE’s operations of the Caliente Rail Line were assumed, improbably, to meet the threshold for a Class II railroad (operating revenue between \$20 million and \$250 million), it is still a categorically exempted start-up operation with no associated amalgamation of operations or other inter-organizational event. In short, the Application is not a “transaction” within the meaning of 49 C.F.R. Part 1106, and DOE should not be required to prepare a SIP.

4. DOE’s Application does not violate 49 C.F.R. § 1150.8 on account of its treatment of potential terrorism attacks.

Nevada argues the Application’s “failure to critically address terrorism as it relates to transportation activity and infrastructure, and related security, exposure, and

²⁴ *Id.* at 11583.

²⁵ *Id.* at 11583, 11584.

first response concerns, should be fatal to the acceptance of DOE's application as presently filed."²⁶ That argument is erroneous.

The Draft Rail Alignment EIS, which is part of Exhibit H of the Application, considers terrorism, sabotage, security, exposure, and first response.²⁷ This consideration is consistent with the court's ruling in *San Luis Obispo Mothers for Peace v. NRC*, 449 F.3d 1016, 1035 (9th Cir. 2006), *cert. denied* 127 S.Ct. 1124 (2007) ("NRC's determination that NEPA does not require a consideration of the environmental impact of terrorist attacks does not satisfy reasonableness review.").

That Nevada may believe additional analysis on this topic should be done does not make the Application deficient under the Board's regulations. Nevada points to 49 C.F.R. § 1150.8;²⁸ but that regulation provides merely that an applicant shall include "[a]ny additional facts or reasons to show that the public convenience and necessity require or permit approval of this application. The *Board* may require additional information to be filed where appropriate."²⁹

The import of the regulation is clear, and it does not support Nevada's position. The regulation directs the applicant to include any additional information *the applicant* considers supportive of the public convenience and necessity. It additionally allows *the Board* to direct the applicant to provide additional information as appropriate. That

²⁶ Motion at 15.

²⁷ See Application, Exhibit H. For a discussion of terrorism, sabotage, and exposure with respect to the Caliente Rail Alignment, see Draft Rail Alignment EIS at pp. 4-313 to 4-316, and supporting information in Appendix K at K-51 to K-63. For a discussion of terrorism, sabotage, and exposure with respect to the Mina Rail Alignment, see Draft Rail Alignment EIS at pp. 4-679 to 4-682, and supporting information in Appendix K at K-63 to K-73. For a discussion of security and first response, see Draft Rail Alignment EIS Appendix L.

²⁸ Motion at 15.

²⁹ 49 C.F.R. § 1150.8 (emphasis added).

regulation in no way means that an application is deficient because it lacks the type of information concerning terrorist attacks that *Nevada* would like to see considered.

The only other bases for Nevada's position are two notices of proposed rulemakings issued by the Department of Transportation's Pipeline and Hazardous Materials Safety Administration ("PHMSA") and the Department of Homeland Security's Transportation Security Administration ("TSA"). The TSA's proposed rules, however, have not been finalized and self-evidently have no effect. Nor would they have any bearing on DOE's Application even had they been issued, as those proposed rules do not concern this Board's public convenience and necessity determinations. They relate instead to TSA's inspection program of existing railroad carriers.³⁰

The interim final rule of the PHMSA was published on April 16, 2008, *after* DOE's Application, as part of the Hazardous Materials Regulations ("HMR"). That new rule, however, does not take effect until June 1, 2008, and simply requires operating carriers to perform certain annual recordkeeping and risk assessments.³¹ Those regulations do not prescribe standards for this Board's public convenience and necessity determinations and therefore plainly do not constitute a basis for rejecting DOE's Application.

In fact, as noted in the preamble for this interim rule, FRA, and not the STB, "is the agency within DOT responsible for railroad safety and is the primary enforcer of safety and security requirements in the HMR pertaining to rail shippers and carriers."³²

³⁰ See generally 71 Fed. Reg. 76851 (Dec. 21, 2006).

³¹ See 73 Fed. Reg. 20752 (April 16, 2008).

³² *Id.* at 20765.

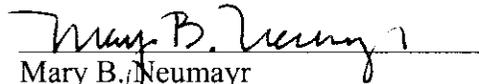
As also noted, the new regulations do not implement “a submission and approval process for security plans and route analyses.” Rather, the new information required of existing operators will be reviewed “[d]uring FRA’s normal inspection process”³³ Nothing in the rule’s text or rulemaking history supports application of its requirements in a public convenience and necessity proceeding before the STB.

IV. CONCLUSION

For the reasons stated above, the Board should deny Nevada’s Motion and find that DOE’s Application is sufficient to proceed for responsive comments and Board review as outlined in the Board’s decision of April 11, 2008.

Dated this 22nd day of April, 2008.

Respectfully submitted,



Mary B. Neumayr
Deputy General Counsel
for Environment & Nuclear Programs
James B. McRae
Martha S. Crosland
Bradley L. Levine
United States Department of Energy
Office of the General Counsel
1000 Independence Avenue, S.W.
Washington, DC 20008
(202) 586-5857

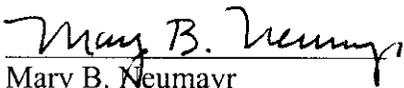
Attorneys for the United States Department
of Energy

April 22, 2008

³³ *Id.*

CERTIFICATE OF SERVICE

I, Mary B. Neumayr, hereby certify that I caused to be served a true and correct copy of the Department of Energy's "Reply to the State of Nevada's Motion to Reject DOE's Application, or alternatively, To Require Responsive Comments Only After Application Has Been Fully Completed by Proper Supplement" in the matter of STB Finance Docket No. 35106 on the parties identified on the attached list by first-class mail or more expedient service this 22nd day of April 2008.


Mary B. Neumayr
Deputy General Counsel
for Environment & Nuclear Programs

April 22, 2008

Attorneys for the State of Nevada	Additional Parties
<p>Paul H. Lamboley Law Offices of Paul H. Lamboley Bank of America Plaza, Ste. 645 50 W. Liberty Street Reno, NV 89501 Email: <i>phlamboley@aol.com</i></p>	<p>Nevada Central Railroad C/O: NCR-Nevada State Resident Agent Robert Alan Kemp 4959 Talbot Lane, Unit #69 Reno, NV 89509 Telephone: (775) 827-3258</p>
<p>Joseph R. Egan Martin G. Malsch Charles J. Fitzpatrick EGAN FITZPATRICK & MALSCH 12500 San Pedro Avenue, Suite 555 San Antonio, TX 78216 Email: <i>mmalsch@nuclearlawyer.com</i></p>	<p>Joni Eastley Chair, Nye County Board of County Commissioners Nye County Board of County Commissioners Tonopah Office 101 Radar Road Tonopah, NV 89049 Phone: (775) 482-8191</p>
<p>Merril Hirsh William H. Briggs ROSS DIXON & BELL 2001 K. Street, N.W., 4th Floor Washington, DC 20006-1040 Email: <i>mhirsh@rdbl.com</i></p>	<p>Honorable Shelley Berkley United States House of Representatives 405 Cannon House Office Building Washington, DC 20515 Phone: (202) 225-5965</p>
<p>Catherine Cortez Masto Attorney General Marta A. Adams Senior Deputy Attorney General Office of the Attorney General of the State of Nevada 100 North Carson Street Carson City, NV Email: <i>Madams@ag.nv.gov</i></p>	