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Via E-filing

May 2, 2008

Hon. Ann K. Quinlan
Acting Secretary
Surface Transportation Board
395 E Street, SW
Washington, DC 20423-0001

Re: STB Finance Docket No. 35106
*United States Department Of Energy – Rail
Construction And Operation – Caliente Line In
Lincoln, Nye, And Esmeralda Counties, Nevada*

Dear Acting Secretary Quinlan:

Enclosed for filing on behalf of the State of Nevada in the above-captioned docket is the *State Of Nevada's Motion for Leave to Amend Motion To Reject DOE's Application, or alternatively, To Require Responsive Comments Only After Application Has Been Fully Completed By Proper Supplement and Request for Oral Argument and Exhibit A - Proposed State Of Nevada's First Amended Motion To Reject DOE's Application, or alternatively, To Require Responsive Comments Only After Application Has Been Fully Completed By Proper Supplement.*

The Motion and proposed Amcnded Motiön are presented in both original and PDF version in WORD format for IMac

The motion reflects the correct document and service dates. Council has been served by U S Mail and/or by c-mail as agreed.

Expedited consideration of this motion is requested

Please acknowledge receipt. Thank you.

Yours truly,
/s/
Paul H. Lamboley

PHL/nd
Enc.

UNITED STATES OF AMERICA

BEFORE THE SURFACE TRANSPORTATION BOARD

STB FINANCE DOCKET NO. 35106

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

**STATE OF NEVADA’S MOTION FOR LEAVE TO AMEND MOTION TO
REJECT DOE’S APPLICATION, or alternatively, TO REQUIRE RESPONSIVE
COMMENTS ONLY AFTER APPLICATION HAS BEEN FULLY COMPLETED
BY PROPER SUPPLEMENT and REQUEST FOR ORAL ARGUMENT.**

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April 30, 2008

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I

MOTION FOR LEAVE TO AMEND MOTION TO REJECT DOE'S APPLICATION, or alternatively, TO REQUIRE RESPONSIVE COMMENTS ONLY AFTER APPLICATION HAS BEEN FULLY COMPLETED BY PROPER SUPPLEMENT and REQUEST FOR ORAL ARGUMENT

A. MOTION FOR LEAVE TO AMEND.

The State of Nevada ("Nevada") moves the Board for leave to amend its original motion filed April 17, 2008 requesting the Board to reject as incomplete the Application of the United States Department of Energy ("DOE") filed March 17, 2008 that seeks prior approval under provisions of 49 U.S.C. §10901 for the proposed construction and operation of a 300-mile rail line, commonly known as the Caliente Line, in Lincoln, Nye, and Esmeralda counties, in the State of Nevada ("Section 10901 Application" or "Application").

Based on DOE's April 22, 2008 Reply to Nevada's original motion, Nevada now requests permission to amend its motion in two respects: *first*, to raise the absence of jurisdiction under 49 U.S.C. §10501 as a reason for the Board to reject DOE's Section 10901 Application as filed, and *second* to include Pipeline and Hazardous Materials Safety Administration ("PHMSA"), Transportation Security Administration ("TSA"), and Federal Railroad Administration ("FRA") as "cooperating agencies" with "lead agency" status for FRA on safety and security matters in any further proceedings

1. Jurisdiction.

While a jurisdictional issue may be raised at anytime by a party or the Board, Nevada's motion for leave to do so is in timely response to DOE's April 22 Reply to Nevada's original motion in which DOE asserted for the first time that Board jurisdiction in this case is *based solely* on the fact of filing an Application under 49 U.S.C. §10901.

2. Cooperating/Lead Federal Agencies.

The Interim Final Rule, effective June 1, 2008, issued by PHMSA in coordination with FRA and TSA, on April 16, 2008 at 73 F.R. 20752, warrants inclusion of these Federal agencies as “cooperating agencies” with “lead agency” status for FRA for purposes of safety and security risk assessments under the National Environmental Policy Act (“NEPA”), 42 U.S.C. §§4321 *et seq.*, and prior approval consideration of DOE’s proposed transportation transaction under Section 10901.

A copy of the Nevada’s proposed Amended Motion accompanies this motion as *Exhibit A*

B. REQUEST FOR ORAL ARGUMENT.

Not only is this a case of first impression for the Board, it presents the first and only opportunity for Federal transportation agencies to review and oversee DOE’s proposed transportation transaction that will implicate both Nevada’s and the Nation’s rail systems.

Because of the unique nature and scope of this proceeding, Nevada believes it would be beneficial for the Board, at the earliest appropriate opportunity, to hear oral argument on Nevada’s motion as amended designed to assist the Board in determining, *first*, whether there is a proper jurisdictional premise under Section 10501 for this Section 10901 proceeding; and if jurisdiction exists, then going forward as the “lead” transportation agency in determining, *second*, the appropriate status of and procedures for evaluating DOE’s Draft Nevada Rail Corridor Supplementary Environmental Impact Statement (“RC-DSEIS”) and Draft Rail Alignment Environmental Impact Statement (“RA-DEIS”) as environmental analysis and documentation, *Exhibit H*, (“EIS’s”) under

the Board's June 7, 2008 decision, consistent with the Board's *non-delegable* obligations under NEPA and applicable regulations, 40 C.F.R. §§1500 *et seq.* and 49 C.F.R Part 1105. *Idaho v. ICC*, 35 F.3d 585, 596-97 (D.C Cir. 1994); *third*, the significance of the function and informative value of the operating plan requirements in Parts 1150 and 1105 for public evaluation and comment in this case, especially, the nature of the proposed rail operations and identity of the operator on the proposed line; *fourth*, the need for a Safety Integration Plan (SIP) under Part 1106 because of the scale of inter-operational activities among various transportation entities and modes that DOE's transportation proposals necessarily contemplate; and *fifth*, in a post-9/11 world, the need to recognize the jurisdictional responsibilities and expertise of other Federal agencies for rail safety and security assessments, and give appropriate consideration to the 27 risk analysis factors in the Interim Final Rule, effective June 1, 2008, issued by PHMSA in coordination with FRA and TSA, by including those agencies as "cooperating agencies" with "lead agency" status for FRA on safety and security matters, as a part of the Board's deliberations on and decisions for purposes of NEPA and prior approval under Section 10901.

Transportation safety and security risk assessments will not be subject to critical review by the Nuclear Regulatory Commission ("NRC") in processing DOE's License Application. Thus, because the STB will be the only Federal agency to review the Nevada and national impacts of DOE's transportation plans for approval purposes and given the presumptive nature of Section 10901, the Board must act to ensure an open and fair opportunity for public participation in these proceedings

II

DISCUSSION IN SUPPORT OF MOTION TO AMEND AND REQUEST FOR ORAL ARGUMENT

A. MOTION FOR LEAVE TO AMEND.

In its April 22, 2008 Reply to Nevada's original motion, DOE relies solely on the filing its Application under 49 U.S.C. §10901 as the basis for the Board's jurisdiction in this case. *DOE Reply* p. 6 ("the plain language of 49 U.S.C. §10901 indisputably vested the Board with jurisdiction over DOE's Application when filed.") While the application process may begin when an application is filed, jurisdiction for a Section 10901 proceeding is based on the content of the application, which must satisfy jurisdictional criteria of Section 10501, by evidence of common carrier activity or common carrier obligation over the proposed new line.

Rather than credit Nevada's initial discussion of Section 10501 as the Board's jurisdictional predicate *only if* there will be requisite common carrier activity over the line, DOE does not assert jurisdiction under Section 10501. Nevada believes the reason is obvious: DOE now, as in the past, refuses to definitely state that this proposed rail line will in fact be used to provide common carrier service or obligation to the general public. See *State of Nevada v. Department of Energy*, 457 F.3d 78 (D.C. Cir. 2006) ("STB jurisdiction comes into play only if DOE decides to operate the branch rail line as a common carrier.") DOE's Application and April 22 Reply continue the effort to mask DOE intentions.

In its Reply, DOE ignores the fact that its Application expressly states that decisions whether to construct and operate a railroad, within which corridor or alignment or to implement a shared-use option (common carrier service) have *not* been made and

will *not* be made until June 2008. See *Application* p. 10. And rather than in June, 2008, DOE now states its decisions are expected to issue in the “summer of 2008”. *DOE Reply* p. 5. Criticizing Nevada’s statement that for DOE common carriage remains merely a “contingency not a commitment”, DOE argues that Section 10901, a procedural statute, confers jurisdiction on the Board and that jurisdiction attaches merely upon the filing of a Section 10901 Application. *DOE Reply* p. 6-7.

DOE, a non-carrier, owns the commodities (spent nuclear fuel - SNF and high level radioactive waste - HLW) to be transported over the proposed DOE-owned rail line to the DOE-owned Yucca Mountain Repository. Without affirmatively committing and holding out that common carriage or common carrier obligation to the public will in fact exist over the proposed new rail line, the proposed construction and operation transaction for which DOE seeks prior approval is merely private carriage, even if that carriage is accomplished by a carrier, and is not within the Board’s jurisdiction for purposes of Section 10901. *B. Willis, C.P.A., Inc - Petition for Declaratory Order*, STB Finance Docket No. 34013, 2001 WL 1168090, (served Oct. 3, 2001)(*B. Willis*) (“if a shipper does not hold out to provide common carrier railroad service over a line it constructs and maintains to serve its own facility, and no other shippers are served by the line, then neither that construction, nor a railroad’s operation over that track to reach the shipper’s facility requires Board authorization or approval.”), *aff’d sub nom. B. Willis, C.P.A., Inc. v. STB*, 51 Fed.Appx. 321 (D.C. Cir. 2002); see also *Hanson Natural Resources Company – Non-Common Carrier Status – Petition for Declaratory Order*, ICC Finance Docket No. 32248 (served Dec. 5, 1994). As filed, DOE’s Application is not subject to Board jurisdiction or approval, since there is no common carrier activity or obligation.

The STB's decision in *B. Willis* is consistent with the legislative history of the ICC Termination Act of 1995 (ICCTA). The Conference Report specifically states that "non-railroad companies who construct rail lines to serve their own facilities..are not required to obtain agency approval to engage in such construction." H.R. Conf. Rep. No. 422, 104th Cong. 1st Sess. 179 (1995).

In sum, the rail line to be constructed and/or operated must be "common carrier" track and common carrier obligations must exist on the line in order to establish Section 10501 jurisdiction for proceedings under Section 10901.

The foregoing precedents are sufficient reason to grant Nevada permission to amend its original motion to raise the absence of jurisdiction as ground for rejection of DOE's Application as filed. As filed, DOE's Application cannot be reasonably read as "holding out" that common carriage or common carrier obligation does or will exist over the proposed new rail line. Factually, the absence of definite common carrier service or obligation is a fatal flaw in DOE's Application, and legally defeats STB jurisdiction required under 49 U.S.C. §10501 to proceed on DOE's Section 10901 Application.

B. REQUEST FOR ORAL ARGUMENT.

Nevada believes oral argument on its motion as amended would assist the Board, now the "lead" agency for on transportation matters, in establishing procedures and schedules to implement Parts 1150 and 1105 to ensure that DOE's Application, at the outset, is complete for purposes of facilitating public review and comment, and that the Board has adequate information to determine its jurisdiction and ascertain whether the proposed transaction is consistent with NEPA policies and satisfies prior approval criteria under Section 10901.

DOE's view that this Application is part of an "overall planning process". DOE Reply p. 7. DOE offers the Application as a placeholder in that process to be supplemented later as its plans become final or as the Board may require. DOE's approach stands Section 10901 "prior approval" proceedings on its head. In short, DOE seeks prior approval from the Board for a transaction not as yet determined or definite. Prior approval under Section 10901 is not merely part of a planning exercise for standby purposes, but applies to a concrete transaction that represents the culmination of the planning process and is subject to public scrutiny and comment as well as critical review by the Board.

In this case, DOE has had many years to conclude the planning process as it relates to transportation to the Yucca Mountain Repository. At best, DOE's Application is very like a petition for declaratory order, which though discretionary, nonetheless requires a jurisdictional premise for relief that is here lacking. At worst, DOE's Application as filed is an invitation to the Board to engage in piecemeal public review and comment as DOE over the coming months attempts to finalize its transportation plans for transporting SNF and HLW from origins throughout the US to the Yucca Mountain destination.

Finally, it is obvious that any event, directly or indirectly related to DOE's transport of SNF and HLW, that compromises the rail structure at any location, can compromise the entire rail system and traffic dynamics in today's constrained rail environment, not to forget the public health and safety. For that reason, DOE's proposed construction and operation plans must be definite in all essential elements, and not speculative.

III

Prayer for Relief

WHEREFORE, Nevada requests the Board grant permission to file the proposed Amended Motion, and in its discretion, grant the opportunity for oral argument.

Dated this 30th day of April, 2008, by _____ /s/ _____
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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that true and correct copies of the foregoing document, and Exhibit A, were served on Parties or Counsel of Record and others identified below by (1) first-class U.S. mail, postage prepaid, (2) e-mail as shown, or (3) other expeditious method, this 2nd day of May, 2008:

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UNITED STATES OF AMERICA

BEFORE THE SURFACE TRANSPORTATION BOARD

STB FINANCE DOCKET NO. 35106

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

**STATE OF NEVADA’S FIRST AMENDED MOTION
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EXPEDITED CONSIDERATION REQUESTED

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**STATE OF NEVADA'S FIRST AMENDED MOTION
TO REJECT DOE'S APPLICATION, or alternatively,
TO REQUIRE RESPONSIVE COMMENTS ONLY
AFTER APPLICATION HAS BEEN FULLY
COMPLETED BY PROPER SUPPLEMENT**

I

Motion

The State of Nevada ("Nevada") moves the Board to reject the Application of the United States Department of Energy ("DOE") filed March 17, 2008 seeking prior approval from the Board under provisions of 49 U.S.C. §10901 for the proposed construction and operation of a 300-mile rail line, commonly known as the Caliente Line, in Lincoln, Nye, and Esmeralda counties, in the State of Nevada ("Section 10901 Application or Application").

The proposed transaction would extend the national rail system into Nevada for the purposes of transporting more than 70,000 metric tons of spent nuclear fuel ("SNF") and high level radioactive waste ("HLW") over a period of 50 years from various origins throughout the United States to a destination which is the first of its kind in the world, the proposed geologic nuclear waste repository at Yucca Mountain, NV.

Rejection of DOE's Application is urged on the grounds and for the reasons that the Application fails to establish a basis upon the Board may exercise jurisdiction and the Application fails to comply with several requirements of the Board's Regulations, principally (a) Part 1150 – *Certificate to Construct, Acquire, or Operate Railroad Lines*, 49 C.F.R. §§1150.1-10 (Applications Under 49 U.S.C. 10901) by failure to include operational data and operating plan *Exhibit D*, 49 C.F.R. §1150.5, and (b) Part 1105 – *Procedures for Implementation of Environmental Laws*, 49 C.F.R. §§1105.1 *et seq.* by

failure to include sufficiently complete environmental information and data, *Exhibit H*, 49 C.F.R. §1150.7.

Additionally, although an Application for construction under 49 U.S.C. §10901, not consolidation under §11323, the full nature and scope of DOE's proposed transaction should require compliance with provisions in Part 1106 – *Procedures for Surface Transportation Board Consideration of Safety Integration Plans in Cases Involving Railroad Consolidations, Mergers, and Acquisitions of Control*, as it qualifies as a "transaction" under 49 C.F.R. §1106.2 for which an SIP should be deemed necessary safety information by the Board in its consideration of the application for authority to construct and operate the line for the proposed transportation at issue.

Similarly, DOE's Application is largely devoid of meaningful consideration of potential terrorism attacks on the proposed transportation activity and infrastructure, and related security and first-response concerns. Terrorism and sabotage concerns prompted Congress to enact "*Implementing Recommendations of the 9/11 Commission Act of 2007*", P.L. 110-53 121 Stat. 266 (August 3, 2007) and responsible administrations within the Department of Transportation ("DOT") and the Department of Homeland Security ("DHS"), in coordinated proceedings, to propose new security regulations for rail shipments of hazardous materials including spent nuclear fuel. These shared concerns should have prompted DOE to reasonably anticipate that meaningful consideration of terrorism would be necessary supportive information under 49 C.F.R. §1150.8 and required for the Board's evaluation of this Application.

To ensure meaningful consideration of terrorism and security risks, Nevada moves to include the Pipeline and Hazardous Materials Safety Administration

("PHMSA"), Transportation Security Administration ("TSA"), and Federal Railroad Administration ("FRA") as a "cooperating agencies" with "lead agency" status for FRA on safety and security matters in any further proceedings.

Alternatively, in the event the Board finds jurisdiction and chooses not to reject DOE's Application as presently filed for the reasons urged, but rather to require that DOE supplement its Application, Nevada moves the Board to require that responsive pleading to the Application be filed *only after* the DOE application has been fully completed by proper supplementary content.

Such an alternative procedure will not impair the rights of DOE but rather will permit stakeholders and interested parties to undertake orderly evaluation and file responsive comments. It will avoid the need for serial filing of supplementary pleadings by responding commenters as well as supplementary replies by DOE.

In short, requiring DOE's full compliance with regulations governing an Application under §10901 will promote the efficient review of a unique transaction, whose effects and impacts are not limited to Nevada but will affect the entire national rail system.

II

Discussion Supporting Motion

A. Nevada's Interest

The State of Nevada, acting through the Nevada Attorney General and the Agency for Nuclear Projects, is responsible to safeguard and protect the public health, safety and environment of its citizens from the potential adverse consequences or impacts of nuclear projects within the State, and specifically the waste repository project

proposed for Yucca Mountain (“YMP”) and related transportation activities. Nevada is responsible for the public health and safety of Nevada employees, and also other workers within the state, especially those that may be adversely impacted by YMP-related activity. Most importantly, Nevada is responsible as trustee to protect the groundwater resources held by the state in trust from any adverse consequences resulting from a project such as YMP

For the purposes of proceedings on the DOE application, Nevada is a stakeholder and an interested party, and acknowledges service of the application by DOE.

Nevada’s standing is undisputed regarding YMP-related proceedings. Nevada has previously participated, and continues to participate, as a party in proceedings before the Environmental Protection Agency (“EPA”), the Nuclear Regulatory Commission (“NRC”), and DOE. Nevada has also participated as a party in judicial review proceedings before the United States Courts of Appeals.

B. Cause for Rejection.

1. Absence of Jurisdiction.

The DOE invokes the Board’s jurisdiction by filing an Application under provisions of 49 U.S.C. §10901 and applicable regulations. However, filing under Section 10901, a procedural statute, does not confer the requisite jurisdiction, which must be established under 49 U.S.C. §10501.

In its Application, DOE must necessarily establish that its proposed transaction will in fact implement a “Shared-Use Option” (“SUO”), that will result in the construction and operation of a line of “railroad” in interstate commerce, and will involve “transportation by rail carrier”, that is conducted over any “part of the interstate rail

network”. “Rail carrier” is defined as “a person providing *common carrier* railroad transportation for compensation” (Italics added.) DOE’s Application must demonstrate that common carrier activities or common carrier obligations, as those terms are defined in provisions of 49 U.S.C. §10102 and §11101, do or will in fact exist in order for the Application to come within the Board’s primary, if not exclusive, jurisdiction under 49 U.S.C. § 10501.

Doubtlessly, DOE’s Application seeks the benefit of federal preemption under the Interstate Commerce Act, as amended, 49 U.S.C. §§10101 *et seq.*, and the jurisdiction of the Surface Transportation Board (“STB”) However, DOE’s Application fails to establish that the proposed transportation transaction falls within STB jurisdiction under Section 10501.

DOE’s Application and supporting submissions are at best equivocal on implementation of the “Shared-Use Option” – which remains more a contingency than a commitment See *Application*, pp.5-6, 9-10, 15-16, 28-30 (SUO identified as a “preferred alternative”); *Exhibit H*, Draft Rail Corridor SEIS (RC-DSEIS) and Draft Rail Alignment EIS (RA-DEIS), p S-40 (designs in implementing alternatives “could allow”/“would accommodate” SUO), p. 2-7, §2.2.2 (construction/operation “could provide” for SUO), pp. 2-108-113, §2.2.6 (each implementing alternative “would allow” SUO) and, p. 6-3. §6.2 (“*If* DOE selected [SUO] as part of the *Proposed Action*” then STB jurisdiction would attach.)(Italics added.); see also *Exhibits K and M*.

While DOE describes SUO everywhere with “could/would” potential, nowhere in its Application does DOE commit or state unequivocally that SUO will in fact be

implemented or that common carrier activities or obligations will occur on the proposed new line.

Indeed, DOE's Application expressly *reserves* decision not only whether to implement the SUO but whether to even construct and operate the line for which prior approval is being sought, stating:

"The DOE anticipates that the Final Rail Alignment EIS will be issued in June 2008. The Final Rail Alignment EIS will assist DOE in deciding whether to construct and operate a railroad, and if so, within which corridor and alignment. The Final Rail Alignment EIS will also assist DOE in deciding whether to implement the Share-Use Option. These decisions will not be made until DOE issues the Final Rail Alignment EIS and a record of decision."

Application, p. 10. Obviously, the FEIS and ROD are not expected for several months.

Significantly, DOE makes this Application as a non-carrier, but fails to identify the operator that will provide rail service on the line or perform the common carrier function for purposes of 49 U.S.C. §11101, stating: "An operator has not been selected at the time of this application." See *Id.*, p. 34.

How then, if at all, will the SUO be implemented? And if common carrier determinative decisions are yet to be made by DOE, how then can this premature Application fall within STB jurisdiction?

To establish jurisdiction necessary to seek prior approval for construction and/or operation of a rail line under Section 10901, DOE must establish itself as a person who is, or in fact intends to be, a rail common carrier or otherwise provides for rail common carriage over the proposed new rail line. DOE's Application does not demonstrate or evidence the fact that rail common carrier service or obligations do or will in fact exist over the proposed line. As a result, DOE's Application should be rejected.

In its April 22, 2008 Reply to Nevada's original motion, DOE relies solely on the filing its Application under 49 U.S.C. §10901 as the basis for the Board's jurisdiction in this case. *DOE Reply* p. 6 ("the plain language of 49 U.S.C. §10901 indisputably vested the Board with jurisdiction over DOE's Application when filed.") While the application process may begin when an application is filed, jurisdiction for a Section 10901 proceeding is based on the content of the application which must satisfy jurisdictional criteria of Section 10501 by evidence establishing common carrier activity or common carrier obligation over the proposed new line.

Rather than credit Nevada's initial discussion of Section 10501 as the Board's jurisdictional predicate *only if* there will be requisite common carrier activity over the line, DOE does not assert jurisdiction under Section 10501. Nevada believes the reason is obvious: DOE now, as in the past, refuses to definitely state that this proposed rail line will in fact be used to provide common carrier service to the general public. See *State of Nevada v. Department of Energy*, 457 F.3d 78 (D.C. Cir. 2006) ("STB jurisdiction comes into play only if DOE decides to operate the branch rail line as a common carrier.") DOE's Application and April 22 Reply continue the effort to mask DOE's intentions.

In its Reply, DOE ignores the fact that its Application expressly states that decisions whether to construct and operate a railroad, within which corridor or alignment or to implement a shared-use option (common carrier service) have *not* been made and will *not* be made until June 2008. See *Application* p. 10. And rather than in June, 2008, DOE now states its decisions are expected to issue in the "summer of 2008". *DOE Reply* p. 5. Criticizing Nevada's statement that for DOE common carriage remains merely a "contingency not a commitment", DOE argues that Section 10901, a procedural statute,

confers jurisdiction on the Board and that jurisdiction attaches merely upon the filing of a Section 10901 Application. *DOE Reply* p 6-7.

DOE, a non-carrier, owns the commodities (spent nuclear fuel - SNF and high level radioactive waste - HLW) to be transported over the proposed DOE-owned rail line to the DOE-owned Yucca Mountain Repository. Without affirmatively committing and holding out that common carriage or common carrier obligations to the public will in fact exist over the proposed new rail line, the proposed construction and operation transaction for which DOE seeks prior approval is merely private carriage, even if that carriage is accomplished by a carrier, and is not within the Board's jurisdiction for purposes of Section 10901. *B. Willis, C.P.A., Inc.-Petition for Declaratory Order*, STB Finance Docket No. 34013, 2001 WL 1168090, (served Oct. 3, 2001)(*B. Willis*) (“if a shipper does not hold out to provide common carrier railroad service over a line it constructs and maintains to serve its own facility, and no other shippers are served by the line, then neither that construction, nor a railroad's operation over that track to reach the shipper's facility requires Board authorization or approval.”), *aff'd sub nom. B. Willis, C P A , Inc v STB*, 51 Fed.Appx. 321 (D C Cir 2002); see also *Hanson Natural Resources Company – Non-Common Carrier Status – Petition for Declaratory Order*, ICC Finance Docket No. 32248 (served Dec. 5, 1994). As filed, DOE's Application is not subject to Board jurisdiction or approval, since there is no common carrier activity or obligation.

The STB's decision in *B. Willis* is consistent with the legislative history of the ICC Termination Act of 1995 (ICCTA). The Conference Report specifically states that “non-railroad companies who construct rail lines to serve their own facilities.....are not

required to obtain agency approval to engage in such construction.” H.R. Conf. Rep. No. 422, 104th Cong 1st Sess 179 (1995).

In sum, the rail line to be constructed and/or operated must be “common carrier” track and common carrier obligations must exist on the line in order to establish Section 10501 jurisdiction for proceedings under Section 10901.

The foregoing precedents are sufficient basis to reject DOE’s Application for failure to establish STB jurisdiction. As filed, DOE’s Application cannot be reasonably read as “holding out” that common carriage or common carrier obligation does or will exist over the proposed new rail line. Factually, the absence of definite common carrier service or obligation is a fatal flaw in DOE’s Application, and legally defeats STB jurisdiction required under 49 U.S.C. §10501 to proceed on DOE’s Section 10901 Application.

2. Failure to File Adequate Application Complying with Regulations.

In the event the Board finds that requisite jurisdiction exists, Nevada urges that DOE’s Application be rejected as incomplete for failure to comply with Board regulations, principal of which are those that require the Application to include (a) operational data and operating plan *Exhibit D*, 49 C.F.R. §1150.5, and (b) sufficiently complete environmental information and data, *Exhibit H*, 49 C.F.R. §1150.7 and §§1105.1 *et seq.*

Nevada also argues that, DOE’s Application is incomplete as it fails to include a safety integration plan (“SIP”) under Part 1106, and also fails to address potential terrorism aimed at the transportation activities and infrastructure proposed in Nevada and

nationwide which information would be consistent with §1150.8 as necessary for the Board's full evaluation of this Application.

In sum, Nevada asserts DOE's Application fails to properly include basic elements essential to the Board's, and the public's, critical review and evaluation of the proposed transaction for which the Board's prior approval is not only appropriate but also statutorily required.

**a. Failure to Provide Operational Data and Operating Plan, Exhibit D
- 49 C.F.R. §1150.5**

On its face, DOE's Application admittedly fails to properly include operating data and operating plan, *Exhibit D*, as required by 49 C.F.R. §1150.5. See *Application*, p 34

In its Application, DOE attempts to excuse this failure away by offering that "an operator for the rail line has not been selected at the time of this Application" but "once an operator has been selected, an operating plan would be developed". *Id*

For Application *Exhibit D*, Operating Plan, DOE merely states: "Not Applicable at this time".

DOE has neither sought a waiver under §1150.10 nor provided justification in its Application for the failure to provide an operating plan.

DOE has had almost 20 years since the 1987 Nuclear Waste Policy Act Amendments (NWPAA), to anticipate the operating data and plan requirements for this Application. But rather, in a rush to meet its self-imposed timetable to file this Application with the Board coincident with a license application with the NRC in June, 2008, DOE failed to timely develop an operating plan to include in this Application.

The failure to include an operating plan compromises full disclosure of essential information which has been the continuing banc of stakeholders regarding DOE's proposed rail transportation activity and infrastructure in Nevada. Previously, DOE has refused to commit to implementing the "Shared-Use Option". Even now, DOE's refusal to clearly do so in its Application is evidenced by not submitting an operating plan to the Board. That failure is fatal and should result in rejection of the Application.

When appearing before the U.S. Court of Appeals for the District of Columbia Circuit ("DC Circuit") in 2005, DOE resisted Nevada's claim that STB jurisdiction and review should apply to the proposed transportation activity and infrastructure based on DOE's repetitious references to an SUO. See *State of Nevada v. Department of Energy*, 457 F.3d 78 (DC Cir. 2006). In that case, Nevada's claim was deemed "unripe because it is speculative". The Court found that "STB jurisdiction comes into play only if DOE decides to operate the branch rail line as a common carrier", and accepted DOE's indecision, stating: "That decision, however, has not been made." Additionally, Nevada's claim that "STB consultation" was required was deemed waived.

DOE's failure to include an operating plan confirms the continuing doubt of its "shared-use, common carrier service" intentions, and ensures the need for subsequent piecemeal proceedings on this issue. The significance of DOE's failure to include an operating plan in its Application should not be underestimated. The failure bears on the jurisdictional question raised above.

b. Failure to Provide Sufficiently Complete Environmental Information and Data, Exhibit H – 49 C.F.R. §1150.7

Despite assertions by Nevada and other stakeholders that shared-use, common carrier service over the proposed line to be constructed in Nevada triggers primary, if not

exclusive, STB jurisdiction over the proposed transportation transaction for all purposes, especially the environmental documentation required under the National Environmental Policy Act, 42 U.S.C. §§4321 *et seq.* (“NEPA”), DOE has consistently refused to commit to “shared-use, common carrier service” over the line. Vague and incomplete as this Application is, DOE has nevertheless invoked Board jurisdiction, but not on that basis.

Faced with Nevada’s continuing assertions of STB jurisdiction and special expertise, and especially that it be the “lead agency” for transportation-related environmental documentation under NEPA, DOE finally included the STB as a “cooperating agency” in DOE’s own undertaking of required but incomplete NEPA environmental documentation. Notably, DOE did not similarly include the Federal Railroad Administration (“FRA”) as a “cooperating agency”, which likewise has jurisdictional interests and special expertise for rail safety.

Board regulations require sufficiently complete environmental information and data, Exhibit H, under 49 C.F.R. §§1150.7 and 1105.1 *et seq.* In its Application, DOE includes its own Draft Nevada Rail Corridor Supplementary Environmental Impact Statement (“RC-DSEIS”) and Draft Rail Alignment Environmental Impact Statement (“RA-DEIS”) as environmental analysis and documentation, *Exhibit H*. The Application proposes that the RC-DSEIS and RA-DEIS be adopted by the Board to support STB’s “fulfillment of its responsibilities under the National Environmental Policy Act, (NEPA), as well as under the Board’s regulations (49 C.F.R. Parts 1105 and 1150).” *Application*, p. 3.

Notwithstanding the STB’s prior participation as a “cooperating agency” in DOE’s undertaking of required RC-DSEIS and RA-DEIS environmental analysis and

documentation, that NEPA process is nonetheless incomplete and, assuming properly established STB jurisdiction, does not now satisfy the STB's own *non-delegable* NEPA responsibilities as the "lead agency" evaluating the proposed transportation transaction. See *Idaho v. ICC*, 35 F.3d 585, 596-97 (D.C. Cir. 1994). The STB may consider the DOE submissions for reference material but is not obligated to accept let alone adopt the RC-DSEIS or RA-DEIS. To avoid duplication, the Board may utilize DOE documents in combination with its own environmental analysis and documentation in order to fulfill its NEPA requirements. See 10 C.F.R. §§1506.3 and .4; and 49 C.F.R. Part 1105.

As previously noted in this motion, the RC-DSEIS and RA-DEIS are, by DOE's own admission, incomplete and indefinite, both in terms of content and decisions. *Supra*, pp. 6-7. So much so, these submissions cannot satisfy the requirements of 49 C.F.R. §1150.7 and Part 1105 for this application.

For example, Part 1105 regulations that address additional NEPA environmental documentation in line construction cases require a detailed operating plan, which is here omitted. 49 C.F.R. §1105.7(11)(iii). Those plan requirements are similar to those contained in §1150.5, *Exhibit D*, for applications under 49 U.S.C. §10901.

Apart from the incompleteness, indefiniteness, omissions and non-acceptability of the RC-DSEIS and RA-DEIS, relative to the criteria normally applied by the STB in environmental analysis and documentation for the transportation transaction such as DOE here proposes for §10901 evaluation, the real question now is: how does the STB intend to proceed to fulfill its own NEPA responsibilities under Part 1105?

The STB must decide and declare what Part 1105 NEPA procedures will apply going forward, and specifically what will be the status of the RC-DSEIS and RA-DEIS in those procedures.¹

c. Failure to Provide Safety Integration Plan (SIP) – 49 C.F.R. §1106

The transportation transaction proposed by DOE for the transport of SNF and HLW will result in a 300-mile extension of the national rail system and necessarily involve the operations of several other carriers, both within and without Nevada. Review and approval of the proposed transaction requires an adequate and coordinated consideration by the Board and the Federal Railroad Administration (“FRA”) for integration of operating safety procedures among the national rail carriers and a presently unidentified rail carrier operative for DOE over the Nevada line.

DOE’s application is silent on the issue and fails to provide a SIP for a transportation proposal that qualifies as a “transaction” as that term is defined in 49 C.F.R. §1106.2 for which an SIP can and should be deemed necessary by the Board for a proper consideration of the application for authority to construct and operate the line in question.

While Part 1106 generally applies to consolidations under 49 U.S.C. §11323 not construction under §10901, 49 C.F.R. §1106.2 makes clear the requirement is not so

¹ Comments on the RC-DSEIS and RA-DEIS by the many interested parties, and specifically those of Nevada, filed with DOE evidence numerous, serious omissions and deficiencies. At the very least, DOE should have included the same as a part of *Exhibit H* in order to make full disclosure and provide more complete environmental information. All of which bears directly on STB’s future determination whether, and if so to what extent, to adopt of DOE’s documentation under 40 C.F.R. §1506.3 as it proceeds to satisfy and create the record for its own environmental analysis and documentation under Part 1105.

limited, but in appropriate cases may be applied to other requests for transaction authority, such as here where interoperation issues among various entities and modes are necessarily contemplated.

d. Failure to Address Terrorism Relative to Rail Transportation and Infrastructure.

Following September 11, 2001, Congress enacted measures that address national concerns for terrorism attacks on transportation activity and infrastructure. One of significance is the *"Implementing Recommendations of the 9/11 Commission Act of 2007"*, P L. 110-53 121 Stat. 266 (August 3, 2007), Titles XII, XIII and XV Subtitles A, B and D. These concerns also prompted responsible administrations within DOT and DHS to undertake rulemakings proposing new security regulations for rail shipments of hazardous materials, including spent nuclear fuel.

DOT's Pipeline and Hazardous Materials Safety Administration ("PHMSA"), in consultation with the FRA, and DHS's Transportation Security Administration ("TSA"), in coordinated, companion proceedings, proposed new security regulations for rail shipments of hazardous materials, including spent nuclear fuel, for 49 C.F.R. Parts 172 and 174, and 49 C.F.R. Parts 1520 and 1580, respectively. The notices of proposed rulemakings (NPRMs) are at 71 FR 76834 and 76852 (December 21, 2006), respectively. [The proposed rules are currently under review at OMB and are expected to become effective within the next 45 - 180 days.]

Unquestionably, Congress, DOT and DHS have very genuine and specific concerns about the security of rail shipments of hazardous materials, including spent nuclear fuel, through major urban areas. Currently proposed rulemakings are designed to address these concerns, among others, through route selection decisions based on security

risk assessments, that have been exacerbated by rail capacity constraints within and without Nevada

DOE's application fails to address the full implications of the revised rail transportation safety and security regulations proposed by PHMSA and TSA. DOE's *Exhibit H* identifies potential rail and barge-to-rail routes to YMP through more than 30 of the nation's largest metropolitan areas, including New York, Philadelphia, Washington, DC, Atlanta, Detroit, Chicago, Houston and Los Angeles, not to overlook the proximity of YMP activity to Las Vegas.

DOE repeatedly underestimates the transportation terrorism risks that DOE has chosen to evaluate, and ignores more severe transportation terrorism risks identified by the State of Nevada and other parties. Nevada has addressed these issues in detail in the written comments on the RC-DSEIS and RA-DEIS submitted to DOE on January 10, 2008

An act of terrorism or sabotage that completely perforates the shipping cask containment, or deployment of a combination of weapons specifically designed to breach, damage, and disperse the cask contents, could result in consequences many times more severe than those evaluated by DOE, with radiation exposure to thousands and clean-up costs in the billions

The circumstances in this case surely heighten terrorism concerns because the proposed transportation activity and infrastructure involves the relatively exposed rail transport of substantial amounts of SNF and HLW not only in Nevada but also from origins nationwide to Nevada.

DOE's *Exhibit I*, at page 30, offers comment on anti-terrorism as a reason for the repository, but does not address terrorism as it relates to national or Nevada transportation activity or infrastructure. Nor does it do so in its efforts at debunking transportation myths. *Id* at 38. Other references in DOE's submissions do not present a meaningful analysis or consideration of terrorism.

Finally, it is important to note that the United States Court of Appeals for the Ninth Circuit ("9th Circuit") recently rejected NRC's 4-factor rationale for excluding meaningful consideration of terrorism from its NEPA environmental analysis and documentation. *San Luis Obispo Mothers for Peace v NRC*, 449 F.3d 1016 (9th Cir. 2006), *cert. denied* 127 S.Ct. 1124 (2007).

Meaningful consideration of these concerns are largely absent from DOE's application but should have been reasonably anticipated as necessary supportive information under 49 C.F.R. §1150.8 required for Board consideration of this application. The failure to critically address terrorism as it relates to transportation activity and infrastructure, and related security, exposure and first response concerns should be considered fatal to the acceptance of DOE's application as presently filed.

In a post-9/11 world, meaningful consideration requires recognition of the jurisdictional responsibility and expertise of other Federal agencies for rail safety and security risk assessments. The Interim Final Rule, effective June 1, 2008, issued by PHMSA in coordination with FRA and TSA, on April 16, 2008 at 73 F.R. 20752, and consideration of the 27 risk analysis factors included therein, warrant the inclusion those agencies as "cooperating agencies" with "lead agency" status for FRA on safety and security risk assessment matters, as a part of the Board's deliberations for purposes of

NEPA and determination of the public convenience and necessity for purposes of prior approval under Section 10901

Transportation safety and security risk assessments will not be subject to critical review by the Nuclear Regulatory Commission (“NRC”) in processing DOE’s License Application. Thus, because the STB will be the only Federal agency to review the Nevada and national impacts of DOE’s transportation plans for approval purposes and given the presumptive nature of Section 10901, the Board must act to ensure an open and fair opportunity for public participation in these proceedings.

III

Conclusion and Prayer

As noted, the geologic repository for spent nuclear fuel and high level radioactive waste proposed for Yucca Mountain, NV is a unique, first-ever in the world, project. For the Board, DOE’s application involving local and national transport of such hazardous materials is likewise unique

DOE’s application seeks prior approval from the Board for the construction and operation of a 300-mile rail line in Nevada as an extension of the national rail system for the transportation of SNF and HLW from origins throughout the United States to the repository. While the application focuses on construction and operation of rail infrastructure in Nevada, it necessarily implicates rail transportation and infrastructure nationwide.

This case represents the first invitation and opportunity for the STB to review and evaluate the local and national impacts of proposed transportation activity and

infrastructure related to the proposed repository. For that reason, the Board should require that DOE's initial Application fully comply with applicable rules and regulations

Nevada finds DOE's Application filed March 17, 2008 deficient, and for the reasons urged, requests the Board to reject the Application either for lack of jurisdiction or as incomplete. If the Board finds jurisdiction and chooses not to reject the Application but to require DOE to appropriately supplement its Application, then Nevada requests that the Board require responsive comments be filed *only after* DOE's application has been fully completed with proper supplementary content and that PHMSA, TSA and FRA be included as "cooperating agencies" with FRA the "lead agency" on safety issues in any further proceedings.

Dated this 30th day of April, 2008, by _____ /s/
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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that true and correct copies of the foregoing document, and Exhibit A, were served on Parties or Counsel of Record and others identified below by (1) first-class U.S. mail, postage prepaid, (2) e-mail as shown, or (3) other expeditious method, this 2nd day of May, 2008:

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