

**BEFORE THE
SURFACE TRANSPORTATION BOARD**

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Finance Docket No. 36284

**SEVEN COUNTY INFRASTRUCTURE COALITION—
CONSTRUCTION AND OPERATION—IN UTAH, CARBON,
DUCHESNE, AND UINTAH COUNTIES, UT.**

**SEVEN COUNTY INFRASTRUCTURE COALITION'S REPLY
TO PETITIONS FOR RECONSIDERATION**

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The Seven County Infrastructure Coalition respectfully files this reply opposing two petitions that seek reconsideration of the Board’s January 5, 2021 decision in this proceeding.

INTRODUCTION

The Board’s rules ensure that reconsideration is a rare occurrence. Petitioners bear the burden of proving that new evidence, changed circumstances, or material error demand a different decision. Reconsideration should be especially rare in cases like this, where the Board’s decision is explicitly preliminary, and environmental review is ongoing. It is not enough to raise arguments based on a lease in a separate proceeding, especially when those arguments can be addressed in that other proceeding. Simply “adopting” the arguments in a dissenting opinion is equally inadequate. Yet that is all these Petitioners do. As a result, they have not carried their burden, and their reconsideration petitions should be denied.

DISCUSSION

Reconsideration is appropriate only where a petition identifies new evidence, changed circumstances, or material error that would mandate a different result.¹ Because the Petitions for Reconsideration fail to meet this standard, they must be denied.

I. Petitioners have not identified new evidence or changed circumstances warranting reconsideration of the Board’s decision.

A. Colorado, Midland & Pacific Railway’s lease does not change the potential for downline impacts.

Petitioners focus their arguments on their claim that there are “changed circumstances” due to a recent notice of exemption filed by Colorado, Midland & Pacific Railway Company (“CMPR”) relating to its lease of the Tennessee Pass Rail Line (“TPL”) from Union Pacific Railroad (“UP”).² They contend that the Board should reconsider its preliminary decision in this unrelated proceeding due to concerns over the potential for trains carrying Uinta Basin oil to run on the TPL.³

¹ See *Jimmy Lee Waneck and Starr Swearingen Waneck, et al.—Petition for Declaratory Order*, STB Docket No. FD 36167, at 3 (Oct. 31, 2018) (internal citations omitted).

² See Notice of Exemption, Colorado, Midland & Pacific Ry. Co.—Lease and Operation Exemption Containing Interchange Commitment—Union Pacific R.R. Co., STB Docket No. FD 36471, at 3-5 (filed Dec. 31, 2020).

³ Petition for Reconsideration, Seven County Infrastructure Coalition—Construction and Operation Exemption—In Utah, Carbon, Duchesne, and Uintah Counties, UT, STB Docket No. FD 36284, at 1-2 (filed Jan. 26, 2021) (“Center for Biological Diversity Pet.”); Motion for Extension of Time and Petition for Reconsideration, Seven County Infrastructure Coalition—Construction and Operation Exemption—In Utah, Carbon, Duchesne, and Uintah Counties, UT, STB Docket No. FD 36284 at 5 (filed Jan. 25, 2021) (“Eagle County Pet.”).

CMPR's lease does not change the potential for downline traffic on the TPL from the Uinta Basin Railway. While the TPL currently is dormant, UP has not formally abandoned the line. It could reinstate rail service at any time. The lease at issue in FD 36471 grants CMPR the same rights that UP already has to operate the TPL.

In any case, Petitioners' concerns regarding resumption of rail service on the TPL are unfounded. Both CMPR and Rio Grande Pacific Corporation, the parent company of CMPR, have told the Board that its primary interest in the TPL is providing passenger service and that it has no plans to run trains carrying Uinta oil over the TPL.⁴ In fact, Rio Grande has explained that it would not be economical to transport Uinta oil over the TPL, which would be the comparatively highest-cost route.⁵

To the extent there remain concerns about resumption of passenger or freight service on the TPL, those concerns can be appropriately addressed as part of the Board's consideration of the transaction in FD 36471.

B. CMPR's lease does not materially affect the Board's decision.

Even if CMPR's lease could be considered new evidence or changed circumstances, Petitioners must still show that the Board's decision is *materially*

⁴ See Reply to Motion to Reject Notice of Exemption, Colorado, Midland & Pacific Ry. Co.—Lease and Operation Exemption Containing Interchange Commitment—Union Pacific R.R. Co., STB Docket No. FD 36471, at 3 (filed Jan. 26, 2021); Verified Statement of Mark W. Hemphill, Jan. 26, 2021, FD 36284 at ¶¶ 6, 8 (“Hemphill V.S.”).

⁵ Hemphill V.S. at ¶ 7.

affected by that new evidence or changed circumstances.⁶ To determine whether there will be such a material effect, the Board considers whether the information “relates to a specifically identified and contested assumption in [the Board’s] prior decision[.]”⁷ Because the potential downline impacts of Uinta Basin rail traffic are being considered in the ongoing environmental review, and did not factor into the Board’s transportation merits decision, there is no cause for reconsideration.

Petitioners’ argument that the CMPR lease somehow implicates the Uinta Basin Railway’s potential for market abuse is baseless. Petitioners fail to explain how an additional rail carrier providing service on a rail line that does not connect to the Uinta Basin Railway—a line proposed to provide rail service for the first time to shippers in the Uinta Basin—could result in market abuse. The Uinta Basin Railway will terminate at the UP line in Kyune, Utah, at which point freight will interchange with either UP or BNSF. From there, UP and/or BNSF will control the routing of traffic, not Rio Grande or any other entity operating the Uinta Basin Railway. Thus, Petitioners’ conjecture regarding “the potential for coordinated operations by affiliated railroads on the proposed Uinta Basin line and reactivated Tennessee Pass Line” fundamentally misunderstands the way that freight is transported via rail.⁸

⁶ *Fla. Dep’t of Transp.—Acquis. Exemption—Certain Assets of CSX Transp., Inc.*, STB Docket No. FD 35110, at 4 (June 22, 2011).

⁷ *Ariz. Pub. Serv. Co. & Pacificorp v. Burlington N. & Santa Fe Ry. Co.*, STB Docket No. NOR 41185, at 4 (May 12, 2003).

⁸ See Eagle County Pet. at 5.

Ultimately, the concerns raised by Petitioners do not go to the transportation merits of the Uinta Basin Railway. Rather, they involve potential environmental impacts to areas and communities along the TPL. Such potential downline impacts from the Uinta Basin Railway are being considered as part of OEA's ongoing environmental review and were discussed in the DEIS.⁹ That analysis concluded that the most likely route for trains carrying Uinta oil is via UP and/or BNSF through Denver, not the TPL.¹⁰ To the extent Petitioners disagree, the Board granted them additional time to comment on this issue in the DEIS.

II. Petitioners have not identified a material error warranting reconsideration.

In addition to seeking reconsideration by alleging new evidence or changed circumstances, Petitioners contend that the Board committed material error by not adopting the dissent's views. That argument fails on both procedural and substantive grounds.

A. Simply adopting the arguments of the dissenting opinion cannot meet Petitioners' burden to prove material error.

The Board rule governing reconsideration requires a petitioner to "demonstrate[] material error, new evidence, or substantially changed

⁹ See, e.g., Uinta Basin Railway Draft Environmental Impact Statement at 3.1-1 (Vehicle Safety and Delay), 3.2-1 (Rail Operations Safety), 3.6-1 (Noise and Vibration), and 3.7-1 (Air Quality and Greenhouse Gases) (October 2020) ("Draft EIS").

¹⁰ See Draft EIS, Appendix C, Downline Analysis Study Area and Train Characteristics at C-4.

circumstances that would materially affect the case.”¹¹ To that end, a reconsideration petition “must state in detail the nature of and reasons for the relief requested.”¹² A party “alleging material error,” in particular, “must do more than simply make a general allegation; it must substantiate its claim of material error.”¹³

Here, each of the petitions for reconsideration simply “adopts,” without elaboration, the “same arguments” made in the dissenting opinion.¹⁴ This casual incorporation of arguments the Board considered when it made its decision does not satisfy the basic pleading requirements for a reconsideration petition, much less meet Petitioners’ burden of proving material error. For that reason alone, Petitioners’ general request to reconsider the dissent’s arguments should be denied.

B. The dissenting opinion’s arguments do not demonstrate material error.

Even if it were appropriate to seek reconsideration based entirely on adoption of the arguments in a dissent, the dissent’s arguments in this case do not demonstrate a material error in the Board’s reasoning.¹⁵

¹¹ *Boston & Me. Corp. & Springfield Terminal R.R. Co. – Petition for Declaratory Order*, STB Docket No. FD 35749, 2013 WL 5869470, at *2 (Oct. 31, 2013); *see* 49 C.F.R. § 1115.3(b).

¹² *Beaufort R.R. Co., Inc.—Modified Rail Certificate*, STB Docket No. FD 34943, 2009 WL 1416460, at *5 (May 20, 2009) (quoting 49 C.F.R. § 1115.3(c)).

¹³ *The Atlanta Dev. Auth. d/b/a Invest Atlanta & Atlanta Beltline, Inc.—Verified Petition for a Declaratory Order*, STB Docket No. FD 35991, 2017 WL 2311846, at *4 (May 26, 2017).

¹⁴ Center for Biological Diversity Pet. at 1; *see* Eagle County Pet. at 5.

¹⁵ The dissent was authored by Board Member Oberman, who was elevated to the position of Board Chairman on January 21, 2021.

1. A petition for exemption does not trigger public convenience and necessity analysis.

The dissent’s argument turns on alleged “unanswered questions about the financial viability of, and public need for, this project”¹⁶ Those questions fall outside the proper scope of an exemption petition.

ICCTA requires the Board to exempt a rail carrier from the statute’s licensing provisions “whenever” it finds that (1) a licensing proceeding “is not necessary to carry out the transportation policy of section 10101” and (2) either “the transaction or service is of limited scope” or a licensing proceeding “is not needed to protect shippers from the abuse of market power.”¹⁷ When the Board receives a petition seeking such an exemption, it must first decide whether the two exemption criteria are met. If they are, the exemption has to be granted. No other questions are relevant.

The Board in this case found that the Uinta Basin Railway project advances section 10101’s rail transportation policy by enhancing competition and fostering sound economic conditions in transportation.¹⁸ The Board further found that an exemption would minimize the need for federal regulatory control and reduce regulatory barriers to entry, both of which would also be consistent with the rail transportation policy.¹⁹ Those findings satisfy the first part of section 10502(a)’s

¹⁶ Decision at 12 (Oberman, dissenting).

¹⁷ 49 U.S.C. § 10502(a); *see Alaska Survival v. Surface Transp. Bd.*, 705 F.3d 1073, 1082 (9th Cir. 2013).

¹⁸ Decision at 9 (citing 49 U.S.C. § 10101(4), (5)).

¹⁹ Decision at 9 (citing 49 U.S.C. § 10101(2), (7)).

exemption test.²⁰ And since no one seriously claimed that a licensing proceeding was necessary to protect shippers, the criteria for applying an exemption were met in this case.²¹

Having found the exemption criteria satisfied, the Board was not obliged to address the project's public convenience and necessity—including its financial viability. Indeed, doing so would have “run contrary to the plain language of [section] 10502(a), which mandates that the STB grant exemptions from the full proceedings required under the statute.”²² As the Ninth Circuit put it, “neither [section] 10502 nor the STB's implementing regulations indicate that an exemption proceeding is improper when the project's financial viability is questioned.”²³

Because the “unanswered questions” raised in the dissent involve the public convenience and necessity test, the Board did not need to answer them. For the same reason, “adopting” the dissent's questions in a petition for reconsideration cannot demonstrate a “material error” in the Board's decision.

2. The market, not the Board, should determine the viability of and need for a project that qualifies for an exemption.

Even if financial viability and public need were proper questions here, those questions have been adequately addressed. Section 10502's exemption procedure is supposed to facilitate “continuing evaluation of the appropriateness of regulation

²⁰ See *Alaska Survival*, 705 F.3d at 1083 (holding that the Board need not consider every factor listed in section 10101).

²¹ See Decision at 10.

²² *Alaska Survival*, 705 F.3d at 1082.

²³ *Id.*

and continuing deregulation where consistent with [ICCTA]’s policies.”²⁴ That is one reason why, as the Board’s decision explains, “the ultimate decision to go forward with an approved project is in the hands of the applicant and the financial marketplace, not the agency.”²⁵

The dissent disagrees. Citing “significant questions about the future global demand for oil,” it doubts the Uinta Basin Railway can succeed.²⁶ That skepticism seems to grow out of media reports concerning oil’s future and the shrinking value of oil reserves.²⁷ But those are precisely the sort of concerns that the market will resolve.²⁸ As the Eighth Circuit explained in *Mid States Coalition for Progress*, “the nation’s financial institutions possess the expertise and insight necessary to determine the financial viability of the project. Given the liberal nature of the licensing statute . . . they should have that opportunity.”²⁹

The dissent responds that “[e]ven if relying on the financial marketplace” is sometimes appropriate, the market is irrelevant here because, the dissent believes,

²⁴ *Id.* at 1082 (quoting *Coal Exps. Ass’n of the U.S., Inc. v. U.S.*, 745 F.2d 76, 82 (D.C. Cir. 1984)).

²⁵ Decision at 6 (citing *Mid States Coalition for Progress v. STB*, 345 F.3d 520, 552 (8th Cir. 2003)).

²⁶ Decision at 16 (Oberman, dissenting).

²⁷ *See* Decision at 16-17 (Oberman, dissenting).

²⁸ The 2021 U.S. Energy Information Administration projections show increasing U.S. oil consumption through 2050. Annual Energy Outlook for Energy Markets through 2050, U.S. Energy Information Administration, AEO2021 Press Release, at 9 (February 3, 2021). EIA is the statistical and analytical agency within the U.S. Department of Energy responsible for collecting, analyzing, and disseminating independent and impartial energy information.

²⁹ *Mid States Coalition for Progress*, 345 F.3d at 552.

the railroad will have to rely on government assistance to afford construction.³⁰ But the Board has previously rejected that distinction: “[T]he decision to go forward with an approved project ultimately is in the hands of the applicant and its potential investors (*whether public or private*) and not this agency.”³¹ In fact, “nothing in [ICCTA] or governing precedent requires that publicly funded projects be subjected to a greater degree of scrutiny than privately funded projects.”³² When “funding decisions have been made by bodies empowered to make those decisions,” the Board “will not use [its] licensing process to revisit” those decisions.³³

Because federal court and STB precedent rely on the financial marketplace and the democratic process to make funding decisions, Petitioners’ adoption of the dissent’s arguments cannot justify reconsideration of the Board’s decision.

3. The Board can assess a project’s transportation merits apart from its potential environmental impacts.

The dissent also objects to the Board’s decision “reaching a preliminary conclusion on the transportation merits” of the Uinta Basin Railway.³⁴ To some extent, this objection overlaps the argument that the Board should scrutinize the

³⁰ Decision at 18-19 (Oberman, dissenting). In fact, the Uinta Basin Railway will not be publicly financed. *See* Petitioner’s Response to Replies to Petition for Exemption, Seven County Infrastructure Coalition—Construction and Operation—In Utah, Carbon, Duchesne, and Uintah Counties, UT, STB Docket No. FD 36284, at 12-13 (filed July 21, 2020).

³¹ *Cal. High-Speed Rail Auth.—Constr. Exemption—In Fresno, Kings, Tulare, and Kern Counties, Cal.*, STB Docket No. FD 35724, 2014 WL 3973120, at *8 (Aug. 12, 2014) (emphasis added).

³² *Id.* at *9.

³³ *Id.*

³⁴ Decision at 13 (Oberman, dissenting).

project's financial viability. Purely as a procedural matter, the Board's decision to segregate the Uinta Basin Railway's transportation merits from its potential environmental effects offers no separate grounds for reconsideration.

The Board has regularly evaluated transportation merits and environmental impacts separately.³⁵ In the context of exemption proceedings like this one, considering the "transportation merits" has meant considering the relevant parts of section 10101's rail transportation policy.³⁶ Which aspects of the rail transportation policy are relevant to the transportation merits can vary from project to project. Here, the Board rightly found that section 10101(2), (4), (5), and (7) favored an exemption. Environmental impacts, by contrast, fit beneath the umbrella of section 10101(8), which favors operating transportation facilities and equipment without detriment to public health and safety.³⁷

The dissent's analysis blurs this distinction. Citing a dissent in a different decision, it says that "[t]he transportation merits and the environmental impacts of

³⁵ See, e.g., *Ken Tenn Regional Rail Partners, Inc.—Constr. & Operation Exemption—Fulton Cnty., Ky. & Obion Cnty., Tenn.*, STB Docket No. FD 36328, 2020 WL 7054177 (Dec. 1, 2020) (conditionally approving transportation merits); *Six County Ass'n of Gov'ts—Constr. & Operation Exemption—Rail Line Between Levan & Salina, Utah*, STB Docket No. FD 34075, 2015 WL 5169108 (Sept. 3, 2015) (exempting a rail line based on a consideration of environmental impacts and a transportation merits decision issued in 2001).

³⁶ See, e.g., *Riverview Trenton R.R. Co.—Petition for an Exemption from 49 U.S.C. 10901 to Acquire and Operate a Rail Line in Wayne Cnty., Mich.*, STB Docket No. FD 34040, 2003 WL 21108179, at *7 (May 15, 2003) (evaluating the rail transportation policy as part of the Board's "statutory responsibility to look at the transportation merits" of a proposal).

³⁷ See Decision at 10; see also *Riverview Trenton R.R. Co.*, 2003 WL 21108179, at *8 (evaluating an Environmental Assessment under section 10101(8)).

this project are inherently interrelated and should be considered in balance with each other, rather than even preliminarily dealing with the transportation merits now.”³⁸ That assertion overlooks section 10101’s separate subsections, which allow the easy division between transportation merits and environmental impacts described in the majority’s decision. Any “balancing” between those factors that may be necessary can be accomplished after the Final EIS is complete, as the majority points out.³⁹ The EIS process is a valuable way to evaluate “public health and safety” under section 10101(8). But it cannot change the Board’s “transportation merits” assessment that the project promotes other parts of the rail transportation policy.

In any event, the DEIS in this case does not raise concerns around the project’s *potential* environmental impacts. First, the DEIS made conservative assumptions throughout to ensure it did not underestimate potential impacts.⁴⁰ Moreover, the potential impacts identified in the DEIS are not unusual when compared to other rail projects of the same size and scope. Consistent with prior Board precedent, those impacts are appropriately addressed through mitigation measures adopted by the Board when granting authority to construct and operate.⁴¹

³⁸ Decision at 21 (Oberman, dissenting).

³⁹ Decision at 10.

⁴⁰ For example, to estimate potential downstream greenhouse gas emissions, the DEIS “assumed conservatively” that all of the oil shipped on the Uinta Basin Railway would add to existing fuel consumption. Draft EIS at 3.15-31. Realistically, as the DEIS acknowledges, oil transported on the proposed line would *displace* oil from sources outside the Uinta Basin. Draft EIS at 3.8-7-8.

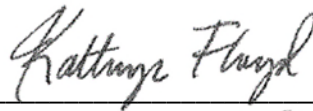
⁴¹ See, e.g., *Alaska R.R. Corp.—Construction and Operation Exemption—A Rail Line Extension to Port MacKenzie, AK*, STB Docket No. FD 35095, at 19-20 (Nov. 21,

Because the Board has a well-founded practice of separating transportation merits from environmental review, adopting the dissent's arguments does not demonstrate a material error justifying reconsideration.

CONCLUSION

Petitioners have failed to show how any new evidence, changed circumstances, or material error would affect the Board's decision preliminarily granting the Coalition's exemption petition. As a result, their petitions for reconsideration should be denied.

Respectfully submitted,

A handwritten signature in cursive script, reading "Kathryn Kusske Floyd", written in dark ink.

Kathryn Kusske Floyd

*Counsel to Seven County
Infrastructure Coalition*

2011); *Alaska R.R. Corp.—Construction and Operation Exemption—Rail Line Between North Pole and Delta Junction, AK*, STB Docket No. FD 34658, at 13-14 (Jan.6, 2010).

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 12th day of February, 2021, I caused a copy of the foregoing Reply to Petitions for Reconsideration to be served on all parties of record by email or first-class mail, postage prepaid.



Margaret K. Fawal