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September 17, 2021

303006

VIA E-FILING

Cynthia T. Brown
Chief of the Section of Administration
Office of Proceedings
Surface Transportation Board
395 E Street, SW
Washington DC 20423-0001

ENTERED
Office of Proceedings
September 17, 2021
Part of
Public Record

Re: California High-Speed Rail Authority – Construction Exemption – In Fresno, Kings, Tulare, and Kern Counties, Cal., FD 35724 (Sub-No. 1)

Dear Ms. Brown:

The California High-Speed Rail Authority (“Authority”), a Class III non-operating rail carrier hereby submits, via e-filing, a Petition to Reopen pursuant to 49 C.F.R. § 1115.4. The required filing fee of \$350.00 has been paid via Pay.gov. If there are any questions concerning this e-filing, please contact me by telephone at (202) 663-7823 or by e-mail at wmullins@bakerandmiller.com. If I am unavailable, you may contact Crystal Zorbaugh, by telephone at (202) 663-7831 or by e-mail at cзорbaugh@bakerandmiller.com.

Sincerely,

/s/ William A. Mullins

William A. Mullins

Enclosures

cc: Parties of Record

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SURFACE
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**BEFORE THE
SURFACE TRANSPORTATION BOARD**

FD 35724 (SUB-NO. 1)

**CALIFORNIA HIGH-SPEED RAIL AUTHORITY
— CONSTRUCTION EXEMPTION —
IN FRESNO, KINGS, TULARE, AND KERN COUNTIES, CALIFORNIA**

PETITION TO REOPEN PURSUANT TO 49 C.F.R. §1115.4

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**Attorneys for the California High-Speed Rail
Authority**

**BEFORE THE
SURFACE TRANSPORTATION BOARD**

FD 35724 (SUB-NO. 1)

**CALIFORNIA HIGH-SPEED RAIL AUTHORITY
— CONSTRUCTION EXEMPTION —
IN FRESNO, KINGS, TULARE, AND KERN COUNTIES, CALIFORNIA**

PETITION TO REOPEN PURSUANT TO 49 C.F.R. §1115.4

Pursuant to 49 U.S.C. § 1322(c) and 49 C.F.R. § 1115.4, the California High-Speed Rail Authority (the “Authority”) petitions the Board to reopen the above-captioned proceeding, in which it granted exemption authority for approximately 114 miles of high-speed passenger rail line between Fresno and Bakersfield, California (“Line”), which would become part of the California High-Speed Rail System (“HSR”).¹ Reopening is requested on the basis of changed circumstances so that the Board may consider a modification of the approved route. The modification is a “locally-generated alternative” (herein referred to as the “F-B LGA”) developed as a result of litigation and a 2014 settlement agreement between the Authority and the City of Bakersfield. The Authority, as the lead agency acting under the National Environmental Policy Act (“NEPA”), conducted the environmental and historic review with the involvement of cooperating agencies, including the Board, and issued a Combined Supplemental Record of Decision (“ROD”) and Final Supplemental Environmental Impact Statement (“EIS”).²

¹ Cal. High-Speed Rail Auth.—Construction Exemption—In Fresno, Kings, Tulare, and Kern Counties, Cal., FD 35724 (sub-No. 1), slip op. (S.T.B. served Aug. 12, 2014) (the “Aug. 2014 Decision”)

² The Combined Supplemental ROD (“Auth. Supp. ROD”) and EIS, as well as the Mitigation Monitoring and Enforcement Plan, Final Supplemental Environmental Report (“EIR”), and Draft Supplemental EIR/EIS, are available at <https://hsr.ca.gov/programs/environmental-planning/project-section-environmental-documents-tier-2/fresno-to-bakersfield-locally-generated-alternative/>

Because the settlement agreement and subsequent development and approval of alternatives occurred after the Board approved the original route, the modifications are changed circumstances that warrant reopening the petition. The Authority respectfully requests the Board reopen the petition for exemption authority and consider the F-B LGA route modifications.

BACKGROUND & DEVELOPMENTS POST-2014

The Authority, a Class III non-operating rail carrier, is tasked with planning, designing, constructing, and operating the HSR. The HSR is broken into eight sections, with the goal of connecting an HSR line from San Francisco through San Jose and the Pacheco Pass and south to Los Angeles through Bakersfield, Palmdale, and Burbank.³ The HSR will then connect Los Angeles to Anaheim. Each segment would be planned and environmentally approved in separate Environmental Impact Report/Environmental Impact Statements (“EIR/EIS”).

The Authority filed a petition on September 26, 2013, for exemption authority to construct the Line between Fresno and Bakersfield.⁴ The Board denied the request to conditionally grant the exemption until after an environmental review was conducted. The Board became a cooperating agency in 2013 and worked with the Authority and the Federal Railroad Administration (“FRA”) in the preparation of the Final EIS for the Section, which was issued on April 18, 2014.⁵ Upon review of the Final EIS and FRA’s June 2014 ROD, the OEA prepared a

³ The Project was originally divided into nine sections, but since the Aug. 2014 Decision on the Line, some of the Southern California sections have been combined. There are now eight sections planned.

⁴ The Line is the second section of the HSR System. The first section is the Merced-to-Fresno Section, filed in FD 35724.

⁵ FRA acted as the lead NEPA agency, and the Authority acted as the lead California Environmental Quality Act (“CEQA”) agency. The Board became a cooperating agency pursuant to 40 C.F.R. § 1508.5 in 2013. See Cooperating Agency Designation for the California High-Speed Train (HST) System – Project Level EISs - Letter to Ms. Victoria Rutson from Mr. David Valenstein, date stamped August 23, 2013, FD 35724 (Sub-No. 1), received date August 27,

memorandum recommending the Board adopt the Final EIS. In the Aug. 2014 Decision, the Board granted the petition subject to certain mitigation measures and additional environmental conditions. The Board noted in its conclusions on environmental issues, that it was satisfied that the Final EIS took the requisite “hard look” at the potential environmental impacts associated with the Line and that the proposed mitigation efforts recommended by the OEA “will avoid, minimize, and mitigate to the extent practicable the potential environmental impacts raised and examined during the environmental review.”⁶ This hard look included review of comments by other rail lines and a major Bakersfield hospital as well as the Authority’s corresponding replies. The Authority amended the Mitigation Monitoring and Enforcement Plan to include the Board’s conditions and FRA approved the amendment on October 8, 2014. Further, the Board recognized the ongoing nature of some negotiations related to the Line, expected in large complex projects like the HSR, and suggested the parties could avail themselves of the Board’s procedures for additional relief if needed.⁷

The City of Bakersfield Litigation and the F-B LGA⁸

In June 2014, the City of Bakersfield filed a state lawsuit challenging the Authority’s approvals under CEQA. The city claimed, among other things, that “the Preferred Alternative

2013. In 2014, the Board’s Office of Environmental Analysis (“OEA”) toured the project area and conducted independent reviews of the drafts of the Final EIS.

⁶ See Aug. 2014 Decision at 19.

⁷ Responding to open negotiations between the Authority, BNSF, and other rail lines, the Board noted that “[i]n construction cases, particularly of this size and complexity where a number of alternatives are considered, outstanding issues (including issues related to property rights) often remain unresolved at the time of the Board’s decision.” Aug. 2014 Decision, at 16-17. The Board invited the parties to return to the Board for additional relief, be it exemption authority or use of the Board’s alternative dispute resolution procedures. *Id.*

⁸ A map of the new alignment can be found as Figure 1 in the Auth. Supp. ROD at Page 1-3; also available at https://hsr.ca.gov/wp-content/uploads/docs/programs/fresno-baker-eir/FBLGA_Map_of_Preferred_Alternative_SP.pdf.

identified in the Fresno to Bakersfield Section Final EIR/EIS would severely affect the City’s ability to utilize existing city assets, including its corporation yard, senior housing, and parking facilities at the Rabobank Arena, Theatre and Convention Center; would render unusable one of the city’s premier health facilities; and would affect the Bakersfield Commons project, a retail/commercial/residential development.”⁹

The parties entered into a settlement agreement, dated December 19, 2014. As part of the settlement, the parties agreed to develop and study alternative routes that would address the City’s concerns as well as the design needs of the Authority. The Authority worked with the City of Bakersfield and other stakeholders to develop the F-B LGA.

The F-B LGA is a 23.13-mile alternative alignment between the city of Shafter and the city of Bakersfield. The alignment “will be located generally adjacent to the BNSF corridor through the City of Shafter. It will then traverse the area between the BNSF and UPRR corridors, and then continue adjacent, or nearly adjacent, to the UPRR corridor through the community of Oildale and the City of Bakersfield.”¹⁰

The F-B LGA is proposed to replace the approved line consisting of a portion of the BNSF Alternative from Poplar Avenue to Hageman Road and the Bakersfield Hybrid from Hageman Road to Oswell Street (the “May 2014 Project”).¹¹ The F-B LGA does not disturb the remaining line approved by the Board in the Aug. 2014 Decision.¹²

⁹ For a description of the pre-litigation approval process, litigation concerns, and settlement agreement, see the Section 1.3.2 of the Supplemental ROD, at p. 1-9.

¹⁰ See Auth. Supp. ROD, Section 3.3, p. 3-2.

¹¹ In the Auth. Supp. ROD, this section is referred to as the “May 2014 Project.” We use the same name here for consistency.

¹² See Auth. Supp. ROD, Section 1.1, page 1-1.

Because the Authority had considered a number of other alternatives, including a “no-action” alternative in the Fresno-to-Bakersfield EIR/EIS, the F-B LGA Draft Supplemental EIR/EIS compared impacts of the LGA with the May 2014 Project. The Impact Avoidance and Minimization Features and Mitigation Measures identified in the Mitigation Monitoring and Enforcement Plan as amended were applied to the F-B LGA. The Draft Supplemental EIR/EIS identified mitigation measures specific to the LGA. The two alternatives were compared on environmental, cost, technical, and engineering perspectives.

The Authority and FRA solicited substantial public comment and input, hosting a number of public meetings which compared the May 2014 Project with the F-B LGA, including environmental settings, potential effects from construction and operations, impact avoidance, and minimization and mitigation measures to avoid, reduce, or eliminate adverse environmental effects.¹³ The Authority and FRA co-hosted a community open house for the F-B LGA in November 2015. With the Board as a NEPA cooperating agency, the Draft Supplemental EIR/EIS was issued on November 9, 2017, with a public comment period open until January 16, 2018. In that time, FRA and the Authority held another public meeting and received comments through a hotline, email, web portal, and mail.

Under a Memorandum of Understanding with FRA dated July 23, 2019, for NEPA assignment under the Surface Transportation Project Delivery Program (23 U.S.C. § 327), the Authority became the lead NEPA agency. The Authority, as the lead NEPA agency, and with the Board as a NEPA cooperating agency, published the Final Supplemental EIS in October 2019 and retained identification of the F-B LGA as the Preferred Alignment Alternative between

¹³ A description of the public outreach conducted by the Authority and FRA may be found in the Auth. Supp. ROD, Section 3.3, page 3-3.

Poplar Avenue in Kern County and Oswell Street in Bakersfield, and the Bakersfield F Street Station as the preferred station alternative.¹⁴ The Authority’s Board approved the LGA project from Poplar Avenue to the F Street Station in Bakersfield and deferred a decision on the alignment south of the station, from the F Street Station to Oswell Street, to when the Bakersfield to Palmdale project section would be considered in its entirety.

The Authority now seeks to reopen its petition to allow the Board to consider the F-B LGA developed as a result of its settlement agreement with the City of Bakersfield and as approved by the Authority’s Board. As with its original petition, the Authority additionally requests that as part of the Board’s consideration of the F-B LGA, that it review and adopt the extensive environmental and historic review already conducted by the Authority and FRA, pursuant to 40 C.F.R. § 1506.3.¹⁵

LEGAL STANDARD

The Board may reopen a proceeding because of material error, new evidence, or substantially changed circumstances. See 49 U.S.C. §1322(c); 49 C.F.R. § 1115.4 and §§ 1115.3(c) & (d). The Authority requests the Board reopen the proceedings based on substantially changed circumstances. “To warrant reopening, the new evidence must be newly available, and

¹⁴ The Draft Supplemental EIR/EIS was prepared and issued in 2017 as a joint CEQA/NEPA document, with the Authority as the lead CEQA agency and FRA as the lead NEPA agency, similar to the original Fresno-to-Bakersfield Section process. Subsequently, the Authority separated the CEQA process from the NEPA process, and prepared a Final Supplemental EIR, and approved the F-B LGA in October 2018. In July 2019, as mentioned above, the Authority received NEPA assignment from the FRA, and pursuant to its responsibilities as the lead NEPA agency, finalized the NEPA process for the F-B LGA, including issuing a combined Supplemental ROD and Final Supplemental EIS. The Mitigation Monitoring and Enforcement Plan and Amendments is Attachment C to the Supplemental ROD.

¹⁵ As set forth in the Aug. 2014 Decision, the Board reviewed and adopted the Fresno-to-Bakerfield Final EIS pursuant to 49 C.F.R. Part 1105, with modifications as stated by the OEA in its Environmental Memorandum. See id., at 16-20.

the new evidence or substantially changed circumstances must materially affect the prior decision.” Riffin—Petition For Declaratory Order, FD 34997 et al., slip op. at 6 (S.T.B. served Oct. 29, 2012); see also Port of Moses Lake—Petition To Reopen, FD 34936, (filed on Nov. 2, 2018) at 2; Tex. Cent. R.R. and Infrastructure, Inc. & Tex. Cent. R.R., LLC—Petition for Exemption—Passenger Rail Line between Dallas and Houston, Tex., FD 36025, (“Tex. Cent. R.R.”) (S.T.B. served July 16, 2020), slip op. at 9 (“The alleged grounds for reopening must be sufficient to show that, if accepted, they would lead the Board to materially alter its prior decision.”).

Changed circumstances looks to the nexus between the Board’s decision and subsequent developments. For example, in Port of Moses, the Board approved a construction exemption for a rail line. After the approval, land adjacent to the route was developed, and the petitioner sought permission to modify the route. The Board found the petitioner had demonstrated changed circumstances and granted a petition to reopen to consider the modifications.¹⁶ Similarly, in Tex. Cent. R.R., the Board originally found it lacked jurisdiction because the line was not intended to have interstate impacts. The Board granted a petition to reopen the proceedings when the line later entered into agreements that expanded the purpose of the line into interstate activities.

Changed circumstances need not be as dramatic as changed topography. In SF&L Ry. Inc., the Board granted a petition to reopen a proceeding to clarify its decision where the parties could not agree on how to apply the Board’s order.¹⁷ The petitioners argued the dispute constituted changed circumstances; the Board agreed in granting the petition to reopen.

¹⁶ Port of Moses Lake—Construction Exemption—Moses Lake, Wash., FD 34936, slip op. at 3 (S.T.B. served Jan. 28, 2019) (“Port of Moses”).

¹⁷ SF&L Ry. Inc.—Acquisition and Operation Exemption—Toledo, Peoria and Western Ry. Corp., between La Harpe and Peoria, IL, FD No.33995, slip op. at 4 (S.T.B. served Jan. 31, 2003).

In contrast, the Board has rejected a petition to reopen where a party simply disagrees with the outcome and tries to outrun it. See Tongue River (rejecting a petition to reopen where the “changed circumstance” was really an attempt to circumvent an adverse decision by the Board).¹⁸

DISCUSSION

1. THE LITIGATION, SETTLEMENT AGREEMENT, AND SUBSEQUENT ANALYSIS AND SELECTION OF THE F-B LGA ARE CHANGED CIRCUMSTANCES THAT MATERIALLY ALTER THE BOARD’S DECISION AND SUPPORT REOPENING

In the Aug. 2014 Decision, the Board granted the construction exemption for the alignment that included the May 2014 Project as the Preferred Alternative. The Preferred Alternative included some mitigation measures and was the option at the time that best addressed and mitigated the impacts of the construction. The Board approved the Authority’s exemption petition and approved construction of the preferable alternative subject to mitigation measures and other conditions.

Subsequent to the Aug. 2014 Decision, the Authority and the City of Bakersfield settled litigation between them with an agreement to develop and study alternatives to the May 2014 Project. This agreement between the Authority and the City of Bakersfield changed the underlying circumstances on which the Authority selected its Preferred Alternative and on which the Board made its determination. Because of the agreement, the Authority and FRA, with the Board as one of the cooperating agencies, developed the F-B LGA with input from the City of Bakersfield and other stakeholders.¹⁹ The result is the Authority’s approval of the F-B LGA as

¹⁸ Tongue River R.R. Co.—Rail Constr. and Operation—Ashland to Decker, Montana, FD 30186 (Sub-No. 2), slip op. (S.T.B. served Dec. 1, 1997) (“Tongue River”).

¹⁹ The OEA participated in the production of both the Draft and Final Supplemental EISs.

the Selected Alternative. Reopening the petition is warranted so that the Board may consider the F-B LGA.

2. BOARD PRECEDENT, SUPPORTS REOPENING THE AUG. 2014 DECISION

The Board has reopened proceedings where subsequent agreements change the circumstances on which the Board decided. In Tex. Cent. R.R., the Board reopened the proceedings to readdress whether it had jurisdiction over a passenger line between Dallas and Houston, Texas. At the time of the original decision, the Board found that connection to interstate rail lines was too speculative, and the line appeared to only connect intrastate, and thus was not within its jurisdiction. The petitioner sought to reopen the proceedings demonstrating that following that decision, the petitioner entered into agreements with Amtrak that contemplated through-ticketing and interstate service. The Board reopened the proceedings to consider whether these agreements changed the basis on which it had denied jurisdiction.²⁰

The Board has also reopened petitions to consider changes to the approved line where subsequent events required changes. In the Port of Moses, the Board granted the petitioner's request to reopen its petition for a construction exemption where subsequent land development necessitated limited changes to the approved route.

Here, the settlement agreement between the Authority and the City of Bakersfield did not exist at the time of the Board's decision. The F-B LGA that came out of the agreement was the product of collaboration and cooperation by several interested parties, including the cities of Bakersfield and Shafter as well as Kern County. The Authority only seeks that the petition be reopened for the limited purpose of modifying a portion of the line and does not seek to disturb or change the remaining route.

²⁰ See Tex. Cent. R.R., at 10-12.

CONCLUSION

Reopening the proceedings is warranted due to changed circumstances. The Board's original approval for an exemption was based on an alignment that included the May 2014 Project. Since that time, the Authority and the City of Bakersfield have entered into an agreement to develop alternatives that address concerns raised by the City in litigation filed in 2014 and address the Authority's design requirements and needs of the HSR. The result of their collaboration and the new Selected Alternative is the F-B LGA.

The Authority requests that the Board reopen the petition to consider the F-B LGA modification to the approved route.

Respectfully submitted,

/s/ William A. Mullins

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September 17, 2021

Attorneys for the California High-Speed Rail Authority

CERTIFICATE OF SERVICE

I hereby certify that a true copy of the California High-Speed Rail Authority's Petition to Reopen Pursuant to 49 C.F.R. § 1115.4 was served by first-class mail, postage prepaid, or by a more expeditious manner, this 17th day of September 2021, on all Parties of Record.

/s/ Erin Glavich
Erin Glavich
Attorney for the California High-Speed Rail Authority