

BEFORE THE
SURFACE TRANSPORTATION BOARD

FINANCE DOCKET NO. 36036

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Office of Proceedings
June 6, 2016
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Public Record

REQUEST FOR EXTENSION BY BENICIANS FOR A SAFE AND HEALTHY
COMMUNITY, CENTER FOR BIOLOGICAL DIVERSITY, COMMUNITIES FOR A
BETTER ENVIRONMENT, NATURAL RESOURCES DEFENSE COUNCIL, SAN
FRANCISCO BAYKEEPER, SIERRA CLUB, AND STAND

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 GRANTED Office of Proceedings	DECISION ID NO.: <u>45268</u>
	DECIDED DATE: <u>6/9/16</u>
	SERVICE DATE: <u>6/10/16</u>
	APPROVED: <u>Rachel D Campbell</u> <i>Extension granted.</i> Director
	☒ <u>Remaining issues pending.</u>

INTRODUCTION

Pursuant to 49 C.F.R. § 1104.7(b), Benicians for a Safe and Healthy Community, Center for Biological Diversity, Communities for a Better Environment, Natural Resources Defense Council, San Francisco Baykeeper, Sierra Club, and Stand (together, Benicians) request an extension until July 8, 2016, for any replies to the Petition for Declaratory Order filed by Valero Refining Company on May 31, 2016, STB FD No. 36036. In its Petition, Valero seeks a declaratory order that the Benicia Planning Commission's denial of a permit for Valero's proposed crude-by-rail offloading facility in Benicia, California, was preempted by the Interstate Commerce Commission Termination Act (ICCTA). Petition at 1. Benicians plan to participate as parties of record and file a reply or replies to Valero's Petition explaining, among other things, why the ICCTA does not apply to the denial of a permit for a non-rail carrier facility.

This request is timely, *see* 49 C.F.R. § 1104.7(b), and the requested extension does not allow Benicians more time than the schedule proposed by Valero in its Petition. Accordingly, Benicians respectfully request that the Board grant their request for an extension until July 8, 2016. For reasons that Benicians will set forth more fully in their reply, it would be inappropriate for the Board to institute a declaratory proceeding here, and thus the Board should not set a deadline for replies to the Petition based on the commencement of such a proceeding. Given the prohibition against replies to replies, 49 C.F.R. § 1104.13(c), and the need for expedited consideration of this matter, Benicians also request that the Board deny Valero's request to file "Rebuttal Comments."

DISCUSSION

I. Benicians' request for an extension is supported by good cause

Under the Board's Rules of Practice, "[a] party may file a reply . . . to any pleading within 20 days after the pleading is filed with the Board, unless otherwise provided." 49 C.F.R. § 1104.13(a). Because Valero filed its Petition on May 31, 2016, any replies to the Petition would be due on June 20, 2016, unless the Board provides otherwise. The Board may extend this reply period in its discretion, upon request and for good cause. *Id.* § 1104.7(b).

Since Valero filed its Petition, Benicians have been diligently reviewing the legal and factual issues raised. Valero's Petition raises statutory preemption issues of potential national significance that require substantial research and analysis. Granting Benicians an additional 18 days would facilitate coordination between the various organizations and increase the chances of them filing one, coordinated reply. In addition, Valero's Petition implicates matters of significant public interest, and the extension would allow time for other organizations and government entities that may have an interest in the Petition to file comments.¹

A Board order granting the requested extension would also provide clarity regarding the deadline for replies. In its proposed procedural schedule, Valero did not set forth any date-certain deadline for replies to its Petition. *See* Petition at 21. Rather, Valero proposed that replies be due within 30 days of an "STB order instituting a

¹ The California Attorney General and many local and regional governments submitted comments to the City of Benicia expressing the view that the ICCTA does not preempt denial of the permit.

declaratory proceeding.” *Id.* For reasons that Benicians will set forth more fully in their reply, it would be inappropriate for the Board to institute a declaratory proceeding here because it is clear that ICCTA does not apply to a project proposed by a non-rail carrier. “Where the law is clear, the Board may decline to institute a proceeding and instead provide guidance on the preemption issue presented” Decision, *SEA-3, Inc., Petition for Declaratory Order*, STB FD No. 35853, 2015 WL 1215490, at *4 (Mar. 17, 2015).

Accordingly, Benicians submit that it would be unworkable to set deadlines based on the commencement of such a proceeding.

Finally, Valero would not be prejudiced by Benicians’ requested extension, as Valero itself proposed a period of at least 30 days, and likely significantly more, for the filing of replies. *See* Petition at 21.

II. The Board should not authorize Valero to reply to any replies

The Board’s Rules of Practice clearly state that “[a] reply to a reply is not permitted,” 49 C.F.R. § 1104.13(c), and a reply to a reply to a petition for a declaratory order is no exception, *see, e.g.,* Decision, *Cal. High-Speed Rail Auth., Petition for Declaratory Order*, STB FD No. 35861, 2014 WL 7149612, at *4 (Dec. 12, 2014) (denying motion for leave to file a reply to a reply to a petition for a declaratory order). Despite this explicit prohibition, Valero provided for the submission of “Rebuttal Comments” in its proposed schedule. Petition at 21. Because such “Rebuttal Comments” to the reply filed by Benicians (or any other replies) would violate the Board’s prohibition on “[a] reply to a reply,” 49 C.F.R. § 1104.13(c), the Board should deny Valero’s proposal to submit “Rebuttal Comments.”

Allowing Valero to file a reply to Benicians' reply would, moreover, be inequitable and prejudice Benicians. After the Benicia Planning Commission denied Valero's permit, Valero appealed the Commission's decision to the Benicia City Council. Thereafter, on March 15, 2016, Valero requested that the City Council delay its decision so that Valero could obtain declaratory relief from the Board. On the same day, Valero's attorney informed the City Council that Valero would file a petition within 30 days.² Valero then failed to file a petition within 30 days.

Subsequently, on April 18, 2016, Valero's attorney again told the City Council that Valero would file a petition within 30 days.³ The City Council voted to defer its decision on the permit until September 20, 2016, on the basis of this representation. And, once again, Valero failed to file a petition within 30 days. It was not until May 31, 2016—77 days after Valero first requested that the City Council defer deciding Valero's appeal—that Valero actually filed its Petition before this Board.

Allowing Valero to file a reply to Benicians' reply would unjustifiably further delay a decision on Valero's Petition—a delay caused by Valero's own, unexplained delays in filing its Petition. It would leave the Board with much less time to reach a

² Transcription of the Videotaped City of Benicia – City Council Meeting, at 114 (Mar. 15, 2016), *available at* http://www.ci.benicia.ca.us/vertical/sites/%7BF991A639-AAED-4E1A-9735-86EA195E2C8D%7D/uploads/City_Council_March_15_2016_Transcript.pdf.

³ Reporter's Tr. of Recorded Proceedings, *In re Valero Crude by Rail Project*, Hearing and Public Comments, at 138 (Apr. 18, 2016), *available at* http://www.ci.benicia.ca.us/vertical/sites/%7BF991A639-AAED-4E1A-9735-86EA195E2C8D%7D/uploads/City_Council_April_18_2016_Transcript.pdf.

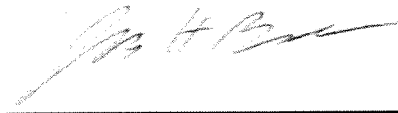
decision on Valero's Petition before September 20, 2016, when the City Council is scheduled to decide Valero's appeal.

REQUEST FOR RELIEF

Benicians respectfully request that the Board: (1) grant an extension until July 8, 2016, for any replies to Valero's Petition; and (2) deny Valero's proposal for the submission of "Rebuttal Comments" in reply to any replies.

June 6, 2016

Respectfully submitted,



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VERIFICATION

I, Jaclyn H. Prange, declare under penalty of perjury that the foregoing is true and correct. Further, I certify that I am qualified and authorized to file this pleading.

Executed: June 6, 2016

A handwritten signature in dark ink, appearing to read "J. H. Prange", is written above a horizontal line.

Jaclyn H. Prange

CERTIFICATE OF SERVICE

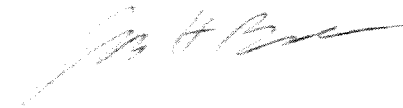
I hereby certify that a copy of the foregoing Request for Extension was filed electronically today with the Surface Transportation Board and served by express mail upon the following:

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Dated: June 6, 2016



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