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February 8, 2002



204731
VIA FACSIMILE AND FEDERAL EXPRESS

Mr. Vernon A. Williams
Secretary
Surface Transportation Board
1925 K Street, N.W., Room 700
Washington, DC 20006

Re: **Finance Docket No. 33877**
Illinois Central Railroad Company -- Construction and
Operation Exemption -- In East Baton Rouge Parish, LA

Dear Secretary Williams:

Enclosed for filing in the above-captioned proceeding are an original and ten copies of the **Reply of Illinois Central Railroad Company to Petition for Stay Pending Judicial Appeal**, dated February 8, 2002.

One extra copy of the Reply and this letter also are enclosed. I would request that you date-stamp those items to show receipt of this filing and return them to me in the provided envelope.

If you have any questions regarding this filing, please feel free to contact me.
Thank you for your assistance on this matter.

Respectfully submitted,

A handwritten signature of William C. Sippel in dark ink.

William C. Sippel
Attorney for Illinois Central
Railroad Company

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WCS:tjl

Enclosures

cc: John R. Molm, Esq.
William J. Pinamont, Esq.

BEFORE THE
SURFACE TRANSPORTATION BOARD

FINANCE DOCKET NO. 33877

ILLINOIS CENTRAL RAILROAD COMPANY
-- CONSTRUCTION AND OPERATION EXEMPTION --
IN EAST BATON ROUGE PARISH, LOUISIANA

**REPLY OF ILLINOIS CENTRAL RAILROAD COMPANY
TO PETITION FOR STAY PENDING JUDICIAL REVIEW**

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**ATTORNEYS FOR ILLINOIS CENTRAL
RAILROAD COMPANY**

Dated: February 8, 2002

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SURFACE TRANSPORTATION BOARD

FINANCE DOCKET NO. 33877

ILLINOIS CENTRAL RAILROAD COMPANY
-- CONSTRUCTION AND OPERATION EXEMPTION --
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**REPLY OF ILLINOIS CENTRAL RAILROAD COMPANY
TO PETITION FOR STAY PENDING JUDICIAL REVIEW**

Illinois Central Railroad Company ("IC") hereby submits this reply¹ to the Petition to Stay Proceedings Pending Judicial Review of The Kansas City Southern Railway Company ("KCS"). Unable to credibly attack any of the substantive conclusions in the Environmental Assessment issued herein, KCS has instead simply attempted to invent a new component of IC's proposed build-in to the Baton Rouge Polyolefins plant ("BRPO") of ExxonMobil Chemical Company ("ExxonMobil") and then faulted the EA for not considering it. KCS's one final effort -- before this agency, at least -- to disparage the Board's environmental review process is meritless. The thorough environmental assessment undertaken by the Board's Section of Environmental Analysis more than satisfied the "hard look" requirement of the National Environmental Policy Act of 1969, 42 U.S.C. § 4321, *et seq.* ("NEPA"). Tellingly, the conclusion of the Environmental Assessment that, as conditioned, IC's proposed build-in will not significantly affect the environment is challenged now only by KCS -- the incumbent carrier and

¹ While KCS purports to file its petition under 49 C.F.R. § 1115.5(a), requests for stay in exemption proceedings are governed by 49 C.F.R. § 1121.4(e). Thus, the five-day period for replies specified by 49 C.F.R. § 1115.5(a) does not technically apply here -- a period that KCS effectively halved by making its filing on a Friday and failing to fax a copy to counsel for IC, instead choosing to send a copy by "overnight" service for Monday delivery. IC is submitting this reply within four days of receiving KCS's petition.

a soon-to-be competitor of IC with no direct interest in environmental issues. KCS's petition should be denied.

Parsing through KCS's gratuitous recitation of its other unsuccessful arguments in this proceeding,² KCS seeks a stay solely on the basis that the Environmental Assessment improperly failed to consider an undefined railcar storage facility that KCS insists IC will build in connection with the now-approved BRPO build-in. Yet the record in this case is clear that IC did not propose any such facility as part of its line construction project, that IC did not claim (and the Board did not rely upon) any benefit from new car storage facilities in connection with the project, and that in fact IC has no present plans to construct any such facility. Reply of Illinois Central Railroad Company to Comments of The Kansas City Southern Railway Company, January 8, 2001 ("IC January, 2001 Reply"), Ruest V.S. at 3-4; Reply of Illinois Central Railroad Company to The Kansas City Southern Railway Company's Motion to Compel Discovery Responses, March 24, 2001, at 15; Post Environmental Assessment, November 20, 2001, at 5-4; see also Finance Docket No. 33877 (Sub-No. 1), Illinois Central Railroad Company -- Petition for Crossing Authority -- In East Baton Rouge Parish, LA, Rebuttal Comments and Evidence of Illinois Central Railroad Company, December 17, 2001, at 7-8, Sensing R.V.S. at 7-8.

² For example, KCS goes on again about the docketing of certain environmental correspondence fifteen months ago -- correspondence which KCS has been aware of for more than fourteen months and has addressed repeatedly throughout the course of this construction exemption proceeding. KCS Petition 2-3. Most amazing is KCS's claim that such correspondence has been "concealed" from the public, who "are thus left in the dark" about the environmental subjects addressed in those letters. KCS Petition at 2 & n.2. The correspondence to which KCS refers was *attached as an appendix* to the Environmental Analysis issued on July 20, 2001 and circulated widely to the public. EA, Appendix 4. KCS is the only party in the case to make such a claim.

KCS contends that IC cannot provide rail service to ExxonMobil without a new local car storage facility,³ but that is precisely what IC is going to do. As IC's senior marketing official in the chemical and petroleum area has previously explained, where ExxonMobil (a consistent and passionate supporter of IC's line construction proposal to the Board) is satisfied that the proposal will adequately meet BRPO's empty and loaded car storage needs, there is no need to look any further -- and certainly not to the self-interested musings of the competitor that stands to lose its effective monopoly on BRPO traffic. IC January, 2001 Reply, Ruest V.S. at 3-4. IC is the largest rail operator in Baton Rouge and has the existing ability to store cars in the area and elsewhere. Id.; see Post EA at 5-4. KCS's insistence that this cannot be is belied by its own extolment in this very proceeding of the feasibility and benefits of "remote storage":

Nevertheless, KCS has always accommodated BRPO's storage needs [even when ExxonMobil tenders to KCS substantially more cars for storage than ExxonMobil has track leases for]. KCS accomplishes this by storing cars at various locations on the KCS system. Remote storage can be to BRPO's advantage. For example, the remote storage may be closer to the later-determined destination, which saves in ultimate transit time. Within the last month, KCS has stored BRPO's loaded pellet cars at East St. Louis (on GWWR [a KCS affiliate]), where up to fifty cars have been stored, Latanier, Louisiana (located south of Alexandria), Baton Rouge, Port Arthur, Texas, and Aberdeen, Mississippi.

Reply of The Kansas City Southern Railway Company to Petition for Exemption of Illinois Central Railroad Company, December 19, 2000, at 11 (citing Joint Verified Statement of Andrew Martin and Amos J. Sonnier at 6).⁴

³ KCS Petition at 7 ("[I]t can be firmly concluded that IC's proposed service to the BRPO plant as contemplated under this rail line construction proposal cannot be accomplished without the construction of storage facilities for Exxon's use.").

⁴ This pleading and the Martin/Sonnier V.S. are attached to KCS's current petition as Exhibit D.

At most, KCS has demonstrated that construction of a car storage facility on ExxonMobil's "Maryland Tank Farm" has been considered in the past -- and even then it was KCS that was proposing such a project to ExxonMobil. KCS December, 2000 Reply, Verified Statement of Gerald K. Davies, at 4-5. As KCS's actions demonstrate, consideration of various car storage locations and alternatives is an on-going and often inconclusive process, and there is simply no basis for a presumption that any particular hypothetical car storage facility is inextricably linked to IC's BRPO build-in -- particularly when IC has not included any such facility as part of its proposal and has specifically indicated that it has no current plans to construct such a facility.⁵

The Supreme Court has expressly recognized that "the statutory language [of NEPA] requires an impact statement only in the event of a proposed action" Kleppe v. Sierra Club, 427 U.S. 390, 401 (1976). Considering that case, the Court said,

At some points in their brief respondents appear to seek a comprehensive impact statement covering contemplated projects in the region as well as those that already have been proposed. The statute, however, speaks solely in terms of *proposed* actions; it does not require an agency to consider the possible environmental impacts of less imminent actions when preparing the impact statement on proposed actions.

Kleppe, 427 U.S. at 410, n.20 (emphasis in original). Courts since Kleppe have had no difficulty understanding what this language means:

Kleppe thus clearly establishes that an EIS need not delve into the possible effects of a hypothetical project, but need only focus on the impact of the particular proposal at issue and other *pending or*

⁵ Indeed, any future construction of a car storage facility on the Maryland Tank Farm could just as likely be a result of KCS's prior proposals for such a facility as of IC's new line construction project, or perhaps some combination of both. We also note that construction of facilities by ExxonMobil on property owned by ExxonMobil would not appear to be subject to the STB's review in any event.

recently approved proposals that might be connected to or act cumulatively with the proposal at issue.

National Wildlife Federation v. FERC, 912 F.2d 1471, 1478 (D.C. Cir. 1990) (emphasis added).⁶

The Board is familiar with application of these standards as well. E.g., CSX Corp. -- Control -- American Commercial Lines, Inc., 2 I.C.C.2d 490, 560 (1984) ("In respect to such cumulative impacts, however, we are not required to consider actions that are merely contemplated."), aff'd sub nom. Crounse Corp. v. ICC, 781 F.2d 1176, 1194-1995 (6th Cir. 1986), cert. denied, 479 U.S. 890 (1986).

The logical underpinnings of this clear legal precedent are obvious: an agency cannot conduct an environmental review of an "action" that has no present form or defined parameters. Kleppe, 427 U.S. at 401-402 ("In the absence of a proposal for [some course of action], there is nothing that could be the subject of the analysis envisioned by the statute for an impact statement. . . . Where no such plan exists . . . [t]here would be no factual predicate for the production of an environmental impact statement of the type envisioned by NEPA."). Here, even KCS has to speculate about the storage facility that it insists IC must build "imminently." Comments of The Kansas City Southern Railway Company on Environmental Assessment, August 20, 2001, at 9 ("The most likely place for that storage facility is the Maryland Tank Farm as KCS has suggested to Exxon in the past.").⁷

⁶ KCS relies on Scientists' Inst. for Public Information, Inc. v. Atomic Energy Comm'n, 481 F.2d 1079 (D.C. Cir. 1973) to argue (KCS Petition at 6) that agencies should "predict" future environmental effects, ignoring the same court's later holding that "[w]e seriously doubt that the relevant reasoning in Scientists' Institute survives the Supreme Court's Kleppe decision." National Wildlife Federation, 912 F.2d at 1478.

⁷ Indeed, if the Board were to grant a stay here on the basis that the environmental review of proposed line constructions must somehow include a consideration of any and every hypothetical future action that might follow, it is difficult to see how the Board could effectively dispose of any of the numerous line construction cases now pending before it.

While the legal precedent above focuses on the distinction between "proposed" and "contemplated" actions, here the action that KCS claims was improperly excluded from the environmental review is not even contemplated -- IC has expressly represented that it has no current plans to construct such a facility in connection with the BRPO build-in. At most it is a hypothetical plan that may have previously been considered by the parties, including KCS itself. The absence of such hypothetical future actions from the Environmental Assessment is entirely consistent with NEPA and the governing case law, and KCS has no likelihood of prevailing on the merits of an argument to the contrary in an appellate court. See Washington Metropolitan Area Transit Comm'n v. Holiday Tours, Inc., 559 F.2d 841, 843 (D.C. Cir. 1977).

The second prong of the Holiday Tours test for granting a stay is whether the movant will suffer irreparable harm absent a stay. The movant here, of course, is KCS, and it would suffer no harm even if the environmental impacts on which it predicates its stay motion were somehow presumed to be real and imminent. KCS is not a resident of East Baton Rouge Parish and has no direct interest in environmental issues there. KCS's only interest is a private, economic one -- to delay for as long as possible construction of the line that will break KCS's hold on traffic at BRPO and introduce rail competition to that facility.

KCS instead argues that the alleged irreparable harm would occur to the public, thus morphing into one the second and fourth prongs of Holiday Tours. Such arguments, of course, would be of more interest if they actually came from a member of the public. In reality, the public interest here has already been exhaustively considered and protected through the Board's environmental review process, the hard look taken at IC's proposed project by the Section of Environmental Analysis, and the mitigation conditions imposed by the Board on its approval of the project. We also note the intrinsically odd nature of KCS's claim (KCS Petition

at 8) of "imminent," "certain" and "actual" injury from the construction of a car storage facility that IC has no present plans to construct.⁸ As the ICC previously held, "[i]n light of petitioners' failure to demonstrate irreparable injury, the lack of merit in their legal position, and the strong interests in the Commission's efficient and expeditious dispatch of its public duties, the public interest requires denial of a stay." Burlington Northern Railroad Company -- Construction and Operation Exemption -- Macon and Randolph Counties, MO, Finance Docket No. 32229 (ICC served November 17, 1993) at 6 (citing Cuomo v. Nuclear Regulatory Comm'n, 772 F.2d 972, 978 (D.C. Cir. 1985)).

Finally, KCS argues that a stay will not substantially harm other parties -- most relevantly, ExxonMobil and IC -- solely on the basis that there is today "robust competition" for rail traffic at BRPO. KCS Petition at 9. This argument, in turn, is predicated on the entirely discredited notion that 2,400 cars annually move to and from BRPO in the account of carriers other than KCS. KCS Petition at 9 (citing the December 19, 2002 Verified Statement of Robert M. Cleator [attached as Exhibit E to KCS's current petition] 2). In reality, in 2000 IC originated 136 cars of line-haul traffic from BRPO, out of more than 9,000 carloads handled at the plant that year. IC January, 2001 Reply at 4, Coulter R.V.S. at 4.⁹

IC's proposed BRPO build-in will provide real transportation, operational and rate benefits to ExxonMobil, and the Board has found that the project is pro-competitive in nature

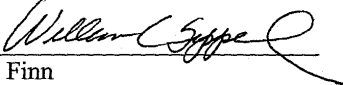
⁸ KCS does not challenge any aspect of the environmental review of IC's actual line construction proposal, and thus does not claim that construction and operation of the proposed BRPO line will result in any irreparable harm.

⁹ As IC has noted before, KCS is the sole carrier physically serving BRPO. As discussed in IC's January, 2001 Reply at 4, KCS's number regarding IC participation in BRPO line-haul traffic is inexplicably based not on actual data but on a mathematical deduction. In contrast, ExxonMobil's number is based on actual data from the shipper's own records.

and more than satisfies the exemption criteria of 49 U.S.C. § 10502. An appeal of the Board's decision allowing the build-in could take a year or more, during which time ExxonMobil will be deprived of a competitive rail alternative which ExxonMobil desperately wants and has worked hard with IC to achieve. KCS's casual dismissal of the substantial harm that a stay will cause ExxonMobil is all too typical of KCS's "me first" attitude throughout this proceeding. KCS's private interest in delaying IC's BRPO build-in project is clear to everyone, and a Board decision granting a stay would serve that interest and that interest alone.

WHEREFORE, IC respectfully requests that the Board deny KCS's petition for a stay pending judicial appeal.

Respectfully submitted,

By: 

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RAILROAD COMPANY**

Dated: February 8, 2002

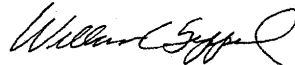
CERTIFICATE OF SERVICE

I hereby certify that on this 8th day of February, 2002, a copy of the foregoing
Reply of Illinois Central Railroad Company to Petition for Stay Pending Judicial Appeal
was served by overnight delivery upon:

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and by first-class mail, postage prepaid, upon:

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