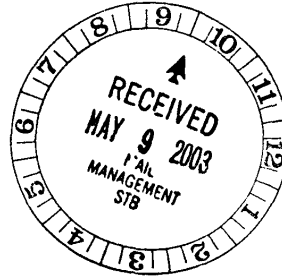


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May 9, 2003

Via Hand Delivery

Honorable Vernon A. Williams
Secretary
Surface Transportation Board
1925 K Street NW
Washington, DC 20423

**ENTERED
Office of Proceedings**

MAY 09 2003

**Part of
Public Record**

Re: *Finance Docket No. 34079, San Jacinto Rail Limited Construction Exemption and the Burlington Northern and Santa Fe Railway Company Operation Exemption-Build Out to the Bayport Loop near Houston, Harris County, Texas*

Dear Secretary Williams:

Enclosed for filing in the above-captioned proceeding are the original and ten copies of the City of Houston, Texas's Petition to Intervene in this proceeding.

I would appreciate it if you would date-stamp the enclosed extra copy of this submission and return it to our messenger for our files. Thank you for your assistance.

Very truly yours,

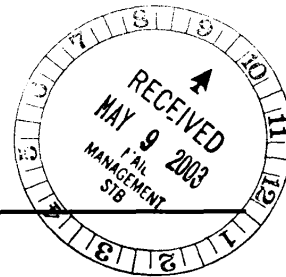
Benjamin S. Lippard

Enclosures

cc: Parties of Record

242054_1.DOC

**BEFORE THE
SURFACE TRANSPORTATION BOARD**



Finance Docket No. 34079

San Jacinto Rail Limited Construction Exemption and the Burlington Northern and Santa Fe Railway Company Operation Exemption-Build Out to the Bayport Loop near Houston, Harris County, Texas

PETITION OF THE CITY OF HOUSTON, TEXAS, FOR LEAVE TO INTERVENE

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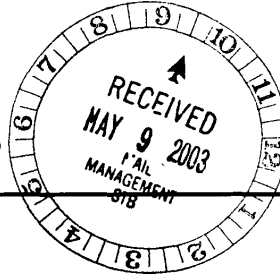
Attorneys for Petitioner

**ENTERED
Office of Proceedings**

MAY 09 2003

**Part of
Public Record**

BEFORE THE
SURFACE TRANSPORTATION BOARD



Finance Docket No. 34079

San Jacinto Rail Limited Construction Exemption and the Burlington Northern and Santa Fe Railway Company Operation Exemption-Build Out to the Bayport Loop near Houston, Harris County, Texas

PETITION OF THE CITY OF HOUSTON, TEXAS, FOR LEAVE TO INTERVENE

Pursuant to 49 C.F.R. § 1112.4, the City of Houston, Texas (the "City"), hereby petitions the Board for leave to intervene in and become a party to the above-referenced proceeding for the limited purpose of participating in appellate review of the Board's decision in this docket, which is to be made in the near future.

The Board's regulations provide that petitions to intervene "may be granted if intervention (1) will not unduly disrupt the schedule for filing verified statements, except for good cause shown; and (2) would not unduly broaden the issues raised in the proceeding."¹ The City's intervention will not unduly disrupt the schedule of this proceeding, as the record has already been completed and the Board has scheduled a vote on this decision for May 9, 2003. Nor will the City's intervention broaden the issues raised in the proceeding; the City seeks to participate in appellate review primarily to address environmental issues that are already at issue in this proceeding. Both a draft and final EIS have been prepared to evaluate the proposed

¹ 49 C.F.R. § 1112.4(a).

exemption and numerous parties, including the City, have already commented on environmental issues.

In support of its petition to intervene, the City states as follows:

1. Statement Regarding Petitioner's Interest in the Proceeding (49 C.F.R. § 1112.4(b)(1)).

The City of Houston, Texas, is a municipality that is generally responsible for ensuring the quality of life for its citizens, including their economic and environmental well being. As the City pointed out in its earlier Notice of Intent to Become a Party to the Proceeding,² the City has significant interests at stake in this proceeding due to the proximity of the proposed project to residential neighborhoods, Sylvan Rodriguez Park, Ellington Field Airport, the Southeast Water Purification Plant (a drinking water purification plant), as well as other City owned or operated property. The proposed routes would impose severe operational and physical burdens on key Houston infrastructure such as airports, parks, and drinking water plants, and these profound environmental impacts have not been properly considered in the Final EIS. Importantly, all four of the routes in the Final EIS involve constructing the rail line on City-owned property. Indeed, BNSF has already initiated condemnation proceedings against the City, which the City is vigorously defending.³ The City is also uniquely positioned to look after the interests of its citizens. Thus, its interest in this proceeding is obvious.

2. Statement as to Whether Petitioner Supports or Opposes the Relief Sought or the Action Proposed or Is Otherwise Concerned with the Issues Presented in the Proceeding (49 C.F.R. § 1112.4(b)(2)).

The City opposes the granting of the exemption sought in this docket, because such a decision would be arbitrary, capricious, and not otherwise in accordance with law under the

² Filed in this Docket on January 7, 2002 (Filing ID # 204315).

³ Cause No. 789496; *Burlington Northern and Santa Fe Railway Co. v. The City of Houston, Texas*; In the County Court at Law No. 4 of Harris County, Texas.

standards of the Administrative Procedure Act and would fail to take the “hard look” at environmental impacts required by the National Environmental Policy Act. Significantly, the Final EIS fails to take into account the comments made by the City regarding critical environmental issues. These environmental issues, of great importance to the people of Houston, either have not been addressed, or have been addressed inadequately, in the Final EIS.

3. Statement Regarding Petitioner’s Request for Relief (49 C.F.R. § 1112.4(b)(3)).

The City respectfully requests that the Board grant it leave to participate in this proceeding as an intervenor. Allowing the City to have intervenor status will allow it to participate in the appellate review of this decision, see generally 49 C.F.R. Part 1115, and ensure that the interests of citizens of Houston are fully considered on these important environmental issues. Such an action is necessary because the Board’s regulations leave some doubt whether a party that has not been granted intervenor status can participate in appellate review. See 49 C.F.R. § 1101.2(d) (“Party” means “intervenor . . . or other persons permitted or directed by the Board to participate in a proceeding.”); see also 49 C.F.R. Part 1115 (referencing the term “party”, although not expressly limiting participation in the appellate process). Granting this petition will ensure that any regulatory ambiguity does not prevent the environmental concerns of the City of Houston from being fully considered in the appellate process.

Allowing the City to intervene in this matter is particularly important, since federal regulations promulgated by the Council for Environmental Quality require that “No decision on [] proposed action shall be made or recorded” until thirty days after publication of the final environmental impact statement.⁴ While there is an exception to this rule for decisions that are “subject to a formal internal appeal” after the issuance of an EIS – in those cases “the decision may be made and recorded at the same time the environmental impact statement is published” –

⁴ 40 C.F.R. § 1506.10(b).

that exception only applies in cases “where a real opportunity exists to alter the decision.”⁵ Thus, the ability of interested parties to participate in a meaningful review of the final EIS is a core principle of federal law.

The CEQ regulations make it very clear that the touchstone of this requirement is the need for public participation in the review of an agency decision and the associated EIS: “Some agencies have a formally established appeal process which allows other agencies or the public to take appeals on a decision and make their views known, after publication of the final environmental impact statement.”⁶ Allowing interested parties to participate in the agency’s appellate process, especially public entities like the City that have significant responsibility to protect the interests of their citizens, is self-evidently a hallmark of a procedure that provides “real opportunity” for appellate review.

* * *

The Board routinely grants petitions to intervene in circumstances where, as here, the petitioner demonstrates that it has an interest in the proceeding and intervention will not unduly broaden the issues. See, e.g., Finance Docket No. 34003, The Burlington Northern and Santa Fe Ry.-Construction and Operation Exemption-Seadrift and Kamey, TX, Decision served February 14, 2001; Finance Docket No. 33782, Entergy Arkansas and Entergy Rail-Construction and Operation Exemption-White Bluff to Pine Bluff, AR, Decision served June 30, 2000; Docket No. AB-33 (Sub-No. 118X), Union Pacific R.R.-Abandonment Exemption-In El Paso County, CO, Decision served June 23, 1998. As the City has demonstrated its interest in this proceeding, the lack of undue issue broadening, and good cause for it to be allowed to intervene and become a party to this proceeding, this petition should be granted.

⁵ Id.

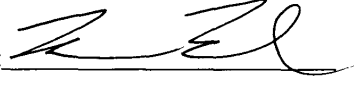
⁶ Id.

WHEREFORE, the City of Houston, Texas, respectfully requests that the Board grant this petition to intervene in the above-referenced proceeding.

Dated: May 9, 2003

Respectfully submitted,

CITY OF HOUSTON, TEXAS

By: 

Anthony W. Hall, Jr.
City Attorney

Bertrand L. Pourteau, II
Deborah F. McAbee

City Hall Annex
900 Bagby, 4th Floor
Houston, TX 77002-4400

City of Houston, Texas

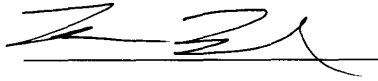
Sharon M. Mattox
Benjamin S. Lippard

Vinson & Elkins, L.L.P.
1455 Pennsylvania Ave. N.W.
Washington, DC 20004

Attorneys for Petitioner

CERTIFICATE OF SERVICE

I hereby certify that on May 9, 2003, I caused copies of the foregoing Petition for Leave to Intervene to be served via express mail and First Class Mail on all parties of record in this proceeding.

A handwritten signature in black ink, appearing to read 'B. S. Lippard', is written over a horizontal line.

Benjamin S. Lippard