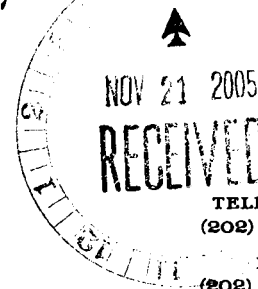


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215183



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EXPEDITED ACTION REQUESTED

November 21, 2005

BY HAND DELIVERY

The Honorable Vernon A. Williams
Secretary
Surface Transportation Board
1925 K Street, N.W., Room 711
Washington, D.C. 20423-0001

ENTERED
Office of Proceedings

NOV 21 2005

Part of
Public Record

Re: Docket No. 34773, Nevada Central Railroad –
Exemption for Acquisition and Operation of Rail
Service – In Elko and White Pine Counties, Nevada

Dear Secretary Williams:

Enclosed for filing in the above-referenced proceeding please find an original and ten copies of the Motion for Stay and for Declaration that Exemption is Void *Ab Initio* filed on behalf of White Pine Energy Associates, LLC ("WPEA") and the City of Ely, Nevada ("Ely"). Because this Motion is being filed shortly before the Exemption would become effective on November 23, 2005, WPEA and Ely request that the Board give this filing **EXPEDITED ACTION**.

We have also enclosed an extra copy of the Motion. Kindly indicate receipt and filing by time-stamping this copy and returning it to the bearer of this letter. Thank you for your attention to this matter.

Sincerely,


Kendra A. Ericson

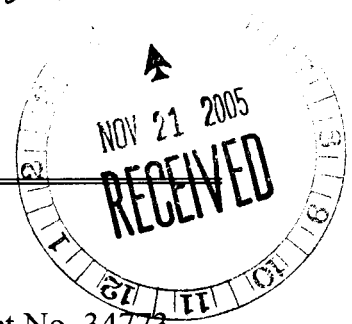
Enclosure
cc: David M. Konschnik, Office of Proceedings
Robert Alan Kemp

215183

**BEFORE THE
SURFACE TRANSPORTATION BOARD**

NEVADA CENTRAL RAILROAD –)
EXEMPTION FOR ACQUISITION AND)
OPERATION OF RAIL SERVICE –)
IN ELKO AND WHITE PINE COUNTIES,)
NEVADA)

Finance Docket No. 34773



**MOTION FOR STAY AND FOR DECLARATION
THAT EXEMPTION IS VOID *AB INITIO***

EXPEDITED ACTION REQUESTED

ENTERED
Office of Proceedings

NOV 21 2005

Part of
Public Record

White Pine Energy Associates, LLC (“WPEA”) and the City of Ely, Nevada

(“Ely”) hereby move the Board to issue an order staying the effectiveness of the railroad acquisition and operation exemption requested by Nevada Central Railroad (“NCRR”) in the above proceeding and declaring that the exemption is void *ab initio* pursuant to 49 CFR § 1150.32(c) because NCRR’s Notice of Exemption contains false and misleading statements. In support of their motion, WPEA and Ely state as follows:

WPEA plans to build a large coal-fired power plant in Nevada, known as the White Pine Energy Station. This plant, which will be located on the rail line in issue, is in the process of being permitted and is scheduled to be completed and put in commercial operation in 2010. Ely is an incorporated city in the State of Nevada and has an interest in the rail line in issue, as described in more detail below.

On November 16, 2005, NCRR filed a Notice of Exemption (“Notice”) to acquire and operate 134 miles of rail line (a) between Cobre and McGill Jct. and (b) between McGill Jct. and McGill, in Elko and White Pine Counties, NV (“McGill Jct. line”).¹ The Notice was filed pursuant to the class exemption for acquisition and operation of a rail line by a Class III rail carrier set forth in 49 CFR §§1150.31-1150.34, under which the exemption automatically becomes effective in seven days – or on November 23, 2005 – unless it is stayed (subject to the filing of a petition to revoke).

A. The Notice Contains False and Misleading Statements and the Exemption Should Be Declared Void *Ab Initio*

The Board’s regulations governing the class exemption for rail acquisition and operation transactions involving a Class III carrier provide that if the notice of exemption contains false and misleading statements, the exemption is void *ab initio*. 49 CFR § 1130.32(c). NCRR’s Notice contains false and misleading statements, so the Board should declare the requested exemption void *ab initio*.

The Notice states that NCRR has instituted an eminent domain proceeding in Nevada state court to acquire the McGill Jct. line from its present owner, the Los Angeles Department of Water and Power (“LADWP”), and “is proceeding to complete the acquisition” pursuant to that proceeding. *Id.* at 4. It is true that NCRR has instituted a condemnation action in Nevada state court, which action is presently pending. However, the Notice is misleading because it fails to disclose that two additional actions to

¹ The term “McGill Jct. line” as used herein refers to parts (a) and (b) jointly and/or separately.

condemn and acquire the McGill Jct. line are also pending in the same court. One was filed by another potential short-line operator, V&S Railway, and the other was filed by Ely. To date, the court has awarded immediate possession of the McGill Jct. line to Ely, and only Ely has been authorized to take possession of the McGill Jct. line.

The Notice also states that NCRR “intends to initiate operations repairs and maintenance to the [McGill Jct.] line within 15-days from the date of filing of this Verified Notice of Exemption for Acquisition and Operation of Rail Service (or, on or about December 1st, 2005). . .” *Id.* at 3. This statement is at worst false and at best misleading. As previously indicated, NCRR has not been authorized by the Nevada condemnation court either to acquire or take possession of the McGill Jct. line, and in fact only Ely has been so authorized. Thus it is impossible that NCRR will be in a position to initiate operations on the line by December 1. In addition, the line has been abandoned and has not been operated for several years, and requires extensive track rehabilitation before rail operations thereon can commence.

The Notice is also misleading because it fails to disclose the fact that Ely and the White Pine Historical Railroad Foundation (“Foundation”)² have recently entered into a binding contract with LADWP, the present owner of the McGill Jct. line, to acquire the line for an agreed price. Closing of the transaction is scheduled for early December of

² The Foundation owns a separate rail line that connects with the McGill Jct. line at McGill Jct., over which it provides rail excursion passenger service.

2005. When the sale is closed Ely intends to withdraw its condemnation petition and seek dismissal of the other condemnation petitions as well.

The Notice further represents that Ely along with Elko and White Pine Counties, NV, are shareholders of NCRR, and that NCRR has a contract with Ely and Elko and White Pine Counties under which NCRR has warranted that it will not abandon the McGill Jct. line for salvage and will provide Ely the first right of refusal to acquire the line if NCRR decides to discontinue operations thereon (*id.* at 6). This statement is false in that Ely is not a shareholder of NCRR and is not a party to any such contract. Even if such a contract existed, it will be rendered moot by Ely and the Foundation's acquisition of the line from LADWP.

After their acquisition of the McGill Jct. line is completed, Ely and the Foundation intend to form a new short line to operate over the line to provide rail freight service to a reactivated copper mine located on the Foundation's present line and, ultimately, to WPEA's White Pine Energy Station. WPEA supports acquisition of the Ely Jct. line by Ely and the Foundation because it believes such acquisition and future operation represent the best alternative for preserving the line and obtaining rail service for the White Pine Energy Station.

The above facts indicate that NCRR's Notice contains false and misleading information and that the requested exemption should be declared void *ab initio* pursuant to 49 CFR § 1130.32(c). However, in the event the Board is unable to rule on the merits of WPEA/Ely's request for such a declaration prior to the requested exemption becoming

effective on November 23, 2005, WPEA and Ely request the Board to stay the effectiveness of the exemption pending a ruling on their request to void it.

B. The Board Should Stay the Effectiveness of the Exemption

The Board will grant a request for a stay if (1) there is a strong likelihood that the movant will succeed on the merits; (2) the movant will suffer irreparable harm in absence of the stay; (3) other interested parties will not be substantially harmed; and (4) the public interest supports the granting of the stay. Docket No. 34335, *Keokuk Junction Railway Company – Feeder Line Acquisition – Line of Toledo Peoria and Western Railway Corporation between La Harpe and Hollis, IL*, STB served Nov. 24, 2004. The Board's standards for issuance of a stay are met here.

The petitioners have a strong likelihood of success on the merits. As discussed in Part A above, NCRR's Notice contains a number of false and misleading statements, which makes the exemption void *ab initio* under 49 CFR § 1130.32(c). For example, the Notice states that Ely and Elko and White Pine Counties are shareholders of NCRR and that NCRR has a contract with Ely and Elko and White Pine Counties regarding the line. Neither of these statements is true. In addition, NCRR's Notice misleads the Board by failing to inform it that other petitions to condemn the McGill Jct. are pending, that the court has awarded immediate possession of the line to Ely; and that Ely and the Foundation have a contract to purchase the McGill Jct. Line from its present owner, LADWP. These facts indicate there is a strong likelihood that the Board will find the exemption to be void *ab initio*.

Ely and WPEA will suffer irreparable harm if the notice is allowed to become effective on November 23, 2005. If the exemption is allowed to become effective, NCRR may attempt to use its existence to obtain an order from the Nevada court finding that NCRR's condemnation petition should be granted and authorizing it to take possession of the McGill Jct. line instead of Ely. This would complicate and prolong (and potentially scuttle) the sale of the line to Ely and the Foundation. A subsequent petition to revoke the exemption, even if ultimately granted, would not avoid the tangle of legal complications that may arise if the exemption is allowed to become effective.

Other interested parties would not be substantially harmed by the stay. NCRR has not completed its eminent domain proceeding, and (unlike Ely) has not been authorized to take possession of the line. Granting a stay would not hinder NCRR's ability to pursue its condemnation petition and to acquire the McGill Jct. line should that petition ultimately be granted. In any event, the line at issue has not been operated for several years, and it has not been maintained in sufficient condition to begin operations over the line within 15 days, as NCRR claims in its Notice. Further, a third party, V&S Railway, has also filed an action to condemn and acquire the line. Granting a stay would preserve the rights of this third party who also has an interest in acquiring the line.

Finally, the public interest supports granting the stay. Such class exemptions become effective within seven days of filing of the notice of exemption. The Board should not permit an exemption to acquire and operate a line to become effective when the Notice contains a number of demonstrably false and misleading statements.

This is particularly the case here, where a number of parties are interested in acquiring and operating over the line in issue.

While granting a stay is considered an extraordinary remedy (*id.* at 3), the standards for a stay have clearly been met here. If the exemption is allowed to go into effect without a stay, the Board will be granting acquisition and operating rights to a party based on that party's false and misleading statements. This result would be particularly egregious under the facts of this case because other parties are attempting to acquire and operate over the line, and their ability to do so would be greatly hindered if the exemption is allowed to become effective.

C. Conclusion

For the foregoing reasons, WPEA and Ely request the Board to stay the effectiveness of the acquisition and operation exemption sought by NCRR and to declare the exemption void *ab initio* because NCRR's Notice of Exemption contains false and misleading statements. Because the exemption is presently scheduled to become effective on November 23, 2005, **expedited action** on this motion is requested.

Respectfully submitted,

WHITE PINE ENERGY ASSOCIATES, LLC
CITY OF ELY, NEVADA

OF COUNSEL:

Slover & Loftus
1224 Seventeenth Street, N.W.
Washington, D.C. 20036

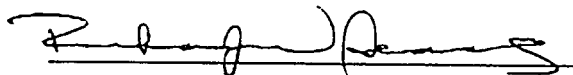
By: Christopher A. Mills
Kendra A. Ericson 
Slover & Loftus
1224 Seventeenth Street, N.W.
Washington, D.C. 20036
(202) 347-7170

Dated: November 21, 2005

Their Attorneys

VERIFICATION

I, RICHARD W. SEARS, verify under penalty of perjury that I am
CITY ATTORNEY of the City of Ely, White Pine County, Nevada
and have personal knowledge of the factual matters set forth in the foregoing Motion for
Stay and for Declaration that Exemption is Void *Ab Initio*; that I have read such Motion
and know the contents thereof; and that the same are true as stated. Further, I certify that
I am qualified and authorized to file this statement.

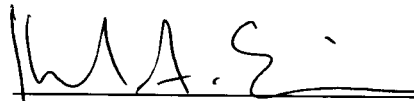


Executed on: November 21, 2005

CERTIFICATE OF SERVICE

I hereby certify that on November 21, 2005, I served a copy of the foregoing Motion upon Nevada Central Railroad via overnight delivery service, addressed to:

Robert Alan Kemp
Aviation Technologies Ltd.
4959 - Talbot Lane, Unit #69
Reno, NV 89509


Kendra A. Ericson