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**BEFORE THE
SURFACE TRANSPORTATION BOARD**

STB Finance Docket No. 35106

**UNITED STATES DEPARTMENT OF ENERGY --
RAIL CONSTRUCTION AND OPERATION --
CALIENTE RAIL LINE IN LINCOLN, NYE, AND ESMERALDA
COUNTIES, NV**

**MOTION FOR LEAVE TO FILE RESPONSE TO REPLY OF THE
UNITED STATES DEPARTMENT OF ENERGY TO COMMENTS ON ITS
APPLICATION FOR A CERTIFICATE OF PUBLIC CONVENIENCE AND
NECESSITY**

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September 18, 2008

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CSX Transportation, Inc ("CSXT") respectfully moves for leave to file a Response to the Reply of the United States Department of Energy (DOE) to Comments on its Application for a Certificate of Public Convenience and Necessity CSXT is tendering the Response with this Motion

I. RELEVANT FACTS

On March 17, 2008, DOE filed its Application for a Certificate of Public Convenience and Necessity ("DOE Application") in this proceeding In that application, DOE made a clear representation to the Board that "[s]hipments of spent nuclear fuel and high-level radioactive waste would be made by dedicated trains " DOE Application, at 15 Further, in describing the operations of its proposed train line, DOE stated "[t]he cask cars would be inspected in

accordance with Federal Railroad Administration regulations and then coupled to Caliente Rail Line operated dedicated trains, which would consist of two or three 4,000-horsepower diesel-electric locomotives followed by a buffer car, one to five cask cars followed by another buffer car, and one escort car carrying security personnel ” *Id* at 34

On April 11, 2008, the Board issued a decision establishing a procedural schedule for the consideration of DOE’s application Pursuant to the Board’s schedule, CSXT filed comments regarding DOE’s application on July 15, 2008 CSXT’s Comments requested that “all rail shipments of Spent Nuclear Fuel (‘SNF’) tendered to CSXT by, for, under the direction of, with the consent of, or in any other manner on behalf of DOE for transportation to Yucca Mountain as the ultimate destination be required to move in dedicated trains, *i.e.*, trains dedicated exclusively to the carriage of SNF ” CSXT Comments, at 1-2 Further, CSXT requested that “the Board condition any such approval [of DOE’s application] on the above-described requirement that any SNF transported over the line be carried in dedicated trains only ” *Id* at 17 In its comments, CSXT requested that DOE clarify whether any SNF arriving at the Yucca Mountain line would arrive in general freight traffic *See id* at 6

As part of its Comments, CSXT attached a “Department of Energy Policy Statement for Use of Dedicated Trains for Waste Shipments to Yucca Mountain ” CSXT Comments, Exhibit A The Policy Statement (from July 18, 2005) indicated that DOE would use dedicated train service for its usual rail transport of SNF and high-level radioactive waste (HLW) to Yucca *See id* at 1

In its Reply, DOE gave only cursory consideration to CSXT’s Comments DOE noted CSXT’s request that the Board require that all shipments of SNF tendered to CSXT for eventual shipment to Yucca move in dedicated trains, but argued in opposition to the proposed condition

that "CSXT's request concerns purported effects outside the Caliente Corridor and is not properly part of the Board's environmental review of the Application " DOE Reply, at 40

DOE further stated that "[t]hough it would be inappropriate for the Board to impose the condition CSXT requests, DOE notes that it has adopted a policy to use dedicated trains as the usual mode of rail service for shipment of spent nuclear fuel and high-level radioactive waste to the Yucca Mountain repository That policy *largely addresses CSXT's concern* " *Id* (footnote omitted, emphasis added) As support for its proposition that it has adopted a policy to use dedicated trains as the "usual mode of rail service" for the shipment of SNF to Yucca, DOE attached (at Appendix E) an internal July 6, 2005 DOE memorandum *See id* at 40 n.125

The July 6 Memorandum attached to DOE's Reply does not unequivocally favor the use of dedicated train service, and appears in fact to undermine DOE's statements to the STB about its plans to use dedicated trains Regarding the Yucca Mountain service, the Memorandum states that DOE "can expect to benefit from planning on use of DTS [dedicated train service], however, the project must be able to use general freight service and truck as needed [DOE] should closely follow industry developments, capacity forecasts, etc, to ensure DTS remains a cost-effective choice, and should make clear to its stakeholders it retains the option to modify its policy as appropriate " DOE Reply, Appendix E, at 4

II. CSXT'S RESPONSE SHOULD BE ACCEPTED

CSXT is filing this Motion pursuant to 49 C F R § 1104.13(a) which provides that a party may file a motion directed to any pleading within 20 days of the pleading's filing with the STB While the filing of a response is not explicitly provided for in the Board's April 11 procedural schedule, the Board, like the Interstate Commerce Commission (ICC) before it, has authorized responsive filings in a circumstance such as this, *id.*, where new evidence or

information is presented by a party for the first time in the closing filing contemplated by the procedural schedule. See *1411 Corp -Abandonment Exemption-In Lancaster County, PA*, STB Docket No AB-581X, slip op at 2 n 5 (STB served Oct 18, 2001) (allowing reply filing where party alleged opponent presented evidence into record in response that was not available at time of opening filing), *Dakota, Minnesota & Eastern R R Corp Construction Into the Powder River Basin*, STB Finance Docket No 33407, slip op at 1 (served Nov 3, 1998) (supplemental evidence admitted where railroad presented new evidence in reply filing), *Ashley Creek Phosphate Co v Chevron Pipe Line Co , et al* , No 40131 (Sub-No 1), 1995 WL 232761, at *3 (ICC served Apr 21, 1995) (limited surrebuttal allowed where new evidence was presented in rebuttal filing), *National R R Passenger Corp and Consolidated Rail Corp -Application Under Section 402(A) of the Rail Passenger Service Act For an Order Fixing Just Compensation*, Finance Docket No 32467, 1995 WL 67109, at *1 (ICC served Feb 17, 1995) (surrebuttal allowed where proponent contended that opponent's rebuttal statement included testimony that purported to establish new factual propositions, proceeding involved "complex, technical issues and it would serve no purpose to exclude relevant evidence that completes or clarifies the record and is useful to render a decision in this case ")

The Board has also accepted surrebuttal "[i]n the interest of compiling a complete record," noting that "the Board's rules may be construed liberally to ensure a just determination of the issues presented."¹ In this proceeding, for example, the Board accepted Nevada's amended motion to reject DOE's application where allowing the amendment would "not unduly delay the proceeding or prejudice any party." *United States Department of Energy-Rail*

¹ See *SMS Rail Service, Inc -Petition for Declaratory Order*, STB Finance Docket No 34483, slip op at 3 (served Jan 24, 2005), *Union Pac R R Co -Abandonment Exemption-In Rio Grande and Mineral Counties, CO*, STB Docket No AB-33 (Sub-No 132X), slip op at 3 (citing 49 C F R § 1100.3)(served June 22, 2004).

Construction and Operation-Caliente Rail Line in Lincoln, Nye, and Esmeralda Counties, NV.

STB Finance Docket No 35106, slip op at 2 (served June 27, 2008)

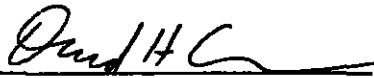
The Board likewise should allow CSXT's responsive filing in this case. In its Reply, DOE attached an internal document issued prior to the date of DOE's public policy statement on use of dedicated trains, which statement CSXT has heretofore assumed represents DOE's views. This internal DOE Memorandum, on which DOE now purports to rely, sets forth views on the use of dedicated trains for SNF that are inconsistent with DOE's representations to the Board in its Application (in which DOE committed to the use of such trains) and inconsistent with the views of other expert agencies, cited by CSXT, which support the use of dedicated trains for safety and security reasons. In the interest of due process, CSXT should be allowed to address DOE's new-found position on the use of dedicated trains and a document which has not been available to it until now.

Additionally, CSXT should be allowed an opportunity to respond to DOE's contention that DOE's position on the requested condition "largely addresses CSXT's concern." CSXT should be permitted the chance to show that this is simply not the case and that CSXT remains less satisfied than at the outset of this proceeding with DOE's intentions with respect to the use of dedicated trains. Moreover, CSXT should be allowed the chance to demonstrate -- based on DOE's own statements in this proceeding -- that DOE is incorrect in the contention that the Board is without authority to impose a requested safety condition that is intended to advance the public interest.

III. CONCLUSION

CSXT moves that the Board accept its tendered Response to DOE's Reply filing into the record in this proceeding

Respectfully submitted,



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September 18, 2008

CERTIFICATE OF SERVICE

I hereby certify that I have caused the CSX Transportation, Inc Motion For Leave to File Response to Reply of the United States Department of Energy to Comments on its Application for a Certificate of Public Convenience and Necessity to be served on each Party of Record by first class mail, postage prepaid, on September 18, 2008



David H Coburn