BEFORE THE
SURFACE TRANSPORTATION BOARD

FINANCE DOCKET NO. 35929

PENINSULA CORRIDOR JOINT POWERS BOARD

VERIFIED PETITION FOR A DECLARATORY ORDER

EXPEDITED CONSIDERATION REQUESTED

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EXPEDITED CONSIDERATION REQUESTED

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PENINSULA CORRIDOR JOINT POWERS BOARD

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Petitioner, the Peninsula Corridor Joint Powers Board ("Petitioner" or "Caltrain"), operator of the Caltrain commuter rail service in northern California, respectfully petitions the Surface Transportation Board ("Board"), pursuant to 5 USC §554 and 49 USC §721, for a declaratory order confirming that, because Petitioner is a rail carrier subject to the Board's jurisdiction, the application of the California Environmental Quality Act (Cal. Public Resources Code §21000 et seq.) ("CEQA") to Petitioner is fully preempted by virtue of 49 USC § 10501(b) of the ICC Termination Act ("ICCTA"). Petitioner seeks to make improvements to its rail line and facilities but has been sued in state court in an action seeking enforcement of CEQA. Consistent with this Board's analysis in F.D. No. 35861, *California High Speed Rail Authority—Petition for a Declaratory Orde*r, (Service Date Dec. 12, 2014) ("*CHSRA*"), Petitioner respectfully requests this Board to issue an order confirming that the requirements of CEQA, as applied to Petitioner, are fully preempted and that state court enforcement of CEQA is contrary to federal law.

BACKGROUND AND PROJECT HISTORY

The rail line between San Jose and San Francisco, California, came into public ownership in 1991, when it was acquired from Southern Pacific Transportation Company ("Southern Pacific") by Petitioner and its managing agency, the San Mateo County Transit District.[1] The acquisition of the line from Southern Pacific reflected a significant investment of state and local funds intended to preserve and improve commuter rail service on the line connecting Silicon Valley with San Francisco. As part of the 1991 transaction, Petitioner made two filings with the Interstate Commerce Commission ("ICC"). The Notice of Exempt Acquisition filed in Finance Docket No. 31980[2] pertained to the transfer of the ownership of the line, while the filing in Finance Docket No. 31983[3] related to the trackage rights held by Southern Pacific for freight operations on the San Francisco to San Jose segment.[4] The Trackage Rights

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1 The 1991 purchase was made by the two cooperating public agencies, The Peninsula Corridor Joint Powers Board or "JPB" (a contractually-created public agency formed under Cal. Government Code §6500 et seq., by the transit operators of the three affected counties: the City and County of San Francisco, the Santa Clara County Transit District (now the Santa Clara Valley Transportation Authority) and the San Mateo County Transit District or "SamTrans") and SamTrans, which provided a significant portion of the local funding for the purchase, took an ownership interest in the real estate in San Mateo County and acts as the administrative operating agency for Petitioner

2 ICC Finance Docket No. 31980, *Peninsula Corridor Joint Powers Board and The San Mateo County Transit District,* Notice of Exempt Acquisition (filed December 20, 1981) ("**Exhibit 1"**).

3 ICC Finance Docket No. 31983, *Southern Pacific Transp. Co. – Trackage Rights -- Peninsula Corridor Joint Powers Board and The San Mateo County Transit District* (filed December 20, 1981) (**"Exhibit 2"**).

4 Copies of these filings are attached as **Exhibits 1 and 2**. Another rail segment, from San Jose (Lick) south to Gilroy (which continues to be owned by SP's successor, Union Pacific, but over which Petitioner operates limited commuter service), was also involved in the 1991 transaction, but is not relevant to this petition. (See ICC Finance

Agreement, which was filed as an exhibit in FD 31983, outlines the terms of the joint operating relationship between the freight and passenger operators on the line. By virtue of these filings, Petitioner became a rail carrier providing transportation subject to the jurisdiction of the ICC.

Since the 1991 purchase, Southern Pacific and its successor by merger, the Union Pacific Railroad Company ("Union Pacific" or "UP"), have continued to operate freight service on the line. In general terms, Petitioner and Union Pacific share the two mainline tracks from San Francisco south to Santa Clara. Between Santa Clara and San Jose, UP has its own track (the "New Coast Main") which is used primarily for its freight operations. UP also hosts Amtrak intercity rail passenger service trains and the regional Capitol Corridor and Altamont Commuter Express passenger services on this track. Many of these trains originate in the East Bay and join the Caltrain line at Santa Clara, which is at the southern end of San Francisco Bay, continuing south to San Jose. Through two "paired track" arrangements, all of the tracks between Santa Clara and points south of San Jose are currently shared to facilitate optimal bi-directional operations for all parties, with Caltrain trains occasionally operating on the New Coast Main and some of the non-Caltrain passenger trains using Caltrain-owned tracks.

This petition is prompted by litigation that has been filed by a local city and two interest groups challenging the environmental clearance under CEQA for a project to electrify the Caltrain line. Among other remedies, the litigation seeks injunctive relief that could

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ICC Finance Docket No. 31985, *Peninsula Corridor Joint Powers Board—Trackage Rights—Southern Pacific Transportation Company* (filed December 20, 1991) ("**Exhibit 3**").)

halt this project. (A copy of the Petition for Writ of Mandate is attached as **Exhibit 4**.) The project that is the subject of this legal challenge is known as the Peninsula Corridor Electrification Project (the "Project"), which proposes to install 25kv electrical lines over the line and utilize Electrical Multi-Units (EMUs) in providing passenger service. By electrifying the service, Petitioner will be able to operate more efficiently, for the benefit of all users of the line. With implementation of the Project, not only would more frequent and more efficient service be implemented, but the improvements on the line will be compatible with future implementation of the proposed California High Speed Rail project.

Although recent decisions by this Board and in the courts have confirmed that the 49 U.S.C. § 10501 preempts the application of CEQA with respect to rail carriers providing transportation that is subject to the jurisdiction of this Board, Petitioner has proceeded to demonstrate its good faith by preparing and circulating an Environmental Impact Report ("EIR") for the Project. In view of those decisions, Petitioner also stated clearly in the Final EIR that it was reserving its rights to assert federal preemption should legal actions be filed to block the Project.[5] Petitioner's governing board adopted the Project and conditionally certified the EIR on January 8, 2015, while specifically reserving its rights to assert preemption of CEQA.[6] Nevertheless, Petitioner has pledged (and confirms its intent to honor that pledge) to fulfill all of the mitigation measures listed in

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5 See FEIR, Section 1.5.1.3 ("**Exhibit 5**").

6 The Board's resolution specifically reserved the agency's rights to claim preemption. (See Resolutions 2015-3 and 2015-4 ("**Exhibit 6**").)

the EIR, regardless of the status of any claim of preemption. The legal challenge was filed on February 9, 2015.

ARGUMENT

I. Petitioner is a rail carrier subject to the jurisdiction of the Board.

As a result of filing the two Notices of Exemption in 1991, Petitioner became a rail carrier providing transportation subject to the jurisdiction of the ICC. At the time of the purchase in 1991, Petitioners were well aware of the *State of Maine* series of ICC decisions (*Maine DOT—Acquisition Exemption—Maine Central Railroad Company* (8 ICC 2d 385 (1991)), involving the acquisitions of rail rights-of-way by public agencies who avoided taking on carrier status by limiting the scope of their control over the lines they acquired. Petitioner felt at the time, and continues to believe, that the level of control that it has (and strongly desires to continue to have) over freight and other passenger operations on the Caltrain line is important in allowing it to control and expand passenger rail service in fulfillment of goals behind the significant public investment in acquiring the line. The terms of Section 4 of the Trackage Rights Agreement, particularly §§4.1 and 4.3, give the Peninsula Corridor Joint Powers Board, as the "Owner," control over all maintenance and dispatching on the line and contain rules that allow Petitioner to confine freight service to certain operating "windows" to facilitate passenger operations. Section 8.3 even contemplates a potential scenario in which the needs of passenger rail service might require the abandonment of freight service. Many of these restrictions track the terms that caused concern in the 1993 decision of the ICC regarding the Los Angeles County Transportation Commission

(LACTC). (*Southern Pacific Transportation Company—Abandonment Exemption—Los Angeles County, CA*, 9 ICC 2d 386 (1993).)

A. This Board has exclusive and plenary jurisdiction over the line owned by Caltrain and used in interstate freight operations by UPRR, and the ICCTA preempts the application of CEQA.

Petitioner is a carrier providing transportation that is subject to the exclusive jurisdiction of the Board pursuant to 49 USC §10501(b):

> The jurisdiction of the Board over--
>
> > (1) transportation by rail carriers, and the remedies provided in this part with respect to rates, classifications, rules (including car service, interchange, and other operating rules), practices, routes, services, and facilities of such carriers; and
> >
> > (2) the construction, acquisition, operation, abandonment, or discontinuance of spur, industrial, team, switching, or side tracks, or facilities, even if the tracks are located, or intended to be located, entirely in one State,
>
> is exclusive. Except as otherwise provided in this part, the remedies provided under this part with respect to regulation of rail transportation are exclusive and preempt the remedies provided under Federal or State law.

The statute, 49 U.S.C. § 10102(9), defines transportation to include:

> ... a locomotive, car, vehicle, vessel, warehouse, wharf, pier, dock, yard, property, facility, instrumentality, or equipment of any kind related to the movement of passengers or property, or both, by rail, regardless of ownership or an agreement concerning use;....

Since Petitioner owns and provides trackage for use in interstate rail service, it is providing transportation that is subject to the jurisdiction of this Board. As a result, under 49 USC §10501(b), the improvement and operation of the line remain under the Board's exclusive jurisdiction. As the Board has noted, in enacting the ICCTA,

Congress "vested exclusively" in the STB "[t]he power to authorize construction of rail lines and the power to authorize railroads to operate them." (*Kings County, WA—Petition for a Declaratory Order—Burlington Northern R.R.--Stampede Pass Line*, 1 STB 731, 734) However, the Project involves only the construction of improvements to the line and not an extension of it, so no specific project approval is required from the Board. (*See City Of Detroit v. Canadian National Railway Company, et al.*, 9 I.C.C.2d 1208 (1993), *aff'd sub nom. Detroit/Wayne Co. Port Authority v. I.C.C.*, 59 F.3d 1314 (D.C.Cir. 1995).[7])

Recently, this Board has confirmed, with regard to the development of the DesertXpress and California High Speed Rail projects, that the application of CEQA is preempted by the ICCTA with regard to projects undertaken by rail carriers providing transportation subject to the jurisdiction of the Board.[8] The decision in *CHSRA* held that the application of injunctive remedies under CEQA is pre-empted by the ICCTA. (*CHSRA*, Slip Opinion at 10-11.) In addition, the Board and a federal court have reached a similar conclusion with regard to the attempt to apply CEQA to rail projects being undertaken by commuter rail operators in California.[9]

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[7] Petitioner had previously obtained NEPA clearance from the Federal Transit Administration, which completed an Environmental Assessment and issued a Finding of No Significant Impact for the Project in 2009.

[8] STB Finance Docket No. 34914, *DesertXpress Enterprises, LLC – Petition for a Declaratory Order* (Served June 27, 2007); STB Finance Docket No. 34914, *California High-Speed Rail Authority – Petition for a Declaratory Order* (Served October 17, 2014, ("*CHSRA*").

[9] STB Finance Docket No. 34111, *North San Diego County Transit Development Board – Petition for Declaratory Order* (Service Date August 21, 2002); *City of Encinitas v. North San Diego County Transit Development Board* 2002 U.S. Dist. Lexis 28531, (S.D. Cal. 2002).

B. The injunctive remedies sought by the challengers in the state court action would directly interfere with the improvement and operation of Petitioner's rail line.

The two interest groups that are parties to the litigation against Petitioner are the Community Coalition on High-Speed Rail and Transportation Solutions Defense and Education Fund.[10] Their demands on Petitioner prior to filing their suit asked Petitioner to undertake additional environmental studies, including a full study of the as-yet undefined operation by which CHSRA would share a portion of Petitioner's tracks. It appears that a major motivation for the litigation involves the relationship between Petitioner and CHSRA. Indeed, the actions of these two interest groups, as well as the third litigant, the Town of Atherton, appear to target the Project precisely because of its potential relationship to the CHSRA project. Although the electrification of the line has been the subject of planning efforts that date back almost two decades (and preceded the legislation that authorized the CHSRA's bond funding), in their CEQA petition the litigants claim that the Project is inextricably linked to the CHSRA project, such that the fact that the EIR for the Project did not examine the CHSRA project as a part of the Project is a fatal flaw in the environmental process. The state court litigants' actions are surprising at best, since despite the fact that the Caltrain EIR fully examined the future cumulative impacts of the CHSRA project (along with other major projects planned by other entities), the litigants seek to halt the Project until additional studies can be

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[10] These two groups have also challenged the Board's ruling with regard to CHSRA in FD 35861. (See *Kings County et al v. Surface Transportation Board*, Case No. 15-70386, 9th Cir.)

conducted to determine the impacts of the shared use with CHSRA, even though the planning schedule for that project calls for service to begin in 2028.[11]

The plaintiffs' actions in the state court proceeding appear to be an attempt to do precisely what this Board, like the ICC before it, has ruled is an impermissible activity – that is, to use state and local environmental and other permitting requirements to block the implementation of projects that will benefit rail carriers that are subject to the Board's jurisdiction. For example, the Town of Atherton demanded that Petitioner fund the construction of a grade crossing signalization project within its borders and discuss providing an increased level of rail service to a station located in the Town as a condition of the Town not bringing a lawsuit. (See letters attached as **Exhibit 7**.) This is precisely the type of economic regulation that was found, in the *City of Auburn* case, to contravene the Board's jurisdiction: "For if local authorities have the ability to impose environmental permitting regulations on the railroad, such power will in fact amount to economic regulation if the carrier is prevented from constructing, acquiring, operating, abandoning, or discontinuing a line." *City of Auburn v. U.S.,* 154 F.3d. 1025, 1031 (9th Cir. 1998). (See also, *Staten Island Rapid Transit Operating Authority v. ICC* 718 F.2d 531 (1983).) Thus, far from being a mere attempt to elicit additional information regarding the Project, this litigation seems aimed at exerting control over the design of

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[11] California High Speed Rail Authority, *2014 Business Plan,* page 16, Ex. 1.1. To the extent the challenger's strategy is to delay or block the high speed rail project, it is clearly using the state court action to indirectly attack a party that has been found by the Board to be a carrier. Rather than using CEQA as an informational process, for which the statute was intended, the strategy of these groups is to use the judicial process to delay projects and increase their costs as a means of furthering an alternative transportation policy agenda. Indeed, one litigant's claims include the failure of Petitioner to adopt the particular type of rail vehicle championed by this particular group.

the rail improvements, the nature of accompanying improvements, and even the details of the day-to-day operation of rail service.

Plaintiffs' avowed purpose in the state court litigation runs counter to the proper scope of state and local regulation of railroads: "[T]he Termination Act does not preempt only explicit economic regulation. Rather it preempts all 'state laws that may reasonably be said to have the effect of managing or governing rail transportation, while permitting the continued application of laws having a more remote or incidental effect on rail transportation.' [Citation omitted.] What matters is the degree to which the challenged regulation burdens rail transportation, not whether it is styled as 'economic' or 'environmental.'" (*New York Susquehanna and Western Rwy. Corp. v Jackson* 500 F.3d 238, 252 (3d Cir. 2007).) Moreover, "[t]he regulation must not be so draconian that it prevents the railroad from carrying out its business in a sensible fashion. . . . [R]egulations must be settled and definite enough to avoid open-ended delays." *Id.* at 254.

C. The Board's action in this proceeding is of importance to resolve an issue

The Board is likely aware that the issue of the preemption of CEQA by the ICCTA has been the subject of litigation in California courts. (*Town of Atherton et al. v. California High-Speed Rail Authority*, (2014) 228 Cal.App.4th 314 ("*Atherton*").)[12] In a case

[12] The *Atherton* decision ended a six-year court challenge, brought by two of the challengers in the new litigation, to the CEQA documents prepared by CHSRA for the segment of the CHSRA system that connects with the Caltrain line in San Jose. Having achieved its goal in obtaining judicial approval of its environmental document, CHSRA

involving CHSRA, an appellate-level court found that preemption was not available to protect the high speed rail project from a CEQA challenge (which involved two of the parties to the action challenging the Project), holding that the "market participant exception" prevented preemption from operating with regard to a state agency. However, and significantly for this proceeding, that court noted in its decision that there had been no decision by this Board with regard to its jurisdiction over the line in question. (*Id.* at 332, fn 4.)[13] Another appellate panel of a different district than the *Atherton* court found that the "market participant exception" should not apply to a CEQA challenge to a proposal by a private rail operator to improve a publicly-owned rail line for freight service.[14] However, that case has been accepted for review by the California Supreme Court in late December, and it will likely be many months, and perhaps more than a year, before a final decision is expected in that case. Nevertheless, the challengers can be expected to argue that the *Atherton* court held that CEQA is not preempted by the ICCTA and to ask the Board to hold off any action until the California courts can rule on this issue of federal jurisdiction. As even the *Atherton* court has

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chose not to seek review of the *Atherton* decision, which found no preemption of CEQA in the absence of a declaratory order from the Board.

[13] Footnote 4 in the *Atherton* decision reads: "The STB, as the agency authorized by Congress to administer the ICCTA, has been called 'uniquely qualified' to determine if state law is preempted. [Citations omitted.] A request to the STB for a declaratory order of preemption would be the remedy for the Authority's claim of federal preemption, just as it was in City of Auburn. The Authority has not informed this court of any request for a formal declaratory order from the STB that the ICCTA preempts CEQA as to the HST system. In the STB June Decision the STB made no such determination; it did not even mention preemption. As we discussed ante, it merely found it had jurisdiction."

[14] *Friends of the Eel River v. North Coast Rail Authority*, Cal. Supreme Court Case No S222472. It should be noted that, under California Rules of Court, Rule 8.1105(e), once an appellate decision that has been accepted for review by the California Supreme Court it is no longer a "published case" and may not be relied upon as precedent in California courts.

acknowledged that the Board is "uniquely qualified" to determine the issue of preemption, there is no reason for the Board to wait for a state court to issue a ruling involving the scope of the Board's authority. (*Atherton*, 228 Cal.App.4th at 332, fn 4.)

REQUEST FOR EXPEDITED CONSIDERATION

Petitioner respectfully requests that the Board issue an order regarding the preemption of CEQA for the Project as soon as possible. Under CEQA, cases are entitled to judicial calendaring priority and are expected to be prosecuted and heard quickly. Currently, the petitioners are preparing the administrative record, as they elected to do under the CEQA statute. We anticipate that task could be completed within 60 days (early June), at which time a roughly 90-day briefing schedule would normally commence, with a hearing on the merits of the petition to be held shortly thereafter. In total, the CEQA case could proceed to a resolution within 160-180 days from now. In order to avoid incurring the bulk of that potentially unnecessary effort and expense, the JPB requests that the STB issue a ruling by June 30. An order from the STB regarding preemption of CEQA with regard to the Project, if issued prior to that date, would eliminate controversy in advance of the initial court appearance in the matter.

To facilitate expedited consideration, Petitioner has served a copy of this Petition for a Declaratory Order on the counsel of record for the challengers in the CEQA lawsuit.

CONCLUSION

For the foregoing reasons, Petitioner respectfully requests that the Board issue an order regarding the preemption of CEQA with regard to the Project.

Respectfully submitted,

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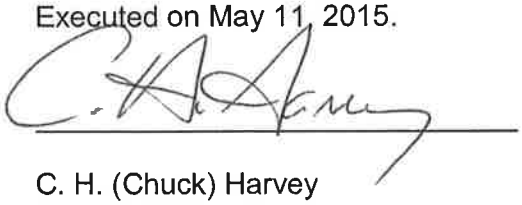
Dated: May 19, 2015

VERIFICATION

I, C.H. (Chuck) Harvey, verify under penalty of perjury that the factual statements made in the foregoing Petition for Declaratory Order are true and correct, to the best of my knowledge, information and belief.

Further, I certify that I am qualified and authorized to file this verification.

Executed on May 11, 2015.



C. H. (Chuck) Harvey
Deputy CEO – Operations, Engineering & Construction
Peninsula Corridor Joint Powers Board

Before the
Surface Transportation Board
Washington, D.C.

Finance Docket No. 35929

CERTIFICATE OF SERVICE

I hereby certify that on this 19th day of May 2015, I have caused a copy of the foregoing Verified Petition for a Declaratory Order to be served upon the following individuals via first class mail, postage prepaid:

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