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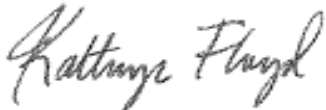
Re: Texas Central Railroad and Infrastructure, Inc. & Texas Central Railroad, LLC—Authority to Construct and Operate—Petition for Exemption from 49 U.S.C. § 10901 and Subtitle IV—Passenger Rail Line Between Dallas, Tex. and Houston, Tex., Docket No. FD 36025

Dear Ms. Brown:

Enclosed for filing in the above-referenced matter are (1) Petitioners' Motion for Leave to File Response to Replies and (2) Petitioners' Response to Replies to Petition to Reopen.

Please do not hesitate to contact me if you have any questions.

Sincerely,



Kathryn Kusske Floyd

encl.

**BEFORE THE
SURFACE TRANSPORTATION BOARD**

Finance Docket No. 36025

**TEXAS CENTRAL RAILROAD AND INFRASTRUCTURE, INC. &
TEXAS CENTRAL RAILROAD, LLC
–AUTHORITY TO CONSTRUCT AND OPERATE–
PETITION FOR EXEMPTION FROM 49 U.S.C. § 10901 AND SUBTITLE IV –
PASSENGER RAIL LINE BETWEEN DALLAS, TX AND HOUSTON, TX**

**PETITIONERS' RESPONSE TO REPLIES
TO PETITION TO REOPEN**

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Dated: June 12, 2018

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**PETITIONERS' RESPONSE TO REPLIES
TO PETITION TO REOPEN**

Texas Central Railroad and Infrastructure, Inc. (“TCRI”) and Texas Central Railroad, LLC (“TCRR”) (collectively, “Texas Central”), pursuant to the accompanying motion for leave, respectfully submit this Response in support of their May 4, 2018 Petition to Reopen.¹

INTRODUCTION

Texas Central is proposing a high-speed passenger rail line between Houston and Dallas (the “Texas Central Line”). To enhance the train service, Texas Central has forged a relationship with Amtrak that will allow passengers to seamlessly connect between Amtrak routes serving destinations throughout the country and the Texas Central Line. This through ticketing arrangement will better attract, assist, and serve rail passengers and bridge an important gap in Amtrak’s national rail

¹ Texas Central Railroad and Infrastructure, Inc. and Texas Central Railroad, LLC Petition to Reopen, STB Docket No. 36025 (filed May 4, 2018) (“Petition to Reopen”). The Texas Central Line will be constructed, operated, and maintained by TCRI and TCRR. *See* Petition for Exemption at 2.

system. Because Texas Central’s agreement with Amtrak firmly integrates the Texas Central Line into the interstate rail network, Texas Central has petitioned to reopen this proceeding, which seeks Surface Transportation Board authority to construct and operate the Texas Central Line.

ARGUMENT

I. The through ticketing agreement with Amtrak incorporates the proposed Texas Central Line into the interstate rail network.

Under the ICC Termination Act (“ICCTA”), the Surface Transportation Board’s jurisdiction extends to transportation by rail carrier between two places in the same state, as long as that intrastate transportation is carried out “as part of the interstate rail network.”² Consistent with Board precedent—including the specific guidance provided by the Board in this matter—Texas Central’s through ticketing agreement with Amtrak makes the Texas Central Line part of the interstate rail network.

A. The Amtrak-Texas Central agreement is a concrete through ticketing arrangement.

The Board’s July 18, 2016 decision in this proceeding concluded that the Texas Central Line was not part of the interstate rail network because it “would have no direct connection with Amtrak, such as a shared station or a clearly defined arrangement to connect passengers using through ticketing.”³ The Board went on to explain that “[s]hould Texas Central develop concrete plans that would make the

² 49 U.S.C. § 10501(a)(2)(A).

³ *Tex. Cent. R.R. & Infrastructure, Inc. & Tex. Cent. R.R., LLC—Auth. to Construct and Operate—Petition for Exemption from 49 U.S.C. § 10901 and Subtitle IV—Passenger Rail Line Between Dallas, Tex. and Houston, Tex.*, STB Docket No. FD 36025 at 5 (served July 18, 2016) (“Decision”).

[Texas Central] Line part of the interstate rail network, ***such as an actual through ticketing arrangement with Amtrak*** . . . Texas Central could seek Board authority at that time.”⁴

Since the Board’s July 2016 decision, Texas Central and Amtrak have executed a Reservation and Ticketing Agreement (“RTA”), the purpose of which is to “make available to consumers the ability to reserve and book Through Tickets using Amtrak’s reservation and ticketing channels.”⁵ The RTA obliges Texas Central to “accept all Through Tickets generated by Amtrak”⁶ And when Through Tickets for travel on the Texas Central Line are purchased using Amtrak’s reservation and ticketing channels, Amtrak is “entitled to retain a commission” of 15%.⁷ Texas Central has already paid Amtrak \$75,000 in “Implementation Fees” under the RTA.⁸

The RTA is precisely the sort of concrete “through ticketing arrangement with Amtrak” that the Board said would make the Texas Central Line part of the interstate rail network. Under the RTA, for example, a passenger who wants to travel by rail from New Orleans to Dallas can buy a single “Through Ticket” using Amtrak’s reservation and ticketing systems for travel on both Amtrak’s Sunset Limited service

⁴ *Id.* at 6 (emphasis added).

⁵ RTA ¶ 1.2.

⁶ *Id.*

⁷ *Id.* ¶ 2.2. The Voluntary Coordination Agreement between Texas Central and Amtrak—which was a precursor to the RTA—will further enhance coordination between the parties and strengthen the Texas Central Line’s connection to the interstate rail network. *See* Petition to Reopen at 6-7.

⁸ RTA ¶ 2.1.

between New Orleans and Houston and the Texas Central trains between Houston and Dallas. As part of the ticket, Texas Central will provide a “connecting transfer service” between the Amtrak and Texas Central stations.⁹ This “clearly defined arrangement to connect passengers using through ticketing”¹⁰ means that the Texas Central Line is part of the interstate rail network, and thus subject to the Board’s jurisdiction under ICCTA.

B. The RTA is enforceable.

Recognizing that the RTA on its face satisfies the jurisdictional criteria set out in the Board’s July 2016 decision, opponents of Texas Central’s project have filed replies arguing that the RTA does not mean what it says, and is instead an unenforceable “agreement to agree.”¹¹ Those arguments fail on several fronts.

To begin with, there is no doubt that the parties to the RTA consider it to be an enforceable through ticketing agreement. Amtrak’s reply to Texas Central’s Petition to Reopen unequivocally states that the RTA “provide[s] for Amtrak to sell through tickets . . . to passengers traveling between points on Amtrak’s national route network and points on Texas Central’s Dallas-Houston high speed route.”¹² Amtrak’s reply further explains that such through ticketing arrangements are a relatively

⁹ RTA at 1 & ¶ 1.2.

¹⁰ Decision at 5.

¹¹ Texans Against High Speed Rail, Inc., Reply in Opp. to Petition to Reopen at 12-13 (filed May 31, 2018) (“TAHSR Reply”); *see* Delta Troy Interests, Ltd., Reply in Opp. to Petition to Reopen at 4-7 (filed May 31, 2018) (“Delta Troy Reply”).

¹² Reply of the National Railroad Passenger Corporation (Amtrak) to Texas Central’s Petition to Reopen at 1 (filed May 31, 2018) (“Amtrak Reply”).

common way in which “Amtrak has extended the reach of its national rail network.”¹³ In short, the parties to the RTA agree that it is enforceable and, in any case, strangers to a contract (like TAHSR and Delta Troy) lack standing to argue otherwise.¹⁴

Despite their lack of standing, TAHSR and Delta Troy claim that Texas Central and Amtrak have not agreed on “essential terms” relating to “scope, price, and duration of services”¹⁵—even though they admit that there are entire sections of the RTA devoted to precisely those topics.¹⁶ And in fact, those sections clearly document the RTA’s definitive terms: Amtrak “shall make available to consumers” through ticketing for connecting service on the Texas Central Line; Texas Central “shall accept” all Through Tickets purchased from Amtrak; and Amtrak “shall be entitled to retain” a 15% commission on those Through Ticket sales.¹⁷ The clear agreement on those material terms and the parties’ undisputed intention to be bound by them make the RTA enforceable.¹⁸

¹³ *Id.* at 2.

¹⁴ *See Fort Lincoln Civic Ass’n, Inc. v. Fort Lincoln New Town Corp.*, 944 A.2d 1055, 1064 (D.C. 2008) (“Generally, a stranger to a contract may not bring a claim on the contract.”).

¹⁵ TAHSR Reply at 12.

¹⁶ Delta Troy Reply at 5 (acknowledging that scope, price, and duration are “seemingly covered” in Sections 1, 2, and 11.1 the RTA).

¹⁷ *See* RTA ¶¶ 1.2 & 2.1. The RTA’s initial term ends three years after service on the Texas Central Line commences, but the agreement continues in force afterward unless it is terminated by one of the parties. *Id.* ¶ 11.1.

¹⁸ *See Eastbanc, Inc. v. Georgetown Park Assocs. II, L.P.*, 940 A.2d 996, 1002 (D.C. 2008). The Delta Troy Reply suggests that enforceability requires agreement on “all terms.” Delta Troy Reply at 5. In reality, “[a]ll agreements have some degree of indefiniteness and some degree of uncertainty.” *Eastbanc*, 940 A.2d at 1002 (citation omitted). Accordingly, “all the terms contemplated by the contract need not be fixed

II. The Board’s jurisdiction extends beyond rail lines physically connected to the interstate rail network.

Faced with “an actual through ticketing arrangement” between Texas Central and Amtrak—precisely the sort of “concrete plans” that the Board indicated “would make the [Texas Central] Line part of the interstate rail network”¹⁹—the Replies resort to revisiting arguments they made two years ago.

At bottom, the Replies assert that the proposed Texas Central Line cannot be part of the “interstate rail network” because there is no “physical connection” between the Texas Central Line and Amtrak’s rail lines.²⁰ But this attempt to narrowly define the phrase “as part of the interstate rail network” cannot be reconciled with ICCTA or the Board’s precedent. It matters that the phrase originated with ICCTA’s expansion of Surface Transportation Board authority to encompass “wholly *intra*state rail transportation based upon its relationship to the interstate rail network,” and that Congress was “endorsing a shift in jurisdiction away from the states.”²¹ Taking those factors into account, the Board defines the term “interstate rail network” “broadly . . . to include (but not be limited to) facilities that are part of

with complete and perfect certainty for the contract to be enforceable.” *Id.* (citation and brackets omitted).

¹⁹ Decision at 6.

²⁰ See TASHR Reply at 7-11, 14-15; Delta Troy Reply at 10-12.

²¹ *Cal. High-Speed Rail Auth.—Constr. Exemption—In Merced, Madera, and Fresno Counties, Cal.*, STB Docket No. 35724 at 14 (June 13, 2013) (emphasis added). Indeed, Congress specifically “implemented its constitutional power to require federal regulation of transportation in interstate commerce in order to avoid a patchwork of conflicting and parochial action that impedes the flow of people and goods throughout the nation.” *DesertXpress Enters., LLC—Petition for Declaratory Order*, STB Docket No. FD 34914 at 16 (May 6, 2010).

the general system of rail transportation and are related to the movement of passengers or freight in interstate commerce.”²²

By exercising its railroad safety authority over the Texas Central Line, the Federal Railroad Administration (“FRA”) has already determined that the line is part of “the general system of railroad transportation.”²³ In fact, FRA has broadly concluded that “an intercity high speed rail system with its own right of way would be part of the general system although not physically connected to it.”²⁴ The Petition to Reopen presents evidence of changed circumstances—the through ticketing arrangement between Amtrak and Texas Central—demonstrating that operations on the Texas Central Line will be “related to the movement of passengers . . . in interstate commerce.”²⁵ Those two points are fully sufficient to make the Texas Central Line “part of the interstate rail network” under the Board’s definition.

The Replies nonetheless argue that Texas Central’s through ticketing arrangement with Amtrak is not enough, and that other “jurisdictional conferring factors” are also necessary.²⁶ Again, their attempt to raise the jurisdictional bar is not

²² *DesertXpress* at 11.

²³ FRA regulations define “general system of rail transportation” as “the network of standard gage track over which goods may be transported throughout the nation and passengers may travel between cities and within metropolitan and suburban areas.” 49 C.F.R. Part 209, App. A. Notably, “portions of the network may lack a physical connection but still be part of the system by virtue of the nature of operations that take place there.” *Id.*

²⁴ *Id.*

²⁵ *DesertXpress* at 11.

²⁶ TAHSR Reply at 8.

consistent with Board precedent. Since at least its 1986 decision in *Cape Cod & Hyannis R.R.*, the Board has held that a “through ticket arrangement” with Amtrak would establish federal jurisdiction over a wholly intrastate railroad.²⁷ Indeed, the Board’s July 2016 decision in this proceeding noted that *Cape Cod* had found “jurisdiction over a through ticketing arrangement between an intrastate passenger railroad and Amtrak.”²⁸

It makes no difference that Texas Central and Amtrak will not share a station. As Amtrak explains in its reply to Texas Central’s Petition, it already uses transfer services to connect with carriers who do not use its stations.²⁹ “In the same way, Texas Central will provide a convenient transfer service between its stations in Dallas and Houston and the Amtrak stations serving those cities.”³⁰ Significantly, interstate trips are already occurring through Dallas and Houston via train and bus service. Amtrak has been providing a “Thruway bus connection” between its stations

²⁷ *Cape Cod & Hyannis R.R.—Exemption from 49 U.S.C. Subtitle IV*, ICC Docket FD 30859 (Aug. 25, 1986); see *DesertXpress* at 9 n.32 (describing *Cape Cod* as holding that “through ticketing from points out of state” established federal jurisdiction). Even before ICCTA’s expansion of jurisdiction over intrastate rail transportation, the Interstate Commerce Commission observed that it “would have jurisdiction over a railroad lying wholly within one State if it were to participate in the movement of passengers from one State to another under common arrangements with connecting carriers, i.e., by means of through ticketing or movement of interstate freight.” *Napa Valley Wine Train, Inc.—Petition for Declaratory Order*, 7 I.C.C. 954, 961 (July 18, 1991).

²⁸ Decision at 5 (describing the holding in *Cape Cod & Hyannis R.R.*).

²⁹ Amtrak Reply at 3.

³⁰ *Id.*

in Houston and Dallas since it discontinued train service between those cities.³¹ According to Amtrak, the “vast majority” of people currently using this bus connection “are making interstate trips.”³² The Texas Central Line and associated transfer service will make these interstate trips much faster and easier, thereby “fill[ing] a major missing link in Amtrak’s national network.”³³

In sum, the Texas Central Line is part of the “interstate rail network” because (1) as FRA has indicated, the Texas Central Line is part of the general system of rail transportation; and (2) Texas Central’s through ticketing arrangement with Amtrak establishes the requisite relationship to interstate commerce. Especially in light of Congressional intent in ICCTA to expand federal jurisdiction over intrastate rail projects, and to avoid “contrasting and inconsistent regulation by the various states,”³⁴ nothing more is needed to demonstrate the Board’s jurisdiction over this project.

III. Texas Central is a rail carrier under 49 U.S.C. § 10102(5).

In another attempt to disclaim federal jurisdiction over the Texas Central Line, TAHSR’s and Delta Troy’s Replies argue that the Texas Central Line cannot involve “transportation by rail carrier”³⁵ because Texas Central allegedly has conceded in

³¹ *Id.* at 5.

³² *Id.*

³³ *Id.* at 6-7.

³⁴ *DesertXpress* at 16.

³⁵ 49 U.S.C. § 10501(a)(1).

state proceedings that it is an “interurban electric railway.”³⁶ They also made this argument to the Board two years ago.³⁷ It remains unpersuasive.

ICCTA says that any “person providing common carrier rail transportation for compensation” is a rail carrier.³⁸ Under that definition, Texas Central is a rail carrier. No one argues that the service it provides on the Texas Central Line will not be “common carrier rail transportation for compensation.” Rather, TAHSR and Delta Troy say that Texas Central is not a “rail carrier” because ICCTA’s definition of “rail carrier” excludes “interurban electric railways not operated as part of the general system of rail transportation.”³⁹

It is true, as stated in the Petition for Exemption, that Texas Central will operate electric-powered trains between Dallas and Houston, thereby meeting the definition of an “interurban electric railway company” under Texas state law.⁴⁰ But as explained above, the Texas Central Line will also be “operated as part of the

³⁶ TAHSR Reply at 6-7; Delta Troy Reply at 12-14.

³⁷ *See* Texas Central Response to Replies to Petition for Exemption at 14-19 (filed June 20, 2016) (“Exemption Response”).

³⁸ 49 U.S.C. § 10102(5).

³⁹ *Id.*; *see* TAHSR Reply at 6-7; Delta Troy Reply at 12-14.

⁴⁰ Exemption Response at 15; *see* Texas Transp. Code, Title 5, Subtitle D, § 131.012 (defining “interurban electric railway company” to include “[any] corporation chartered under the laws of this state to conduct and operate an electric railway between two municipalities in this state”).

general system of rail transportation.”⁴¹ As a result, Texas Central meets the ICCTA definition of “rail carrier.”⁴²

IV. The merits of Texas Central’s Petition for Exemption should be separately addressed under a procedural schedule.

Various letter submissions and replies to Texas Central’s Petition to Reopen raise questions regarding whether Texas Central meets the exemption criteria, the transportation merits of the proposed rail line, and the adequacy of FRA’s ongoing environmental review. Those issues are not relevant to the Board’s jurisdiction over the Texas Central Line. If and when the Board grants Texas Central’s Petition to Reopen, Texas Central will propose a procedural schedule that provides project opponents an opportunity to supplement their responses to Texas Central’s Petition for Exemption. Until then, their questions about the merits of Texas Central’s Petition for Exemption are premature.

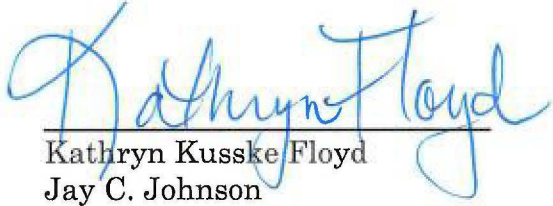
CONCLUSION

For the reasons discussed above, the Board should grant Texas Central’s Petition to Reopen and assert jurisdiction over the Texas Central Line.

⁴¹ *See supra* at 7; *see also* Exemption Response at 15-16. TAHSR’s and Delta Troy’s suggestion that the Texas Central Line is not part of the general system of rail transportation would create an untenable conflict between the Board’s and FRA’s interpretation of that phrase.

⁴² As Texas Central explained before, the fact that it qualifies as an “interurban electric railway company” under state law does not mean that it is an “interurban electric railway” for purposes of federal law. *See* Exemption Response at 16-18. Congress used that term narrowly in ICCTA, as evidenced by the fact that it also excluded “street” and “suburban” railways from the definition of “rail carrier.” *See id.*

Respectfully submitted,



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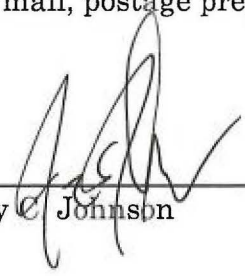
Hanna M. Chouest

Counsel to Texas Central Railroad
and Infrastructure, Inc. & Texas
Central Railroad, LLC

Dated: June 12, 2018

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 12th day of June 2018, I caused a copy of the foregoing Response to Replies to Petition to Reopen to be served on all parties of record electronically, by courier, or by first class mail, postage prepaid.



Jay C. Johnson