BEFORE THE SURFACE TRANSPORTATION BOARD

STB Finance Docket No. 35929

PENINSULA CORRIDOR JOINT POWERS BOARD

PETITION FOR DECLARATORY ORDER

PRELIMINARY REPLY AND REQUEST FOR EXTENSION OF TOWN OF ATHERTON, COMMUNITY COALITION ON HIGH-SPEED RAIL, AND TRANSPORTATION SOLUTIONS DEFENSE AND EDUCATION FUND IN RESPONSE TO PETITION FOR DECLARATORY ORDER OF PENINSULA CORRIDOR JOINT POWERS BOARD

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FINANCE DOCKET NO. 35929

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PENINSULA CORRIDOR JOINT POWERS BOARD
PETITION FOR DECLARATORY ORDER

PRELIMINARY REPLY AND REQUEST FOR EXTENSION IN RESPONSE TO PETITION FOR DECLARATORY ORDER

Town of Atherton ("Atherton"), Community Coalition on High-Speed Rail ("CC-HSR"), and Transportation Solutions Defense and Education Fund ("TRANSDEF", and the foregoing, collectively, "Atherton Parties") submit this Preliminary Reply and Request for Extension in response to the Petition for Declaratory Order filed by the Peninsula Corridor Joint Powers Board ("PCJPB") on May 19, 2015.

PCJPB asks the Board to follow-up on its order of December 2014 granting the Petition for Declaratory order of the California High-Speed Rail Authority ("CHSRA") and declare, on an expedited basis, that the California Environmental Quality Act ("CEQA")[1] is likewise fully preempted as applied to PCJPB's electrification project. PCJPB's request is misplaced for multiple reasons. First, there is no good reason for expediting PCJPB's request. No damage will be caused by processing PCJPB's request normally, while rushing its petition through will adversely affect Atherton Parties, and potentially others wishing to participate in the proceeding. Second, PCJPB, unlike CHSRA, does not run an intercity rail

[1] California Public Resources Code §21000 *et seq.*

line connecting to the national rail network. Rather, as a local public agency running a commuter rail line, it is not subject to the Board's jurisdiction. Third, the Board's 2-1 decision granting the order on the CHSRA petition is currently under judicial review and therefore should not be relied upon by the Board. Further, the Board could not even muster a majority vote to deny the Petitions for Reconsideration of that order. In fact, that order was wrongly decided, and if the Board is to consider PCJPB's petition on its merits, it should overrule its prior decision on the CHSRA petition. (See, e.g., Dakota, Minnesota & Eastern Railroad Corporation and Cedar American Rail Holdings, Inc.--Control-- Iowa, Chicago & Eastern Railroad Corporation (STB January 31, 2003) FD 34178 [STB overruled prior ICC decision and applied broad "public interest" standard in considering application for acquisition of rail carrier].)

I. THE BOARD SHOULD EXTEND THE TIME TO RESPOND BECAUSE THE ACTION IS NOT IN ANY SENSE URGENT.

PCJPB asserts that expedited consideration of its petition is necessary because the pending action under CEQA will otherwise be resolved quickly, requiring it to expend "unnecessary effort and expense." (Petition for Declaratory Order [hereinafter, "Petition"] at p.12.) PCJPB neglects to mention that it is possible, under circumstances like those that present themselves here, to stay the state court action pending resolution of the preemption question. That is exactly what has happened in the case of the Petition for Declaratory Order by the

California High-Speed Rail Authority ("CHSRA") that PCJPB relies upon so heavily. As PCJPB notes, that petition is currently under appeal in the Ninth Circuit Court of Appeals, and the issue of CEQA preemption under the Interstate Commerce Commission Termination Act of 1995[2] ("ICCTA") has also been taken up by the California Supreme Court in *Friends of Eel River et al. v. North Coast Rail Authority et al.* (Case Number S222472). That case is now in the final stages of briefing and, given the importance of the issue, will likely be heard in an expedited manner, perhaps as early as this summer.

There is no reason why a similar stipulated stay could not have already been put in place here, other than the fact that PCJPB never raised that possibility. Indeed, the first notice Atherton Parties received of this petition was when their legal counsel received a copy by mail service. PCJPB still has yet to even suggest the possibility of staying the state court action, which would eliminate the supposed urgency of the Petition.

Further, the Petition is not anywhere as urgent as has been represented by PCJPB. Atherton Parties have indeed begun preparing the administrative record for that case, but are awaiting PCJPB's action to provide it with copies of various memos and e-mails related to the action. Record certification, and subsequent briefing, is unlikely to happen in anything like the expedited time frame represented to the Board by PCJPB. Further, a settlement proposal is still pending before PCJPB. Settlement would, of course, moot the Petition.

[2] 49 U.S.C. §10101 et seq.

Further, the expedited schedule that the Board has approved places an unfair burden on Atherton Parties, and any other parties who may wish to participate. That order setting the schedule was issued less than a week ago, and provided less than two weeks before the deadline for filing replies. Nor was it served on the Atherton Parties, or anyone else. Atherton Parties have just served discovery requests on PCJPB related to PCJPB's Petition. The current schedule does not provide any time for Atherton Parties to conduct discovery or to use the results of that discovery in preparing their reply. Especially given the harsh consequences of preemption on Atherton Parties, this does not comport with procedural due process. While Atherton Parties have hurriedly prepared this preliminary reply, it cannot be considered an adequate opportunity to be heard, especially when PCJPB had abundant time (at least three months) to prepare its Petition and Atherton Parties have been forced to file this Preliminary Reply without the benefit of PCJPB's discovery responses.

Atherton Parties therefore respectfully request that the Board extend the time for the filing of replies until at least two weeks after the service of PCJPB's discovery responses, and allow Atherton Parties the opportunity to submit a supplemental reply within that time.

II. PCJPB'S PETITION SHOULD BE SUMMARILY DENIED BECAUSE THE STB DOES NOT HAVE JURISDICTION OVER COMMUTER RAIL PROJECTS SUCH AS THAT PROPOSED BY PCJPB.

PCJPB asserts that it, like the CHSRA, is entitled to a declaratory order preempting the application of the California Environmental Quality Act ("CEQA") to its Peninsula Corridor Electrification Project ("Project"), a project which it admits is solely intended to electrify a commuter rail line that runs from San Francisco to San Jose, a distance of roughly forty miles.[3] Unlike CHSRA, PCJPB's Project does not and cannot connect to the national rail network. Indeed, if anything, its project has the potential to interfere with the operations of the Union Pacific Railroad Company ("UP"), a freight rail operation that has the right to use PCJPB's trackage. A copy of that agreement was included in the Petition.[4] Indeed, UP has not given PCJPB permission to proceed with the Project, permission that is required under the trackage agreement between PCJPB and UP, and has raised concerns about the Project's potential interference with its current

[3] PCJPB asserts that the Project, "will benefit rail carriers that are subject to the Board's jurisdiction." (Petition at p. 9.) Only two rail lines currently use the PCJPB's tracks – Caltrain and UP. As explained further infra, Caltrain is not subject to STB jurisdiction. UP, while a freight carrier subject to STB jurisdiction, has no plans to electrify its service and, in fact, has raised concerns about the Project interfering with its current and future freight service. (See infra.)

[4] PCJPB has served its Petition, along with related documents, upon counsel for Atherton Parties. However, those related documents were so skewed in copying that they are not fully legible. Atherton Parties therefore request that the Board order those documents re-filed and re-served in fully legible form, and that the deadline for replies be modified accordingly.

and future operations.[5] Given these open issues, PCJPB's Project is highly unlikely to start any time soon.

PCJPB expressly admits that it is the operator of the Caltrain commuter rail service. (Petition at p. 1.) It further acknowledges that it did not seek approval from the Interstate Commerce Commission ("ICC") for its acquisition of the San Francisco to San Jose right of way from the Southern Pacific Transportation Company in 1991, since it was acquiring it to operate an exempt commuter rail line, but only notified the ICC of its exempt acquisition. (Petition, p.2 fn.2.)

In 1976, the Rail Transportation Improvement Act[6] removed mass transportation by rail that is provided by a local public body from application of the Interstate Commerce Act ("ICA"). When the ICCTA took effect, it continued that proviso, meaning that "mass transportation" provided by a local governmental authority is not subject to the Surface Transportation Board's jurisdiction.[7] PCJPB

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[5] In California Public Utilities Commission Decision 15-03-029, the Commission approved a settlement (to which PCJPB was a party) after UP and BNSF had objected to application of a proposed rule on electrification to trackage such as the PCJPB's. The settlement states, "the scope of this proceeding and the scope of the Proposed GO is limited to the 25 kV electrification systems constructed in the State of California serving a high-speed rail passenger system (HSRS) capable of operating at speeds of 150 miles per hour or higher, *located in dedicated rights-of-way with no public highway-rail at-grade crossings and in which freight operations do not occur*." (at 3 [emphasis added].) The rule therefore specifically excluded PCJPB's trackage.

[6] Pub. L. No. 94-555, § 206, 90 Stat. 2613, (1976).

[7] This legislative decision makes excellent sense. Does the Board really wish to be burdened with considering every schedule and fare change and every opening or closing of a commuter rail station or line across the entire United States? Aside from whether commuter lines such as Caltrain have any connection to interstate commerce, the burden on the Board would be overwhelming.

has provided no authority to support its claim that it is subject to STB jurisdiction. Indeed, it has never sought approval for any of its projects from the STB. Indeed, not only was the current project not submitted to the Board for approval, or even exemption; it was not even considered by the Federal Railroad Administration. Rather it was reviewed and approved (and the initial EIR for the Project funded by) the Federal Transit Administration as a local transit project.

This Board's own decisions bear out its lack of jurisdiction over commuter rail lines such as that operated by PCJPB. In Norfolk And Western Railway Company - Petition For Declaratory Order - Lease Of Line In Cook And Will Counties, Il, To Commuter Rail Division Of The Regional Transportation Authority Of Northeast Illinois. (S.T.B. Feb. 3, 1999) FD 32279, a situation closely paralleling that involved here, the Board considered an STB-governed freight line's lease of a rail line to a local government authority, METRA, for use by its commuter rail line. The proceeding had been initiated under the ICC and remanded to the Board after appellate court proceedings. The Board concluded that under the ICCTA, as under the ICA, it did not have jurisdiction and summarily dismissed the proceedings.

PCJPB attempts to insinuate, and indeed asserts, that it is subject to STB jurisdiction. (Petition at p.3.) The fact remains, however, that federal statutes do not give the STB jurisdiction, nor has PCJPB ever attempted to seek STB jurisdiction. For example, PCJPB's rates and tariffs, unlike those of providers of

interstate rail service that are subject to STB jurisdiction, have never been submitted to or approved by the STB.

PCJPB asserts that the southernmost segment of its trackage is shared by "some of the non-Caltrain passenger trains." (Petition at p.3) In fact, however, only two other passenger lines could possibly be using that segment of Caltrain tracks to any significant extent. One is the Altamont Commuter Express ("ACE") line, a line that, like the PCJPB's Caltrain line, is a commuter rail line. It runs locally through the East Bay from Stockton to San Jose. The other is the California Department of Transportation ("Caltrans") Division of Rail[8] Capital Corridor line, a local intercity line that runs from San Jose through Oakland to Sacramento and provides only local, intrastate, service. Further, examination of the actual configuration of the tracks in this several-mile segment between Santa Clara and San Jose (copy of detailed map attached) indicates that even these other passenger lines are unlikely to use the Caltrain tracks to any significant extent, because they use UP's separate trackage.[9]

PCJPB also asserts that it has a level of control over its line that makes it subject to the Board's jurisdiction. (Petition at p. 5.) Examination of the Trackage Rights Agreement covering the Lick section (the portion of Caltrain's tracks that it points to as making it subject to STB jurisdiction) (Volume II, Tab 3 of the

[8] The line is operated by Amtrak under a contract with Caltrans.

[9] As can be seen, the UP tracks run entirely east of the Caltrain tracks.

Petition), shows that Southern Pacific Transportation Company ("SP") [10] holds most of the cards in terms of control over the trackage. About the only thing that PCJPB controls is the provision of commuter rail service – the only type of service that the STB does not have jurisdiction over. The types of service that STB does control, freight service (§§ 2.1 2.4, 2.6, 2.11) and intercity passenger rail service connecting to the national rail network (§§ 2.1, 2.4, 2.7, 2.11, all remain under the control of the "User" (i.e., SP/UP), not the Owner (PCJPB). In short the "level of control" that PCJPB has over anything except commuter passenger rail service is minimal at best, and certainly not enough to invoke STB jurisdiction.[11]

III. PCJPB'S PETITION SHOULD BE DENIED BECAUSE PCJPB'S USE OF CEQA IS PROTECTED FROM ICCTA PREEMPTION BY THE MARKET PARTICIPANT EXCEPTION DOCTRINE.

Even assuming the Board decides to consider PCJPB's Petition on the merits, it should be rejected due to the application of the market participant exception doctrine. The central question presented by PCJPB's preemption argument is whether a local public commuter rail line, established by and under the control of the State of California[12], is subject to the requirement, implicit in the state's establishment of it, that it conduct CEQA review of its own project. In this respect, PCJPB is in a fundamentally different position from the local officials

[10] Now succeeded to in interest by Union Pacific Railroad Company ("UP").

[11] As noted earlier, this is evidenced by the fact the PCJPB has never sought approval from the STB (or the ICC) for any of its decisions.

[12] California Public Utilities Code §160000 *et seq.*

involved in *City of Auburn*, as well as the other ICCTA preemption cases (other that CHSRA) cited by PCJPB.

In all those cases, an external public agency, other than the STB, was attempting to regulate by way of issuing a permit or enacting regulations, and thereby potentially reject, a rail project over which the STB had jurisdiction. Thus, for example, in *City of Auburn*, the city required the Burlington Northern Santa Fe Railroad to obtain a local land use permit. In *Green Mountain Railroad*, the State of Vermont required that private railroad company to obtain a state permit to build a train barn. In *Assn. of Am. Railroads*, the South Coast Air Quality District attempted to issue regulations to control operations at a private rail yard. In *Boston and Maine Corp. and Town of Ayer, MA* – Joint Petition for Declaratory Order, No. FD 33971, 2001 WL 458685, a town conservation commission sought to require conditions on approving a railroad project, and even in *City of Encinitas v. North San Diego County Transit Development Bd.* (S.D.Cal. 2002) 2002 WL 34681621, relied upon heavily by PCJPB as supporting its petition, it was the City of Encinitas, rather than the rail agency itself, that attempted to apply CEQA in conjunction with requiring the rail agency to obtain a local coastal permit for its operations. (*Id.* at *3.)

In this case, however, it is PCJPB itself that was considering approval of *its own* project. No external permit or regulation is involved. All that is involved is the State of California's mandate to its own subsidiary agency that it comply with CEQA in considering and approving its project. Thus the State of California, and,

by extension PCJPB, its subsidiary agency, is acting, not as a public agency attempting to regulate a private third party, but as the proprietor of an enterprise, albeit a publicly owned and financed enterprise, making decisions about *its own* rail program. The case law is abundantly clear that in such a situation the state agency falls under the market participant exception to federal preemption doctrine.

A. FEDERAL PREEMPTION UNDER THE ICCTA ONLY OCCURS IF THE FEDERAL, STATE, OR LOCAL LAW OR REGULATION UNREASONABLY INTERFERES WITH INTERSTATE COMMERCE.

While the ICCTA's preemption clause (49 U.S.C. §10501(b)) appears very broad, preempting remedies provided under Federal or State law with respect to regulation of rail transportation, nevertheless it is limited to regulations that would arguably conflict with the STB's plenary jurisdiction over the subjects included in subsections (1) and (2) of that clause. In *Assn. of Am. Railroads, supra*, the Ninth Circuit Court of Appeal held that under the ICCTA, such preemption only applies when the challenged law or regulation imposes an unreasonable burden on interstate commerce. (*Id.* at 1097, 1098.) This narrows the question to whether PCJPB's decision in approving its own narrow electrification project, as affected by the application of CEQA, could unduly burden interstate commerce. As explained below, actions such as this one, that fall under the market participant exception to commerce clause preemption, are not preempted.

B. THE MARKET PARTICIPANT EXCEPTION ALLOWS A GOVERNMENTAL AGENCY TO REGULATE ITS OWN BEHAVIOR WITHOUT FEDERAL PREEMPTION.

The market participant exception to preemption under the U.S. Constitution's Commerce Clause was formulated in recognition that government agencies do not always act in a regulatory capacity. "The basic distinction drawn in *Alexandria Scrap* [*Hughes v. Alexandria Scrap* (1976) 426 U.S. 794, 810] between States as market participants and State as market regulators makes good sense and sound law." (*Reeves v. Stake* (1980) 447 U.S. 429, 436.) The cases since that time have generally recognized that when a state is acting as a participant in the market, rather than as a regulator, federal preemption of state action generally does not apply.

For example, in Building & Constr. Trades Council v. Assoc. Builders & Contractors ("Boston Harbor Cases") (1993) 507 U.S. 218, the Massachusetts Water Resources Agency ("MWRA") negotiated an agreement with the Building & Construction Trades Council to govern construction of sewage treatment facilities that MWRA owned. The agreement required that all contractors bidding on the project abide by the agreement. Associated Builders & Contractors, representing nonunion contractors, sued, claiming the agreement was preempted under the National Labor Relations Act. The Supreme Court rejected that claim. It held that a state authority, when acting as the owner of a construction project and absent specific indication by Congress of a prohibitory intent, was free to take action as the owner, rather than as regulator.

> When the MWRA, acting in the role of purchaser of construction services, acts just like a private contractor would act, and conditions its purchasing upon the very sort of labor agreement that Congress explicitly authorized and expected frequently to find, it does not 'regulate' the workings of the market forces that Congress expected to find; it exemplifies them. (*Id*. at 233 [quoting from dissent in Court of Appeal's decision].)

Likewise, in *Tocher v. City of Sana Ana* (9th Cir. 1999) 219 F.3d 1040, the Ninth Circuit Court of Appeal held that a city's use of a rotational list to determine which company to employ to tow illegally parked and abandoned vehicles was not preempted by the express preemption provision of the Federal Aviation Administration Authorization Act ("FAAAA"), which generally preempts local or state regulations affecting motor vehicle carriers such as trucking companies. The rationale for the law's preemption clause, parallel with that of the ICCTA, which was passed at approximately the same time, was to promote deregulation of the trucking industry. (*Id.* at 1049.) However, the court held that in this case the City of Santa Ana's "regulation" was not preempted. That was because the city was only establishing rules and regulations for *its own* contracts with tow companies, not those of the public in general.

In Cardinal Towing & Auto Repair v. City of Bedford, Texas ("Cardinal Towing") (5th Cir.) 1999 180 F.3d 686, analyzing preemption under the FAAAA, the court applied a two-part test to determine whether state or local governmental actions were preempted by the federal statute's express preemption clause:

> First, does the challenged action essentially reflect the entity's own interest in its efficient procurement of needed goods and services, as measured by comparison with the typical behavior of private parties

> in similar circumstances? Second, does the narrow scope of the challenged action defeat an inference that its primary goal was to encourage a general policy rather than address a specific proprietary problem? (*Id.* at 693.)

The court concluded that the city, which was contracting with a private towing company for towing services for nonconsensual towing of vehicles, was acting in its own proprietary interest in procuring services, and the narrow scope of the action (contracting with a single private towing company) did not have a primary goal of encouraging a general policy.

Most recently, in *Johnson v. Rancho Santiago Community College Dist*. (9th Cir. 2010) 623 F. 3d 1011, the 9th Circuit applied the *Cardinal Towing* two-part test for federal preemption under two federal statutes, the National Labor Relations Act and the Employment Retirement Income Security Act, the latter of which, like the ICCTA, contains a very broad express preemption clause. In doing so, it analyzed whether the test required satisfying both, or only one prong to qualify for the market participant exception. (*Id*. at 1024.) The court concluded that:

> The Cardinal Towing test thus offers two alternative ways to show that a state action constitutes non-regulatory market participation: (1) a state can affirmatively show that its action is proprietary by showing that the challenged conduct reflects its interest in efficiently procuring goods or services, or (2) it can prove a negative—that the action is not regulatory—by pointing to the narrow scope of the challenged action. We see no reason to require a state to show both that its action is proprietary and that the action is not regulatory. (*Id*.)

C. UNDER BOTH PRONGS OF THE JOHNSON/CARDINAL TOWING TEST, PCJPB'S APPROVAL OF ITS ELECTRIFICATION PROJECT IS NOT SUBJECT TO PREEMPTION BY THE ICCTA.

Applying the two-part *Johnson/Cardinal Towing* test to PCJPB's approval of its electrification project, the result is similar to that found in *Johnson, supra*. Neither the decision nor its accompanying CEQA compliance is preempted by the ICCTA.

On the first prong, the PCJPB, and the State of California, in directing it to apply CEQA, were seeking solely to make efficient market-based decisions on the nature of their own commuter rail operation, an operation that is, in any case, exempt from STB jurisdiction.

PCJPB, like CHSRA, will presumably argue that concern for environmental impacts falls outside of the reach of "efficient procurement of goods and services" and falls instead in the prohibited realm of attempting to influence rail transportation policy. However, a proprietary interest in one's own project, whether public or private, need not be limited to purely pecuniary considerations. Especially when the proprietor is a public agency, its legitimate proprietary reach extends to how its enterprise will affect the welfare of its customers/citizens.

In Engine Manufacturers Assn. v. South Coast Air Quality Management Dist. (9th Cir. 2007) 498 F.3d 1031, 1046-1047 the Ninth Circuit held that a state agency's requirement that public agencies' proprietary projects be conducted in an

environmentally benign manner fell within the market participant exception to preemption under the Clean Air Act. Similarly here, the State of California's requirement[13] that PCJPB comply with the environmental disclosure requirements of CEQA, and, indeed, that PCJPB's proprietary project seek to avoid harmful environmental impacts, is within the ambit of "efficient" procurement by a genuine market participant.

As to the second prong, PCJPB's action here merely approved its own project, which, except for this petition, would never even have reached the STB. PCJPB's application of CEQA compliance to that project was mandated by California statute. However, neither PCJPB's approval of the project nor its CEQA analysis was primarily intended to encourage a general policy; not even as environmentally benign a policy as making the railroad project "environmentally friendly." CEQA review of the policy merely provided PCJPB with information on the project's environmental consequences that the Legislature felt was important for PCJPB to have in hand before making its internal decision on approving the Project.[14]

PCJPB's actual decision to approve the Project was, like the Air Quality Management District's decision on applying an air quality regulation to the state's

[13] The California Legislature, in establishing the PCJPB, had the option of exempting it from CEQA review. (See, e.g., Public Resources Code §21080.13 [statutory exemption for railroad grade separation projects].) It chose not to do so. In so doing, it implicitly directed the PCJPB to undertake CEQA review of any project that was not otherwise exempt from CEQA.

[14] Indeed, PCJPB cannot point to any problematic influence the Project's CEQA compliance will have on any rail carrier that is subject to STB jurisdiction.

own fleet of vehicles in *Engine Manufacturers Assn.*, restricted to its own proprietary interest. Indeed, it was considerably narrower than the Air District's decision. That decision applied to all of the state's vehicles. PCJPB's decisions apply only to its own commuter rail line.

Thus just based on the narrow nature of PCJPB's decisions, which affected nothing but the agency itself, it is not subject to preemption. Comparison of the decision here with, for example, the air district's decision in *Assn. of Am. Railroads*, *supra,* only fortifies this conclusion. In that case, the adoption of the regulation was intended to affect not the air board, but private commercial railroad lines using the rail yard in question. (*Id*. at 1096.) The air board's action was intended to influence and regulate not itself, but external entities involved in rail transport, thereby directly impinging on the STB's plenary jurisdiction over those matters. (*Id.* at 1098.) Here, PCJPB's CEQA-guided decisions on approving its own project no more impinges on STB's jurisdiction than would, for example, Union Pacific Railroad's internal decision about its own proposal to establish a new freight line.

Having satisfied both prongs of the *Johnson/Cardinal Towing* test, PCJPB's decision-making on its electrification project, as well as the CEQA environmental review associated with that decision, falls well within the market participant exception to federal preemption. Therefore, neither PCJPB's decision to approve its own project, nor the associated CEQA review, is subject to preemption under the ICCTA.

D. THIRD PARTY ENFORCEMENT OF CEQA'S MANDATE IS DIFFERENT FROM THIRD-PARTY REGULATION, AND IS NOT SUBJECT TO PREEMPTION.

PCJPB attempts to equate third-party enforcement of CEQA's mandates to third-party government regulation as epitomized by *City of Auburn* or *Green Mountain Railroad*. They are quite different. When the California Legislature established CEQA, it was well aware of the state's limited ability to enforce its provisions. Consequently, it, like the federal government, set up provisions for citizen enforcement through the courts. (Public Resources Code §§21167 *et seq*.; *Rich v. City of Benicia* (1979) 98 Cal.App.3d 428, 437.) However, in delegating its powers to citizens to enforce CEQA's mandates on its own agencies, it was not giving citizens the power to regulate. All it was doing was ensuring that if one of its subsidiary state agencies failed to enforce CEQA, it would not have to rely on the Attorney General or some other state agency to police its own entity. (*See, Serrano v. Priest* (1977) 20 Cal.3d 25, 44 [although the executive branch includes offices such as the Attorney General intended to represent the public interest, those offices are often not adequate, necessitating the ability for private parties to enforce].)

CEQA's citizen enforcement provisions were therefore a reasonable, cost-effective alternative to limiting enforcement to the Attorney General or other public agency. A private party who steps into the shoes of the Attorney General to enforce California's requirements on its own agency is just as much an essential part of California's governance of its own proprietary business as would be an

enforcement action by the Attorney General, an investigation by the State Auditor or the Joint Legislative Audit Committee, or, for that matter, a corporation member's derivative lawsuit to enforce the corporation's own bylaws. (*See, e.g., Singh v. Singh* (2004) 114 Cal.App.4th 1264 [derivative lawsuit by church member over church's alleged violation of its own bylaws].)

E. THE ICCTA'S PREEMPTION CLAUSE DOES NOT EXPRESSLY OR IMPLIEDLY PREEMPT THE ACTIONS OF A STATE PURSUING ITS OWN PROPRIETARY INTERESTS.

PCJPB might finally, in desperation, grasp at the argument that the ICCTA's preemption clause was broad enough to preclude application of the market participant exception. This argument was considered and rejected, as applied to the Clean Air Act, in *Engine Manufacturers. Assn., supra*, 498 F.3d at 1044. Similar considerations call for its rejection here as well.

As with the Clean Air Act, nothing within the ICCTA indicates that Congress intended to prevent a state, acting in its proprietary role as the owner of a rail line, from making decisions about how to conduct that rail business.[15] It would be highly anomalous, indeed a violation of the Tenth Amendment, for Congress to assert it could, through the STB, dictate to a sovereign state the procedures that were allowable, especially when PCJPB's Project involved only a local commuter rail line with no significant linkage to the interstate rail system.

[15] Atherton Parties have also examined the House and Senate committee reports on the ICCTA. Nothing in those reports refers to the market participant exception, let alone indicates a congressional intent to disallow or even restrict the well-established market participant exception as applied to the ICCTA's preemption clause.

IV. CALIFORNIA'S RIGHT TO DICTATE PROCEDURAL REQUIREMENTS TO ITS OWN AGENCIES SUPERSEDES THE GENERAL PREEMPTION CLAUSE IN THE ICCTA.

The State of California has sovereign and absolute authority to establish the extent and character of the powers vested in its state agencies. (See, e.g., *Nixon v. Missouri Municipal League* (2004) 541 U.S. 125, 140-141.) As a result, the Supreme Court has found that a federal express preemption statute, such as in the ICCTA, cannot "interpos[e] federal authority between a State and its municipal subdivisions" absent an "unmistakably clear" congressional intent to do so in the language of the statute, which the ICCTA does not provide. (*Ibid.*; see 49 U.S.C. § 10501(b).)

Here, the California legislature has implicitly required PCJPB to comply with state environmental laws for the protection of the public.[16] If the Board finds that the ICCTA preempts CEQA review by PCJPB here, it would directly interpose federal authority between the State and its agency – *i.e.*, PCJPB – by allowing PCJPB to continue to have discretionary approval authority over the electrification Project, while at the same time excusing PCJPB from complying with state environmental laws and regulations governing the exercise of that discretion.

Such a result would be flatly inconsistent with federal law. Both the United States and California Supreme Courts have long held that a State has absolute power over its internal affairs, including "the extent and character of the powers

[16] See fn. 10 supra.

which its various political organizations shall possess." (*Platt v. San Francisco* (1910) 158 Cal. 74, 82; see also *Claiborne v. Brooks* (1884) 111 U.S. 400, 410 ["the extent and character of the powers (of a State's) various political and municipal organizations . . . is a question that relates to the internal constitution of the body politic of the State"].) The California Supreme Court recently reiterated this rule in *California Redevelopment Assn. v. Matosantos* (2011) 53 Cal.4th 231, holding the state has plenary power to both create and abolish its political subdivisions, as well as to determine the nature of the powers held by those entities. (*Matosantos*, *supra*, 53 Cal.4th at 255 [citing *Hunter v. Pittsburgh* (1907) 207 U.S. 161, 178-179; *Board of Supervisors v. Local Agency Formation Com.* (1992) 3 Cal.4th 903, 914-915].)

Any federal preemption statute that would "threaten[] to trench on the States' arrangements for conducting their own governments should be treated with great skepticism, and read in a way that preserves a State's chosen disposition of its own power . . . ." (*Nixon*, *supra*, 541 U.S. at p. 140.) "'If Congress intends to alter the usual constitutional balance between the States and the Federal Government, it must make its intention to do so unmistakably clear in the language of the statute.'" (*Gregory v. Ashcroft* (1991) 501 U.S. 452, 460 [quoting *Atascadero State Hospital v. Scanlon* (1985) 473 U.S. 234, 242]; see *Nixon*, *supra*, at pp. 140-141; see also *Medtronic, Inc. v. Lohr* (1996) 518 U.S. 470, 485 [presumption that Congress did not intend to preempt state law is hard to overcome].)

Nixon v. Missouri Municipal League (2004) 541 U.S. 125, is closely on point. In *Nixon*, a Missouri statute barred state political subdivisions from providing or offering for sale telecommunications services. (*Nixon*, *supra*, 541 U.S. at p. 129.) A group of Missouri municipalities sought relief under the federal Telecommunications Act of 1996, 47 U.S.C. § 253, which preempted "state and local laws and regulations expressly or effectively 'prohibiting the ability of any entity' to provide telecommunications services." (*Id.* at p. 128.) The Court noted, "[i]n familiar instances of regulatory preemption under the Supremacy Clause, a federal measure preempting state regulation in some precinct of economic conduct carried on by a private person or corporation simply leaves the private party free to do anything it chooses consistent with the prevailing federal law." (*Id.* at p. 133.) "But no such simple result would follow from federal preemption meant to unshackle local governments from entrepreneurial limitations." (*Ibid.*) The problem with freeing a state political subdivision from the State's own limiting authorities is that "the liberating preemption would come only by interposing federal authority between a State and its municipal subdivisions, which our precedents teach, 'are created as convenient agencies for exercising such of the governmental powers of the State as may be entrusted to them *in its absolute discretion*.'" (*Id.* at p. 140 [emphasis added] [quoting *Wisconsin Public Intervenor v. Mortier* (1991) 501 U.S. 597, 607-608].)

As in *Nixon*, where State law prohibited state political subdivisions from providing or offering for sale telecommunications services, the California

legislature has made plain here that PCJPB's decision-making process is subject to numerous state laws dictating its form, function, and powers, including state environmental laws such as CEQA. A finding that PCJPB's state-mandated environmental review process is preempted by ICCTA would directly "interpos[e] federal authority" between the State and PCJPB by directly overriding the State's express limitation on PCJPB's discretion. (*Nixon*, *supra*, 541 U.S. at 140.)

Here, there is no express language in the ICCTA providing that a state, such as California, may not limit the discretionary authority of a state-created agency to evaluate the environmental consequences of its actions. CEQA is among the state laws that determine the extent and character of those powers, and imposes certain procedural and substantive limitations on any discretionary approval undertaken by PCJPB, particularly those which may impact the environment. (See, e.g., Pub. Resources Code § 21080; 1 Kostka & Zischke, *supra*, § 1.19, pp. 17-18.) Here, there is no question that the PCJPB retains discretionary approval authority over the electrification Project. This discretionary approval authority remains subject to the State's own directive to comply with state environmental laws for the protection of the public. Because preemption here would directly interfere with the State's internal control of its own agency's exercise of discretion, the ICCTA does not preempt PCJPB's environmental review obligations under CEQA.

In light of the foregoing, the cases cited by PCJPB are inapplicable here. Nearly every case cited, including *City of Auburn* and *Association of American*

Railroads,[17] involves a *private* rail carrier, seeking relief against external regulation by state and local governments. PCJPB cites only two STB decisions[18] involving a publicly owned rail carrier. (See *North San Diego County Transit Development Board – Petition for Declaratory Order* (S.T.B. Aug. 19, 2002) No. FD 34111, 2002 WL 1924265.) However, that case is inapplicable here because that public agency was not seeking relief from its own internal CEQA obligations, but rather those sought to be imposed by another public entity, the City of Encinitas. (*Id.* at pp. *1-2; see also *City of Encinitas v. North San Diego County Transit Development Bd.* (S.D.Cal. 2002) 2002 WL 34681621, *4.)

Those cases are plainly distinguishable. Unlike the above cases, the State has imposed limitations on its own subsidiary agency – PCJPB – requiring it to comply with state environmental laws, including CEQA. Thus, rather than being an external regulatory barrier to development, CEQA in this case serves as an *internal* control, compelled by the state legislature, governing the procedures

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[17] In addition to *City of Auburn* and *Association of American Railroads*, PCJPB cites *Adrian & Blissfield R. Co. v. Village of Blissfield* (6th Cir. 2008) 550 F.3d 533, 535; *New Orleans & Gulf Coast Ry. Co. v. Barrois* (5th Cir. 2008) 533 F.3d 321, 325-326; *Green Mountain R.R. Corp. v. Vermont* (2d Cir. 2005) 404 F.3d 638, 640; *CSX Transp., Inc. v. Georgia Public Service Com'n* (N.D.Ga. 1996) 944 F.Supp. 1573, 1575; *People v. Burlington Northern Santa Fe R.R.* (2012) 209 Cal.App.4th 1513, 1516; *Jones v. Union Pacific Railroad* (2000) 79 Cal.App.4th 1053, 1056; *DesertXpress Enterprises, LLC – Petition for Declaratory Order* (S.T.B. June 25, 2007) No. FD 34914, 2007 WL 1833521; and *Joint Petition for Declaratory Order – Boston and Maine Corporation and Town of Ayer, MA* (S.T.B. Apr. 30, 2001) No. FD 33971, 2001 WL 458685; all of which involve private rail carriers seeking relief from state and local regulation.

[18] The STB's decision preempting CEQA for the state's high-speed rail project is currently under judicial review. (Kings County et al. v. Surface Transportation Bd. et.al., 9th Cir. 2015, case no. 15-70386.)

under which PCJPB may take discretionary action that affects the environment. In its Petition, PCJPB invokes federal preemption as grounds to avoid state law that limits the exercise of its discretion. No such relief is available here, because PCJPB cannot escape the fact it is an agency of the State, subject to the State's self-imposed internal controls, and not a private rail carrier.

In short, nothing in the ICCTA purports to intrude upon California's sovereignty. Here, where the ICCTA does not even provide for STB jurisdiction over the operation of PCJPB's commuter rail operations, even less does it allow the STB to intrude upon the internal controls and limitations the State has placed upon PCJPB, its own subsidiary agency, requiring PCJPB to comply with state environmental laws, including CEQA, without unconstitutionally interfering with the State of California's sovereign authority. Accordingly, PCJPB's environmental review obligations under CEQA are not preempted by the ICCTA.

V. EVEN IF NEITHER THE MARKET PARTICIPANT EXCEPTION NOR THE TENTH AMENDMENT APPLY TO ICCTA PREEMPTION, CEQA IS STILL NOT PREEMPTED.

A. FEDERAL PREEMPTION UNDER THE ICCTA ONLY OCCURS IF THE FEDERAL, STATE, OR LOCAL LAW OR REGULATION INTERFERES WITH THE STB'S REGULATION OF RAIL TRANSPORTATION

While the ICCTA's preemption clause (49 U.S.C. §10501(b)) appears very broad, preempting remedies provided under Federal or State law with respect to regulation of rail transportation, nevertheless it is limited to regulations that would conflict with the STB's plenary jurisdiction over the subjects included in

subsections (1) and (2) of that clause. In *Assn. of Am. Railroads, supra*, the Ninth Circuit Court of Appeal held that such preemption only applies when the challenged law or regulation imposes an unreasonable burden on interstate commerce. (*Id.* at 1097, 1098.) This narrows the question to whether CEQA compliance, in and of itself, creates such a burden.

B. CEQA DOES NOT INTERFERE WITH THE STB'S REGULATION OF RAIL TRANSPORTATION, AND HENCE IS NOT PREEMPTED.

PCJPB point to case law that holds that the ICCTA preempts state and local permitting laws for establishing rail service, and specifically to *City of Auburn*. However, *City of Auburn* and the other cases cited by Respondents make clear that what the ICCTA preempts are state or local statutes or regulations that attempt to regulate, and thus could interfere with, rail transportation. In particular, *City of Auburn* states that even an environmental statute *may* trespass on the exclusive jurisdiction of the STB:

> 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. (Id. at 1031.)

In *City of Auburn*, local authorities had attempted to impose permit requirements on the Burlington Northern Railway's proposed reopening of Stampede Pass. (*Id*. at 1027-1028.) While these permits were apparently primarily environmental in nature, they nevertheless would have been requirements for the project to proceed, and their denial would have defeated the

project. The court therefore properly found that they were preempted by the ICCTA. Similarly, in *Green Mountain, supra,* Vermont's Act 250, a state environmental land use statute, required the railroad to obtain preconstruction permits for land development. (*Id*. at 639.) The court ruled that such permit requirements were likewise preempted by the ICCTA.

In *Assn. of Am. Railroads* , regulations approved by the South Coast Regional Air Quality District similarly were preempted under the ICCTA because they attempted to regulate air quality in connection with railroad yard operations[19] and, in doing so, attempted to manage or govern rail transportation.

In each of these cases, a public agency other than the STB was attempting to regulate, by way of issuing a permit or enacting regulations – and thereby potentially delay or reject – a rail project over which the STB had jurisdiction. Thus, for example, in *City of Auburn*, the city required the Burlington Northern Santa Fe Railroad to obtain a local land use permit. In *Green Mountain Railroad*, the State of Vermont required that private railroad company to obtain a state permit to build a train barn. In *Assn. of Am. Railroads*, the South Coast Air Quality District attempted to issue regulations to control operations at a private rail yard. In Boston and Maine Corp. and Town of Ayer, MA – Joint Petition for

[19] Subsequently, the Air District submitted the same rules to the California Air Resources Board for approval by U.S. E.P.A. and incorporation in the California's State Implementation Plan under the Clean Air Act. The District Court concluded that this action was not preempted. (*Assn. of Am. Railways v. South Coast Air Quality Mgmt. Dist ("Assn. of Am. Railways II")* (C.D. CA, 2012) Case 2:06-cv-01416-JFW-PLA, Document 269, filed 2/24/2012.

Declaratory Order, No. FD 33971, 2001 WL 458685, a town conservation commission sought to require conditions on approving a railroad project.

CEQA, by contrast, provides information and direction, but not necessarily coercion. It serves as an "environmental alarm bell" to alert governmental officials, and the public, to a project's potential environmental impacts and to inform public officials and the public of ways in which significant impacts might be mitigated or avoided. (*Sierra Club v. State Bd. of Forestry ("Sierra Club I")* (1994) 7 Cal.4th 1215, 1229.)

CEQA also, and not just incidentally, provides the opportunity for the public to participate and be involved in the project approval process. Indeed, a central tenet of CEQA is that California citizens have not just the right, but the *responsibility* to contribute to the preservation and enhancement of the environment. (Public Resources Code §21000 subd. (e).) Through its comment and response process, CEQA provides California citizens the opportunity to have their voices heard by the California public agency that will make decisions about whether and how a project moves forward to approval. Because CEQA requires the public agency to go on record not only about its approval decision, but also about the reasons underlying that decision, CEQA is a statute of accountability. (*Sierra Club I, supra,* 7 Cal.4th, at 1229.)

> If CEQA is scrupulously followed, the public will know *the basis* on which its responsible officials either approve or reject environmentally significant action, and the public, being duly informed, can respond accordingly to action with which it

> disagrees.... The EIR process protects not only the environment but also informed self-government. (*Id.* [Emphasis added])

Further, CEQA does not, in itself, either approve or reject a project. Rather, analysis of a project under CEQA provides the public agency's decision makers with information that informs their decisions on the merits.[20]

> The purpose of CEQA is not to generate paper, but to compel government at all levels to make decisions with environmental consequences in mind. *CEQA does not, indeed cannot, guarantee that these decisions will always be those which favor environmental considerations.* (*Laurel Heights I, supra,* 47 Cal.3d at 393 [emphasis added; quoting from *Bozung v. Local Agency Formation Com*. (1975) 13 Cal.3d 263, 283].)

Indeed, CEQA allows an agency to approve a project in spite of its having significant and unavoidable environmental impacts. The only requirement on granting such an approval is that the agency, in approving the project, adopt a statement of overriding considerations ("SOC") that explains to the public the agency's rationale for approving the project in spite of its impacts.[21] (Public

[20]PCJPB cites to the STB's order in DesertXpress Enterprises, LLC – Petition for Declaratory Order, No. FD34914, 2007 WL 1833521 (STB June 25, 2007) as indicating that CEQA compliance is generally preempted for rail projects. (Petition at p. 7.) Not so. That ruling is distinguishable in that DesertXpress was a private rail carrier seeking regulatory approval for its application. CEQA compliance was an adjunct to that regulatory approval, and was therefore subsumed within the more general preemption of that state regulatory control of a private railroad. Similarly, in *North San Diego County Transit Development Board – Petition for Declaratory Order, supra,* CEQA compliance would have been in the context of the agency's applying for a state Coastal Act permit from the City of Encinitas. Since the permit requirement was preempted under the ICCTA, so was CEQA compliance.

[21] Of course, the SOC must be supported by substantial evidence. (*Sierra Club II, supra*.)

Resources Code §21081(b); *Sierra Club v. Contra Costa County ("Sierra Club II")* (1992) 10 Cal.App.4th 1212, 1222.)

PCJPB argues that CEQA contains "action-forcing" provisions that prohibit an agency from approving a project with significant environmental impacts if there are feasible mitigation measures or alternatives that would reduce or avoid the impacts. (Public Resources Code §§ 21002, 21002.1(b).) That is, indeed, an important feature of CEQA, and one that is not part of NEPA. PCJPB goes on to complain that Atherton Parties are using these provisions to coerce PCJPB into taking specific remedial actions. (Petition at pp. 8-9.) However, CEQA and its case law clarify that "feasible," as used in determining whether to approve a project, can includes legal or public policy considerations. More specifically, an alternative or mitigation measure can be found infeasible not only for technologic or economic grounds (*see, e.g., Sequoyah Hills Homeowners Assn. v. City of Oakland* (1994) 23 Cal.App.4th 704, 715), but also for legal or public policy reasons. (Public Resources Code §21081 subd. (a)(3); *Mount Shasta Bioregional Ecology Center v. County of Siskiyou* (2012) 210 Cal.App.4th 184, 198; *Rialto Citizens for Responsible Growth v. City of Rialto* (2012) 208 Cal.App.4th 899, 948; *California Native Plant Society v. City of Santa Cruz* (2009) 177 Cal.App.4th 957, 998, 1000 *et seq*.; *see also, City of Marina v. Board of Trustees of California State University* (2006) 39 Cal.4th 341, 353, 368 [CSU Trustees asserted that legal considerations made contributing to offsite mitigation measures infeasible – Supreme Court reversed, concluding that such contribution, if voluntary, was not

legally prohibited].) Legal considerations could, and indeed almost inevitably would, include if a mitigation measure or alternative would contradict or significantly delay implementation of a project as approved by the STB. This, if PCJPB had legitimately brought its proposal before the STB and sought STB approval, it could have legitimately asserted that any mitigation measure or alternative that would conflict with the STB-approved project was legally infeasible.

In short, CEQA, unlike federal, state, or local statutes or regulations that could be used to defeat a rail project, does not stand in the way of approving a project consistent with the STB's plenary jurisdiction.[22] All it requires is that, before granting such an approval, the agency considering the approval have adequate information about the project, its potential environmental impacts, and how those impacts might be avoided or mitigated. The agency, upon consideration of the restrictions on feasible mitigation measures and alternatives related to STB's plenary jurisdiction over the project and upon issuance of an appropriate SOC, could then approve the project regardless of the severity of the legally unavoidable impacts it might cause. In this respect, it differs fundamentally from the statutes at issue in, for example, *City of Auburn* and *Green*

[22] Depending on the complexity of a project, there may be a certain amount of delay involved in doing the necessary environmental review. However, CEQA review is usually coterminous with NEPA review, which is not preempted by the ICCTA. The delay often complained about under CEQA, like that under NEPA, is most often due to claims that the review was not done properly. A rigorous review will generally eliminate or greatly reduce the risk and associated delay of litigation.

Mountain, and the regulation involved in *Assn. of Am. Railroads*. Consequently, CEQA compliance is not preempted by ICCTA's §10501.[23]

CONCLUSION

There are multiple reasons why PCJPB's Petition is ill advised and improper. This preliminary reply lays out some of those that Atherton Parties feel are most cogent and compelling, but Atherton Parties urge the Board to also consider carefully the arguments raised by other Petition opponents. In the final analysis, and hopefully after the Atherton Parties have been granted their due process right to submit a supplemental reply, Atherton Parties respectfully request that the STB deny PCJPB's Petition.

Dated: June 8, 2015

Respectfully submitted,

/S/ Stuart M. Flashman

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[23] It should be noted that NEPA, like CEQA and unlike, for example, the Clean Air Act, is primarily an informational, rather than an action-forcing, statute. Thus NEPA is likewise not preempted by the ICCTA. This is expressly shown by the fact that the STB relied upon the NEPA analysis done by the Federal Railroad Administration in making its determinations on the high-speed train application before it. (*See*, California High-Speed Rail Authority--Construction Exemption--in Merced, Madera and Fresno Counties, Cal. ("CHSRA-STB1) (STB, June 13, 2013, No. FD35724) 2013 STB Lexis 180.

SURFACE TRANSPORTATION BOARD
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VERIFICATION

I, Stuart M. Flashman, verify under penalty of perjury that the factual statements made in the foregoing Preliminary Reply and Request for Extension 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 June 8, 2015

/S/ Stuart M. Flashman
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CERTIFICATE OF SERVICE

I hereby certify that the foregoing Preliminary Reply and Request for Extension in response to Petition for Declaratory Order was served on the 8th day of June, 2015 by electronic mail, on the following parties:

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