

January 16, 2015

VIA FEDERAL EXPRESS

Chief Justice Tani Cantil-Sakauye
and Associate Justices
California Supreme Court
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Re: *Union Pacific Railroad v. Santa Fe Pacific Pipelines*
Case Number S223179
Amici Curiae Letter in Support of Review
(Cal. Rules of Court, rule 8.500(g))

Dear Chief Justice Cantil-Sakauye and Associate Justices:

Under California Rules of Court, rule 8.500(b)¹, the Chamber of Commerce of the United States of America and the Los Angeles Area Chamber of Commerce respectfully requests that this Court grant review in this case.

For over 60 years, Union Pacific Railroad Company has granted subsurface easements on its rights-of-way for pipelines conveying oil, gas, and other petroleum products across the western United States. (Typed opn. 2.) In the intervening years there have been numerous lawsuits and appeals involving the easement agreements between Union Pacific and the pipeline companies. (*Ibid.*) But there has never previously been any suggestion that Union Pacific could not permit its rights-of-way to be used in such a manner. Indeed, the relevant guidelines published by the United States Department of Interior and Bureau of Land Management confirm that Union Pacific has been well within its rights to lease its subsurface rights-of-way for pipelines under the General Railroad Right-of-Way Act of March 3, 1875. (PFR 7, 14-15.) Contrary to the relevant federal regulations, however, the Court of Appeal here has held, in a published opinion, that Union Pacific may *not* grant easements for pipelines on its rights-of-way by virtue of the federal government's initial conveyance of those

¹ We wish to advise this Court that Union Pacific is a current client of Horvitz & Levy LLP, but only the named represented amici curiae have retained Horvitz & Levy LLP to prepare this brief. Neither Union Pacific, its affiliates, nor any other party in this case has retained or paid Horvitz & Levy LLP for its work on this brief.

rights-of-way to Union Pacific. (Typed opn. 79.) The Court of Appeal decided that question even though the parties never raised the issue of Union Pacific's authority to use its rights-of-way to grant easements—either in the trial court below or in their main Court of Appeal briefing. (See PFR 5-6.)

As we explain in greater detail below, review by this Court is essential to ensure the predictable enforcement of contracts governing the use of railroad subsurface rights-of-way under the 1875 Right-of-Way Act by pipeline and fiber optic cable companies that provide essential services for our local, state, and national economy.

INTEREST OF AMICI CURIAE

The Chamber of Commerce of the United States of America is the world's largest business federation, representing 300,000 direct members and indirectly representing the interests of more than three million businesses and professional organizations of every size. The Chamber has many members located in California and others who conduct substantial business in the state. The Chamber routinely advocates for the interests of the business community in courts across the nation by filing amicus curiae briefs in cases implicating issues of vital concern to the nation's business community.

The U.S. Chamber's membership includes railroad companies that lease subsurface rights-of-way as well as businesses that lease and sublease such rights, including utilities, pipeline companies and telecommunications companies. The U.S. Chamber believes that the decision below has created significant uncertainty for businesses that both grant and use railroad rights-of-way. These business relationships contribute to the economic wellbeing of the country by facilitating the intra and interstate delivery of fuel and transmission of information. The uncertainty created by the lower court's decision threatens to disrupt longstanding energy and telecommunications investments, and to undermine the viability of in-progress and future projects.

The mission of the Los Angeles Area Chamber of Commerce is to improve the economic prosperity and quality of life of the Los Angeles region. The Los Angeles Area Chamber is the largest and oldest chamber of commerce in Los Angeles County and has helped build the Los Angeles area's water system, freeways, port, transit system, among other projects.

LEGAL ARGUMENT

A. Review should be granted because the Court of Appeal disrupted the predictable interpretation and enforcement of contracts involving the title to railroad rights-of-way.

This Court has acknowledged “the importance of predictability in assuring commercial stability in contractual dealings.” (*Freeman & Mills, Inc. v. Belcher Oil Co.* (1995) 11 Cal.4th 85, 98; see also *Erlich v. Menezes* (1999) 21 Cal.4th 543, 561 [noting importance of role of courts in ensuring “stability and predictability in commercial affairs”]; *Nedlloyd Lines B.V. v. Superior Court* (1992) 3 Cal.4th 459, 494 (conc. & dis. opn. of Kennard, J.) [“Parties enter into contracts to allocate risks and to bring certainty, order, and predictability to their mutual relations. One of the principal aims of contract law is to assist contracting parties in achieving this objective by making the outcome of legal disputes clear and predictable”]; *Harris v. Atlantic Richfield Co.* (1993) 14 Cal.App.4th 70, 81 [“predictability of the consequences of actions related to contracts is important to commercial stability”].)

The United States Supreme Court recently emphasized “ ‘the special need for certainty and predictability where land titles are concerned’ ” in a case construing the rights granted to a railroad in its rights-of-way. (*Marvin M. Brandt Revocable Trust v. U.S.* (2014) 134 S.Ct. 1257, 1268 [188 L.Ed.2d 272].) Indeed, the Supreme Court has “traditionally recognized the special need for certainty and predictability where land titles are concerned.” (*Leo Sheep Co. v. U. S.* (1979) 440 U.S. 668, 687 [99 S.Ct. 1403, 59 L.Ed.2d 677].)

“[F]or over a century, the railroads have been granting rights to utility companies to string cables and run pipelines in their corridors. Ever since the telegraph was invented, rails and wires have moved together across the country, the railroad dependent on the telegraph for communication to upcoming stations and switches, and the telegraph dependent on the railroad’s corridor for placement of its poles and wires.” (Wright & Hester, *Pipes, Wires, and Bicycles: Rails-to-Trails, Utility Licenses, and the Shifting Scope of Railroad Easements from the Nineteenth to the Twenty-First Centuries* (2000) 27 Ecology L.Q. 351, 359.) In recent years, fiber optic cables have also been installed in railroad rights-of-way. (See Ely & Bruce, *The Law of Easements & Licenses in Land* (2014) § 8:5.)

The Court of Appeal here upset settled expectations regarding the title to railroad rights-of-way by holding that railroads cannot enter into contracts for the use

of their rights-of-way, in direct conflict with the longstanding views of the United States Department of the Interior that railroads enjoy exclusive rights to both the surface and subsurface of the rights-of-way. (See Mem. Op. M-37025 (2011) p. 12 & fn. 26; BLM Instruction Memorandum No. 2014-122, § E (Aug. 11, 2014); see also PFR 7, 14-15, 25-26.) American businesses depend on the predictable enforcement of contracts, especially those relating to title to land. Review is necessary to ensure that railroad rights-of-way are subject to uniform interpretation.

B. Review is necessary to protect the economic benefits derived from the use of the railroad rights-of-way.

The type of contract at issue here is uniquely important to the local, state, and national economy, because railroad rights-of-way that have traditionally been used for pipelines are increasingly being used also to support the telecommunications industry. The Court of Appeal's decision threatens to undermine the economic benefits that contracts for pipeline and telecommunication easements along such rights-of-way have historically provided and promise to deliver in the future.

Pipelines in railroad rights-of-way have provided and will continue to provide significant benefits to society. "Pipelines remain the principal mode for transporting crude oil, refined products and natural gas. In 2013, pipelines carried nearly 15 billion barrels of crude oil, petroleum products and natural gas liquids to their destinations reliably and safely more than 99.999 percent of the time. Though nearly 12,000 miles of new crude oil and 11,000 miles of new natural gas liquids pipelines have been constructed during the last 10 years, much more is needed to transport the high volumes of crude oil, natural gas and natural gas liquids being produced to refineries and chemicals plants where they can be made into the fuels and raw materials consumers rely on each day." (Energy Tomorrow, American Petroleum Institute, at p. 25, (2015) <<http://goo.gl/eIGcDO>>.)

But railroad rights-of-way are not only used for pipelines, they are also particularly "good paths for telecommunications cable because they offer cleared, linear routes." (Tanner, *New Life for Old Railroads; What Better Place to Lay Miles of Fiber Optic Cable*, N. Y. Times (May 6, 2000) <<http://goo.gl/1yCK1O>>; see also Wright & Hester, *supra*, 27 Ecology L.Q. at p. 353 ["One quick and easy solution has been to locate fiber-optic cables in railroad corridors where disruptions and licensing costs are minimal"]; *Hynek v. MCI World Communications, Inc.* (N.D.Ind. 2002) 202 F.Supp.2d 831, 838 ["For many years the railroad has played a vital role in many areas including: transportation, communication, gas and electric and many other public needs.

[Citation.] It is well worth noting that the entire public, including the servient landowners, are benefitted by the installation of the fiber optic cables. Among those benefits are: ‘increased 911 services, emergency communications and linkages, clear and inexpensive long distance services and lower local telephone rates made possible by competition among providers.’ [Citation.] These policy considerations lend further weight to an expansive definition of the rights bestowed upon a railroad's interest in an easement for railroad purposes consistent with the case law and statutes discussed above.”.]

“Reliable high-speed transmission of telecommunications is more than a convenience to our modern society—it is essential to the transaction of public and private business including national defense.” (*Williams Telecommunications Co. v. Gragg* (1988) 242 Kan. 675, 682 [750 P.2d 398, 403].) “The invention of fiber-optic cable has resulted in a myriad of benefits for consumers. In addition to improving the quality of long-distance and cellular communication, fiber-optic technology has provided more efficient Internet access and is leading to significant advances in the visual entertainment industry.” (Note, *Balancing Private Property Rights with Public Interests: Compensating Landowners for the Use of Railroad Corridors for Fiber-Optic Technology* (2000) 84 Minn. L.Rev. 1769, 1769.)

Indeed, the use of railroad rights-of-way by telecommunication companies “contributes to the generation of billions of dollars in revenue annually.” (Ackerson, *Right-of-way Rights, Wrongs and Remedies: Status Report, Emerging Issues, and Opportunities* (2003) 8 Drake J. Agric. L. 177, 178.) Schools, fire departments, police departments, and numerous small businesses across the country benefit from the expanded use of railroad rights-of-way for broadband telecommunications and Internet connectivity. (*Id.* at p. 194.)

“Historically, railway and telegraph companies often formed symbiotic alliances because of the numerous benefits the arrangement afforded to both industries. Many of the same benefits enjoyed by the telegraph companies by association with the railroads, including availability of the rights-of-way, routing considerations, relative ease of acquisition, security, accessibility, and safety, were found to be of equal or greater value to modern long distance companies, and it was determined that fiber-optic cables would be placed within railroad rights-of-way. As one study concluded, ‘Railroad rights-of-way provided the foundation for the earliest nation-wide telecommunications service, the telegraph; so why not the latest?’ ” (*International Paper Co. v. MCI Worldcom Network Services, Inc.* (W.D.Ark. 2002) 202 F.Supp.2d 895, 898; see also Wright & Hester, *supra*, 27 Ecology L.Q. at p. 463 [“If a horse and buggy

trail can be converted into a road for automobile traffic, then a fiber-optic cable ought to be permitted in a rail corridor where the mail was originally carried from town to town”].)

The Court of Appeal’s decision threatens the continuing use of railroad rights-of-way for pipelines and telecommunications, each of which deliver tremendous economic and social benefits. Review therefore should be granted to help protect the present and future development of the local, state, and national economy.

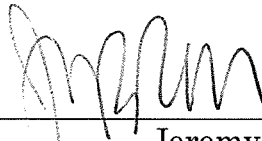
CONCLUSION

For the reasons set forth in the Petition for Review and in this letter, this Court should grant review.

Respectfully submitted,

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By: _____



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**CHAMBER OF COMMERCE OF THE
UNITED STATES OF AMERICA and LOS
ANGELES AREA CHAMBER OF
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PROOF OF SERVICE

STATE OF CALIFORNIA, COUNTY OF LOS ANGELES

At the time of service, I was over 18 years of age and not a party to this action. I am employed in the County of Los Angeles, State of California. My business address is 15760 Ventura Boulevard, 18th Floor, Encino, California 91436-3000.

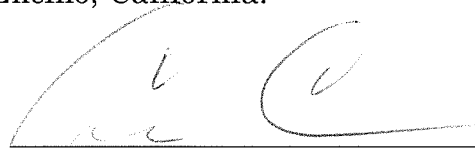
On January 16, 2015, I served true copies of the following document(s) described as on the interested parties in this action as follows:

SEE ATTACHED SERVICE LIST

BY MAIL: I enclosed the document(s) in a sealed envelope or package addressed to the persons at the addresses listed in the Service List and placed the envelope for collection and mailing, following our ordinary business practices. I am readily familiar with Horvitz & Levy LLP's practice for collecting and processing correspondence for mailing. On the same day that the correspondence is placed for collection and mailing, it is deposited in the ordinary course of business with the United States Postal Service, in a sealed envelope with postage fully prepaid.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Executed on January 16, 2015, at Encino, California.



Connie Christopher

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