

THE BOND BUYER

Brightline wants more time to issue next bond deal

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The owners of Florida's Brightline passenger train system have requested more time to issue \$1.15 billion of bonds, a federal agency said Wednesday.

Brightline, to be rebranded next year as Virgin Trains USA, will also face a new legal challenge from a small county on Florida's east coast.

Brightline currently has until Dec. 31 to issue tax-exempt private activity bonds to finance portions of its 169-mile second phase from West Palm Beach to Orlando, according to its allocation from the U.S. Department of Transportation.

The company has requested that the USDOT give it more time to sell the bonds, Marianne McInerney, the agency's director of public affairs, told The Bond Buyer Wednesday.

The committee that reviews PAB allocations will consider Brightline's extension request at its meeting next week, she said.

On Tuesday, the Indian River County Commission voted 5-0 for the law firm of Murphy & Walker PL to file a complaint asking a judge to determine if the private owners of the train company can benefit from the county's 32 at-grade highway crossing agreements with Florida East Coast Railway.

If a court rules in the county's favor, it could add millions to the cost of the passenger train project.

The USDOT allocated the PABs a year ago, ordering the company to issue the bonds by May 31. At the time, Brightline said it was still considering several financing methods, including a low-interest loan from the Federal Railroad Administration. A federal lawsuit challenging the bonds was also pending.

Now another legal dispute is brewing over who funds highway crossing improvements recommended by federal agencies that reviewed the passenger train project.

Brightline approached Indian River County in 2013 asking that the FERC agreements be amended to make the company, then known as All Aboard Florida, a third-party beneficiary. Brightline has agreements to use FERC railroad lines.

The county refused to amend the agreements, County Attorney Dylan Reingold told commissioners Tuesday, but the company must make capital improvements at crossings to support its higher-speed intercity passenger trains.

“It’s become clear that Brightline believes that they can force the county to pay for the installation and the maintenance of the safety improvements at the crossings that are needed for their project,” Reingold said.

Murphy & Walker, the law firm that has conducted legal research for a potential suit since mid-November, indicates that “absent the amendments to the FERC agreements Brightline cannot pass its railroad crossing maintenance and installation costs on to the county,” he said, adding that the county’s complaint will be filed as soon as it is prepared.

A declaratory judgment would define the terms of the crossing agreements, although he said the extent to which Brightline would be affected by a ruling for the county isn’t clear.

“I am not sure how it will impact the ability of the train to travel through Indian River County,” Reingold told The Bond Buyer. “However, it may be an issue that needs to be disclosed by Brightline.”

Brightline didn’t immediately respond to a request for comment about the new litigation. It has declined to comment on legal matters in the past.

Indian River County has estimated it would cost it \$8.2 million over 30 years to maintain Brightline’s safety improvements, Reingold told the House Committee on Oversight and Government Reform’s Subcommittee on Government Operations in April. The crossing agreements are in perpetuity.

The county, which has 146,000 residents, won’t be able to limit taxpayers’ costs because the county has no control over the costs, he said.

Reingold also told the committee that the county opposes the higher-speed passenger train “because it is not safe and because All Aboard Florida is seeking to pay its bills with taxpayer dollars from the pockets of our constituents.”

“This is not OK,” he added.

Indian River County’s new legal move comes as a federal judge considers motions in the county’s suit seeking to block Brightline from issuing the \$1.15 billion of PABs.

U.S. District Court Judge Christopher Cooper heard oral arguments Nov. 21 in the case, and is considering motions for summary judgment filed by Indian River County, AAF Holdings, and the USDOT.

Cooper said he will issue a ruling by Dec. 31.

In its motion for summary judgment in the federal lawsuit, Indian River County said the USDOT’s allocation of \$1.15 billion of PABs should be vacated and annulled.

The county contends that the bond approval violated the National Environmental Policy Act, or NEPA, because the USDOT didn’t take a hard look at relevant environmental issues, failed to evaluate and mitigate reasonably foreseeable significant adverse impacts on the human environment, and that the passenger train didn’t qualify for PABs under the Internal Revenue Code.

The IRC defines only passenger railway projects that are entitled to issue PABs as “high-speed intercity rail facilities” that reach 150 mph. Brightline plans to run 32 passenger trains daily along the east coast portion of the corridor at speeds up to 110 mph, the county’s motion said.

“These trains would hurtle non-stop through Indian River County for a distance of 21 miles at an average speed of 106.6 mph, crossing 32 roadways at-grade,” said the motion, describing many crossings as running through “densely populated urban centers.”

The county also contended that Brightline didn’t qualify for the PABs under any of the 15 categories listed in Section 142 of the code.

In its motion for summary judgment, the USDOT said the court should deny Indian River County’s pleadings.

“The purpose of Section 142(m) is to provide tax-exempt financing to projects that meet its eligibility requirements, not to protect against the environmental and other effects of projects that purportedly do not meet the requirements,” the USDOT’s motion said.

The agency said it properly determined that the Brightline project is a “surface transportation project” that receives federal funding assistance under Title 23 of the U.S. Code.

“DOT reasonably interpreted its PAB allocation authority to include any surface transportation project that receives Title 23 funding, including rail projects, and to allow an allocation to an entire project, even if only a portion of the project receives Title 23 funding,” the agency said.

While the agency said that the Florida Department of Transportation spent millions in federal Title 23 funds to improve railway-highway grade crossings along the Phase 2 corridor, Indian River County said All Aboard Florida stated in its PAB application that the funds were spent on Florida East Coast Railway corridor improvements and FECR is a separate company.

The USDOT also said the environmental review process was “comprehensive and thorough,” as demonstrated by the FRA’s environmental impact statement and subsequent “record of decision” finding that the project had no significant impact.

“FRA carefully considered and addressed all reasonably foreseeable environmental and safety impacts of the proposed project and a reasonable range of alternatives, and thus fully complied with NEPA,” USDOT’s motion said.

If Cooper rules for Indian River County, as he did in a previous case involving the county that was dismissed before a final ruling, his decision would be precedent-setting because it would mean for the first time that future PAB bond allocations by USDOT must be reviewed in the federal environmental permitting process under NEPA. Most major transportation projects go through the NEPA process.

If the federal court rules for the USDOT, Brightline would be clear to issue the PABs free of that litigation, although the new suit planned by Indian River County likely would be pending. The bonds would be issued through the Florida Development Finance Corp.

Brightline could also see new regulations imposed next year by Florida lawmakers.

Sen. Debbie Mayfield, a Republican whose district includes Indian River County, is expected to file a bill for the 2019 session governing high-speed rail safety.

Mayfield filed bills in 2017 and 2018 that would have created minimum safety standards and inspections for projects such as Brightline, but both measures died in committee.

The Legislature this year appropriated funds for a comprehensive review of passenger rail operations and regulations.

The Office of Program Policy Analysis and Government Accountability released the Florida Passenger Rail System Study in early November, which found that neither the FRA or Florida Department of Transportation have regulations specific to “higher-speed rail” passenger trains that run at speeds between 81 mph and 125 mph.

The study recommended that the state clarify FDOT’s mandate concerning oversight of passenger rail with respect to maintenance, safety, revitalization, and expansion.