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By Email

Cynthia T. Brown, Chief
Section of Administration, Office of Proceedings
Surface Transportation Board
395 E. Street, SW
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Re: Finance Docket No, 36488, *DesertXpress Enterprises, LLC – Authority to Construct and Operate – Petition for Exemption from 49 U.S.C. § 10901 – Passenger Rail Line Between Victorville, CA and Rancho Cucamonga, CA*

Dear Ms. Brown:

Two days after the May 3, 2021 due date for public comments regarding the Petition for Exemption filed by DesertXpress Enterprises, LLC (“DXE”) in this proceeding had passed, the San Manuel Band of Mission Indians (“SMBMI”) filed an untimely request for an extension of that deadline. SMBMI fails to explain why it did not seek an extension prior to the filing deadline, as required by the Board’s regulations, nor does it otherwise articulate “good cause” for granting an extension. As discussed below, extending the comment period at this late date would prejudice DesertXpress. Therefore, DXE respectfully requests that the Board deny SMBMI’s extension request.

As the STB’s regulations make clear, “[d]ocuments must be received for filing within the time limits set for filing.” 49 C.F.R. § 1104.6. The regulations give interested parties an opportunity to file a reply to a petition for exemption “within 20 days after the pleading is filed with the Board.” 49 C.F.R. § 1104.13(a). While the Board may grant an extension of the 20-day reply period “for good cause,” the regulations explicitly require that “[a] request for an extension must be filed not less than 10 days before the due date.” 49 C.F.R. § 1104.7(b) (emphasis added). The obvious purpose of that requirement is to afford the Board time to review (and other parties time to respond to) an extension request *before* the applicable filing deadline expires.

SMBMI's request flouts these longstanding Board requirements. DXE filed its Petition for Exemption on April 13, 2021. Accordingly, SMBMI's reply to the Petition was due on or before May 3, 2021. If SMBMI wanted an extension of that due date, it was required to request the extension on or before April 23, 2021. However, SMBMI neither complied with the 20-day deadline for filing its comments nor did it seek an extension in a timely manner. Instead, SMBMI waited until May 5, 2021 – two days *after* the deadline for submission of comments had passed – to request an extension of that (expired) deadline. The Board should not countenance such noncompliance with its procedural regulations.

Even if SMBMI's request were timely, SMBMI would have to demonstrate “good cause” that would justify granting the requested extension. SMBMI suggests two grounds for finding that “good cause” exists here. Neither has merit.

First, SMBMI claims that it was unable to file comments on the Petition for Exemption in timely fashion due to “reduced staffing and the continued reallocation of our talent due to COVID-19.” (SMBMI Letter at 1.) That assertion is belied by SMBMI's announcement – *just one day before it filed its extension request* – that it had reached an agreement to acquire the Palms Casino Resort in Las Vegas for \$650 million.¹ The timing of that announcement makes clear that SMBMI made a business decision to prioritize the casino transaction over submitting timely comments in this proceeding.

Second, SMBMI's May 5, 2021 letter is largely devoted to a discussion of alleged deficiencies in the Federal Railroad Administration's (“FRA's”) environmental review of the proposed high-speed passenger rail line between Las Vegas, NV and Victorville, CA that is the subject of Finance Docket No. 35544. SMBMI's concerns regarding that environmental review process should be addressed to FRA. Moreover, as DXE's Petition for Exemption (at 10) indicates, FRA (as lead agency) and the Board's Office of Environmental Analysis (“OEA”) will conduct an environmental review of the construction project at issue in this proceeding. SMBMI will, of course, have the opportunity to participate in that review process.

Granting the requested extension would prejudice DXE by inflicting yet another delay on a project that will promote the public interest by improving transportation options and combatting climate change. Unwarranted delay will not serve those important public interest objectives – to the contrary, it will result in increased costs and complicate project financing. As DXE has repeatedly stated, time is of the essence for this project.

Last week, the CEO of DXE's parent, Brightline Holdings, testified before a subcommittee of the House Committee on Transportation and Infrastructure regarding the benefits and challenges

¹ See <https://www.sbsun.com/2021/05/04/san-manuel-band-of-mission-indians-plans-to-acquire-the-palms-in-las-vegas/>.

SIDLEY

Cynthia T. Brown
Page 3

of High-Speed Rail and Emerging Rail Technologies. The many panelists and Members of Congress who participated in the hearing were united in their belief that America needs to take action *now* to catch up with the rest of the world when it comes to environmentally friendly, multi-modal transportation infrastructure. It was made very clear that regulatory delay is a serious threat to achieving that goal. President Biden has declared that revitalizing the transportation landscape in America is not only a desire, but a necessity. Through his America Jobs Plan, President Biden proposes to “create millions of good jobs, rebuild our country’s infrastructure, and position the United States to out-compete China.” But private initiatives (like the proposed DXE Line) to revitalize the nation’s passenger rail infrastructure will succeed only if the Federal government supports those efforts by establishing – and adhering to – review processes and timelines that minimize unnecessary delay and uncertainty.

Government deadlines in connection with important infrastructure projects are not “optional.” For example, responses to procurement bids and grant applications are dismissed if they are not filed by the deadline prescribed in the governing regulations. Granting an extension where, as here, the requesting party waited until after the comment period established by the Board’s regulations had expired would set a poor precedent for future proceedings before the Board in connection with important rail construction projects.

As the United States faces the threat of climate change, Americans are realizing the powerful impact that a state-of-the art 21st Century transportation system with a variety of mobility choices can have in creating a stronger economic future and fostering greater equality. DXE’s proposed high-speed passenger rail service will promote those important policy objectives and help put America back on top when it comes to world-class rail infrastructure. The STB should administer its regulatory oversight of such projects in a manner that avoids unwarranted delays by adhering to its well-established procedural deadlines in the absence of a compelling reason to depart from those requirements.

For the foregoing reasons, DXE respectfully urges the Board to deny SMBMI’s request for an extension.

Sincerely,



Terence M. Hynes
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Attorneys for DesertXpress Enterprises, LLC

TMH: Parties of Record