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March 27, 2019

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By Hand Delivery

Cynthia T. Brown, Chief
Section of Administration
Office of Proceedings
Surface Transportation Board
395 E Street, SW
Washington, D.C. 20423-0001

ENTERED
Office of Proceedings
March 27, 2019
Part of
Public Record

Re: Finance Docket No. 35544, *DesertXpress Enterprises, LLC and DesertXpress HSR Corporation – Construction and Operation Exemption – In Victorville, Cal. and Las Vegas, Nev.*

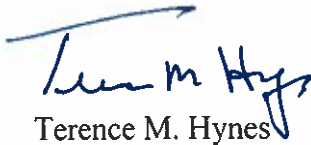
Dear Ms. Brown:

Enclosed for filing in the above-captioned proceeding are an original and ten (10) copies of a Petition to Reopen. Also enclosed is a check in the amount of Three Hundred Dollars (\$300.00) in payment of the required filing fee. Please return one date-stamped copy of the Petition with our messenger.

Thank you for your assistance.

FEE RECEIVED
March 27, 2019
SURFACE
TRANSPORTATION BOARD

Sincerely,


Terence M. Hynes

cc: Parties of Record

TMH:mdm

Enclosures

FILED
March 27, 2019
SURFACE
TRANSPORTATION BOARD



**BEFORE THE
SURFACE TRANSPORTATION BOARD**

Finance Docket No. 35544

**DESERTXPRESS ENTERPRISES, LLC AND DESERTXPRESS HSR
CORPORATION—CONSTRUCTION AND OPERATION EXEMPTION—IN
VICTORVILLE, CAL. AND LAS VEGAS, NEV.**

PETITION TO REOPEN

**Terence M. Hynes
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(202) 736-8711 (fax)**

Attorneys for DesertXpress Enterprises, LLC

Dated: March 27, 2019

**BEFORE THE
SURFACE TRANSPORTATION BOARD**

Finance Docket No. 35544

**DESERTXPRESS ENTERPRISES, LLC AND DESERTXPRESS HSR
CORPORATION—CONSTRUCTION AND OPERATION EXEMPTION—IN
VICTORVILLE, CAL. AND LAS VEGAS, NEV.**

PETITION TO REOPEN

Pursuant to 49 U.S.C. § 1322(c) and 49 C.F.R. § 1115.4, DesertXpress Enterprises, LLC, d/b/a/ XpressWest (“DesertXpress”) petitions the Board to reopen the above-captioned proceeding for the purpose of modifying, on the basis of changed circumstances, the condition imposed in the Board’s prior decision requiring DesertXpress to construct its proposed high-speed passenger rail line along the alignment identified as the “Selected Alternative” in the Record of Decision issued by the Federal Railroad Administration (“FRA”) on July 8, 2011 (the “ROD”).

I. BACKGROUND.

In *DesertXpress Enterprises, LLC and DesertXpress HSR Corp.—Construction and Operation Exemption—In Victorville, Cal. And Las Vegas, Nev.*, STB Docket No. 35544 (STB served Oct. 25, 2011) (the “2011 Decision”), the Board exempted from the prior approval requirements of 49 U.S.C. § 10901 DesertXpress’ proposal to construct and operate a high-speed passenger rail line between Victorville, CA and Las

Vegas, NV (the “Line”). The Board found that DesertXpress’ proposal would “provid[e] additional transportation options and alleviat[e] automobile congestion on the I-15 freeway, while also reducing air pollution and overall fuel consumption.” *2011 Decision* at 3. The Board noted further that the Line “will alleviate constraints on the expansion of air travel in Southern California and is expected to have a projected multi-billion dollar beneficial impact on the economies of both Nevada and California.” *Id.* Based on these findings with respect to the transportation merits of the Line, the Board concluded that regulation of the project was not necessary to carry out the rail transportation policy or to protect shippers from an abuse of market power. *Id.* at 3-4.

The Line was the subject of “a thorough NEPA review.” *Id.* at 4. FRA served as lead agency, while the Board, through its Office of Environmental Analysis (“OEA”), participated as a cooperating agency. *Id.* Other Federal and State governmental agencies, including the Bureau of Land Management (“BLM”), Federal Highway Administration, Federal Aviation Administration, Environmental Protection Agency, National Park Service, U.S. Fish and Wildlife Service, U.S. Army Corps of Engineers, Advisory Council on Historic Preservation, Native American Heritage Commission, and the Departments of Transportation and Offices of Historic Preservation of both California and Nevada, participated actively in the NEPA process. *Id.* at 5, n.8.

FRA’s NEPA review of the DesertXpress project took more than five years to complete. FRA issued a Draft Environmental Impact Statement (“DEIS”) in March of 2009, a Supplemental Draft EIS in August of 2010, and a Final EIS (“FEIS”) in October of 2010. *Id.* at 5. As a cooperating agency, “the Board provided its

expertise in rail transportation and independently assessed the environmental analysis to ensure that the Board met its NEPA responsibilities.” *Id.*

Based on this comprehensive environmental review process, FRA issued a ROD approving the project on July 8, 2011. The ROD identified an alignment generally running along the north/west side of the I-15 corridor as the “Selected Alternative” among several options studied in the FEIS. The ROD imposed 146 mitigation measures designed to avoid or minimize potential adverse environmental impacts of constructing and operating the Line. *Id.*

In the *2011 Decision*, the Board concluded:

“After considering the entire record on both the transportation and the environmental issues, we are granting [DesertXpress] petition for exemption, subject to environmental conditions and the condition that [DesertXpress] build the route designated below [i.e., the route specified in the ROD].” *2011 Decision* at 1 (emphasis added).

In the years following the issuance of the ROD and the *2011 Decision*, DesertXpress was actively engaged in development and planning for construction of the Line. Among other things, DesertXpress obtained a right-of-way grant from BLM permitting it to construct a majority of the Line on federal land. DesertXpress engaged in negotiations with the States of California and Nevada for the right to use state-owned property to complete the route. DesertXpress also obtained certain other required federal and state permits and approvals, and pursued financing to construct the project.

Ultimately, DesertXpress' original owners decided that a sale of the company would best promote completion of the project. On September 17, 2018, DesertXpress' ownership group entered into an agreement to sell a 100% membership interest in the company to Virgin Trains US LLC (formerly Brightline Holdings LLC) ("Virgin Trains"), an affiliate of Fortress Investment Group LLC.¹ The Board issued a notice of exemption relating to that transaction on October 11, 2018. *See Fortress Investment Group LLC—Continuance in Control Exemption—Central Maine & Quebec Railway US Inc., Ohio River Partners Shareholder LLC, and DesertXpress Enterprises, LLC*, STB Finance Docket No. 36225 (STB served Oct. 11, 2018). Virgin Trains' acquisition of DesertXpress was consummated on March 4, 2019.

II. THE BOARD SHOULD MODIFY THE CONDITION IN ITS 2011 DECISION REGARDING THE ALIGNMENT OF THE LINE.

The Board will reopen a decision to consider changed circumstances that materially affect the Board's initial decision. *Florida Dep't of Transp. – Acquisition Exemption – Certain Assets of CSX Transp., Inc.*, STB Docket No. 35110 at 4 (served June 22, 2011). For the reasons set forth below, the Board should reopen the 2011 *Decision* for the limited purpose of modifying the condition that requires DesertXpress to build the Line along the route designated as the "Selected Alternative" in the July 2011 ROD.

¹ A subsidiary of Virgin Trains currently operates express passenger rail service between Miami and West Palm Beach, FL.

In evaluating a potential acquisition of the DesertXpress project, Virgin Trains determined that it would be more efficient to construct the Line primarily in the median between the northbound and southbound lanes of the I-15 freeway, and to utilize a single-track configuration with passing sidings, rather than constructing a double-track railroad, for certain portions of the route. DesertXpress recognized that these proposed changes to the project would necessitate a reevaluation of certain aspects of the FEIS and ROD. DesertXpress has consulted with FRA regarding the required additional environmental review, and FRA has agreed to serve as lead agency in conducting that analysis. The Board (through OEA) has again agreed to participate as a cooperating agency. See Attachment A, Letter dated December 4, 2018 from FRA Administrator Batory to Mr. Anthony Marnell II at 1 (“FRA agrees to conduct a reevaluation and develop any other documentation required by the National Environmental Policy Act and other environmental laws. . . [m]y staff has reached out to the [STB], who has agreed to serve as a cooperating agency”).

The “I-15 median” alignment now proposed by DesertXpress was the primary option to the “side-running” alignment chosen as the Selected Alternative in the ROD. Indeed, FRA found that the I-15 median alignment would, in several respects, raise fewer environmental concerns than the side-running route. In particular, FRA noted that constructing the Line in the I-15 median would likely have less impact on archaeological resources because the median area has already been disturbed by the construction of the I-15 freeway. See ROD at 22, 26.² FRA

² See also FEIS at 3.7-30 (“Rail alignments within the I-15 freeway median would be less likely to impact resources, as freeway construction activities in the past have

also found that the I-15 median alignment would be less likely to generate adverse impacts on hydrological and biological resources. *See id.*; FEIS at 3.8-22. FRA's designation of the side-running alignment as the Selected Alternative was premised on differences in the costs of constructing and maintaining a Line in the I-15 median, and certain operational issues, rather than the environmental consequences of doing so. DesertXpress will address those issues during the course of the FRA's supplemental environmental review.³

DesertXpress' proposal to modify the Line's alignment, and FRA's decision to supplement its prior NEPA review to evaluate that proposal, constitute changed circumstances that warrant reopening and modification of the *2011 Decision*. The condition imposed by the Board in the *2011 Decision* requires DesertXpress to build the line along "the route designated below as environmentally preferable." *2011 Decision* at 1 (emphasis added). The route discussed "below" in the Board's decision was the side-running alignment located north/west of the I-15 freeway. In the event that FRA approves DesertXpress' proposal to construct the Line within the I-15 median, and modifies the ROD to adopt that alignment as the "Selected Alternative," the condition set forth in the *2011 Decision*, as written, could stand as an obstacle to constructing the Line along the newly-designated route. Accordingly, DesertXpress petitions the Board to reopen the *2011 Decision* for the limited

most likely resulted in the degradation of archaeological resources within the right-of-way.")

³ DesertXpress' proposal to utilize a single-track configuration (with passing sidings) along certain segments of the route will significantly reduce the cost of constructing the Line within the I-15 median.

purpose of modifying that condition to authorize DesertXpress to “build the route approved by FRA in its reevaluation of the ROD.”

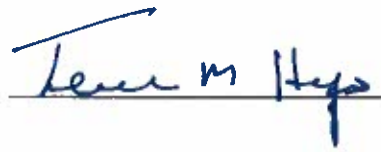
This proposed modification to the Board’s route condition will harmonize the *2011 Decision* with any modified ROD issued by FRA, and promote the apparent intent of that condition (*i.e.*, to ensure that DesertXpress builds the Line along the alignment chosen by FRA on the basis of its analysis). The Board has previously found that the FRA-led environmental review process fulfills the agency’s NEPA obligations, and OEA will again participate in that process as a cooperating agency. Therefore, it is appropriate for the Board to modify its decision to render it consistent with FRA’s modified ROD. DesertXpress will, of course, comply with any additional (or revised) conditions and mitigation measures prescribed by FRA in a modified ROD.

The Board need not revisit the *2011 Decision’s* findings with respect to the transportation merits of the Line. None of those findings would be affected by substituting the I-15 median alignment for the side-running route previously approved by FRA. The Line will still be built and operated between Victorville, CA and Las Vegas, NV. DesertXpress will provide the same safe, efficient and convenient transportation alternative, and generate the same public benefits, as those discussed in the *2011 Decision*. The Board’s 2011 findings regarding the transportation merits of the Line remain accurate today, and there exist no changed circumstances that would warrant reconsideration or modification of those findings.

CONCLUSION

For the foregoing reasons, DesertXpress respectfully requests that the Board reopen this proceeding, and modify the condition set forth in the *2011 Decision* to authorize DesertXpress to construct the route approved by FRA in its reevaluation of the ROD.

Respectfully submitted,

A handwritten signature in blue ink, appearing to read "Terence M. Hynes", is written over a horizontal line.

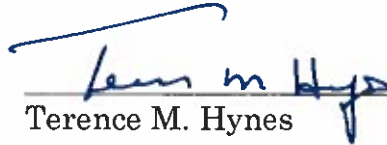
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Attorneys for DesertXpress Enterprises, LLC

Dated: March 27, 2019

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this ____ day of March 2019, I caused a copy of the foregoing Petition to Reopen to be served on all Parties of Record by first class mail, postage prepaid.


Terence M. Hynes



U.S. Department
of Transportation

**Federal Railroad
Administration**

Administrator

1200 New Jersey Avenue, SE
Washington, DC 20590

DEC 04 2018

Mr. Anthony Marnell, II
XpressWest
222 Via Marnell Way
Las Vegas, NV 89119

Dear Mr. Marnell,

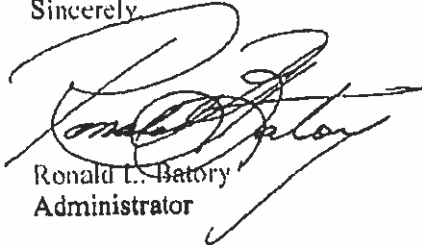
Thank you for your October 10, 2018, letter to the Federal Railroad Administration (FRA) requesting that FRA initiate a reevaluation of the Final Environmental Impact Statement (FEIS) issued in October 2010 for the XpressWest project.

FRA agrees to conduct a reevaluation and develop any other documentation required by the National Environmental Policy Act and other environmental laws including, but not limited to, Section 106 of the National Historic Preservation Act (Section 106) and Section 7 of the Endangered Species Act. FRA will work with our other Federal partners as well as the relevant State Departments of Transportation to facilitate an efficient environmental review process. In anticipation of this effort, my staff has reached out to the Surface Transportation Board (STB), who has agreed to serve as a cooperating agency.

I understand that there is general agreement to provide FRA with contractor support for any required analysis, documentation, and public outreach required for the reevaluation through the 2008 Third-party Memorandum of Understanding (MOU) among DesertXpress, LLC, FRA, STB, and CirclePoint, Inc. As such, the next step is an initial kick-off meeting among the MOU signatories to establish a scope for the reevaluation as well as to begin the development of an initial work plan and schedule. We would also like to continue to discuss potential approaches to completing the Section 106 consultation process. Ms. Stephanie Perez, FRA's Environmental Protection Specialist, will be in touch with your staff to set up a meeting in the coming weeks.

If you have any questions regarding this matter, please contact Ms. Marlys Osterhues, Chief,
FRA Environmental and Corridor Planning Division, at 202-493-0413 or
marlys.osterhues@dot.gov.

Sincerely,

A handwritten signature in black ink, appearing to read "Ronald L. Batory", is written over a circular stamp. The signature is fluid and cursive.

Ronald L. Batory
Administrator

CC: Victoria Rutson, STB
Kenneth Blodgett, STB