

**BEFORE THE
SURFACE TRANSPORTATION BOARD**

FINANCE DOCKET NO. 34914

**REPLY OF DESERTXPRESS ENTERPRISES, LLC
TO THE JOINT PETITION TO INTERVENE AND
REOPEN FILED ON BEHALF OF THE CALIFORNIA-
NEVADA SUPER SPEED TRAIN COMMISSION
AND THE AMERICAN MAGLINE GROUP**

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Dated: April 28, 2009

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INTRODUCTION

Petitioner DesertXpress Enterprises, LLC (“DesertXpress”) submits this reply in opposition to the Joint Petition to Intervene and Reopen this proceeding (“Petition”) filed on behalf of the California-Nevada Super Speed Train Commission and the American Magline Group (collectively, “Petitioners”). Simply stated, the Petitioners’ legal arguments lack merit, and many of their factual assertions are questionable at best. Accepting these arguments as a basis for reopening this proceeding not only would undermine the Surface Transportation Board’s (“STB” or “Board”) jurisdiction over the development of the nation’s first high-speed passenger rail network—one of the top priorities of the Obama Administration—but also would cause DesertXpress significant harm. Contrary to what the Petitioners would have the Board believe, the prior decision in this case confers no “unfair advantage” to DesertXpress. The Board’s preemption authority over “transportation by rail carrier” is both technology- and project-neutral, and is equally available to DesertXpress or any other rail carrier. Conversely,

granting the Petition would be wholly unfair to DesertXpress, given that the Petitioners have been aware of this proceeding for at least the last two years and chose to bring their arguments to the Board only after DesertXpress and various federal agencies (including the Board) expended a great deal of time, effort, and resources preparing the recently-issued Draft Environmental Impact Statement (“DEIS”). For all of these reasons, the Board should promptly and summarily reject the Petition.

BACKGROUND

The specific details of the DesertXpress Project have been explained in prior submissions to the Board. *See* DesertXpress Petition for Declaratory Order, at 4-5 (filed July 24, 2006); DesertXpress Reply to the Comments Submitted in Response to Its Petition for Declaratory Order, at 2-9 (filed Nov. 6, 2006); *see also* Verified Statement of Thomas J. Stone at ¶ 2 (attached as Exhibit A). As such, there is no need to recount them here.

On June 27, 2007, a final decision was issued in this proceeding in which the Board granted DesertXpress’ request for a declaratory order regarding the Board’s exclusive jurisdiction over the Project. Since then, DesertXpress has been working diligently with the Federal Railroad Administration (“FRA”), the Board, the Bureau of Land Management, the Federal Highway Administration, the National Park Service, the U.S. Fish and Wildlife Service, the Environmental Protection Agency, the Advisory Council on Historic Preservation, the Nevada Department of Transportation (“NDOT”), the California Department of Transportation (“Caltrans”), and various other state, regional, and local agencies and entities in California and Nevada to confer about the Project and support the FRA’s preparation of an Environmental

Impact Statement (“EIS”). The FRA issued the DEIS in late March 2009.¹ Once this environmental review process is complete, DesertXpress intends to seek from the Board the necessary authority to construct the new line and related facilities and to conduct rail operations over the new line.² DesertXpress also has been coordinating the planning and design of the Project with the California High Speed Rail Authority (“CHSRA”) so that at some point the DesertXpress system can be readily extended the approximately 50 miles west to connect to the planned, voter-approved CHSRA system in the vicinity of its proposed intermodal station in Palmdale, California. *See id.* at ¶ 4.

Two additional background points should be clarified. Contrary to the Petitioners’ suggestion, DesertXpress did not first “surface[] in 2006.” Petition at 11. Rather, the DesertXpress Project has been in development since 2002, and the Petitioners have been aware of the Project’s existence since at least July 14, 2004, when Transmax, a founding DesertXpress partner, submitted comments at the environmental scoping meetings for the California-Nevada Interstate Maglev Project (“CNIMP”) indicating that due diligence had been conducted on the steel wheel high-speed alternative being developed by the founding members of DesertXpress, and offering to provide assistance in the evaluation of the steel-wheel-on-rail alternative that was

¹ Public comments on the DEIS are due by May 22, 2009. *See* Draft Environmental Impact Statement and 4(f) Evaluation for the Proposed DesertXpress High-Speed Passenger Train, at cover page 3 (Mar. 2009), available at http://www.fra.dot.gov/downloads/rrdev/DXE_Volume_1_complete.pdf (last visited Apr. 24, 2009).

² It should be noted that, while the Board’s prior decision in this case specifically exempted the Project from the requirements of the California Environmental Quality Act (“CEQA”), the DEIS includes environmental analyses that also would satisfy CEQA requirements. Moreover, CEQA-related noticing procedures have been followed (including issuance of a Notice of Preparation to the California Clearinghouse in July 2006). *See* DEIS at 1-2 n.1.

to be evaluated as part of the CNIMP environmental review process. *See* Stone V.S. at ¶ 7 n.4. Moreover, the legislation enabling the California-Nevada Super Speed Train Commission (“CNSSTC”) in California is no longer in effect. Therefore, the CNSSTC exists only as a Nevada state entity with no authority to implement a Maglev system in the State of California. *See id.* at ¶ 10.

ARGUMENT

A. The Board Is Clearly The Appropriate Agency To Exercise Jurisdiction In This Matter, And DesertXpress Has Acted Responsibly In Seeking The Exercise Of The Board’s Authority.

The basic thrust of the Petitioners’ arguments seems to be that no federal agency possesses jurisdiction over the permitting, construction, and operation of dedicated high-speed passenger rail lines, and that such an improbable state of affairs is the result of specific Congressional design. This simply cannot be—and is not, in fact—the case. Regulating and conducting oversight with regard to dedicated high-speed passenger rail lines clearly falls within the parameters of this Board’s core mission “to ensure the development and continuation of a sound rail transportation system...to meet the needs of the public....” 49 U.S.C. § 10101(4). In service to this mission, Congress has granted the Board general jurisdiction over rail line construction and operation. *See id.* § 10901. Moreover, the Obama Administration’s High-Speed Rail Strategic Plan affirmatively anticipates the new construction of potentially thousands of miles of grade-separated, dedicated high-speed passenger rail line track. *See* Vision For High-Speed Rail In America, at 2 & 6 (Apr. 2009), available at <http://www.fra.dot.gov/Downloads/RRdev/hsrstrategicplan.pdf> (last visited Apr. 24, 2009). This new effort will necessarily require coordination among rail carriers, and between rail carriers and operators of other modes of surface transportation. It simply defies common sense to suggest

that no federal agency has jurisdiction over (a) the permitting, construction, and operation of these lines, as well as (b) the coordination necessary to ensure the efficient operation of the national transportation system and address the transportation infrastructure needs of the nation as a whole.

The Petitioners argue that the FRA might step in to fill this regulatory void. FRA jurisdiction, however, is limited to the implementation and administration of railroad safety laws and certain financial assistance programs. *See, e.g.,* 49 U.S.C. § 20101 *et seq.*, § 22101 *et seq.* Moreover, the Petitioners' argument runs directly contrary to the FRA's consistent position regarding the Board's jurisdiction over the DesertXpress proposal in particular, and over new rail line construction and operation in general. *See, e.g.,* DEIS at 1-15 ("STB has the authority to declare that the construction and operation of an interstate rail project is exempted from most state and local laws, which it has done for this project"); Notice of Intent, Environmental Impact Statement: DesertXpress High Speed Train Between Victorville, CA and Las Vegas, NV, 71 Fed. Reg. 40,176-77 (July 14, 2006) ("The FRA...is primarily responsible for railroad safety regulation....The STB has exclusive jurisdiction, pursuant to 49 U.S.C. 10501(b), over the construction, acquisition, operation and abandonment of rail lines....The construction and operation of the proposed DesertXpress high-speed train project is subject to STB's approval authority under 49 U.S.C. 10901."); Letter from M. Yachmetz (FRA Associate Administrator for Railroad Development) to T. Stone (Dec. 19, 2005) ("Because of the extent of the DesertXpress proposal and because it would use European high speed trains, the FRA ma[y] take...regulatory measures related to the safety of the new railroad....I have appreciated the two meetings you have had with the FRA staff to discuss the proposed project, and to address the necessity of making an application with the Surface Transportation Board (STB).") (attached as Exhibit B).

Additionally, the suggestion that DesertXpress has sought some sort of “unfair advantage” in a nefarious effort to “pass through the turnstiles of the regulatory oversight process far more quickly” than the CNIMP borders on the absurd. *Petition, Cummings V.S.* at ¶ 28. The Board’s exclusive jurisdiction—and the principle of general federal preemption of state and local permitting requirements in the field of interstate rail transportation—is both technology- and project-neutral, and therefore is equally available to DesertXpress or any other rail carrier. DesertXpress has neither sought nor received “unfair advantages” by virtue of this proceeding. Rather, DesertXpress’ filing of its declaratory order petition was a straightforward and legitimate attempt to determine and fulfill the full scope of its statutory and regulatory obligations. *See Stone V.S.* at ¶¶ 5-6, 12. DesertXpress has simply followed the guidance provided to it by the FRA and the Board in several meetings and discussions regarding the environmental and regulatory process in which DesertXpress must engage.

B. The Petitioners Have No Basis For Seeking A Reopening, And Granting The Petition Would Cause DesertXpress Significant Harm.

The Petitioners have presented no adequate justification for reopening this proceeding nearly three full years after it was instituted and nearly two full years after it was decided. Like all other potentially interested entities, the Petitioners received constructive notice of this proceeding almost three years ago, on or about August 31, 2006, when the Board formally instituted the declaratory order proceeding and solicited public comments on DesertXpress’ petition. *See Institution of Declaratory Order Proceeding, DesertXpress Enterprises, LLC—Petition for Declaratory Order*, 71 Fed. Reg. 51,885-86 (Aug. 31, 2006). Moreover, the Petitioners admit that they received actual notice of this proceeding almost two years ago, in July 2007. *See Petition* at 2-3. The decision to file the Petition now, after all this time, is certainly suspicious. Having chosen to remain silent for years and then—only after DesertXpress and

various federal agencies (including the Board) expended a great deal of time, effort, and resources preparing the EIS—filing the Petition within weeks of the FRA’s issuance of the DEIS amounts to nothing more than a thirteenth-hour attempt to derail the Project, a practice that the Board should not countenance. There is no legitimate basis upon which to reopen or allow the Petitioners to intervene in this proceeding at this time.

Furthermore, reopening the proceeding after two years would result in significant harm and unjust prejudice to DesertXpress. DesertXpress initially sought a declaratory order from the Board in a specific effort to resolve uncertainty about Board jurisdiction over the Project, an issue which the Board’s decision conclusively addressed. This decision was necessitated by the fact that, in early 2006, DesertXpress sought to engage a lead agency for purposes of determining compliance with California’s unique environmental requirements (*i.e.*, CEQA). During the course of this process, questions arose as to whether any state or local agency could do so. In particular, DesertXpress sought the declaration after extensive consultation with representatives from Caltrans and the California Office of Planning and Research (the latter of which houses the state’s clearinghouse responsible for coordinating the state-level review of environmental documents pursuant to CEQA and provides technical assistance on land use planning and CEQA matters), who specifically questioned whether it was even possible for a California state or local entity to serve as the lead agency for purposes of CEQA review due to the interstate nature of the Project and the Board’s regulatory jurisdiction over interstate rail lines. *See Stone V.S.* at ¶ 5.³ DesertXpress has relied on the Board’s decision in its discussions

³ DesertXpress has also consulted extensively with San Bernardino County and NDOT senior staff on a variety of Project-related issues, including federal preemption, over the past several years. *See Stone V.S.* at ¶ 5 n.3.

with investors and throughout the operational planning and engineering processes, and has invested over \$25 million to bring the Project closer to the point of implementation in specific reliance on the Board's declaratory order. *See id.* at ¶ 6. DesertXpress has a clear and significant interest in the finality of the Board's decision, and the Board therefore would be justified in denying the Petition solely on procedural grounds. *See, e.g., Norfolk & W. Ry. Co.—Abandonment Exemption—Between Kokomo and Rochester in Howard, Miami, and Fulton Counties, IN*, STB Docket No. AB-290 (Sub-No. 168X), slip op. at 3 (STB served May 4, 2005) (explaining that petitions to reopen are subject to a higher level of scrutiny than timely-filed petitions for reconsideration due to the concerns of administrative finality, repose, and detrimental reliance associated with the former); *Union Pac. R.R. Co.—Abandonment Exemption—In Rio Grande and Mineral Counties, CO*, STB Docket No. AB-33 (Sub-No. 132X), slip op. at 6 (STB served June 22, 2004) (stating that “the need for administrative finality dictates that the hurdle to be overcome by...a petitioner [filing a petition to reopen] increases **substantially** as time passes”) (emphasis added).

C. The Strict Legal Standards For Reopening Have Not Been Met.

As the Petitioners correctly state, the Board has explained that it will grant a petition to reopen only upon a substantial showing that the challenged action would be materially affected by one or more of the following factors: material error, new evidence, or substantially changed circumstances. *See, e.g., Pioneer Indus. Ry. Co.—Alternative Rail Serv.—Cent. Ill. R.R. Co.*, STB Fin. Docket No. 34917 (STB served Jan. 12, 2007). However, even if one or more of these factors is found to be present, they must be balanced against the important concerns of finality, repose, and detrimental reliance. *See, e.g., Norfolk & W. Ry. Co.*, slip op. at 3. Petitions to

reopen thus face a bar that is raised higher and higher as more and more time passes. *See, e.g., Union Pac. R.R. Co.*, slip op. at 6.

With regard to the first factor, the Board committed no material error in its prior decision. Contrary to the Petitioners' arguments, the absence of track or other structure providing a present physical connection to the nation's larger system of existing rail lines does not mean that the Project would not be "part of the interstate rail network," 49 U.S.C. § 10501(a)(2)(A), and does not mean that it would "not [be] operated as part of the general system of rail transportation," *id.* § 10102(5). *See, e.g., Union Pac. R.R.—Abandonment—In Harris, Fort Bend, Austin, Wharton, and Colo. Counties, TX*, STB Docket No. AB-33 (Sub-No. 156) (STB served Dec. 1, 2006) (permitting abandonment of a portion of rail-banked line while maintaining Board jurisdiction over the remainder); *Chelsea Property Owners—Abandonment—Portion of the Consol. Rail Corp.'s W. 30th St. Secondary Track in New York, NY*, STB Docket No. AB-167 (Sub-No. 1094A) (STB served June 13, 2005) (concluding that the physical severance of a portion of rail line did not sever it from national rail system and therefore did not remove Board jurisdiction thereover); *RLTD Ry.—Abandonment Exemption—In Leelanau County, MI*, 1997 WL 679120, at *1 (Oct. 20, 1997) (explaining that the Board lost jurisdiction only when the right of way became "irrevocably severed" from the national rail transportation system, thus "forever eliminat[ing]" the possibility of using the line in interstate commerce); *Chi. & N.W. Transp. Co.—Abandonment Exemption—Guthrie and Dallas Counties, IA*, 1996 WL 360660, at *1 (June 11, 1996) (permitting abandonment of a portion of rail-banked line while maintaining Board jurisdiction over the remainder). These cases make clear that a present physical connection to the larger

system of existing rail lines is not a prerequisite to a determination that a line is part of the interstate rail network for purposes of exclusive STB jurisdiction.⁴

Moreover, DesertXpress is coordinating the planning and design of this Project with the California High Speed Rail Authority (“CHSRA”), and is designing its system so that it might be readily extended to connect with the planned, voter-approved CHSRA high-speed rail system in the vicinity of its proposed intermodal station in Palmdale, California. *See* Stone V.S. at ¶ 4. DesertXpress is working with state and local entities to encourage such an extension. *See id.* It is therefore clear that DesertXpress hopes to have its line operate as part of the nation’s first true high-speed passenger rail network. The development of this network is critical to addressing the nation’s greater infrastructure needs and has been made a top priority of the Obama Administration. The arguments made by the Petitioners threaten to undermine this important objective.

Contrary to the Petitioners’ arguments, DesertXpress is indeed a rail carrier within the meaning of 49 U.S.C. § 10501(b)(1).⁵ The exclusion in § 10102(5) for “street, suburban, or interurban electric railways not operated as part of the general system of rail transportation” does

⁴ To the extent these cases are thought to stand for the proposition that a rail line must at least maintain a connection to the larger rail system through contiguous right-of-way (regardless of the presence of physical structure) in order for the Board to maintain its exclusive jurisdiction, the Project clearly meets this test. *See, e.g.,* Petition at 6 n.7 (citing DEIS).

⁵ For purposes of § 10501(b)(1), “rail carrier” is defined as “a person providing common carrier railroad transportation for compensation, but does not include street, suburban, or interurban electric railways not operated as part of the general system of rail transportation. 49 U.S.C. § 10102(5). DesertXpress clearly meets the threshold statutory definition. First, it indisputably will be a common carrier. *See, e.g., Am. Orient Express Ry. Co. v. STB*, 484 F.3d 554, 557 (D.C. Cir. 2007) (affirming the Board’s conclusion that Orient Express was a common carrier because it “holds itself out to the general public as engaged in the business of transporting persons”). Second, it indisputably will provide railroad transportation for compensation. *See, e.g.,* 49 U.S.C. § 10102(9)(A) & (B) (defining “transportation” to include a “locomotive, car, [or] vehicle...related to the movement of passengers...by rail” as well as “services related to that movement, including...interchange of passengers”).

not apply because the Project as envisioned will indeed operate as “part of the interstate rail network” (within the meaning of § 10501(a)(2)(A)). Among other reasons, this is so because DesertXpress will function as a common carrier transporting passengers in interstate commerce—literally, transporting them across state lines—from day one of the Project’s operation. The fact that it will do so over dedicated, passenger-only rail line and does not intend to accommodate freight traffic does not mean that the Project will not operate as part of the “general system of rail transportation” or “the interstate rail network.” The statements contained in the legislative history of the Interstate Commerce Commission Termination Act (“ICCTA”) regarding the “curtailment of [the Board’s] regulatory jurisdiction in areas such as passenger transportation” and the notion that “regulation of passenger transportation” was to be “generally eliminated” were in specific reference to 49 U.S.C. § 10501(c)(2), the ICCTA provision setting forth that “the Board does not have jurisdiction...over mass transportation provided by a local governmental authority.” See, e.g., *Removal of Obsolete Regulations Concerning Rail Passenger Fare Increases*, STB Ex Parte No. 624, 2 S.T.B. 306, 308-09 & n.6 (June 6, 1997).⁶ An interstate high-speed passenger railway clearly does not constitute “mass transportation provided by a local government authority.”⁷

The Petitioners rely on a number of cases in an attempt to support their argument that rail lines must accommodate, or must physically connect to other rail lines that accommodate, freight

⁶ As explained in that 1997 rulemaking, while ICCTA did indeed limit the Board’s regulatory authority over rail passenger transportation, it certainly did not purport or intend to eliminate it. See *Removal of Obsolete Regulations*, at 309. The Petitioners’ assertion to the contrary (see Petition at 22-24) is simply incorrect.

⁷ Similarly, the Project does not fall within the § 10102(5) exclusion because it is not a “street, suburban, or interurban electric railway[.]” Rather, it is an **interstate** high-speed electric railway. Had Congress wished to carve out a statutory exclusion for interstate electric railways, it easily could have included language to this effect in § 10102(5).

traffic in order to fall within the Board's exclusive jurisdiction. *See, e.g., State of Maine, Dep't of Transp.—Acquisition and Operation Exemption—Me. Cent. R.R. Co.*, 8 I.C.C.2d 835 (May 20, 1991); *Ry. Labor Executives Ass'n v. ICC*, 859 F.2d 996 (D.C. Cir. 1988).⁸ Of course, none of the cases cited by the Petitioners are particularly relevant to the issue at hand because none involved an interstate passenger-only rail line (much less a high-speed one). These cases thus had no occasion to consider, much less discuss, issues such as (a) whether such a line would be considered a component of the nation's greater interstate rail system, or (b) whether interference with such a line by, for example, a purely local commuter rail service would affect interstate commerce—by interfering with the interstate passenger-only line's ability to fulfill its common carrier obligation, for example—to such a degree that the Board could still exert jurisdiction over that purely local service. In short, they contribute nothing useful to a discussion of the Board's jurisdiction over interstate passenger-only rail lines.

In addition, no new factual evidence has been presented to justify reopening this proceeding. The facts allegedly not considered in the Board's prior decision do not constitute "new evidence." DesertXpress always has described the Project accurately (before this Board and otherwise), and has never represented or suggested that the Project, as initially constructed, would include track or other structure providing a present physical connection to the nation's larger system of existing rail lines. *See Stone V.S.* at ¶ 12; *see also, e.g.,* Petition at 12 (acknowledging that the FRA's notice of intent to prepare the DesertXpress EIS—published in

⁸ Indeed, almost all of the cases cited by the Petitioners on this point predate ICCTA, and therefore have very little to say about the scope of the Board's exclusive jurisdiction under that Act. Moreover, the entire *State of Maine* line of cases has no relevance to the issue at hand because those cases generally determined only that the Board lacks jurisdiction over the transfer of an existing line from a rail carrier to a public agency seeking to develop a local mass transit system because the proposed transaction involves no transfer of common carrier obligations.

July 2006, a full year before the Board’s declaratory order—(a) “made clear that there would be no rail freight service provided on the proposed [DesertXpress] tracks” and (b) contained no mention of a physical connection or interchange with the nation’s larger system of existing rail lines).

Finally, circumstances have not substantially changed since this Board’s prior decision. The various recent Congressional enactments cited by the Petitioners are primarily funding mechanisms that have no bearing on the relative feasibility of the CNIMP and the DesertXpress projects. In essence, the 2009 American Recovery and Reinvestment Act and the 2008 Passenger Rail Investment and Improvement Act prioritize funding to eleven high-speed rail corridors throughout the country—a group that does not include the California-Nevada corridor—and so-called “shovel-ready” projects—which the CNIMP indisputably is not. Indeed, these enactments say nothing at all about the only question at issue in this proceeding—the scope of this Board’s exclusive jurisdiction.

Furthermore, the Petitioners repeatedly suggest that the funding mechanism contained in the 2008 SAFETEA-LU Technical Corrections Act somehow renders the CNIMP “newly viable,” thereby justifying their belated attempt to intervene. However, even if they were to receive the \$45 million provided for in that Act, those funds can only be used for their planned environmental review process and related tasks. *See* Petition at 10. Moreover, that amount is inconsequential when compared to what independent studies conducted by various public agencies estimate would be tens of billions of dollars in public funding required to construct the CNIMP. *See, e.g.*, BSL Management Consultants, *Maglev or High Speed Rail in the Las Vegas to Southern California Corridor, an Analysis Performed for the Southern California Logistics Rail Authority*, at 15-16 (Nov. 2008) (surveying recent Maglev studies and concluding that the

CNIMP's cost-per-mile would likely be somewhere between \$60 million and \$199 million, for a total construction cost of between \$16 billion and \$52 billion), *available at* <http://www.victorvillecity.com/documents/bslreport.pdf> (last visited Apr. 27, 2009). Thus, the funds from the Act would have no bearing upon the CNIMP's overall lack of financial viability. Further, access to the \$45 million is contingent upon raising a significant percentage of that total in non-federal matching funds, a task the Petitioners admit they have not yet been able to accomplish despite the Act having been signed into law almost a year ago. *See* Petition, Kevorkian V.S. at ¶ 20. Indeed, there is a very real possibility that this hurdle will never be overcome, particularly given (a) the Petition's suggestion that only a total of \$2.1 million in non-federal funds has ever been raised for (and subsequently spent on) the CNIMP (*see id.* at 8-11); and (b) the fact that the FRA website indicates that work on the CNIMP environmental review process, begun in 1999 (*see id.*, Cummings V.S. at ¶ 8), has been suspended "due to funding constraints" (*see* <http://www.fra.dot.gov/us/content/211> (last visited April 23, 2009)). *See* Stone V.S. at ¶ 9. Thus, the legislative activity cited by the Petitioners does not in any way enhance the CNIMP's financial viability. In any event, despite whether or not the prospect of SAFETEA-LU funding might constitute a new development providing a basis for intervention in another case, it is a development that has no relevance to the jurisdictional issues decided in the Board's prior decision and therefore cannot qualify as a material, "substantially changed circumstance" that would justify reopening this proceeding.⁹

⁹ Moreover, as the Petitioners concede, the SAFETEA-LU Technical Corrections Act was signed into law almost a year ago. *See* Petition at 3. According to the Petitioners, this was the event that supposedly triggered their ability to intervene in this proceeding. *See, e.g., id.*, Kevorkian V.S. at ¶ 16; *id.* at 20 (arguing that the Petitioners "did not believe they were in a position to intervene" prior to passage of the Act because they "did not have a stake in the outcome of this proceeding because funding for the CNIMP had not been secured"). Despite this (continued...)

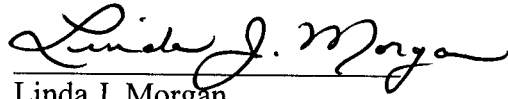
Because no material error was made in the Board's prior decision, because no new evidence has been presented, and because circumstances have not substantially changed in the last two years, there is absolutely no basis for reopening this proceeding. Moreover, even if one or more of these factors is determined to be present, such factors would be outweighed by (a) DesertXpress' interest in the administrative finality of the Board's prior decision, and (b) the significant financial investment made in this Project by DesertXpress in specific reliance on the Board's prior decision.

CONCLUSION

DesertXpress has appropriately sought the exercise of the Board's exclusive jurisdiction over the construction and operation of rail lines, and the Board appropriately exercised this jurisdiction in the original declaratory order proceeding. Petitioners have not met the stringent legal requirements for reopening this proceeding, and such action clearly would be unfair and cause significant harm to DesertXpress. For all of the reasons stated above, the Board should promptly and summarily reject the Petition.

being the supposed triggering event for their interest in this proceeding, the Petitioners never explain or seek to justify waiting almost a year after the occurrence of that event to file their Petition. In addition, the claim that the Petitioners did not have a stake in the outcome of the proceeding prior to 2008 is directly contradicted by prior statements made by them to the U.S. Department of Transportation. *See id.*, Cummings V.S. at ¶ 5 (describing 1998 certification made to the USDOT that the Petitioners then "stood ready, willing and able to finance, construct, operate and maintain" the CNIMP) (internal quotation marks omitted).

Respectfully submitted,

A handwritten signature in cursive script, reading "Linda J. Morgan".

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Dated: April 28, 2009

EXHIBIT A

**BEFORE THE
SURFACE TRANSPORTATION BOARD**

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**VERIFIED STATEMENT OF THOMAS J. STONE,
PRESIDENT OF DESERTXPRESS ENTERPRISES, LLC,
IN SUPPORT OF THE DESERTXPRESS REPLY TO
THE JOINT PETITION TO INTERVENE AND REOPEN
FILED ON BEHALF OF THE CALIFORNIA-NEVADA
SUPER SPEED TRAIN COMMISSION AND AMERICAN
MAGLINE GROUP**

1. My name is Thomas J. Stone, and I am President of DesertXpress Enterprises, LLC (“DesertXpress”). My business address is 6750 Via Austi Parkway, Suite 250, Las Vegas, Nevada, 89119. A PhD engineer by trade, I have been deeply involved in rail-related projects for over 34 years, having had the unique opportunity throughout my career to lead the implementation of major rail transit projects in many countries from different sides of the table: as a public policy maker, as an engineer and program and construction manager, and as a leader of contractor teams. My experience covers the full spectrum of transit technologies and project implementation approaches, including light rail, commuter rail, monorail, automated people movers, rail rapid transit, and high-speed rail, using innovative private-public partnerships and creative financing approaches. I have served as President of the transit systems division of Bombardier, Inc., one of the world’s largest suppliers and operators of rail transit and high-speed rail; as Vice Chair and Transportation Division Manager for one of the nation’s fastest growing

engineering firms; as Chief Project Officer of the Los Angeles to Pasadena Gold Line Authority, where I was responsible for the on-time and within-budget design and construction of the Los Angeles to Pasadena Gold Line; and for seven years, as President of DesertXpress Enterprises and its founding company. Additional projects completed under my watch include: the Ankara Metro in Turkey; the Kuala Lumpur Light Rapid Transit System in Malaysia; the Walt Disney World Monorail train and train control replacement project in Florida; the planning, preliminary engineering, and Environmental Impact Statement for the TREX light rail and interstate freeway reconstruction project in Denver, Colorado; and the development phases of the Las Vegas Monorail in Nevada.

2. As has been explained in prior filings, the proposed DesertXpress project (“Project”) is a privately financed interstate high-speed passenger rail system that, upon completion, will initially span an approximately 200-mile route between Victorville, California and Las Vegas, Nevada. The Project will include the construction of fully grade-separated, dedicated, exclusive double track (predominantly in the median of or immediately alongside Interstate 15) and ancillary facilities integral to the Project, including two passenger stations and a 50-acre train maintenance and storage facility and operations center near the Victorville Station.

3. For the last three years, DesertXpress has been working with the Federal Railroad Administration (“FRA”), the Surface Transportation Board (“Board”), the Bureau of Land Management (“BLM”), the Federal Highway Administration (“FHWA”), the National Park Service, the U.S. Fish and Wildlife Service, the Environmental Protection Agency, the Advisory Council on Historic Preservation, the Nevada Department of Transportation (“NDOT”), the California Department of Transportation (“Caltrans”), and numerous other state, regional, and local agencies and entities in California and Nevada to support the FRA’s preparation of the

Project's Environmental Impact Statement ("EIS"). The FRA issued the Draft EIS ("DEIS") in March 2009.¹ Once this environmental review process is complete, DesertXpress intends to seek from the Board the necessary authority to construct the new line and related facilities and to conduct rail operations over the new line.

4. DesertXpress also has been coordinating the planning and design of the Project with the California High Speed Rail Authority ("CHSRA") so that at some point the DesertXpress system can be readily extended the approximately 50 miles west to connect to the planned, voter-approved CHSRA system in the vicinity of its proposed intermodal station in Palmdale, California. To this end, DesertXpress has met with CHSRA Executive Director Mehdi Morshed and key members of his engineering team, and with CHSRA Chairman Quentin Kopp. DesertXpress also has met with several local elected officials who have direct involvement in the planning of the proposed corridor that would provide the right of way for the DesertXpress extension to Palmdale, and offered our assistance in the planning and design of the proposed route. These officials include former Victorville Mayors and current City Council members Terry Caldwell and Mike Rothschild, Palmdale Mayor Jim Ledford, and San Bernardino County Supervisor Brad Mitzelfelt.

5. On July 24, 2006, DesertXpress filed with the Board a Petition for Declaratory Order in which it sought an affirmative declaration that the California Environmental Quality Act ("CEQA") and similar state and/or local discretionary permitting requirements are preempted under the Interstate Commerce Commission Termination Act insofar as the Project is

¹ Draft Environmental Impact Statement and 4(f) Evaluation for the Proposed DesertXpress High-Speed Passenger Train (Mar. 2009), *available at* http://www.fra.dot.gov/downloads/rrdev/DXE_Volume_1_complete.pdf (last visited Apr. 24, 2009).

concerned.² DesertXpress sought such a declaration in a specific effort to remove uncertainty as to precisely what environmental, land use, and other permitting criteria the Project would be required to satisfy. In particular, DesertXpress sought the declaration after extensive consultation with representatives from Caltrans and the California Office of Planning and Research (the latter of which houses the state's clearinghouse responsible for coordinating the state level review of environmental documents pursuant to CEQA and provides technical assistance on land use planning and CEQA matters), who specifically questioned whether it was even possible for any California state or local entity to serve as the lead agency for purposes of CEQA due to the interstate nature of the Project and the Board's regulatory jurisdiction over interstate rail lines.³

6. The Board issued a decision containing such a declaration in June 2007, which allowed DesertXpress to confidently continue the operational planning and engineering processes with a clear view of its statutory responsibilities. DesertXpress has relied on this decision in its discussions with investors, and has invested over \$25 million in an effort to bring the Project closer to the point of implementation in specific reliance on the Board's declaratory order. This large private investment, the nature of which is unprecedented in this country to my knowledge, has covered all internal and third-party costs required to support and complete the EIS process and prepare the project for implementation, including system planning, station design, detailed

² It should be noted, however, that (i) the DEIS includes environmental analyses that also would satisfy CEQA requirements, and (ii) CEQA-related noticing procedures have been followed (including issuance of a Notice of Preparation to the California Clearinghouse in July 2006). *See* DEIS, at 1-2 n.1.

³ DesertXpress also has consulted extensively with San Bernardino County and NDOT senior staff on a variety of Project-related issues, including federal preemption, over the past several years.

civil and structural preliminary engineering of the entire 200-mile corridor, traffic engineering, ridership and revenue forecasting, detailed operational simulations and comprehensive operational planning, financial analysis and financial planning, project management, and community and public agency coordination and outreach. This investment has resulted in the issuance of the first ever privately-funded high-speed passenger rail EIS.

7. It is therefore clear that granting the petition to intervene and reopen the declaratory order proceeding (“Petition”) would cause DesertXpress significant harm. Moreover, granting the Petition would be patently unfair, as the California-Nevada Super Speed Train Commission and the American Magline Group (collectively, “Petitioners”) have known about the Board’s decision since at least July 2007.⁴ The Petitioners should not be rewarded for sitting on their hands for nearly two years, waiting to file their ill-founded petition mere weeks after issuance of the DEIS. While an exhaustive rebuttal of the misleading assertions contained in the Petition is unnecessary, several important points must be clarified.

8. The Petitioners significantly overstate the viability of the CNIMP. First, the ridership studies cited by the Petitioners are obviously questionable. *See* Petition at 10. The CNIMP forecast of 42 million annual passenger trips exceeds the entire population of California,⁵

⁴ The DesertXpress Project has been in development since 2002, and the Petitioners have been aware of the Project’s existence since at least July 14, 2004, when Transmax, a founding DesertXpress partner, submitted comments at the environmental scoping meetings for the California-Nevada Interstate Maglev Project (“CNIMP”) indicating that due diligence had been conducted on the steel wheel high-speed alternative they were developing, and offering to provide assistance in the evaluation of the steel-wheel-on-rail alternative that was to be evaluated as part of the CNIMP environmental review process.

⁵ In 2008, the U.S. Census Bureau estimated the total population of California at approximately 37 million. *See* Annual Estimates of the Resident Population for the United States, Regions, States, and Puerto Rico: April 1, 2000 to July 1, 2008, *available at* <http://www.census.gov/popest/states/NST-ann-est.html> (last visited Apr. 25, 2009).

exceeds all annual visitors to Las Vegas from the entire world, and is more than three times greater than the annual volume of trips made from Southern California by all modes of transportation. *See* <http://www.visitlasvegas.com/vegas/stay/planning-information/basics.jsp> (last visited Apr. 26, 2009). In contrast, the ridership study commissioned by DesertXpress in 2005 establishes reasonable expectations that have been independently vetted by the FRA's expert consultants in connection with the preparation of the DEIS.

9. Second, the Petitioners repeatedly suggest that the CNIMP is somehow “newly viable” because of the funding mechanism contained in the 2008 SAFETEA-LU Technical Corrections Act.⁶ However, even if they were to receive the \$45 million provided for in that Act, those funds can only be used for their planned environmental review process and related tasks. *See* Petition at 10. Moreover, that amount is inconsequential when compared to what independent studies conducted by various public agencies estimate would be tens of billions of dollars in public funding required to construct the CNIMP. *See, e.g.,* BSL Management Consultants, *Maglev or High Speed Rail in the Las Vegas to Southern California Corridor, an Analysis Performed for the Southern California Logistics Rail Authority*, at 15-16 (Nov. 2008) (surveying recent Maglev studies and concluding that the CNIMP's cost-per-mile likely would be somewhere between \$60

⁶ As the Petitioners concede, the SAFETEA-LU Technical Corrections Act was signed into law almost a year ago. *See* Petition at 3. According to the Petitioners, this was the event that supposedly triggered their ability to intervene in this proceeding. *See, e.g., id.*, *Kevorkian V.S.* at ¶ 16; *id.* at 20 (arguing that the Petitioners “did not believe they were in a position to intervene” prior to passage of the Act because they “did not have a stake in the outcome of this proceeding because funding for the CNIMP had not been secured”). Despite this being the supposed triggering event for their interest in this proceeding, the Petitioners never explain or seek to justify waiting almost a year after the occurrence of that event to file their Petition. In addition, the claim that the Petitioners did not have a stake in the outcome of the proceeding prior to 2008 is directly contradicted by prior statements made by them to the U.S. Department of Transportation. *See id.*, *Cummings V.S.* at ¶ 5 (describing 1998 certification made to the USDOT that the Petitioners then “stood ready, willing and able to finance, construct, operate and maintain” the CNIMP) (internal quotation marks omitted).

million and \$199 million, for a total construction cost of between \$16 billion and \$52 billion), *available at* <http://www.victorvillecity.com/documents/bslreport.pdf> (last visited Apr. 27, 2009). Thus, the funds from the Act would have no bearing upon the CNIMP's overall lack of financial viability. Further, access to the \$45 million is contingent upon raising a significant percentage of that total in non-federal matching funds, a task the Petitioners admit they have not yet been able to accomplish despite the Act having been signed into law almost a year ago. *See* Petition, *Kevorkian V.S.* at ¶ 20.⁷ Indeed, there is a very real possibility that this hurdle will never be overcome, particularly given (i) the Petition's suggestion that only a total of \$2.1 million in non-federal funds has ever been raised for (and subsequently spent on) the CNIMP (*see id.* at 8-11); and (ii) the fact that the FRA website indicates that work on the CNIMP environmental review process, begun in 1999 (*see id.*, *Cummings V.S.* at ¶ 8), has been suspended "due to funding constraints" (*see* <http://www.fra.dot.gov/us/content/211> (last visited April 23, 2009)).⁸

10. Third, it is my understanding that the legislation enabling the CNNSTC in California is no longer in effect, and that the CNNSTC therefore exists only as a Nevada state entity with no authority to implement a Maglev system in the State of California.

⁷ Private sector commitment to the CNIMP is called into question even further by the Petitioners' proposed spending plan for the SAFETEA-LU Technical Corrections Act and matching funds—announced in a presentation at a June 25, 2008 public meeting held by the California-Nevada Super Speed Train Commission ("CNSSTC")—which allocates nearly 75% of those funds to the private partner, the American Magline Group.

⁸ Moreover, the suggestion that passage of the 2009 American Recovery and Reinvestment Act and/or the 2008 Passenger Rail Investment and Improvement Act somehow bolsters the viability of the CNIMP is nothing more than speculation, at best. In essence, these enactments prioritize funding to eleven high-speed rail corridors throughout the country—a group that does not include the California-Nevada corridor—and so-called "shovel-ready" projects—which the CNIMP indisputably is not. Indeed, significant opposition to the Passenger Rail Investment and Improvement Act was directed specifically at the CNIMP.

11. Additionally, the Petitioners suggest—without support—that “the right-of-way along the I-15 Freeway...has been designated for use by the CNIMP.” *See* Petition at 11. In fact, no such designation has been made by the FHWA (which oversees the interstate highway network), Caltrans, NDOT, or the BLM.⁹ The Petitioners also state—again without support—that “Congress has specifically designated the CNIMP to serve the rail passenger corridor between Las Vegas and Southern California.” *See id.*, Kevorkian V.S. at ¶ 21. Again, Congress has never made any such designation, in the SAFETEA-LU Technical Corrections Act or otherwise.

12. Finally, despite any assertions by the Petitioners to the contrary, DesertXpress has always been forthright about precisely what the Project entails: the construction of a new dedicated, interstate high-speed passenger-only rail line. DesertXpress has never represented or suggested—to the Board, the FRA, or otherwise—that its initial plans were to include track or other structure that would provide a present physical connection to the nation’s larger system of existing rail lines. Any suggestion to the contrary is irresponsible in the extreme. In doing so, the Petition threatens to derail a Project that not only is well on its way to the implementation stage as the nation’s first true, fully exclusive high-speed passenger-only rail line, but one that also will play an important role in fulfilling President Obama’s vision of developing this country’s first expansive high-speed passenger-only rail network. It is therefore critically important for the Board to reject the Petition and allow the Project to continue its journey through the regulatory process.

⁹ The BLM manages the federal lands encompassing the I-15 corridor, and granted a non-exclusive right of way to NDOT and Caltrans for the existing freeway. Federal land constitutes a majority of this corridor’s total length.

VERIFICATION

State of Nevada,

Clark County,

SS:

Thomas J. Stone, being duly sworn, deposes and says that he has read the foregoing statement,
knows the facts asserted there are true and that the same are true as stated.

Signed: Thomas J. Stone

Subscribed and sworn to before me this 28th day of April 2009.

Notary Public of State of Nevada County of Clark

Chelsea Black

My commission expires May 17, 2011

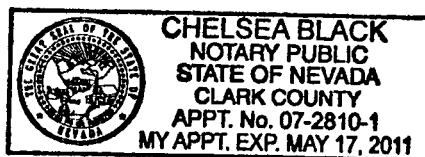


EXHIBIT B



U.S. Department
of Transportation

**Federal Railroad
Administration**

1120 Vermont Ave., N.W.
Washington, D.C. 20590

DEC 19 2005

Mr. Thomas J. Stone
President
DesertXpress Enterprises, LLC
10816 Iris Canyon Road
Las Vegas, NV 89135

Dear Mr. Stone:

Thank you for your letter of November 23, 2005 to Administrator Boardman in which you request that the Federal Railroad Administration (FRA) serve as lead federal agency for a Federal environmental review of the proposed DesertXpress project. Mr. Boardman has asked me to respond to you on his behalf.

The privately sponsored DesertXpress proposal is to construct and operate a passenger railroad at speeds up to 125 miles per hour along new right-of-way from Victorville, California to Las Vegas, Nevada. Because of the extent of the DesertXpress proposal and because it would use European high speed trains, the FRA make take actions subject to the National Environmental Policy Act through issuance of waivers or other regulatory measures related to the safety of the new railroad.

I have appreciated the two meetings you have had with the FRA staff to discuss the proposed project, and to address the necessity of making an application with the Surface Transportation Board (STB). As we discussed with you, in undertaking this effort the FRA would adopt the third-party contracting procedures used by STB for preparation of necessary environmental documentation. Subsequent to receipt of your letter, we have conferred with STB staff and reached agreement on how to best coordinate between the two Federal Agencies.

Accordingly, the FRA will serve as lead Federal agency for compliance with the National Environmental Policy Act and related laws, while the STB will serve as a cooperating agency. The FRA also considered your recommendation for the use of Circlepoint, Inc. with Jones and Stokes from the list of STB qualified environmental third-party contractors.¹ The FRA selects Circlepoint Inc. with Jones and Stokes to provide environmental consulting services through a third-party contract commonly used by the STB.

We are providing a memorandum of understanding (MOU) with this letter that would govern the third-party contract. If you wish to advance the proposal, please have both DesertXpress and Circlepoint, Inc execute the MOU and return the copies to the

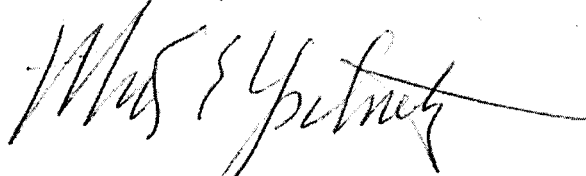
¹ STB Environmental Contact List Sorted by Company Name [<http://www.stb.dot.gov/SEAContactList.nsf/ByCompanyName?OpenPage>]

FRA. The FRA and STB will then complete the MOU and return a copy to you for your records.

Upon execution of a contract in accordance with the MOU and provision of the disclosure statement and a copy of the contract, the FRA will begin work with the Circlepoint to initiate the environmental review.

The FRA manager for this environmental review is Mr. David Valenstein, who can be reached at (202) 493-6368. Please contact Mr. Valenstein should you have any questions or concerns regarding the MOU or the environmental process.

Sincerely,

A handwritten signature in black ink, appearing to read 'Mark E. Yachmetz', with a long horizontal flourish extending to the right.

Mark E. Yachmetz
Associate Administrator
for Railroad development

Enclosure

cc: Victoria Rutson, STB