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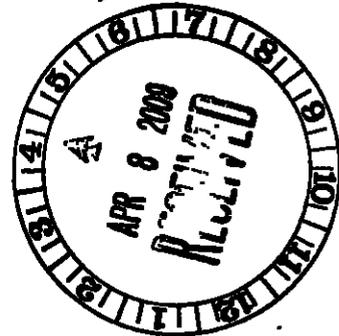
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The Honorable Anne K. Quinlan
Acting Secretary
Surface Transportation Board
395 E Street, S.W.
Suite 101
Washington, D.C. 20423-0001



Subject: Finance Docket No. 34914 – *DesertXpress Enterprises LLC, Petition for Declaratory Order – Petition to Intervene and Reopen*

Dear Secretary Quinlan:

Enclosed for filing in the above proceeding is the Joint Petition to Intervene and Reopen on Behalf of the California-Nevada Super Speed Train Commission and American Magline Group. Enclosed is a check for \$200 in payment of the filing fee specified at Ex Parte 542 (Sub-No 15) at Appendix B, §1002.2(f)(61). We will be supplementing this filing with an original copy of the Verified Statement of Kenneth Kevorkian, Vice Chairman of the California-Nevada Super Speed Train Commission.

Sincerely yours,

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Robert P. vom Eigen

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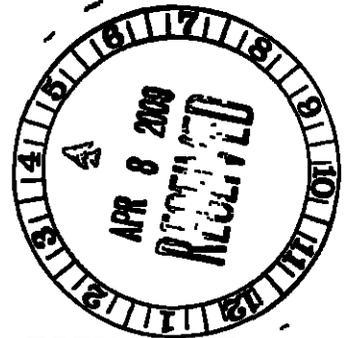
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**SURFACE
TRANSPORTATION BOARD**

Before the
SURFACE TRANSPORTATION BOARD
Washington, D.C.

Finance Docket No. 34914



DESERTXPRESS ENTERPRISES, LLC—PETITION FOR DECLARATORY ORDER

**JOINT PETITION TO INTERVENE AND REOPEN
ON BEHALF OF CALIFORNIA-NEVADA SUPER SPEED TRAIN COMMISSION AND
AMERICAN MAGLINE GROUP**

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SURFACE
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CALIFORNIA-NEVADA SUPER SPEED
TRAIN COMMISSION AND
AMERICAN MAGLINE GROUP

April 8, 2009

Before the
SURFACE TRANSPORTATION BOARD

Finance Docket No. 34914



DESERTXPRESS ENTERPRISES, LLC—PETITION FOR DECLARATORY ORDER

JOINT PETITION TO INTERVENE AND REOPEN
ON BEHALF OF CALIFORNIA-NEVADA SUPER SPEED TRAIN COMMISSION AND
AMERICAN MAGLINE GROUP

INTRODUCTION

The California-Nevada Super Speed Train Commission (“CNSSTC”) and the American Magline Group (“AMG”) petition the Board pursuant to 49 C.F.R. §1113.7 and §1115.4 for leave to intervene in this proceeding, and to reopen its Decision served June 27, 2007 (“DesertXpress Decision”) in this docket to accept new factual evidence describing changed circumstances not before the Board prior to its DesertXpress Decision, and to correct material error in declaring DesertXpress to be a rail carrier under the Board’s jurisdiction.

CNSSTC is a bi-state Commission and an agency of the State of Nevada, and AMG is a joint venture formed to bring *Transrapid* Maglev technology to the Southern California – Las Vegas transportation corridor¹ CNSSTC and AMG have been jointly engaged since 1996 in preparation of preliminary engineering, financial, and environmental studies for the California–Nevada Interstate Maglev Project (“CNIMP”) that will provide high speed passenger service over a 269 mile route between Las Vegas and Anaheim. Petitioners were not aware of the

¹ The partners in the AMG joint venture are General Atomics, Parsons Corporation, Hirschfeld Steel Co. Inc. and M. Neil Cummings & Associates PLC. See Verified Statement of M. Neil Cummings (“Cummings V.S.”) attached hereto at Tab II at ¶ 2.

DesertXpress Decision and the underlying petition for declaratory order until July 2007 when an employee of the Board's Section on Environmental Analysis provided copies of the Board's DesertXpress Decision to various employees of the California and Nevada departments of transportation, who in turn forwarded copies to CNSSTC and AMG representatives.

At that time, CNSSTC and AMG were working diligently to secure enactment of a technical corrections bill to modify language to the 2005 SAFETEA-LU legislation that had designated \$45 million of the \$90 million under the Maglev Deployment Program, 23 U.S.C. § 322, to the first phase of the CNIMP, but which, because of a drafting flaw, required revision before expenditures could be approved by the Federal Railroad Administration ("FRA"). DesertXpress, during the period from 2006 until June 2008, was actively lobbying Congress to defeat enactment of this corrective language.²

Without this modification, the CNIMP would not be able to proceed, and CNSSTC and AMG would not have had a stake in the outcome of the DesertXpress proceeding. Persistence paid off, and Congress passed the SAFETEA-LU Technical Corrections Act of 2008 ("TC Act of 2008"), and the President signed it into law on June 6, 2008, with the designation of P.L. 110-244. Section 102(a) of the TC Act of 2008 authorizes funding of \$45 million for each FY 2008 and FY 2009 for the Maglev Deployment Program, while Section 102(d)(1) directs the Secretary of Transportation to allocate from those funds:

(1) 50 percent to the Nevada department of transportation who shall cooperate with the California-Nevada Super Speed Train Commission for the MAGLEV project between Las Vegas and Primm, Nevada, as a segment of the high-speed MAGLEV system between Las Vegas, Nevada and Anaheim, California .

² See Cummings V.S. at ¶ 22

More recently, Congress enacted the Passenger Rail Investment and Improvement Act of 2008, Pub. L. 110-432 (“PRIIA”) which authorized funding for various intercity rail passenger programs, including programs to promote development of high speed rail corridor development.³ In response to the deteriorating economy, Congress enacted the American Recovery and Reinvestment Act of 2009, Pub. L. 111-5 (“Recovery Act”) which appropriated in Title XII \$8 billion for capital assistance for high speed rail corridors and intercity passenger rail service. CNSSTC had developed a plan for financing the initial phase of the CNIMP, but the Recovery Act will ease that process, and create a concrete opportunity to move these high speed rail projects beyond the planning, environmental study and preliminary engineering phase to the implementation phase so they can demonstrate their potential for providing energy efficient and environmentally friendly surface transportation alternatives to highway and airline travel.

The Recovery Act, PRIIA and the earlier Congressional endorsement for the CNIMP in the TC Act of 2008 are changed circumstances that create new reasons for the Board to reconsider its DesertXpress Decision. However, they did not change the definition of what constitutes a rail carrier within the meaning of the Interstate Commerce Act, as modified by the ICC Termination Act of 1995 (“ICCTA”). With all due respect for this Board, Petitioners do not believe that Congress has granted it jurisdiction to regulate carriers that do not operate over the interstate network of rail freight transportation. However, this issue is not just about the southern California – Las Vegas corridor; it will have consequences for the broader investments being made in high speed intercity passenger service that cannot be accommodated on the traditional

³ See, e.g. section 501 and 502 of PRIIA. As noted in the Board’s Notice served on December 23, 2008 in Ex Parte No. 683, PRIIA also enhanced the Board’s authority to address Amtrak service issues and to mediate access disputes between commuter rail authorities and freight railroads.

freight network because of the high speeds involved. The STB needs to get this right after a careful and thorough analysis, and such analysis did not occur in the four and a half page DesertXpress Decision.

Petitioners maintain that, like the CNIMP, DesertXpress is a passenger only railroad, with no connection to, or planned operation over, the interstate rail network, and no plan or ability to provide common carrier services to shippers along its tracks.⁴ For the first time, there is significant public assistance available for development of high speed intercity passenger rail service, and there is no evidence that Congress intended one technology to benefit from Federal preemption that is not available to the other.

The focus of the DesertXpress Petition and the Board's DesertXpress Decision was exclusively on Sections 10102, 10501(b) and 10901(a) of the ICCTA and the preemptive effect of the STB's jurisdiction over state and local law. The four and a half page DesertXpress Decision does not mention or cite Section 10501(a) or the geographical limit of the Board's jurisdiction to transportation between "a State and a place in the same or another State as part of the interstate rail network .." 49 U.S.C. §10501(a)(2)(A).⁵ The one paragraph at page 4 of the Decision devoted to the definition of "transportation by rail carrier" under Section 10501(b), cites one case for the proposition that carrying passengers by rail in interstate transportation "over its own track" satisfies the test of that section. However, the facts of that one case are

⁴ Petitioners will show *infra* at III B. that DesertXpress, like Amtrak and the California-Nevada Maglev Project, is a "railroad" as defined at 49 U.S.C. § 20102 and thereby subject to the safety jurisdiction of the FRA.

⁵ While not quoted or cited, the Decision does refer in passing to "track that is part of the interstate rail network" in a sentence describing the Board's exclusive jurisdiction under §10501(b), without pausing to explain in any way how that phrase relates to the track to be operated by DesertXpress. DesertXpress Decision at 3-4.

incorrectly characterized.⁶ The DesertXpress Petition describes no connection between its “dedicated two-track passenger rail system” and the interstate rail network, and it fails to explain how the project is made a “part of” that network. *See* Petition at 4-5.⁷ The DesertXpress Petition does make one passing reference to the requirement that the lines subject to the Board’s jurisdiction be part of the interstate rail network, and likens its construction project to the reactivation of the BNSF’s Stampede Pass rail line. *Id* at 7. Of course, the reestablished Stampede Pass line is a freight line connected to the rest of the freight rail network – not a stand alone passenger line with no ability or intention to provide common carrier service to freight customers along the right-of-way or to become “part of” the network.⁸ Those facts and issues, which Petitioners believe to be of great significance to the question before the Board, are not discussed in the prior record of this proceeding or in the Board’s DesertXpress Decision.

Therefore, the Board was deprived of facts of critical relevance to the scope of its jurisdiction over the proposed construction of the rail facilities by DesertXpress. The tracks to

⁶ See discussion of the *Am. Orient Express Ry v STB* decision at page 28, *infra*

⁷ The DesertXpress Petition speaks of the use of public rights of way managed by the Bureau of Lands Management and on the I-15 corridor to which the California and Nevada Departments of Transportation can grant easements. There is a vague reference to an alternative possible use involving “the laying of new track alongside existing rail right-of-way covering approximately 30 miles ... between Victorville and Barstow.” *Id* at 5, note 1. No connection between the new track and the existing rail right-of-way is mentioned anywhere in the Petition or the Board’s Decision. FRA recently released a draft environmental impact statement prepared for the project (“Draft DesertXpress EIS”) which confirms that none of the route segments under consideration are part of the existing interstate rail network, although several optional short segments of DesertXpress track may occupy rights of way owned by freight carriers. *See* Draft DesertXpress EIS, available at <http://www.fra.dot.gov/us/printcontent/1703>, at Ch. 2 pp. 2-19 to 2-23

⁸ *See King County, WA – Petition for Declaratory Order – Burlington Northern Railroad Co. – Stampede Pass Line*, 1 S.T.B. 731, 732 (1996) (Stampede Pass I) (“... BNRR is now proposing to reacquire the segment sold to WCRC and reestablish the Stampede Pass line as a main line for through traffic.”)

be constructed will not connect with, or become part of, the interstate rail network, and DesertXpress or a designee will be incapable of fulfilling the common carrier obligations to freight shippers over those tracks.

The changes to the Interstate Commerce Act (“IC Act”) contained in the ICCTA made clear that this Board does not have jurisdiction over passenger only “railroad carriers,” as defined by 49 U.S.C. §20102(2), unless they operate over lines that are part of the interstate rail network. Petitioners can find no precedent for what the Board has done in the DesertXpress Decision (the one case cited by the Board is incorrectly characterized and does not support the Board’s ruling).

Moreover, the DesertXpress Decision cannot be reconciled with the *State of Maine* line of cases⁹ where rail passenger-only public authorities that acquire lines, over which rail freight service is provided, routinely are granted motions to dismiss their §10901 acquisition notices for lack of jurisdiction (because they are not “rail carriers” within the meaning of ICCTA) if they can show that they will not provide freight services to shippers or impair the provision of common carrier services by other carriers to shippers on the line.¹⁰

These facts and issues were not presented to the Board, and Petitioners assert that the Board committed material error in the DesertXpress Decision.

⁹ *State of Maine, Dep’t of Trans. – Acquisition and Operation Exemption – Maine Cent R.R. Co.*, 3 I.C.C. 2d 835; 1991 ICC LEXIS 105 (1991)(“*State of Maine*” case)

¹⁰ This is the case even though most of these entities are local public transit authorities which are subject to a general exclusion from STB jurisdiction in 49 U.S.C. §10501(c)(2), except those that qualify under §10501(c)(3)(B), which provides them with the potential remedy of forcing access over rail lines and connections within a terminal area that are part of the interstate rail network.

I. Statement of Facts

A. The Parties

CNSSTC is a bi-state Commission, and an agency of the State of Nevada, created in 1988 for the purposes of promoting the development of, and issuing a franchise to build, operate and maintain, a 269-mile super speed train system connecting Las Vegas with Anaheim and other cities in Southern California along the Interstate Highway 15 Corridor, which now is known as the CNIMP. *See* the Nevada Revised Statutes at 705.4291, 705.42935 and 705.4294. CNSSTC is comprised of an equal number of Commissioners from Nevada and California plus a Chairman and Vice Chairman. *See* Verified Statement Kenneth Kevorkian, Vice Chairman of CNSSTC (“Kevorkian V.S”) attached hereto at Tab I, where the history and structure of CNSSTC is discussed in greater detail at ¶ 2.

In 1991, CNSSTC selected the German engineered, *Transrapid*™ Maglev (magnetic levitation) technology as the ideal high-speed ground transportation system for this heavily traveled, congested corridor. In 1996, CNSSTC designated AMG as its private sector partner, and awarded AMG the franchise to build, operate and maintain a super speed service utilizing this Maglev technology. *See* Kevorkian V.S. at ¶ 3.

AMG is a joint venture formed in 1994 to bring the *Transrapid* Maglev technology to the Southern California – Las Vegas transportation corridor. The partners in the AMG joint venture are General Atomics, Parsons Transportation Group, Hirschfeld Steel and the firm of M. Neil Cummings & Associates PLC. *See* Cummings V S. at ¶ 2

B. The California-Nevada Interstate Maglev Project

The CNIMP will operate between Las Vegas and Anaheim via Primm, Nevada¹¹ and Barstow, Victorville and Ontario, California generally along the right of way of Interstate Highway 15 (I-15). Speeds will exceed 300 m.p.h. over portions of the route, and one way transit times as low as 87.5 minutes for express service between Las Vegas and Anaheim, with one stop at the Ontario International Airport

In 1998, Congress authorized the Magnetic Levitation Transportation Deployment Program ("Maglev Deployment Program") in Section 1218 of the Transportation Equity Act for the 21st Century ("TEA21"), codified at 23 U.S.C. §322. The FRA published regulations implementing that program in 2000, now codified at 49 C.F.R. Part 268. FRA designated the CNIMP as one of seven projects eligible for funding under the Maglev Deployment Program in a Federal Register Notice published on July 24, 2000.¹²

Prior to the TC Act of 2008, the FRA has granted to CNSSTC nearly \$7.5 million under the Maglev Deployment Program and the Next Generation High Speed Rail Program that was matched with \$2.1 million in state, regional and city funds to perform pre-construction design, engineering and financial planning and to commence the environmental studies for the CNIMP. The Federal and local funds were spent on studies that were performed in accordance with six separate Cooperating Agreements between CNSSTC and FRA. *See Kevorkian V.S. at ¶ 20*

¹¹ Primm is the location of the new Ivanpah International Airport, which is the planned relief airport for McCarran International Airport. The site for Ivanpah is located about 40 miles southwest of the center of Las Vegas where AMG will construct its Las Vegas terminal. *See Kevorkian V.S. at ¶ 6.*

¹² Draft Programmatic Environmental Impact Statement for the Maglev Deployment Program, 65 Fed. Reg. 45647 (July 24, 2000)

The environmental studies performed with these funds include an Environmental Assessment, and, most recently, a Programmatic Environmental Impact Statement (“PEIS”) for the entire CNIMP that will also address project-level decisions for the initial segment of the project, “The First Forty Miles” from Las Vegas to Primm. FRA issued a Notice of Intent to prepare this PEIS published at 69 Fed Reg. 29161 (May 20, 2004).

In 2005, Congress in its SAFETEA – LU legislation designated the Las Vegas to Primm segment of the CNIMP to receive half of the \$90 million total allocated to the Maglev Deployment Program or \$45 million during FY 2007 through FY 2009 to complete the PEIS. Upon completion of these studies now made possible by the TC Act of 2008, and approval of a public private financing plan, CNSSTC is now working on a plan for constructing “The First Forty Miles” of the CNIMP. This plan will be reevaluated in light of new funding that is being made available pursuant to PRIIA. *See Kevorkian V.S. at ¶ 19.*

Ridership studies performed as part of this environmental analysis for the Corridor forecast more than 42 million passenger trips per year, generating net operating revenue of more than \$500 million (in 2000 \$) by 2025 (ten years after completing the construction of the full corridor California-Nevada Interstate Maglev Project) Another ridership study by the Clark County (Nevada) Regional Transportation Commission found that upgraded, high-speed service on the existing Amtrak routes would generate ridership of only 119,000 passengers annually between Riverside, CA and Las Vegas, with revenue covering only 17.9% of the annual cost of operation and maintenance. *See Cummings V.S. at ¶ 16.*

Since enactment of the TC Act of 2008, CNSSTC and Nevada DOT (“NDOT”) have worked together to develop a two-year plan and a draft statement of work (“SOW”) for the programmatic environmental impact statement for the CNIMP, as well as an SOW for the funds

provided under the TC Act, which contemplates completion of the PEIS (both draft and final) and a construction level EIS for the First Forty Miles in Nevada. The proposed SOW's have been submitted to FRA, and CNSSTC and NDOT are awaiting its approval. In addition, the two-year plan calls for final design and engineering sufficient to qualify for implementing the financing plan to generate \$1.5 billion for construction of the First Forty Miles in Nevada. *See Cummings V.S. at ¶ 14.*

C. The DesertXpress Project

The DesertXpress project surfaced in 2006 with a plan to institute passenger-only rail service over trackage to be constructed along a portion (between Las Vegas and Victorville, 60 miles east of Anaheim) of the right-of-way along the I-15 Freeway that has been designated for use by the CNIMP. FRA published a Notice of Intent to Prepare an EIS for the DesertXpress project on July 14, 2006 (71 Fed. Reg. 40176), and CNSSTC and AMG participated in the public scoping meetings. *See Cumming V.S. at ¶ 18.* It was clear from this Notice that FRA was proposing an environmental review process that was substantially different from that which it had been employing for the CNIMP during the preceding years of study. The roles of the California and Nevada DOTs were minimized, and there was no mention of compliance with the California Environmental Quality Act or local permitting requirements. Also, FRA decided that there would be no comparative analysis between the DesertXpress and the CNIMP. A draft EIS was released several days prior to the filing of this Petition on March 24, 2009. As of the date of this filing, the notice to the public has yet to appear in the Federal Register.¹³

¹³ Petitioners have not have an opportunity to perform a detailed analysis of the draft EIS, but a brief review indicates that the characteristics of the DesertXpress project have not changed in material respects for this proceeding. The alternative rights of way are not connected to, or part of, the interstate rail network, and DesertXpress remains a "passenger-only railroad." One

The FRA Notice of Intent also made clear that there would be no rail freight service provided on the proposed tracks to be used by DesertXpress. “The project would involve construction of a fully grade-separated, dedicated double track *passenger-only railroad*...” *Id.* at 40177 (emphasis added). The description of the track segments in the Notice mentions no connection or interchange with the interstate network of freight rail carriers. The description of certain segments speak of the route “following the existing BNSF Railway Company (BNSF) railroad corridor. ” and “utiliz[ing] an existing, but abandoned, former Atchison, Topcka & Santa Fe railroad corridor...” *Id.* There is no discussion of a connection to the rail network or an interchange with it

AMG President, Neil Cummings attended FRA’s scoping sessions for the DesertXpress EIS that were held in Las Vegas, Nevada, Barstow, California, and Victorville, California on July and 26, 2006. *See Cummings V.S.* at ¶ 20. Present at the meetings was a representative of the Surface Transportation Board, named Catherine Glidden, identified in the General Information booklet distributed at the scoping meetings as one of the “Environmental Protection Specialists” with the Board. Mr. Cummings asked Ms. Glidden what the basis was for the assertion in the *Federal Register* Notice of Intent, and also repeated at the scoping meetings, that the STB had exclusive jurisdiction over the DesertXpress project. Ms. Glidden indicated she was uncertain of the basis. After the meeting, CNSSTC submitted its comments to Mr. David Valenstein at FRA in accordance with the instructions specified in the Notice. A copy of those comments are attached at Exhibit 4 to the Cummings V.S. In those comments, CNSSTC posed a

non-material change is that alternative train technologies are considered: a diesel/electric multiple unit (“DEMU”) with a maximum speed of 125 mph and electric multiple unit (“EMU”) with catenary with a maximum speed of 150 mph.

number of questions concerning the process and the legal basis for the positions taken at the scoping meeting and in the Notice of Intent, including the following

Must a new railroad line be a “common carrier railroad line” and “part of the interstate rail network” to fall within the jurisdiction of the STB? Please explain. How has the STB defined and applied the terms “common carrier railroad lines” and “interstate rail network” since its inception in 1996?

The CNSSTC never received a response from Mr Valenstein, or anyone at the Board in response to this question.

*CNSSTC and AMG were totally unaware of the Declaratory Order proceeding in this docket prior to the issuance of the DesertXpress Decision. CNSSTC and AMG did not have Washington counsel that monitored notices from the STB and, as a result, did not become aware of the institution of this proceeding when the Board published its Notice in the *Federal Register* on August 31, 2006.*

On July 3, 2007, Ms. Catherine Glidden, sent an email transmitting the DesertXpress Decision to a number of State and Federal officials, including James Mallery at Nevada DOT. That was Mr. Mallery’s first actual notice of this proceeding, and he promptly forwarded the email to Ms Richann Johnson, who is Executive Assistant to CNSSTC, who in turn forwarded the Decision to Bruce Aguilera, Chairman of CNSSTC, and Mr. Cummings. *See Cummings V.S. at ¶ 21* As a result, the STB did not receive input from affected state agencies or local communities on the facts essential to reaching a correct determination of the jurisdictional question that was before the Board.

II. CNSSTC and AMG Satisfy the Requirements of §1113.7 and §1115.4

A. STB Should Reopen the DesertXpress Proceeding

Pursuant to 49 C.F.R. § 1115.4, CNSSTC and AMG respectfully request that the Board reopen its Decision served on June 27, 2007 in the DesertXpress proceeding. The Board has stated that it will grant a petition to reopen only upon a 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 Industrial Railway Co. – Alternative Rail Service – Central Illinois Railroad Co.*, STB Finance Docket No. 34917 (served Jan. 12, 2007), at 7. In the *Pioneer Industrial Railway Co.* proceeding, the petitioner requested that the Board reopen its decision to grant an adverse discontinuance of its service because the fundamental premises of the decision were no longer true and circumstances had changed dramatically from what the Board believed them to be at the time the decision was issued. *Id.* at 7-8. The Board agreed with the petitioner and reopened its initial decision upon a finding that new evidence and changed circumstances may materially affect its previous analysis in the proceeding. *Id.* at 8. The Petitioners believe that all three factors are present and, as a result, the Board should reopen the DesertXpress proceeding.

First, as discussed in Section III.A. *infra*, the Board's decision in the DesertXpress proceeding constituted material error. The Board was deprived of relevant facts to its decision in the DesertXpress proceeding, specifically that the tracks to be constructed for this project will not connect with, or become part of the interstate rail network, and DesertXpress will not be able to fulfill common carrier obligations to freight shippers on its tracks. Lacking all of the pertinent

facts, the Board's decision erroneously focused on the scope of federal preemption under 49 U.S.C. § 10501(b), and failed to focus adequate attention to the discrete elements of rail transportation services which trigger jurisdiction under ICCTA. In fact, as discussed further in Section III.B 1 *infra*, DesertXpress is a "railroad" as defined by 49 U.S.C. § 20102 subject to the FRA's safety jurisdiction, rather than a "rail carrier" subject to the Board's jurisdiction as defined by 49 U.S.C. § 10501(b). Accordingly, in light of the material error committed in the DesertXpress proceeding resulting from the Board's inability to consider all facts relevant to the proceeding, Petitioners respectfully request that the Board reopen this proceeding.

Second, Congressional enactment of the TC Act of 2008, PRIIA and the Recovery Act represents substantially changed circumstances from those that were before the Board at the time of the DesertXpress proceeding. At the time Board was considering DesertXpress's Petition for Declaratory Order, CNSSTC and AMG were working to ensure that funding for the CNIMP would proceed. When the Board's DesertXpress Decision was rendered on June 27, 2007, the Petitioners were not certain that their efforts to secure the funding would be successful. The prospects for funding high speed rail in general, and CNIMP in particular, have changed dramatically. In light of these substantially changed circumstances in the form of a newly-funded, viable, and Congressionally-supported CNIMP, the Petitioners respectfully request that the Board reopen its decision in the DesertXpress proceeding.

This Petition draws attention to facts not considered in the Board's DesertXpress Decision – *in effect new evidence supporting a decision by the Board to reopen its decision*. First, DesertXpress will not be able to fulfill its common carrier obligation by offering freight service on its line. As explained by FRA in its July 14, 2006 Federal Register Notice of Intent to prepare an Environmental Impact Statement for the DesertXpress project:

DesertXpress . . . proposes to construct and operate a privately financed interstate high-speed passenger train, with a proposed station in Victorville, California and a station in Las Vegas, Nevada, along a 200-mile corridor, within or adjacent to the I-15 freeway for about 170 miles and adjacent to existing railroad lines for about 30 miles.

71 Fed. Reg. 40176 at 40177. See also Draft DesertXpress EIS at ES-1.

There is no mention in the FRA Scoping Notice that the DesertXpress line will have any connection to the freight network.¹⁴ FRA's discussion of the proposed DesertXpress track segments in the FRA Notice of Intent omits any reference to the railroad having any connections to the freight network. While the description of certain segments reference the route "following the existing BNSF Railway Company railroad corridor . . ." and "utiliz[ing] an existing, but abandoned, former Atchison, Topeka & Santa Fe railroad corridor . . .," there is no mention of DesertXpress connecting to or interchanging with the freight network

Finally, the TC Act of 2008, enacted over the strenuous opposition of DesertXpress representatives, constitutes a Congressional endorsement for development of the CNIMP. This confirmation of congressional support for the project justifies a reexamination of the earlier DesertXpress Decision. The Board's earlier ruling extends Federal preemption to one form of intercity passenger-only rail service. That outcome could not have been intended by Congress simply because DesertXpress plans to operate diesel powered trains using a steel wheel on steel

¹⁴ **The draft EIS also does not include any discussion of the proposed DesertXpress line having any connection to the freight rail network. The "Alternatives" section of the draft EIS does suggest that "limited portions of the proposed rail alignment would be located within existing railroad corridors or rights-of-way." Section 2.0 of draft EIS. For instance, the discussion of alternative segment 2 states that "[t]hrough the City of Barstow, the alignment would utilize a former Atchison Topeka & Santa Fe railroad corridor . . ." *Id.* at Section 2.4.2.1. In addition, the discussion of alternative segment 6C provides that the line would "generally follow the existing UPRR corridor (primarily within the UPRR right-of-way) . . ." *Id.* at Section 2.4.6.3. However, even if these alternatives were ultimately chosen, DesertXpress would not be "part of the interstate rail network."**

rail technology. DesertXpress and CNIMP both will have no capability, either of serving freight shippers along the right of way that they will pass over, or of interchanging traffic with carriers operating on the interstate rail network. Congress did not intend that one would benefit from Federal preemption and the other would not

B. CNSSTC and AMG Should Be Permitted to Intervene in the Re-opened DesertXpress Proceeding

CNSSTC and AMG respectfully request leave to intervene in the reopened DesertXpress proceeding in accordance with 49 C.F.R. §1113.7. Petitioners respectfully submit that it has shown good cause for reopening this proceeding at this time and that their interests are substantially and adversely affected by the DesertXpress Decision. The intervention in the reopened DesertXpress proceeding is not too late, will not broaden the issues, and will not unjustly prejudice DesertXpress

First, the intervention is not too late because Petitioners are challenging the Board's finding of subject matter jurisdiction in the DesertXpress Decision, and subject matter jurisdiction in a judicial context may be raised at any time. Petitioners are not aware of any STB or I.C.C. precedent on this specific question, but maintain that the Board should adhere to this universally recognized principle. In *Central States Co-ops v. Watson Bros. Transp. Co.*, 165 F.2d 392 (7th Cir. 1948) *vacated on other grounds* 337 U.S. 951 (1949), a defendant removed a state court action to the U.S. District Court, and lost a jury verdict. Upon appeal, the defendant raised for the first time the issue of subject matter jurisdiction, and the Court ruled:

We need no more than mention the firmly established rule that a jurisdiction question may be raised at any stage of the proceedings. In fact, it is the duty of a reviewing court on its own volition and irrespective of whether the question has been raised by the parties to examine into the matter of jurisdiction [citations omitted]

* * *

This ironclad rule takes no note of the apparent hardships and unfairness which its application may produce.

Id at 394.¹⁵

Second, intervention will not broaden the issues. The focus of the intervention is the same as the with petition for declaratory order in the DesertXpress proceeding, *e g* . whether the project falls within the Board's exclusive jurisdiction. *See* DesertXpress Decision at 2 Being part of operations over the interstate rail network was always an issue in the DesertXpress proceeding, but it simply did not receive the attention it deserved.

Lastly, intervention will not unjustly prejudice DesertXpress or third parties. DesertXpress chose not to serve its Petition for Declaratory Order on CNSSTC, AMG or the California and Nevada DOT's. DesertXpress has relied upon the Board's declaratory order, but such reliance does not confer jurisdiction where it was not granted by Congress DesertXpress has not filed with the Board its §10901 application to construct its alleged "line" of railroad. In addition, a search performed on March 11, 2009 of the STB's filings with and decisions made by the Board since its June 2007 decision in the DesertXpress proceeding reveals that, with one exception, none of these filings by other parties appearing before the Board have relied upon the

¹⁵ *See also, e g* . *Preferred Risk Mutual Ins Co v United States*, 86 F.3d 789, 793 (8th Cir. 1996) (citing *Yeldell v. Tutt*, 913 F.2d 533, 537 (8th Cir 1990). The *Preferred Risk* case addressed the issue of potential infringement by the Federal Emergency Management Agency ("FEMA"), through use of the term "Preferred Risk" in conjunction with the Agency's flood insurance applications, upon an insurance company's trademark. Preferred Risk Mutual ("PRM"), the insurance company in the case, argued that the scope of judicial review was limited to the administrative record in the proceeding, which consisted of six letters exchanged between FEMA and PRM. *Id.* at 793. PRM argued that, because FEMA failed to raise the issue of sovereign immunity during its correspondence with PRM, that the Agency had waived its ability to assert immunity. *Id.* However, the court found that sovereign immunity is jurisdictional in nature and that questions of subject matter jurisdiction may be raised at any time and may not be waived. *Id.*

DesertXpress Decision. The only exception did not involve passenger rail service, and the Board found the party that cited the DesertXpress decision had done so incorrectly.¹⁶

There are other mitigating circumstances. Petitioners did not have actual notice of the DesertXpress proceeding. Focusing solely on their efforts to promote enactment of the TC Act of 2008 so that funding for the CNIMP could be secured, Petitioners did not retain Washington counsel to monitor STB notices.

Further, Petitioners understand that neither the California nor the Nevada DOT were aware of the DesertXpress declaratory judgment proceeding prior to July 2007 when an employee of the Board's Section on Environmental Analysis forwarded copies of the Board's decision to various employees of the California and Nevada DOTs. *See Cummings V.S.* at ¶ 21. As a result, neither state's DOT participated in the proceeding, nor were they served by the parties to the proceeding with DesertXpress's Petition or subsequent pleadings, even though it was their respective state laws that were being preempted. In other contexts, the Board requires parties to serve the relevant state agencies.¹⁷ This did not occur in the DesertXpress proceeding and, as a result, neither the California nor the Nevada DOT participated in the proceeding, even though it was their respective state laws that were being preempted as a result of the Board's decision. CNSSTC and AMG have served copies of this petition on each entity

¹⁶ *See Suffolk & S R R LLC – Lease and Operation Exemption – Sills Road Realty, LLC*, STB Finance Docket No. 35036, *slip op* at 3, note 3 (served August 27, 2008) (distinguishing the DesertXpress Decision cited by petitioner from the facts in that case.)

¹⁷ *See, e.g.*, 49 C.F.R. § 1150.10(e) (rail line construction applications); 49 C.F.R. § 1108.4(c)(5)(i) (railroad consolidation applications); *JP Rail Inc. – Lease and Operation Exemption – Nat. Indus, Inc.*, STB Finance Docket No. 35090 (served Jan. 18, 2008), at 1 (where STB, on its own initiative, ordered that state and local parties be provided actual notice of a notice of exemption proceeding).

Finally, at the time the proceeding was occurring, Petitioners did not have a stake in the outcome of the proceeding because funding for the CNIMP had not been secured. Following the enactment of the TC Act of 2008 and the Recovery Act, Petitioners now have a stake in the DesertXpress proceeding because of the funding provided specifically for the CNIMP in the TC Act to complete the necessary environmental and engineering plans, plus the prospect of additional capital funding for construction of the first segment of the project between Las Vegas and Primm, NV. As such, CNSSTC and AMG now have a substantial interest in DesertXpress proceeding because it involves a directly competing railroad that could directly impact on the viability of the CNIMP.¹⁸

III. Deprived of Relevant Facts The Board Committed Material Error in its DesertXpress Decision

A. The DesertXpress Decision Focused on the Scope of Federal Preemption Under §10501(b), and Devoted Inadequate Attention to the Jurisdictional Issues Resulting in Material Error

The Board in its DesertXpress Decision devotes one paragraph to a description of the nature of DesertXpress' proposed operation, without describing the specific route or whether the rail segments will become a part of the interstate rail network, or whether DesertXpress will service rail freight shippers along the line or arrange for a third party to do so. The Board devotes one paragraph to the question of whether DesertXpress is a "rail carrier" subject to its jurisdiction. It does so citing one case, which it mischaracterizes, and without citing §10501(a) which defines the scope its jurisdiction. Rather, the bulk of the Decision relates to the secondary

¹⁸ See, e.g., *Norfolk S. Corp – Control – Norfolk and W Ry. Co.*, STB Finance Docket No. 29430 (Sub-No 21) (served Dec 15, 1999) (discussing factors for granting leave to intervene by an uninvolved labor union in an appeal by another union from an arbitration panel decision denying labor protection benefits to the second union's members under *New York Dock*)¹⁸

question, which DesertXpress defined in its petition as the key uncertainty requiring clarification, of “whether [the Board’s] jurisdiction preempts state and local environmental laws, land use restrictions, and other permitting requirements that might otherwise apply to the DesertXpress’ project ” DesertXpress Decision at 2.

The Board’s error may be explained by the manner in which DesertXpress framed the issue for the Board. “DesertXpress argues that this project presumptively falls within the Board’s exclusive jurisdiction over transportation by rail carriers as set forth at 49 U.S.C. 10501....” DesertXpress Decision at 2. The STB’s environmental staff may have succumbed to the same presumption by participating with the FRA in the environmental scoping process in 2006. In its July 14, 2006 Federal Register Notice of Intent to prepare an Environmental Impact Statement for the DesertXpress project, FRA states.

The STB has exclusive jurisdiction, pursuant to 49 U.S.C. 10501(b), over the construction, acquisition, operation and abandonment of rail lines, rail rates and services and rail carrier consolidations and mergers. 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.

71 Fed. Reg. 40176 at 40177. The first sentence of this notice loosely summarizes the scope of the Board’s exclusive jurisdiction over freight railroads,¹⁹ but the next sentence offers no reasoned explanation why these tracks to be constructed by DesertXpress become “lines” of railroad within the meaning of §10901.

CNSSTC and AMG do not know on what basis this determination was made by FRA or by the STB in its DesertXpress Decision, but they respectfully suggest that there should be no

¹⁹ The STB has not regulated rates of rail passenger carriers under Chapter 107 of Title 49 U.S.C. since its predecessor did in 1971, and provisions relating to regulation of passenger rates [e.g. 49 U.S.C. §10722 (1990)] were deleted by ICCTA.

“presumption” about jurisdiction over passenger rail service, and that the jurisdictional provisions require closer scrutiny under the facts of this case.

1. DesertXpress is Not a Rail Carrier Subject to STB Jurisdiction Because its Lines Will Not Be “Part of the Interstate Rail Network ”

The Board’s error in finding DesertXpress to be a rail carrier subject to its jurisdiction can be demonstrated by a close examination of the changes in its jurisdiction over rail passenger and intra-state rail transportation arising from the ICCTA.²⁰ Prior to 1995, the IC Act contained provisions relating to the regulation of changes in passenger service, both interstate and intra-state (if local jurisdictions failed to act promptly) and passenger rates. See 49 U.S.C. §§ 10908, 10909 and 10722 (1990) and Appendix A hereto. ICCTA removed these provisions,²¹ and with other clarifications, effectively eliminated Federal economic regulation of interstate passenger rail service that is not performed by Amtrak or performed by carriers on lines that are part of the interstate rail network which also serve freight shippers.²² These changes in 1995 were designed to strip away the remnants of ICC regulation of the interstate passenger service provided prior to the creation of Amtrak in 1971.²³

²⁰ Changes to Section 10501(a) extended jurisdiction to intrastate rail transportation, thereby eliminating provisions of the IC Act which delegated to States very tightly constrained economic jurisdiction over intrastate freight transportation.

²¹ Section 10102(9) retains the historic definition of “transportation” as the provision of certain types of equipment, including that which move “passengers.” Also, the Board’s consolidation regulations exhibit concern over impacts upon “commuter or other passenger services.” 49 C.F.R. §1180.8. However, these references do not purport to convey jurisdiction to the Board – for that is done only in Section 10501.

²² The STB retains jurisdiction over Amtrak operations through very specific and limited provisions of the Rail Passenger Services Act, e.g. 49 U.S.C. §24308. See argument at Section III.B. *infra*.

²³ The amendments to the IC Act that occurred in 1973, 1976 and 1980 did not address these provisions, perhaps because at least initially the freight railroads had not uniformly

The Conference Report accompanying ICCTA, H.R. Rep. No. 104-422²⁴ (Joint Explanatory Statement of the Committee of Conference) explains that Congress thought this amendment ended regulation by the STB of passenger service under the IC Act. In describing the Senate version of the amendments to §10501, the Report states that.

The exclusive nature of the Board's regulatory authority would be clarified. The Board's rail jurisdiction would be limited to freight transportation, because rail passenger transportation today (other than service by Amtrak, which is not regulated under the Interstate Commerce Act) is now purely local or regional in nature and should be regulated (if at all) at that level.

Id. at 167. The Report describes the treatment of passenger transportation in the Conference substitute in similar terms:

This provision ..changes the statement of agency jurisdiction to reflect curtailment of regulatory jurisdiction in areas such as passenger transportation.... This section also clarifies that, *although regulation of passenger transportation is generally eliminated*, public transportation authorities that meet the existing criteria for being rail carriers may invoke the terminal area and reciprocal switching access remedies of section 11102 and 11103.

Id. (emphasis added).

Contrary to the description of the Board's ability to regulate rates, operations and abandonment of a passenger rail carriers contained in the FRA Notice of Intent quoted *supra*, the Board has no procedures in place to regulate those matters, and Congress has not authorized the STB to perform that role

surrendered their passenger operations to Amtrak. The total reassessment of the IC Act regime that occurred in 1995 resulted in the elimination of what were regarded as superfluous provisions

²⁴ H.R. Conf. Rep. 104-422 104th Cong., 1st Sess. 1995; 1995 U.S.C.C A N 850, 1995 WL 767862 (Leg. Hist).

The resulting regulatory framework after enactment of ICCTA permits the STB to exercise jurisdiction over an entity providing passenger rail service only when two conditions are satisfied:

- (1) if the lines it operates over are part of the interstate rail network; and
- (2) if the passenger entity provides, or controls the provision of, freight services along such lines that are subject to the common carrier obligation under 49 U.S.C. §11101 to freight shippers.

When both conditions are satisfied, the passenger rail entity can still avoid the designation of a rail carrier under ICCTA if it assigns sufficient independent operating authority to a freight rail operator to fulfill the common carrier freight obligation on the lines in question. See discussion of the *State of Maine* line of cases at Section III A.2. *infra*.

The changes enacted by Congress in ICCTA confirm that the “common carrier railroad transportation for compensation” referred to in 49 U.S.C. §10102(5) must encompass freight rail service over lines that are part of the interstate rail network, and that it is not enough simply to offer rail passenger service to the general public on a line *not* part of the interstate rail network. An analysis of the language of ICCTA is aided by a side-by-side comparison of relevant provisions of the pre-1995 IC Act and ICCTA. Appendix A to this Memorandum contains such a table.

The first comparisons are to the changes in the definition of “rail carrier” in Section 10102 and the jurisdictional provisions of Section 10501(a) of the respective acts. Section 10102(5) of ICCTA adds the following qualifier to the definition of rail carrier, which the Board chose to overlook in its *DcsertXpress* Decision at 4: “but does not include street, suburban, or interurban electric railways not operated as part of the general system of rail transportation.” The statute does not define “street, suburban, or interurban electric railways,” but it is language

that finds its origin in the IC Act since 1920.²⁵ The definition of “rail carrier” excludes services over tracks that are not operated as part of the general system of rail transportation, but encompasses within its scope coverage of local or interstate passenger service that is operated on those lines of railroad.

The required integration of operations with the “general system of rail transportation” is reflected in somewhat different language inserted in Section 10501(a). In defining the types of transportation interstate movements covered by STB jurisdiction, Congress limits the types of interstate rail carrier movements to those between “a State and a place in the same or another State as part of the interstate rail network....” The “general system of rail transportation” and the “interstate rail network” are one in the same, and that system or network is the rail freight network over portions of which rail passenger services may be performed

The case law interpreting the Transportation Act of 1920 (“1920 Act”) confirms that the distinguishing characteristics of the general “steam” system of rail transportation was that it was constructed for the purpose of transporting freight. Under this line of cases, courts found that only those rail carriers whose lines are part of the interstate rail network and provide freight service were subject to ICC jurisdiction.

²⁵ See 49 U.S.C. § 1(22), formerly part of the Interstate Commerce Act as amended by section 402 of the Transportation Act of 1920 which provides:

The authority of the commission, conferred by paragraphs (18) to (21), both inclusive, shall not extend to the construction or abandonment of spur, industrial, team, switching, or side tracks, located or to be located wholly within one State, or of *street, suburban, or interurban electric railways, which are not operated as a part of parts of a general steam railroad system of transportation.*

emphasis added.

First, in *Piedmont & Northern Ry. Co. v. Interstate Commerce Commission*,²⁶ the petitioners sought to construct extensions to two separate and disconnected lines of railway. The petitioners argued that the ICC did not have jurisdiction over the extensions and related new construction because the lines were “an interurban electric railway not operated as part of a general steam railroad system of transportation.”²⁷ However, the Supreme Court found that the petitioners were engaged in the general transportation of freight, and that their line connected with a steam railroad and thus were not exempt from regulation by the ICC.²⁸

In a subsequent case, *Texas Electric Ry Co.*,²⁹ the rail company sought exemption from the Railway Labor Act, arguing that it was an electric interurban railway, constructed and used for passenger service, which had developed additional freight service that could be undertaken without interfering the primary purpose of passenger service.³⁰ In appealing a ruling by the ICC that the railway was not exempt from its jurisdiction, the company further argued that it was not operating as part of a general railroad system of transportation.³¹ However, the court found that “an interurban . . . , which, in its ordinary course of business, is so connected by a rail plan as to permit cars of freight in large quantities and not in sporadic instances, to pass from steam

²⁶ 286 U.S. 299 (1932).

²⁷ *Id* at 305.

²⁸ *Id.* at 311

²⁹ 25 F.Supp. 825 (N D. TX 1938).

³⁰ *Id* at 827.

³¹ *Id*

transportation systems, to and upon its own rails, for carriage and transportation, must be considered to be outside of the [Railway Labor Act's exemption] proviso ”³²

In a more recent case before the D.C. Circuit, two labor unions appealed the ICC's finding that an interurban electric railroad was not subject to the Railway Labor Act after it abandoned its obligation to allow freight service over its line.³³ In affirming the ICC's finding, the court stated that the rail's "connection with the general steam railroad system of transportation ended with the abandonment of its legal right and obligation to allow passage of interstate freight over its line . . .”³⁴ Therefore, when the freight service terminated, so did the rail carrier status, even though train operation held out to the general public continued.

The Board erred in finding that DesertXpress was a rail carrier because DesertXpress has failed to show that its proposed track is part of the interstate rail network or that it, or a designated third party, will perform common carrier freight operations over the trackage that would fulfill the requirements of 49 U.S.C. §11101. Indeed, the public record confirms just the opposite. The FRA Notice of Scoping for the Environment Impact Statement for the DesertXpress service, attached as Exhibit 2 to Cummings V.S., the rail lines are “dedicated” and restricted to “passenger only” operations:

The project would involve construction of a fully grade-separated, *dedicated double track passenger-only railroad* along an

³² *Id.* at 831

³³ See *Ry Labor Executives' Assoc. v. Interstate Commerce Comm'n.*, 859 F.2d 996 (1988).

³⁴ *Id.* at 998.

approximately 200-mile corridor from Victorville, California to Las Vegas, Nevada³⁵

The Board relies on one case to support its DesertXpress Decision. *American Orient Express Railway Company v. STB*, 484 F.3d 554 (D.C. Cir. 2007) *aff'g American Orient Express Railway Company, LLC – Petition for Declaratory Order*, STB Finance Docket No. 34502 (served December 29, 2005) (“AOE Decision” and “STB AOE Decision”). *Id.* at 4. Contrary to the parenthetical description of the case in the DesertXpress Decision, American Orient Express (“AOE”) did not transport passengers “over its own tracks ” *Id.*

AOE contracted with Amtrak to move AOE’s elegant passenger cars “on the interstate rail network” and AOE did not “own or operate any of the equipment, road, or facilities listed in [49 U.S.C §10102(6)].” *See* STB AOE Decision, slip op. at 2, 4. The lines of railroad over which Amtrak and AOE provided their services were the lines of the interstate rail network where other rail carriers provided common carrier freight services. The AOE Decision dealt with facts clearly distinguishable from the facts by DesertXpress – no freight service will be provided on the tracks DesertXpress proposes to construct between Victorville and Las Vegas, and there will be no interchange with freight rail carriers to fulfill the common carrier obligation to rail freight shippers located adjacent to the right of way.

Connection to the general interstate network has been a matter of significance to the Board in other contexts. In the abandonment context, the Board has concluded that once a line is severed from the interstate network, the Board loses jurisdiction. *See RLTD Railway Corp v Surface Transportation Board*, 166 F.3d 808, 813 (6th Cir. 1999) (where a line operated as an

³⁵ 71 Fed. Reg. at 40177 (July 14, 2006) (emphasis added). Again, this fact is confirmed by the recent Draft DesertXpress EIS at p. ES-1.

intrastate scenic tourist railroad, but was years earlier severed from the network, could not be abandoned as an out of service line and transferred under the National Trails System Act).

In addition, the FRA's recent Notices of Intent to prepare an EIS for the California High-Speed Train ("HST") Project's from Merced-to-Bakersfield and San Jose-to-Merced segments further contradict the Board's finding that DesertXpress is a rail carrier. The notices indicate that the HST is not a rail carrier, and is obligated to comply with California environmental law and procedures³⁶ In particular, the notices imply that, at least the San Jose-to-Merced segment of the HST will operate over a rail line or within the same right of way used by freight railroads³⁷ By contrast, DesertXpress, which the Board has determined to be a rail carrier subject to its jurisdiction, will operate over a line that is not used by freight railroads and is not part of the interstate rail network. The FRA's treatment of the HST as a non-carrier, even though it will operate over a line or within a freight right of way that is used by freight railroads, and is part of the interstate rail network, further demonstrates the anomaly created by the Board's finding that DesertXpress is a rail carrier.

³⁶ See FRA Notice of Intent to Prepare an Environmental Impact Statement for the California High-Speed Train Project From San Jose to Merced, CA, 74 Fed. Reg. 11170 (March 16, 2009), FRA Environmental Impact Statement for the California High-Speed Train Project From Merced to Bakersfield, CA, 74 Fed. Reg. 11172 (March 16, 2009).

³⁷ The Merced-to-Bakersfield Notice indicates that the "approved HST system would be about 800-miles long, with electric propulsion and steel-wheel-on-steel-rail lines capable of operating speeds of 220 miles per hour (mph) on a dedicated system of fully grade-controlled steel tracks" 74 Fed. Reg. at 11172. The San Jose-to-Merced Notice also indicates that the HST system would be "about 800-miles long, with electric propulsion and steel-wheel-on-steel-rail trains capable of maximum operating speeds of 220 miles per hour," but would operate "on a *mostly* dedicated system of fully grade-separated, access-controlled steel tracks . . ." 74 Fed. Reg. at 11170 *emphasis added*. Use of the term "mostly" in the San Jose-to-Merced notice indicates that on a portion of the route, the HST will be operating on a freight right of way, or on a right of way owned by a public authority that permits freight rail operation and is therefore part of the interstate rail network. Even in that case, the HST will not be a rail carrier according to the Notice.

2. The Board's DesertXpress Decision for the First Time Extended STB Jurisdiction Over Trackage that Will Not and Can Not Serve Shippers.

The Board, and the ICC before it, has adhered to a process pursuant to which State DOTs or local commuter passenger authorities that acquire portions of the interstate rail network from freight rail carriers can avoid being designated as rail carriers subject to jurisdiction of the Board by granting exclusive freight easements or similar conveyances to the former owner or a third party freight rail carrier. The process was first adopted in the *State of Maine, Department of Transportation – Acquisition and Operation Exemption – Maine Central Railroad Co.*, 8 I.C.C. 2d 835; 1991 ICC LEXIS 105 (1991) (“State of Maine” case). It is commenced by filing an application pursuant to §10901 or notice of exemption pursuant to 49 C.F.R. §1150.31 to acquire the rail line simultaneously with a Petition to Dismiss the application or notice of exemption on the ground that no common carrier rights or obligations are conveyed to the public authority.³⁸ Public agencies providing “mass transportation” under 49 U.S.C. §5302(a) are not subject to the STB’s jurisdiction, even though they operate over portions of the interstate rail network, hold themselves out to the public and provide “transportation” services 49 U.S.C. §10501(c)(2). Nevertheless, they can become rail carriers if their ownership and control impacts freight service and the fulfillment of the common carrier obligation. The only issue for the STB in these cases is whether or not the agency interferes with or impairs the rail freight carrier’s ability to fulfill its common carrier freight obligation. *Id.*

³⁸ See, e.g., STB F.D. No. 35008, *Utah Transit Auth.-Acquisition Exemption-Union Pacific R.R. Co.*, slip op. at 4 (served July 23, 2007); STB, F.D. No. 34293, *Metro-North Commuter R. Co.-Acquisition and Operation Exemption-Line of Norfolk Southern Ry. Co and Pennsylvania Lines, LLL*, slip op (served May 13, 2003) and STB F.D. No. 33046, *Sacramento-Placerville Trans. Corridor J.P.A. – Acquisition Exemption-Certain Assets of S. Pac. Trans. Co.*, slip op., 1996 WL 616841 (S.T.B.) at 2 (served October 28, 1996).

Yet, the Board never even asks the question about freight service on the line that DesertXpress proposes to construct. The Board makes no determination or findings relating to whether DesertXpress would impair service to shippers over the line which would be constructed – presumably for the reason that it knew that no freight service would be provided. Provision of freight service and the common carrier obligation to shippers is a distinguishing characteristic of a line of railroad under 49 U.S.C. §10901, and the common carrier obligation to shippers applies to every inch of the interstate rail network, and no case to Petitioners' knowledge has found it to be otherwise – until the DesertXpress Decision.

ICCTA distinguishes between various categories of track – rail lines under §10901 are all subject to the common carrier obligation to serve shippers and other categories of track are not subject to those requirements. Entities that only switch rail cars with locomotives on track within an industrial plant facility are not rail carriers. See *Willard v Fairfield S. Co., Inc.*, 472 F.3d 817, 821-23 (11th Cir. 2006); *Sullivan v. Scoular Grain Co.*, 930 F.2d 798, 800-01 (10th Cir. 1991); and *Kieronski v Wyandotte Terminal Railroad*, 806 F.2d 107, 108-10 (6th Cir. 1986) “[S]treet, suburban, or interurban electric railways not operated as part of the general system of rail transportation” are not rail carriers. 49 U.S.C. §10102 (5). The guideways on which CNIMP will operate will have trains traveling up to 300 m.p.h., and freight service at intermediate locations along the corridor would not be conducive to trains operating at such speeds with short headways measured in minutes. Even the 125 m.p.h. speeds projected by DesertXpress are not conducive to freight service.³⁹ Petitioners maintain that these guideways and tracks are not part

³⁹ See Association of American Railroads Position Paper on Passenger Rail, January 2009 at: <http://www.aar.org>, which states that “high-speed passenger trains should only operate on tracks designated for their sole use, not on tracks used by freight railroads.” PRIIA defines high-speed rail as service that is “reasonably expected to reach speeds of at least 110 miles per

of the interstate rail network because they are not capable of and not intended for the provision of common carrier service to freight shippers, and that the DesertXpress proceeding be reopened to confirm that.

B. Like Amtrak and the California-Nevada Interstate Maglev Project, DesertXpress is a “Railroad” as Defined by 49 U.S.C. §20102 and Subject to the Safety Jurisdiction of FRA

Congress has not left unregulated passenger rail entities or, more properly “railroad carriers,” that do not fall within the jurisdiction of the STB. They are subject to the safety regulation of FRA by virtue of 49 U.S.C. §20102, which provides the following definitions of “railroad” and “railroad carriers” for purposes of the safety rules:

In this part—

(1) “railroad”--

(A) means any form of nonhighway ground transportation that runs on rails or electromagnetic guideways, including—

- (i) commuter or other short-haul railroad passenger service in a metropolitan or suburban area and commuter railroad service that was operated by the Consolidated Rail Corporation on January 1, 1979, and
- (ii) high speed ground transportation systems that connect metropolitan areas, without regard to whether those systems use new technologies not associated with traditional railroads, but

(B) does not include rapid transit operations in an urban area that are not connected to the general railroad system of transportation.

(2) “railroad carrier” means a person providing railroad transportation

hour.” 49 U.S.C §26106 (b)(4). In testimony presented on April 1, 2009 before the Subcommittee on Transportation of the House Committee on Appropriations, Matt Rose, President and CEO of BNSF Railway stated “[a]t sustained speeds in excess of 90 mph, passenger train operations will need to be segregated from freight operation on separate track.” *The Future of High Speed Rail, Intercity Passenger Rail and Amtrak. Hearing Before Subcomm. on Trans of the H Comm. On Appropriations, 111th Cong. (2009) (statement of Mr Matthew K. Rose, Chairman, President and Chief Executive Officer, BNSF Railway Co.), at p. 4, attached hereto at Tab III.*

These definitions are significant because they show that Congress specifically contemplated that there are railroad carriers that are not part of the general system of rail transportation or the interstate rail network that it wanted to be within the regime of Federal rail safety regulation. Electromagnetic guideways, like those used in AMG's maglev technology, are clearly not to be part of the interstate rail network. Similarly, high speed technologies "not associated with traditional railroads," like DesertXpress, are also "railroad carriers" under this section.

This statutory language was amended in 1994, just a year before enactment of ICCTA. If the House and Senate legislative committees with jurisdiction over these statutes intended to extend the new STB's jurisdiction over economic regulatory matters to "railroad carriers" under 20102, they would not have limited the scope of the Board's jurisdiction in Section 10501(a) to transportation that is provided over the interstate rail network.⁴⁰ These new high speed technologies for moving passengers between metropolitan areas were receiving active research and development funding from Congress, and it was known generally that at these high speed services could not be operated over the same lines as the traditional freight rail network.

The substantive economic regulation performed by the STB addresses service, rate and other issues arising from freight transportation, but not passenger transportation. When Congress wanted the STB or its predecessor agency to address passenger rail issues, it created specific authorization for that purpose. For instance, in the Rail Passenger Service Act, Congress designated the ICC to resolve disputes between freight carriers and Amtrak over the terms of Amtrak's access of rail facilities in 49 U.S.C. §24308(a)(2). More recently, under PRIIA,

⁴⁰ They also would not have filed a Conference Report, H.R. Rep. No. 104-422, with the language about the "curtailment" of the STB's jurisdiction over passenger rail, discussed *supra*

Congress created a consultative role for the STB in the development by FRA and Amtrak of metrics for measuring performance and service quality under Section 207 of this law, and in Section 213 of PRIIA, Congress amended 49 U.S.C. §24308 to create new subsection (f) which grants the STB power to initiate investigations or to entertain complaints by Amtrak or freight railroads to determine whether Amtrak service delays or failures to achieve minimum service standards are caused by a freight railroad's failure to grant appropriate priority to Amtrak trains. However, the procedures for initiating or discontinuing Amtrak service do not require the involvement of the ICC or STB under Chapter 109 of the IC Act or ICCTA. Rather, those matters are initiated by Amtrak without a regulatory proceeding. *See* 49 U.S.C. §§24701 and 24706.

Recognizing that the Board's role with rail passenger matters was limited to issues arising from Amtrak's use of and impacts on the service of freight railroads (or vice versa), Congress in the Amtrak Reform and Accountability Act of 1997 (§401(1)) changed Amtrak's designation as a rail carrier under 49 U.S.C. §10102(5) to a railroad carrier under 49 U.S.C. §20102(2). The explicit limitation of the Board's jurisdiction over mass transportation provided by commuter rail operators in §10501(c)(2) does not lead to the inference that other forms of passenger operations are somehow intended to be subject to the STB's jurisdiction. Congress simply has not provided the Board with the tools to do so. The rate reasonableness regulation in Chapter 107 of Title 49 and the abandonment and discontinuance of service in Chapter 109 are equally not designed for these purposes. The Board's narrow jurisdiction over commuter rail operations extends only to the extent that these commuter rail services impact the common

carrier obligation to freight shippers Congress did not provide the Board in ICCTA or any subsequent legislation to regulate intercity passenger rail service not provided by Amtrak ⁴¹

The Board's DesertXpress Decision did not grapple with any of the facts which define whether rail transportation is or is not subject to its jurisdiction. Rather, it focused solely on the preemptive effect of rail transportation that "presumptively" was within its jurisdiction. The Board erred in extending its jurisdiction in this unreasoned and unprecedented way.

C. The Board's DesertXpress Decision Presumes That Congress Intended to Convey a Procedural Advantage to Conventional Rail Passenger Technologies to the Detriment of Carriers Designated Under the Maglev Deployment Program

The DesertXpress Decision creates an anomaly that Congress could not have intended. Congress in 1998 created the Maglev Deployment Program, *supra*, to promote and encourage the commencement of rail passenger service which employs this advanced passenger transportation technology. This enactment followed by three years the enactment of ICCTA, in which Congress stripped from the IC Act the Board's explicit authority to regulate rail passenger matters. Yet, Congress did not exempt the deployment of maglev train service from State or local regulation. In effect, the Board's DesertXpress Decision presumes that Congress intended to provide a procedural advantage to conventional, steel on steel technologies. There is no support for that presumption.

Since 2001, FRA has funded \$75 million in environmental and planning funds for the deployment of the maglev technology operating in the I-15 Corridor between Las Vegas and

⁴¹ Section 214 of PRIIA does create a highly limited pilot program whereby FRA may permit rail carriers in up to two corridors to petition FRA to provide service in lieu of Amtrak. The Board is given in 49 U.S.C. §24711(d) a role "in collaboration" with FRA to address termination of these services or failures by the replacement carriers to their contractual obligations

Anaheim under the public private partnership established between CNSSTC and AMG. *See* Kevorkian V.S. at ¶ 20. Local matching funds of more than \$2.1 million also has been expended on those studies. *Id.* With the recent enactment of the TC Act of 2008, Congress has added \$45 million in Federal funding for this project. These funds will be used to complete the environmental impact statements and engineering plans so that contracts can be let to commence construction of the first segment of this maglev system.

CNSSTC and AMG have devoted years of work and resources negotiating agreements with local communities and the Nevada and California DOTs to secure the necessary commitments and support for this project. A number of those communities support this joint petition. DesertXpress has sought through its petition for declaratory judgment to stretch the scope of the STB's jurisdiction in an unprecedented way as a means to short circuit the local approval processes. The Board should reopen this proceeding, and reverse its prior ruling.

CONCLUSION

Congress did not authorize or intend for this Board to convey to DesertXpress a procedural advantage over the California-Nevada Interstate Maglev Project CNIMP that has been designated by Congress to serve the rail passenger corridor between Las Vegas and Southern California. The tracks that DesertXpress proposes to construct and operate will not be a part of the interstate rail network or the general system of rail transportation, and the DesertXpress will not provide common carrier services for rail shippers or be in a position to affect those services provided by rail carriers under ICCTA.

The record of this proceeding should be reopened, CNSSTC and AMG should be permitted to intervene in this proceeding and the Board's Declaratory Order served June 27,

2007 should be revised to declare that construction of a passenger only railroad not part of the interstate rail network is not subject to its jurisdiction.

Respectfully Submitted;

**Robert P. vom Eigen
Sarah Sunday Key
FOLEY & LARDNER LLP
3000 K Street, N W
Washington, D.C. 20007
202-672-5300**

**Counsel for
CALIFORNIA-NEVADA SUPER SPEED
TRAIN COMMISSION AND
AMERICAN MAGLINE GROUP**

Filed April 8, 2009

APPENDIX A

Definitions – Section 10102:	
IC Act	ICCTA
“(20) ‘rail carrier’ means a person providing railroad transportation for compensation.”	“(5) ‘rail carrier’ means 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;”
General Jurisdiction – Section 10501	
<p>“(a) Subject to this chapter and other law, the Interstate Commerce Commission has jurisdiction over transportation –</p> <p>“(1) by rail carrier...</p> <p>(2) to the extent such jurisdiction is not limited by subsection (b) of this section or the extent the transportation is in the United States and is between a place in -</p> <p>“(A) a State and a place in another State;....</p>	<p>“(a)(1) Subject to this chapter, the Board has jurisdiction over transportation by rail carrier that is –</p> <p align="center">(A) only by railroad;....</p> <p>“(2) Jurisdiction under paragraph (1) applies only to transportation in the United States between a place in –</p> <p>(A) a State and a place in the same or another State as part of the interstate rail network, ...”</p>
<p>“(b) The Commission does not have jurisdiction under subsection (a) of this section over-</p> <p>“(1) the transportation of passengers or property...entirely in a State ...and not transported between a place in the United States and a place in a foreign country”</p> <p>“(c) This subtitle does not affect the power of a State, in exercising its police power, to require</p>	<p>ICCTA contains no equivalent provision reserving jurisdiction over rail carriers for the States, but does limit the STB’s jurisdiction over “mass transportation” that is provided “by rail”, to one exception:</p> <p>“(c)(3)(B) The Board has jurisdiction under section 11102 and 11103 of this title over</p>

<p>reasonable intrastate transportation by carriers providing transportation subject to the jurisdiction of the Commission under the subchapter unless (1) [the State's request for certification that its standards and procedures were in consistent with the Staggers Act had been denied] or (2) the State requirement is inconsistent with an order of the Commission issued under this subtitle or is prohibited under this subtitle</p>	<p>transportation provided by a local governmental authority only if the Board finds that such governmental authority meets all of the standards and requirements for being a rail carrier providing transportation subject to the jurisdiction of the Interstate Commerce Commission that were in effect immediately before the ICC Termination Act of 1995 "</p>
<p>"(d) The jurisdiction of the Commission and of State authorities (to the extent such authorities are authorized to administer the standards and procedures of this title pursuant to this section and section 11501(b) of this title over transportation by rail carriers .. is exclusive.</p>	<p>The equivalent subsection in ICCTA reads:</p> <p>"(b) The jurisdiction of the Board over –</p> <p>(1) transportation by rail carriers, and the remedies provided in this part with respect to rates, classifications, rules (including car service, interchange, and other operating rules), practices, routes, services and facilities of such carriers; and</p> <p>(2) the construction acquisition, operations abandonment or discontinuance of spur, industrial, team, switching, or side tracks, or facilities, even if the tracks are located, or intended to be located, entirely in one States,</p> <p>is exclusive. Except as otherwise provided in this part, the remedies provided under this part with respect to regulation of rail transportation are exclusive and preempt the remedies provided under Federal or State law "</p>
<p>Section 10722</p> <p>Established general guidelines for the carriers, including rail carriers, to establish certain incentive passenger rates.</p>	<p>No equivalent provision is included in ICCTA</p>
<p>Section 10908</p> <p>Discontinuance or change in interstate passenger rail service was addressed in accordance this section.</p>	<p>No equivalent provision is included in ICCTA.</p>
<p>Section 10909</p> <p>Discontinuance or change in intra-state</p>	<p>No equivalent provision is included in ICCTA.</p>

<p>passenger rail service, when Satc authority fails to act finally within 120 day the carrier request, was addressed in accordance with this section.</p>	
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CERTIFICATE OF SERVICE

I hereby certify that I have caused the foregoing Joint Petition to Intervene and Reopen on Behalf of California-Nevada Super Speed Train Commission and American Magline Group to be served by Federal Express, this 8 day of April, 2009 on:

**The Honorable Ray LaHood
Secretary of Transportation
U.S. Department of Transportation
1200 New Jersey Ave, SE
Washington, DC 20590**

**Susan Martinovich, P.E.
Director
Nevada Department of Transportation
1263 South Stewart Street
Carson City, Nevada 89712**

**Will Kempton
Director
California Department of Transportation
1120 N Street
MS 49
Sacramento, CA 95814**

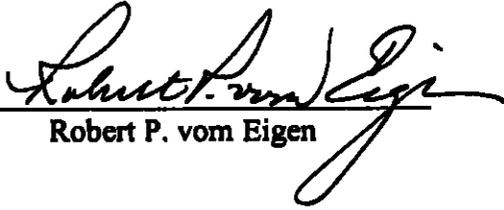
**S. Mark Lindsey
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1200 New Jersey Avenue, SE
Washington, D.C. 20590**

**Mark Yachmetz
Associate Administrator for Railroad Development
Federal Railroad Administration
1200 New Jersey Avenue, SE
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Galland, Kharasch, Greenberg, Fellman & Swirsky, P.C.
Canal Square
1054 Thirty-First Street N.W.
Washington, D.C 20007



Robert P. vom Eigen

**Before the
SURFACE TRANSPORTATION BOARD**

Finance Docket No. 34914

DESERTXPRESS ENTERPRISES, LLC—PETITION FOR DECLARATORY ORDER

**VERIFIED STATEMENT OF KENNETH KEVORKIAN, VICE-CHAIR OF
CALIFORNIA-NEVADA SUPER SPEED TRAIN COMMISSION
IN SUPPORT OF JOINT PETITION BY CALIFORNIA-NEVADA SUPER SPEED
TRAIN COMMISSION AND AMERICAN MAGLINE GROUP
TO REOPEN**

1. My name is Kenneth Kevorkian, and I am the Vice-Chair of the California-Nevada Super Speed Train Commission ("CNSSTC"). My business address is 5067 Los Feliz Blvd, Los Angeles, CA 90027. I am also a former Commissioner and Chairman of the California Transportation Commission ("CTC") to which I was appointed by former California Governor George Deukmejian, and reappointed by former California Governor Pete Wilson. The CTC has jurisdiction and funding authority responsibility for all transportation projects (highways, roads, bridges and transit) within the state of California.
2. The CNSSTC is a bi-state Commission, and a non-profit public benefit corporation, established by the States of Nevada and California in 1998. The CNSSTC was formed to promote development of, and issue a franchise to build, a high-speed train system connecting Las Vegas, Nevada with Anaheim, California along the I-15 Corridor. The CNSSTC is a public agency chartered within the state of Nevada, with powers granted by the State to issue a franchise to a private sector partner to design, build, operate and maintain a super speed train system. The CNSSTC's powers include eminent domain and the power to issue bonds or other

credit instruments necessary to finance construction of the high-speed train system. The CNSSTC is comprised of 16 Commissioners, 8 each representing Nevada and California.¹

3 In 1991, the CNSSTC selected the *Transrapid*[™] (“TRI”) Maglev technology as the high-speed ground transportation system for the I-15 Corridor.

4. In 1996, the CNSSTC formally issued an exclusive franchise to the American Magline Group (“AMG”), which serves as the Commission’s private sector partner, to design, build, operate and maintain the California-Nevada Interstate Maglev Project (“CNIMP”). Since that time, the CNSSTC, along with AMG, has been engaged in the preparation of preliminary engineering, financial, and environmental studies for the CNIMP, which will provide high-speed passenger service over a 269 mile route between Las Vegas, Nevada and Anaheim, California via Primm, Nevada and Barstow, Victorville and Ontario, California.

5. The CNSSTC and AMG have an exclusive arrangement covering the finance, construction, operation and maintenance phases for the CNIMP. In particular, the CNSSTC, which is a Nevada state agency, serves as the public partner for the CNIMP and facilitates coordination with affected localities as well as public outreach. AMG, which serves as the private partner the CNIMP, operates as prime contractor and manager for the project, and also

¹ CALIFORNIA COMMISSIONERS: Sarah L. Catz; Lawrence Dale (former Mayor, City of Barstow); Ken Kevorkian (Vice Chairman); Gary C. Ovitt (San Bernardino County Supervisor – 4th District), Angie Papadakis; Curt Pringle (Mayor, City of Anaheim); Joe Stein; Alan D. Wapner (Commissioner, City of Ontario).

NEVADA COMMISSIONERS: Bruce Aguilera (Commission Chairman); James Bilbray (former U.S. Congressman, Nevada), Larry Brown (Clark County Transportation Commissioner); Marykaye Cashman; Susan Martinovich (Director, Nevada Department of Transportation); Chip Maxfield (former Clark County Transportation Commissioner), Danny Thompson (AFL-CIO Director); Dina Titus (U.S. Congresswoman, 2nd District, Nevada).

serves as the technology transferee, in addition to helping the CNSSTC with facilitating coordination with affected localities as well as coordinating public outreach.

6. In 1998, as part of the Transportation Equity Act for the 21st Century ("TEA21"),² the Maglev Deployment Program was enacted by the U.S. Congress in order to plan, build and demonstrate a high speed Maglev system in the appropriate location somewhere in the United States. Pursuant to this program, in January 2000, the FRA instituted a competition for the selection of one Maglev product for final design, engineering and construction funding.³ The CNSSTC and AMG entered the competition with the "First Forty Miles" of the CNIMP, the segment between the Las Vegas and the town of Primm, Nevada, on the California Border. The Commission received federal matching funds to prepare a project description and pre-construction design and engineering plans for this segment, as well as an environmental assessment (published by the FRA in 2000). Congress continued to appropriate additional funding for the project to prepare preliminary plans for the remainder of the project, and to begin environmental analysis and documentation for the project.

7. In June 2002, the CNSSTC prepared and submitted to FRA a Project Description describing the 169-mile Las Vegas-Barstow component as a stand-alone project.

8. In June 2003, the CNSSTC prepared and submitted to FRA a Project Description describing the 32.1 mile Ontario-Anaheim segment.

² See section 1218 of the Transportation Equity Act for the 21st Century ("TEA21"), codified at 23 U.S.C. § 322

³ See Final Rule: Magnetic Levitation Transportation Technology Deployment Program, 65 Fed. Reg. 2342 (Jan. 14, 2000), attached hereto as Exhibit 1.

9. Also in 2003, Congress enacted the Department of Transportation and Related Agencies Appropriations Act⁴ to provide appropriations for FRA as well as other agencies. This measure included funds specifically allocated to conduct additional design, engineering, and environmental studies concerning the CNIMP pursuant to the FRA's Next Generation High Speed Rail Technology Demonstration Program.

10. In May 2003, FRA issued a Notice of Intent to indicate its plan to prepare a programmatic environmental impact statement ("PEIS") for the CNIMP in cooperation with the Nevada Department of Transportation ("NDOT").⁵ FRA entered into a Memorandum of Understanding⁶ with the CNSSTC, NDOT and the California Department of Transportation ("Caltrans") to govern the conduct of the PEIS.

11. In 2005, Congress approved the new transportation bill entitled Safe, Accountable, Flexible, Efficient Transportation Equity Act – A Legacy for Users ("SAFETEA-LU"), which directed the Secretary of Transportation to provide additional "federal assistance" to enable deployment of the Las Vegas to Primm segment of the CNIMP. Specifically, the legislation allocated the first \$45 million of the \$90 million authorized by the Maglev Deployment Program to the first phase of the CNIMP to initiate deployment of the Las Vegas to Primm project segment. However, due to inadvertent drafting flaws, this funding was not guaranteed as "contract authority." In addition, the full corridor between Las Vegas and Anaheim was not

⁴ See Pub. L. 108-7.

⁵ See 69 Fed. Reg. 29161 (May 20, 2004), attached hereto as Exhibit 2.

⁶ See "Memorandum of Understanding Among the Federal Railroad Administration, California Department of Transportation, Nevada Department of Transportation and The California-Nevada Super Speed Train Commission For The Preparation of a Program Environmental Impact Statement and Program Environmental Impact Report for The Proposed California-Nevada Interstate Maglev Project" attached hereto as Exhibit 3.

named. Due to the drafting flaws, SAFETEA-LU required revision before the \$45 million authorization could actually be approved and allocated by FRA.

12. The DesertXpress project came to our attention in 2006 with the announcement of a plan to institute passenger-only rail service over trackage to be constructed between Las Vegas and Victorville, California, along a portion of the right-of-way along the I-15 Freeway that has been designated for use by the CNIMP. FRA published a Notice of Intent to Prepare an Environmental Impact Study (“EIS”) for the DesertXpress project on July 14, 2006,⁷ and CNSSTC and AMG participated in the public scoping meetings.

13 It was clear from this Notice that FRA was processing the environmental review process in a manner substantially different from that which had been required by the FRA for the CNIMP during the preceding years of study. For instance, the roles of the Caltrans and NDOT were minimized, and there was no mention of compliance with the California Environmental Quality Act or local permitting requirements. Also, FRA decided that there would be no comparative analysis between the DesertXpress and the CNIMP. Moreover, the Notice made clear that there would be no rail freight service provided on the proposed tracks to be used by DesertXpress “The project would involve construction of a fully grade-separated, dedicated double track *passenger-only railroad* .”⁸ The description of the track segments in the Notice mentions no connection or interchange with the interstate network of freight rail carriers. The description of certain segments speak of the route “following the existing BNSF Railway Company (BNSF) railroad corridor...” and “utiliz[ing] an existing, but abandoned, former Atchison, Topeka &

⁷ 71 Fed. Reg. 40176 (July 14, 2006), attached hereto as Exhibit 4.

⁸ *Id.* at 40177 (emphasis added).

Santa Fe railroad corridor. .”⁹ The Notice does not include any discussion of connection or interchange.

14. CNSSTC and AMG were unaware of DesertXpress’s Declaratory Order proceeding before the Surface Transportation Board (“STB”) prior to the Board’s issuance of the DesertXpress decision the summer of 2007. Neither CNSSTC nor AMG had Washington, D.C counsel to monitor notices before the STB. Further, it is my understanding that neither NDOT nor Caltrans received actual notice of the DesertXpress declaratory judgment proceeding beyond the August 21, 2006 official notice published in the Federal Register. As a result, neither Caltrans nor NDOT participated in the proceeding and the Board did not receive input from the affected state agencies concerning the facts pertinent to the jurisdictional issue before the Board. Moreover, during the time of the DesertXpress proceeding, CNSSTC and AMG were working to secure the enactment of legislation to address the drafting flaw in the SAFETEA-LU measure which was crucial to the continued viability of the CNIMP.

15. CNSSTC and AMG did not learn of the Board’s decision in the DesertXpress proceeding until July 3, 2007 when Ms. Catherine Glidden, an environmental specialist in the STB’s Section of Environmental Analysis, sent an e-mail transmitting the DesertXpress Decision to several state and federal officials, including James Mallery at NDOT. Mr. Mallery forwarded the e-mail with the notice to Ms Richann Johnson, who serves as Executive Assistant to CNSSTC. Ms. Johnson then forwarded the e-mail and notice to Mr Bruce Aguilera, Chairman of the CNSSTC, as well as to Mr. M. Neil Cummings, President of AMG.

16. After learning of the Board’s decision in the DesertXpress proceeding, CNSSTC and AMG considered, but ultimately decided against, filing a motion to intervene in the

⁹ *Id.*

DesertXpress proceeding. At that time, CNSSTC and AMG were working to secure the necessary technical corrections to SAFETEA-LU that would result in funding for the CNIMP. Prior to obtaining the corrections to SAFETEA-LU, CNSSTC and AMG did not have a stake in the outcome of the DesertXpress proceeding because the viability of the CMIMP was unclear. As a result, even though CNSSTC and AMG learned about the Board's decision in the DesertXpress proceeding in July 2007, without the funding necessary to ensure the viability of the CNIMP, CNSSTC and AMG did not believe they were in a position to intervene.

17. In 2008, CNSSTC and AMG were ultimately successful in their efforts and the drafting flaw was addressed by Congress through passage of the SAFETEA-LU Technical Corrections Act of 2008 ("TC Act"), which was signed into law by President Bush on June 6, 2008. Section 102(a) of the TC Act authorizes funding of \$45 million for each fiscal year 2008 and 2009 for the CNIMP.

18 In January 2009, I, along with CNSSTC Chairman Bruce Aguilera, Susan Martinovich, Director of NDOT, her deputy Kent Cooper, as well as the AMG Board of Directors, met with staff from FRA to present the 2 Year Plan and request that FRA publish a "Record of Decision" regarding the plan. Mr. Mark Yachmetz, the FRA Associate Administrator in charge of railroad development, indicated that FRA did not have any concerns with the plan, provided it had been approved by NDOT, which had already occurred. We are currently awaiting FRA's final comments on the plan

19. Completion of the necessary environmental, final design/engineering and financial planning work has now been made possible by Congress in allocating federal funds to the CNIMP through enactment of the TC Act. The CNSSTC has been working on a plan for funding construction of the "First Forty Miles" of the CNIMP. This plan will be reevaluated in light of

the new funding available under the Passenger Rail Investment and Improvement Act of 2008¹⁰ (“PRIIA”) as well as the American Recovery and Reinvestment Act of 2009¹¹ (“Recovery Act”). We believe that the prospects for proceeding with construction are greatly enhanced by the enactment of the Recovery Act.

20. CNSSTC and AMG, along with the Federal government, have already invested a substantial amount of time and resources towards the CNIMP. In particular, since 2001, FRA has funded almost \$7.5 million in environmental and planning funds for the deployment of the maglev technology operating in the I-15 Corridor between Las Vegas and Anaheim under the public private partnership established pursuant to Nevada and California laws between CNSSTC and AMG. In addition, local matching funds of more than \$2.1 million have also been expended on those studies. Most recently, through the recent enactment of the TC Act of 2008, Congress has added \$45 million in Federal funding for this project, for which matching funds of \$11.25 million will be raised.

21. It is imperative that the Board grant the motion by CNSSTC and AMG to reopen and intervene in the DesertXpress proceeding so that the Board’s June 27, 2007 Declaratory Order can be reassessed taking into consideration all of the pertinent facts of the case and relevant statutory provisions. Congress has specifically designated the CNIMP to serve the rail passenger corridor between Las Vegas and Southern California. In light of this Congressional pronouncement, the Board should reconsider these facts and reexamine the applicable law relating to its jurisdiction of passenger only rail service not operated as part of the interstate rail network, and reverse its June 27, 2007 Declaratory Order.

¹⁰ Pub. L. 110-432.

¹¹ Pub. L. 111-5.

VERIFICATION

State of California,

County of Los Angeles,

SS:

Kenneth Kevorkian, 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: _____.

Subscribed and sworn to before me this ____ day April 2009.

Notary Public of _____.

My Commission expires _____

**Before the
SURFACE TRANSPORTATION BOARD**

Finance Docket No. 34914

DESERTXPRESS ENTERPRISES, LLC—PETITION FOR DECLARATORY ORDER

**VERIFIED STATEMENT OF KENNETH KEVORKIAN, VICE-CHAIR OF
CALIFORNIA-NEVADA SUPER SPEED TRAIN COMMISSION
IN SUPPORT OF JOINT PETITION BY CALIFORNIA-NEVADA SUPER SPEED
TRAIN COMMISSION AND AMERICAN MAGLINE GROUP
TO REOPEN**

1. My name is Kenneth Kevorkian, and I am the Vice-Chair of the California-Nevada Super Speed Train Commission ("CNSSTC"). My business address is 5067 Los Feliz Blvd , Los Angeles, CA 90027 I am also a former Commissioner and Chairman of the California Transportation Commission ("CTC") to which I was appointed by former California Governor George Deukmejian, and reappointed by former California Governor Pete Wilson. The CTC has jurisdiction and funding authority responsibility for all transportation projects (highways, roads, bridges and transit) within the state of California
2. The CNSSTC is a bi-state Commission, and a non-profit public benefit corporation, established by the States of Nevada and California in 1998. The CNSSTC was formed to promote development of, and issue a franchise to build, a high-speed train system connecting Las Vegas, Nevada with Anaheim, California along the I-15 Corridor The CNSSTC is a public agency chartered within the state of Nevada, with powers granted by the State to issue a franchise to a private sector partner to design, build, operate and maintain a super speed train system. The CNSSTC's powers include eminent domain and the power to issue bonds or other

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¹ CALIFORNIA COMMISSIONERS: Sarah L. Catz, Lawrence Dale (former Mayor, City of Barstow); Ken Kevorkian (Vice Chairman); Gary C. Ovitt (San Bernardino County Supervisor – 4th District); Angie Papadakis; Curt Pringle (Mayor, City of Anaheim); Joe Stein; Alan D. Wapner (Commissioner, City of Ontario).

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9. Also in 2003, Congress enacted the Department of Transportation and Related Agencies Appropriations Act⁴ to provide appropriations for FRA as well as other agencies. This measure included funds specifically allocated to conduct additional design, engineering, and environmental studies concerning the CNIMP pursuant to the FRA's Next Generation High Speed Rail Technology Demonstration Program

10. In May 2003, FRA issued a Notice of Intent to indicate its plan to prepare a programmatic environmental impact statement ("PEIS") for the CNIMP in cooperation with the Nevada Department of Transportation ("NDOT").⁵ FRA entered into a Memorandum of Understanding⁶ with the CNSSTC, NDOT and the California Department of Transportation ("Caltrans") to govern the conduct of the PEIS.

11. In 2005, Congress approved the new transportation bill entitled Safe, Accountable, Flexible, Efficient Transportation Equity Act – A Legacy for Users ("SAFETEA-LU"), which directed the Secretary of Transportation to provide additional "federal assistance" to enable deployment of the Las Vegas to Primm segment of the CNIMP. Specifically, the legislation allocated the first \$45 million of the \$90 million authorized by the Maglev Deployment Program to the first phase of the CNIMP to initiate deployment of the Las Vegas to Primm project segment. However, due to inadvertent drafting flaws, this funding was not guaranteed as "contract authority." In addition, the full corridor between Las Vegas and Anaheim was not

⁴ See Pub. L. 108-7.

⁵ See 69 Fed. Reg. 29161 (May 20, 2004), attached hereto as Exhibit 2.

⁶ See "Memorandum of Understanding Among the Federal Railroad Administration, California Department of Transportation, Nevada Department of Transportation and The California-Nevada Super Speed Train Commission For The Preparation of a Program Environmental Impact Statement and Program Environmental Impact Report for The Proposed California-Nevada Interstate Maglev Project" attached hereto as Exhibit 3.

named. Due to the drafting flaws, SAFETEA-LU required revision before the \$45 million authorization could actually be approved and allocated by FRA.

12. The DesertXpress project came to our attention in 2006 with the announcement of a plan to institute passenger-only rail service over trackage to be constructed between Las Vegas and Victorville, California, along a portion of the right-of-way along the I-15 Freeway that has been designated for use by the CNIMP. FRA published a Notice of Intent to Prepare an Environmental Impact Study (“EIS”) for the DesertXpress project on July 14, 2006,⁷ and CNSSTC and AMG participated in the public scoping meetings.

13 It was clear from this Notice that FRA was processing the environmental review process in a manner substantially different from that which had been required by the FRA for the CNIMP during the preceding years of study. For instance, the roles of the Caltrans and NDOT were minimized, and there was no mention of compliance with the California Environmental Quality Act or local permitting requirements. Also, FRA decided that there would be no comparative analysis between the DesertXpress and the CNIMP. Moreover, the Notice made clear that there would be no rail freight service provided on the proposed tracks to be used by DesertXpress. “The project would involve construction of a fully grade-separated, dedicated double track *passenger-only railroad* . . .”⁸ The description of the track segments in the Notice mentions no connection or interchange with the interstate network of freight rail carriers. The description of certain segments speak of the route “following the existing BNSF Railway Company (BNSF) railroad corridor...” and “utiliz[ing] an existing, but abandoned, former Atchison, Topeka &

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Santa Fe railroad corridor....”⁹ The Notice does not include any discussion of connection or interchange.

14. CNSSTC and AMG were unaware of DesertXpress’s Declaratory Order proceeding before the Surface Transportation Board (“STB”) prior to the Board’s issuance of the DesertXpress decision the summer of 2007. Neither CNSSTC nor AMG had Washington, D.C. counsel to monitor notices before the STB. Further, it is my understanding that neither NDOT nor Caltrans received actual notice of the DesertXpress declaratory judgment proceeding beyond the August 21, 2006 official notice published in the Federal Register. As a result, neither Caltrans nor NDOT participated in the proceeding and the Board did not receive input from the affected state agencies concerning the facts pertinent to the jurisdictional issue before the Board. Moreover, during the time of the DesertXpress proceeding, CNSSTC and AMG were working to secure the enactment of legislation to address the drafting flaw in the SAFETEA-LU measure which was crucial to the continued viability of the CNIMP.

15. CNSSTC and AMG did not learn of the Board’s decision in the DesertXpress proceeding until July 3, 2007 when Ms. Catherine Glidden, an environmental specialist in the STB’s Section of Environmental Analysis, sent an e-mail transmitting the DesertXpress Decision to several state and federal officials, including James Mallery at NDOT. Mr. Mallery forwarded the e-mail with the notice to Ms. Richann Johnson, who serves as Executive Assistant to CNSSTC. Ms. Johnson then forwarded the e-mail and notice to Mr. Bruce Aguilera, Chairman of the CNSSTC, as well as to Mr. M. Neil Cummings, President of AMG.

16. After learning of the Board’s decision in the DesertXpress proceeding, CNSSTC and AMG considered, but ultimately decided against, filing a motion to intervene in the

⁹ *Id.*

DesertXpress proceeding. At that time, CNSSTC and AMG were working to secure the necessary technical corrections to SAFETEA-LU that would result in funding for the CNIMP. Prior to obtaining the corrections to SAFETEA-LU, CNSSTC and AMG did not have a stake in the outcome of the DesertXpress proceeding because the viability of the CMIMP was unclear. As a result, even though CNSSTC and AMG learned about the Board's decision in the DesertXpress proceeding in July 2007, without the funding necessary to ensure the viability of the CNIMP, CNSSTC and AMG did not believe they were in a position to intervene.

17. In 2008, CNSSTC and AMG were ultimately successful in their efforts and the drafting flaw was addressed by Congress through passage of the SAFETEA-LU Technical Corrections Act of 2008 ("TC Act"), which was signed into law by President Bush on June 6, 2008. Section 102(a) of the TC Act authorizes funding of \$45 million for each fiscal year 2008 and 2009 for the CNIMP.

18. In January 2009, I, along with CNSSTC Chairman Bruce Aguilera, Susan Martinovich, Director of NDOT, her deputy Kent Cooper, as well as the AMG Board of Directors, met with staff from FRA to present the 2 Year Plan and request that FRA publish a "Record of Decision" regarding the plan. Mr. Mark Yachmetz, the FRA Associate Administrator in charge of railroad development, indicated that FRA did not have any concerns with the plan, provided it had been approved by NDOT, which had already occurred. We are currently awaiting FRA's final comments on the plan.

19. Completion of the necessary environmental, final design/engineering and financial planning work has now been made possible by Congress in allocating federal funds to the CNIMP through enactment of the TC Act. The CNSSTC has been working on a plan for funding construction of the "First Forty Miles" of the CNIMP. This plan will be reevaluated in light of

the new funding available under the Passenger Rail Investment and Improvement Act of 2008¹⁰ (“PRIIA”) as well as the American Recovery and Reinvestment Act of 2009¹¹ (“Recovery Act”). We believe that the prospects for proceeding with construction are greatly enhanced by the enactment of the Recovery Act.

20. CNSSTC and AMG, along with the Federal government, have already invested a substantial amount of time and resources towards the CNIMP. In particular, since 2001, FRA has funded almost \$7.5 million in environmental and planning funds for the deployment of the maglev technology operating in the I-15 Corridor between Las Vegas and Anaheim under the public private partnership established pursuant to Nevada and California laws between CNSSTC and AMG. In addition, local matching funds of more than \$2.1 million have also been expended on those studies. Most recently, through the recent enactment of the TC Act of 2008, Congress has added \$45 million in Federal funding for this project, for which matching funds of \$11.25 million will be raised

21. It is imperative that the Board grant the motion by CNSSTC and AMG to reopen and intervene in the DesertXpress proceeding so that the Board’s June 27, 2007 Declaratory Order can be reassessed taking into consideration all of the pertinent facts of the case and relevant statutory provisions. Congress has specifically designated the CNIMP to serve the rail passenger corridor between Las Vegas and Southern California. In light of this Congressional pronouncement, the Board should reconsider these facts and reexamine the applicable law relating to its jurisdiction of passenger only rail service not operated as part of the interstate rail network, and reverse its June 27, 2007 Declaratory Order.

¹⁰ Pub L. 110-432

¹¹ Pub L. 111-5.

VERIFICATION

State of California,

County of Los Angeles,

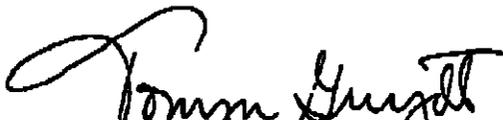
SS:

Kenneth Kevorkian, 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: 

Subscribed and sworn to before me this 8TH day April 2009.

Notary Public of LOS ANGELES, CA


My Commission expires MARCH 25, 2012

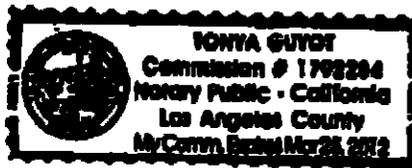


TABLE 1—WASTES EXCLUDED FROM NON-SPECIFIC SOURCES—Continued

Facility	Address	Waste description
		<p>(5) Reopener</p> <p>(a) If BWX Technologies discovers that a condition at the facility or an assumption related to the disposal of the excluded waste that was modeled or predicted in the petition does not occur as modeled or predicted, then BWX Technologies must report any information relevant to that condition, in writing, to the Regional Administrator or his delegate within 10 days of discovering that condition</p> <p>(b) Upon receiving information described in paragraph (a) of this section, regardless of its source, the Regional Administrator or his delegate will determine whether the reported condition requires further action. Further action may include repealing the exclusion, modifying the exclusion, or other appropriate response necessary to protect human health and the environment</p> <p>(6) Notification Requirements BWX Technologies must provide a one-time written notification to any State Regulatory Agency to which or through which the delisted waste described above will be transported for disposal at least 60 days prior to the commencement of such activities. Failure to provide such a notification will be deemed to be a violation of this exclusion and may result in a revocation of the decision</p>

[FR Doc. 00-959 Filed 1-13-00, 8:45 am]
BILLING CODE 6580-60-P

DEPARTMENT OF TRANSPORTATION

Federal Railroad Administration

49 CFR Part 268

[FRA Docket No. FRA-98-4545, Notice No. 3]

RIN 2130-AB29

Magnetic Levitation Transportation Technology Deployment Program

AGENCY: Federal Railroad Administration (FRA), Department of Transportation (DOT).

ACTION: Final rule.

SUMMARY: FRA published an interim final rule with request for comments on October 13, 1998 (63 FR 54600), implementing the Magnetic Levitation Technology Deployment Program. An amendment to the interim final rule was published on February 12, 1999 (64 FR 7133) extending the deadline for the submission of application packages from December 31, 1998, to February 15, 1999, and making other adjustments to various dates which flow from that extension of time.

As amended, the interim final rule establishes dates for the Timing of Major Milestones and requires FRA to select one project for final design, engineering, and construction funding at the completion of Phase III. This rulemaking revises the dates established for the Timing of Major Milestones to reflect unanticipated delays in the completion of Phase I of the program, changes the description of Phase II to eliminate the requirement for each grant recipient to initiate activities aimed at

preparing a site-specific draft Environmental Impact Statement (EIS), expands Phase III to allow down-selecting to more than one project for additional study, and shifts FRA's selection of one project for final design, engineering, and construction funding to Phase IV. It also specifies that certain expenses incurred prior to the execution of a cooperative agreement to assist in the financing of pre-construction activities, but after enactment of the Transportation Equity Act for the 21st Century (TEA 21) (June 9, 1998), are eligible for reimbursement of the Federal share of the cost.

EFFECTIVE DATE: This final rule is effective January 14, 2000.

FOR FURTHER INFORMATION CONTACT: Arnold Kupferman, FRA, 1120 Vermont Ave., NW, Washington, DC 20590 (telephone 202-493-6365; E-mail address:

(Arnold.Kupferman@fra.dot.gov), or Gareth Rosenau, Attorney, Office of Chief Counsel, FRA, 1120 Vermont Ave., NW, Mailstop 10, Washington, DC 20590 (telephone 202-493-6054, E-mail address: Gareth.Rosenau@fra.dot.gov)

SUPPLEMENTARY INFORMATION:

I. Background

A. The Transportation Equity Act for the 21st Century (TEA 21)

TEA 21 (Pub. L. No. 105-178) adds a new section 322 to title 23 of the United States Code. Section 322 provides a total of \$55 million for Fiscal Years 1999 through 2001 for transportation systems employing magnetic levitation ("Maglev"). Section 322 requires FRA to establish project selection criteria, to solicit applications for funding, to select one or more projects to receive financial assistance for preconstruction planning activities, and, after completion of such

activities, to select one of the projects to receive financial assistance for final design, engineering, and construction activities. Section 322 authorizes—but does not appropriate—additional Federal funds of \$950 million for final design and construction of the most promising project. Section 322 provides that the portion of the project not covered by the funds provided under section 322 may be covered by any non-Federal funding sources—including private (debt and/or equity), State, local, regional, and other public or public/private entities—as well as by Federally-provided Surface Transportation Program, and Congestion Mitigation and Air Quality Improvement Program funds, and from other forms of financial assistance under TEA 21, such as loans and loan guarantees.

B. The Interim Final Rule

On October 13, 1998, FRA published in the Federal Register an interim final rule that established, on an interim basis, the regulations governing financial assistance under the Maglev Deployment Program, including the project selection criteria. The document solicited public comments and applications for Maglev preconstruction planning grants. As noted above, the rule was amended once to extend the deadline for submission of application packages from interested States or their designated authorities. The interim final rule provides a definition of terms used in the Interim Final Rule, a description and schedule for the various phases of the Maglev Deployment Program, identification of available funding sources for the Program, requirements for the Federal and State shares and restrictions on the uses of Federal maglev funds; identification of eligible participants, project eligibility

standards; a description of the format, content and timing of applications for preconstruction planning assistance and the criteria to be used by FRA in evaluating the applications, and a description of the criteria to be used in selecting one project for final design, engineering and construction

II. Discussion of Comments and Conclusions

FRA received only two timely-filed public comments on the interim final rule. Set forth below is a summary of the comments received and FRA's responses to the concerns expressed in those letters to the docket.

Comment. One commenter expressed concern that the process set forth in the interim final rule appears to call for project applicants to commit to proceeding with a maglev project in advance of the environmental analysis required under National Environmental Policy Act (NEPA). The commenter alleges that under NEPA any project must involve a study of alternatives, including technology alternatives which may have different environmental effects.

Response. Under the authorizing legislation (Section 1218 of TEA 21), the authorized funding can only be used to pay the costs of preconstruction planning activities, design, engineering and construction of "transportation systems employing magnetic levitation that would be capable of safe use by the public at a speed in excess of 240 miles per hour." It is clear that the Congressional intent is to consider only maglev technology for the use of these funds.

Comment. The second commenter expressed concern that under the schedule suggested in the interim final rule, not enough time was allowed for promulgation of appropriate safety standards and testing for safety before full construction authorization is given.

Response. Under the changes in the schedule effected by this rulemaking, the selection of one project for final design, engineering and construction is delayed until March 2001, at the earliest. In no event will construction be authorized until FRA is fully satisfied that the system will meet appropriate safety standards.

III. Summary of Revisions to the Interim Final Rule and Rationale for Such Changes

Changes in Dates

Section 268.3 (b) of the interim final rule, as amended, established April 30, 1999 as the date for the completion of Phase I—Competition for Planning

Grants. However, the selection of seven of the applicants for participation in the program was not announced by the Secretary of Transportation until May 24, 1999. Additional time has been required to negotiate suitable cooperative agreements with each of the selected participants. As a consequence, it is necessary to revise many of the dates specified in the interim final rule to reflect a realistic schedule.

Eligibility of Pre-agreement Activities

In order to continue on-going work on several projects that had been initiated prior to the execution of cooperative agreements under the Maglev Deployment Program and in response to several requests, FRA has decided to make eligible for funding certain expenses incurred subsequent to June 9, 1998 (the date of enactment of TEA 21), provided that they contributed to development of the Project Description described in Phase II. This rulemaking adds this provision to § 268.5 of the rule.

Exclusion of Requirement for Funding for Site-specific EIS in Phase II of the Project

The interim final rule required that, "After completion of the EA [Environmental Assessment], each financial assistance recipient will initiate activities aimed at preparing a site-specific draft environmental impact statement." It was intended that these activities would be included in the scope of work to be funded by the preconstruction planning grant. Because of the constraints on the available funding, there may not be sufficient funds to pay the Federal share of the costs of activities aimed at the preparation of site-specific draft EIS's for each of the seven projects selected for pre-construction planning, as specified in § 268.3 (c). Therefore, this rulemaking eliminates that requirement from the description of Phase II—Project Description Development.

Down-selection of One or More Projects in Phase III of the Program

The interim final rule, as amended, requires FRA to evaluate the information provided by the seven selected participants during Phase II of the Program and select a single project for final design, engineering, and construction funding as Phase III of the Program. FRA anticipates that after a year of study more than one of the projects being planned may meet all of the eligibility requirements of the law, and, without additional information from additional environmental studies, financial analysis, and detailed design,

it will not be possible to make a well-informed choice of the best project. This rulemaking changes the description of Phase III—Project Selection Process to permit the FRA to delay the selection of a single project for final design, engineering, and construction funding, and to down-select more than one eligible project for further study. Additional environmental studies, financial analysis, and detailed design would be funded for each of the down-selected projects.

Selection of One Project

This rulemaking also changes Phase IV—Project Development and Completion of Site-Specific EIS to require FRA to select one project, if more than one project is down-selected by FRA in Phase III.

These proposed changes have been discussed with the seven participating agencies that would be affected by the proposed change, and there is agreement that such changes are desirable.

Regulatory Analyses and Notices

This rulemaking modifies the interim final rule by:

(1) Eliminating the requirement in § 268.3 (c) for each grant recipient to initiate activities aimed at the preparation of a site-specific EIS after completion of an Environmental Assessment (EA),

(2) Modifying § 268.3 (d) to allow the FRA to down-select one or more projects and to finance the preparation of environmental and other additional studies for the down-selected projects before selecting one project for final design, engineering, and construction funding;

(3) Changing § 268.3 (e) to require FRA to select one project for final design, engineering, and construction funding, if more than one project is down-selected by FRA in Phase III,

(4) Amending the dates specified in § 268.3 to reflect a realistic schedule,

(5) Adding paragraph (c) to § 268.5 to make some costs incurred after June 9, 1998 eligible for reimbursement; and

(6) Amending § 268.21 to conform to the above changes.

There are no other changes to the interim final rule.

Regulatory Analyses and Notices

E.O. 12866 and DOT Regulatory Policies and Procedures

The agency has evaluated this Final Rule in accordance with existing regulatory policies and procedures and has concluded that it is a nonsignificant regulatory action under E.O. 12866, and

a non-significant rule under section 5(a)(4) of the DOT Regulatory Policies and Procedures (44 FR 11034, February 26, 1979) The Final Rule is not a significant regulatory action under E.O. 12866 because it will not have an annual effect on the economy of \$100 million or more or adversely affect in a material way the economy, a sector of the economy, productivity, competition, jobs, the environment, public health or safety, or State, local, or tribal governments or communities; will not create a serious inconsistency with an action planned or underway by another Federal agency, will not materially alter the budgetary impact of entitlements, grants, user fees, or loan programs or the rights and obligations of recipients thereof; and will not raise novel legal or policy issues arising out of legal mandates, the President's priorities, or the principles of the Executive Order. The Final Rule implements the preconstruction planning portion of a Congressionally mandated program to provide financial assistance to state and local governments in developing and implementing a transportation project involving magnetic levitation. At this time, the sum of \$55 million dollars is available to implement the program and an authorization for future appropriations totaling \$950 million is in place. However, as noted earlier, the availability of these additional funds is contingent on an appropriation by the Congress.

Regulatory Flexibility Act

The Regulatory Flexibility Act of 1980 (5 U.S.C. 601 *et seq.*) requires a review of rules to assess their impact on small entities. FRA certifies that this rule will not have a significant impact on a substantial number of small entities. Eligible applicants for the Maglev Deployment Program are limited by the enabling statute (23 U.S.C. 322(d)) to States or authorities designated by one or more States. The program implemented by the final rule has the potential to benefit some small entities who may be able to participate as consultants to States or designated authorities in the preconstruction planning activities, final design, engineering and construction activities for Maglev deployment.

Paperwork Reduction Act

The Paperwork Reduction Act (44 U.S.C. 3501 *et seq.*) addresses the collection of information by the Federal government from individuals, small businesses and State and local government and seeks to minimize the burdens such information collection requirements might impose. A

collection of information includes requiring answers to identical questions posed to, or identical reporting or record-keeping requirements imposed on, ten or more persons, other than agencies, instrumentalities or employees of the United States. This final rule contains information and reporting requirements that would apply to States, groups of States or designated authorities that file applications for Federal funding for preconstruction planning activities, and to grant recipients who would conduct final design, engineering and construction activities in support of Maglev deployment. As anticipated in the interim final rule, the statutory limit on the types of entities that may apply for funding (States, groups of States, and State designated authorities), the rigorous requirements for developing a viable project, and the substantial financial and resource commitment that were required of applicants, the FRA received fewer than 10 completed applications for preconstruction planning funds from qualified applicants.

Environmental Impact

FRA has evaluated these regulations in accordance with its procedures for ensuring full consideration of the potential environmental impacts of FRA actions, as required by the National Environmental Policy Act (42 U.S.C. 4321 *et seq.*) and related directives. FRA has concluded that the issuance of this final rule, which establishes a process for receiving applications for planning activities associated with the Maglev Deployment Program, does not have a potential impact on the environment and does not constitute a major Federal action requiring an environmental assessment or environmental impact statement. The final rule includes requirements for the preparation of environmental assessments of proposed Maglev projects by successful applicants during the preconstruction planning stage and additional environmental reviews will be undertaken under the auspices of the FRA before one Maglev project is selected for final design and construction funding.

Federalism Implications

This final rule has been analyzed in accordance with the principles and criteria contained in Executive Order 12612, and FRA has determined that it does not have sufficient federalism implications to warrant the preparation of a Federalism Assessment. The Maglev Deployment Program provides states with the opportunity to explore the development of a new transportation

technology in a working partnership with the Federal Government.

List of Subjects in 49 CFR Part 268

Grant programs-transportation, High speed ground transportation, Maglev, Magnetic levitation

IV. Provisions of The Final Rule

In consideration of the foregoing, FRA revises part 268 title 49 of the Code of Federal Regulations to read as set forth below:

PART 268—MAGNETIC LEVITATION TRANSPORTATION TECHNOLOGY DEPLOYMENT PROGRAM

Subpart A—Overview

- 268.1 Definitions
- 268.3 Different phases of the Maglev Deployment Program
- 268.5 Federal funding sources for the Maglev Deployment Program
- 268.7 Federal/State share and restrictions on the uses of Federal Maglev Funds

Subpart B—Procedures For Financial Assistance

- 268.9 Eligible participants
 - 268.11 Project eligibility standards
 - 268.13 Deadline for submission of applications for preconstruction planning assistance
 - 268.15 Form and contents of applications for preconstruction planning assistance
 - 268.17 Project selection criteria
 - 268.19 Evaluation of applications for preconstruction planning assistance
 - 268.21 Down-selection of one or more Maglev projects for further study and selection of one project for final design, engineering, and construction funding
- Authority: 49 U.S.C. 322, 23 U.S.C. 322, 49 CFR 1.49

Subpart A—Overview

§ 268.1 Definitions.

As used in this part—

CMAQ means Congestion Mitigation and Air Quality Improvement Program (23 U.S.C. 149)

Environmental assessment ("EA") means the environmental assessment in support of the project description and containing the information listed in § 268.11(b)(6)(i).

Environmental impact statement ("EIS") means the environmental impact statement which is required pursuant to §§ 268.3

Eligible project costs means the costs of preconstruction planning activities and the capital cost of the fixed guideway infrastructure of a Maglev project, including land, piers, guideways, propulsion equipment and other components attached to guideways, power distribution facilities (including substations), control and communications facilities, access roads,

and storage, repair, and maintenance facilities, but eligible project costs do not include the cost of stations, vehicles, and equipment.

Federal Maglev funds means such funds as are provided under the authority of 23 U.S.C. 322 to pay for Eligible Project Costs

Full project costs means the total capital costs of a Maglev project, including Eligible Project Costs and the costs of stations, vehicles, and equipment

Phase means one of the five different phases of the Maglev Deployment Program, these phases are described in § 268.3

Maglev means transportation systems employing magnetic levitation that would be capable of safe use by the public at a speed in excess of 240 miles per hour

Maglev Deployment Program means the program authorized by 23 U.S.C. 322

Partnership potential means the usage of the term in the commercial feasibility study of high-speed ground transportation (*High Speed Ground Transportation for America*) mandated under section 1036 of the Intermodal Surface Transportation Efficiency Act of 1991 (105 Stat. 1978). Under that usage any corridor exhibiting Partnership Potential must at least meet the following two conditions

(1) Private enterprise must be able to run on the corridor—once built and paid for—as a completely self-sustaining entity, and

(2) The total benefits of a Maglev corridor must equal or exceed its total costs.

STP means the Surface Transportation Program (23 U.S.C. 133)

TEA 21 means the Transportation Equity Act for the 21st Century (Public Law No. 105-178, 112 Stat. 107)

§ 268.3 Different phases of the Maglev Deployment Program.

(a) The Maglev Deployment Program includes five phases, as described in paragraphs (b) through (f) of this section. The current projected timing for implementing these phases is indicated to assist applicants in planning their projects. All dates beyond the first date (the deadline for the submission of preconstruction planning applications) are for planning purposes only and are subject to change—including possible acceleration of deadlines—based on the progress of the Maglev Deployment Program, grantees will be notified accordingly

(b) **Phase I—Competition for Planning Grants (Early October 1998—September 15, 1999).**

(1) **Description.** In Phase I, States will apply for funds for preconstruction planning activities. As required by § 268.13, applications must be filed with FRA by February 15, 1999. FRA will select one or more projects to receive preconstruction planning financial assistance awarded under this part to perform Phase II of the Maglev Deployment Program.

(2) **Timing of Major Milestones**

(i) February 15, 1999—Planning grant applications due.

(ii) May 24, 1999—FRA announces grantees for planning grants.

(iii) August 31, 1999—FRA awards planning grants for the conduct of activities listed in Phase II

(c) **Phase II—Project Description Development (July 1, 1999—June 30, 2000)**

(1) **Description.** In Phase II, each grant recipient will prepare and submit to FRA a project description, supporting preconstruction planning reports, and an EA. Supporting reports may include demand and revenue analyses, project specification, cost estimates, scheduling, financial studies, a system safety plan (including supporting analysis), and other information in support of the project description. FRA will use this information in reaching a decision on which projects to down-select for completion of site-specific environmental studies, investment grade revenue forecasts, and other studies and analyses necessary prior to initiation of construction. FRA will initiate documentation of environmental factors considered in the project selection process.

(2) **Timing of Major Milestones**

(i) February 29, 2000—Deadline for submission of appropriate EA's needed by FRA for the down-selection of one or more projects under Phase III.

(ii) June 30, 2000—Deadline for submission of project descriptions and any related supporting reports needed by FRA for down-selection of one or more projects

(d) **Phase III—Project Selection Process (July 1, 2000—September 30, 2000).**

(1) **Description.** FRA will evaluate the information provided by the grant recipients under Phase II and will down-select one or more projects for completion of additional environmental studies, investment grade revenue forecasts, and other studies and analyses necessary prior to initiation of construction

(2) **Timing of Major Milestones** September 30, 2000—FRA down-selects one or more project(s).

(e) **Phase IV—Project Development and Completion of Site-specific EIS (October 1, 2000—November 30, 2001).**

(1) **Description.** The financial assistance recipient(s) down-selected in Phase III will complete additional environmental studies, investment grade revenue forecasts, and other studies and analyses necessary prior to initiation of construction, and address issues raised by FRA's review of system safety plans (including supporting analysis). They will also initiate final design and engineering work for the down-selected project(s). If more than one project is down-selected in Phase III, FRA will select one of them for final design, engineering, and construction funding. Detailed agreements for the construction and operation of the selected project will be negotiated

(2) **Timing of Major Milestones**

(i) March 31, 2001—If more than one project is down-selected in Phase III, FRA will select one project

(ii) December 31, 2001—FRA will issue a Final Record of Decision on the site-specific EIS for the one selected project, confirming the project design

(f) **Phase V—Completion of Detailed Engineering and Construction (January 1, 2002 and beyond)** In Phase V, the sponsoring State or State-designated authority will oversee the efforts of the public/private partnership formed to progress the selected project, to complete the detailed engineering designs, and finance, construct, equip, and operate the project in revenue service. Construction will be contingent upon the appropriation of Federal funds. In no event will construction be authorized until FRA is fully satisfied that the system will meet appropriate safety standards

§ 268.5 Federal funding sources for the Maglev Deployment Program.

(a) **Federal Maglev Funds.** Section 322 of Title 23 provides for the following funds for the Maglev Deployment Program:

(1) **Contract authority.** Fifty-five million has been made available for the Maglev Deployment Program as contract authority from the Highway Trust Fund for Fiscal Years 1999 through 2001, this would be used to fund the competition in all its phases and could also be used for final design, engineering, and construction activities of the selected project. Of the \$55 million, the Congress has made available up to \$15 million for Fiscal Year 1999, up to \$15 million for Fiscal Year 2000, and \$25 million for Fiscal Year 2001

(2) **Authorization for appropriations.** Nine hundred fifty million, also from the Highway Trust Fund, has been

authorized to be appropriated for the Maglev Deployment Program for Fiscal Years 2000 through 2003. Of the \$950 million, \$200 million is authorized to be appropriated for each of Fiscal Years 2000 and 2001, \$250 million for Fiscal Year 2002, and \$300 million for Fiscal Year 2003. Any decision to proceed with possible Federal funding of the construction of a Maglev system will be contingent upon the receipt of appropriations, and upon completion of appropriate environmental documentation.

(b) *Other Federal funds* Section 322 of Title 23 provides that the portion of the Maglev project not covered by Federal Maglev Funds may be covered by any non-Federal funding sources—including private (debt and/or equity), State, local, regional, and other public or public/private entities—as well as by Federally-provided STP and CMAQ funds, and by other forms of financial assistance made available under title 23 and TEA 21, such as loans and loan guarantees.

(c) *Costs Incurred in Advance of Cooperative Agreement* Certain costs incurred in advance of the execution of a cooperative agreement between FRA and the grantee for pre-construction planning but after enactment of TEA 21 (June 9, 1998) will be eligible for reimbursement, but such costs are allowable only to the extent that they are otherwise allowable under the terms of a fully executed cooperative agreement.

§ 268.7 Federal/State share and restrictions on the uses of Federal Maglev Funds.

(a) *Federal share* The Federal share of Full Projects Costs shall be not more than $\frac{3}{4}$, with the remaining $\frac{1}{4}$ paid by the grant recipient using non-Federal funds. Funds made available under STP and CMAQ are considered non-Federal funds for purposes of the matching requirement.

(b) *Restrictions on the uses of Federal Maglev Funds*

(1) Federal Maglev Funds may be applied only to Eligible Project Costs;

(2) Federal Maglev Funds provided under a preconstruction planning grant may be used only for Phase II activities, and for completion of site-specific draft EIS's, see § 268.3,

(3) Federal Maglev Funds may be used to pay for only $\frac{3}{4}$ of preconstruction planning costs, grant recipients are required to pay the remaining $\frac{1}{4}$ of the costs with non-Federal funds; and

(4) The "prevailing wages" requirement of the Davis Bacon Act (40 U.S.C. 276a-276a-5) applies to any

construction contracts under the Maglev Deployment Program

Subpart B—Procedures For Financial Assistance

§ 268.9 Eligible participants

Any State, or any authority designated by one or more State(s) to carry out the preconstruction planning activities under the Maglev Deployment Program is eligible to participate in the Maglev Deployment Program

§ 268.11 Project eligibility standards

(a) *Project eligibility standards for preconstruction planning financing* (1) As required by 23 U.S.C. 322(d)(4), in order to be eligible to receive financial assistance, a Maglev project shall

(i) Involve a segment or segments of a high-speed ground transportation corridor that exhibit Partnership Potential,

(ii) Require an amount of Federal funds for project financing that will not exceed the sum of Federal Maglev Funds, and the amounts made available by States under STP and CMAQ,

(iii) Result in an operating transportation facility that provides a revenue producing service,

(iv) Be undertaken through a public and private partnership, with at least $\frac{1}{2}$ of Full Project Costs paid using non-Federal funds;

(v) Satisfy applicable statewide and metropolitan planning requirements;

(vi) Be approved by FRA based on an application submitted by a State or authority designated by one or more States,

(vii) To the extent that non-United States Maglev technology is used within the United States, be carried out as a technology transfer project, and

(viii) Be carried out using materials at least 70 percent of which are manufactured in the United States.

(2) FRA recognizes that applicants for preconstruction planning grants will not have detailed information with respect to some of the requirements of paragraph (a)(1) of this section, and that the purpose of a preconstruction planning grant is to develop much of this information with respect to a particular Maglev project. As required by § 268.15, an applicant will need to provide whatever information it has with respect to each of the requirements of paragraph (a)(1) of this section, together with a certification that the applicant fully intends to comply with the requirements of this paragraph (a) should its project be selected by FRA for final design, engineering and construction financing.

(b) *Project eligibility standards for final design, engineering, and*

construction financing FRA will select the most promising Maglev project for final design, engineering, and construction financing. To be eligible to be considered, the project must meet each of the following requirements, these requirements restate the requirements in paragraph (a)(1) of this section, but with more detail and in a different order:

(1) *Purpose and significance of the project* (i) The project description shall point to a Maglev facility and daily operation the primary purpose of which is the conduct of a revenue-producing passenger transportation service between distinct points, rather than a service solely for the passengers' riding pleasure.

(ii) The project description shall incorporate scheduled operation at a top speed of not less than 240 mph.

(2) *Benefits for the American economy* The project description shall include a certification as to paragraphs (b)(2) (i) and (ii) of this section and, as appropriate, a technology acquisition/transfer plan which describes the strategy for their accomplishment.

(i) Processes will be established that will enable an American-owned and -sited firm (or firms) to gain, in the course of the project, the capability to participate in the design, manufacture, and installation of the facilities and vehicles needed for a Maglev operation, if the owner of the selected version of Maglev technology is not an American-owned and -sited firm (thus meeting the technology transfer requirement of 23 U.S.C. 322).

(ii) The 70 percent U.S. content requirement content of 23 U.S.C. 322 will be carried out.

(3) *Partnership potential* The project shall exhibit Partnership potential by satisfying the following:

(i) A private/public partnership must be in place that is ready, willing, and able to finance, construct, operate, and maintain the project.

(ii) The private/public partnership either owns the version of Maglev technology proposed to be implemented in the project, or has an agreement with the owner which affords full cooperation to the partnership in progressing the project, including implementation of the technology acquisition/transfer plan if applicable; and

(iii) The recipient of a preconstruction planning grant or the FRA has developed and endorsed a projection of system capital costs, demand, revenues, operating expenses, and total costs and benefits, that:

(A) Covers either the entire corridor in which the Maglev project is involved

("Corridor"), or the project considered independently.

(B) Demonstrates that private enterprise would be able to run the Corridor or the project—once built and paid for—as a completely self-sustaining entity, in which revenues will cover operating expenses and continuing investment needs; and

(C) Shows total benefits equal to or exceeding total costs

(4) *Funding Limits and Sources* The project description shall include a financing plan that demonstrates project completion with the \$950 million in Federal Maglev Funds, funds remaining unobligated from the \$55 million in contract authority, and the funds made available under STP and CMAQ. The project that is selected will be eligible for other forms of financial assistance provided under title 23 and TEA 21, including loans, loan guarantees, and lines of credit. However, at least 1/2 of Full Project Costs must come from non-Federal Funds.

(5) *Project Management* The State, the technology owner, and all other relevant project partners must include in the project description, an agreed upon—

(i) *Management plan* that defines the partnership, responsibilities, and procedures for accomplishing the project;

(ii) *Project schedule* that shows how timely implementation of the project will be accomplished, including, to the extent possible, a construction plan and schedule, and

(iii) *Financial plan* that shows how funds will flow, in accordance with the other requirements of this subsection.

(6) *Planning/environmental process*

(i) *Assessment of environmental consequences of the proposed project* Recipients of preconstruction planning grants shall conduct an EA in support of the project description, and will prepare additional environmental studies for the project. The EA shall include information to support the grantee's decision to pursue the proposed project. The grantee shall develop the information and discuss the environmental consequences of the proposed technology and route in sufficient detail for the preparation of appropriate documentation by FRA to support selection of one project. This shall include the identification of potential positive and negative environmental effects resulting from the technology (e.g., energy consumption compared to other transportation options), generic noise emissions at various distances from the centerline of the guideway, changes in electromagnetic field levels at various

distances from the centerline of the guideway, and environmental screening of the proposed route (e.g., identification of land use; identification of endangered species possibly present and location of their critical habitat, identification of navigable waterways, wetlands and other sensitive water resources; and identification of the location of parks, wildlife refuges, historic and archaeological sites of National, State or local significance and other sites protected by section 4(f) of the Department of Transportation Act). The latter information and analysis shall be submitted four months in advance of the remainder of the project description. The above list is illustrative only. Grantees will be expected to review proposed work statements with FRA at pre-application meetings or through some other means to develop the final scope of this environmental review.

(ii) The project description must also include letters of endorsement of project implementation from all the State departments of transportation involved, and from all Metropolitan Planning Organizations for metropolitan areas that would be served by the project.

§ 268.13 Deadline for submission of applications for preconstruction planning assistance.

Completed application packages shall be returned to FRA by December 31, 1998. Applications shall be submitted to: Honorable Jolene M. Molitoris, Administrator, Federal Railroad Administration, ATTN: Maglev Project, RDV-11, 400 Seventh Street, SW, Stop 20, Washington, DC 20590.

§ 268.15 Form and contents of applications for preconstruction planning assistance.

States, groups of States, or designated authorities that have Maglev projects are invited to submit applications in Phase I of the Maglev Deployment Program, the competition for preconstruction planning grants. The applications shall contain:

(a)(1) If submitted by a State: name, address, responsible party, telephone, fax number, and e-mail address of the State agency submitting the application, or

(2) If submitted by a designated authority: name, address, responsible party, telephone, fax number, and e-mail address of the designated authority and of the State agency or agencies on whose behalf the designated authority is submitting the application, together with letters from the State(s) evidencing all such designations.

(b) A description of the project concept, identifying its likely location,

market area, length, and the transportation service that it would perform, and a preliminary estimate of the time that would be required—if funds are made available—to bring the project to the start of construction and then to the initiation of full revenue service. At its option, the applicant may include any reports already completed on the project as well as any additional descriptive material that would assist the FRA in evaluating the application;

(c) Whatever information the applicant has to demonstrate that the project meets the project eligibility standards in § 269.11(a), and the project selection criteria in § 268.17, together with a certification that the applicant fully intends to comply with the requirements in § 269.11 should its project be selected by FRA for final design, engineering and construction financing.

(d) A statement of work for the preconstruction planning activities to be accomplished under the planning grant. The statement shall describe the work to be performed, including but not necessarily limited to:

(1) Preconstruction planning work as is needed to develop a Maglev project, and project description that will satisfy the project eligibility standards in § 268.11(b), and the project selection criteria in § 268.17, and

(2) Preparation of EAs, as described in § 268.11(b)(6)(i);

(e) Management plan, schedule, and financial plan for accomplishing the preconstruction planning work under the planning grant,

(f) Letters supporting the application from the heads of all State departments of transportation involved, as well as from responsible officials of the Metropolitan Planning Organizations of all metropolitan areas to be served by the proposed project,

(g) A certification from the State, or from the authority designated by one or more States, that the 1/4 matching funds required for work under the planning grant are, or will be, available by the time the grants are announced. The source(s) of the matching must be shown in the financial plan under paragraph (e), and

(h) If the applicant has made a definitive choice of the particular Maglev technology proposed to be included, a description of that technology and the degree to which it has been produced and tested should be submitted. Further, if the applicant has identified organizations that would form members of the team that would implement the project, the names of those organizations and the persons

representing them should also be submitted.

§ 268.17 Project selection criteria.

Except as qualified by § 268.19, the following criteria will govern FRA's selection of projects to receive funding under the Maglev Deployment Program

(a) *Purpose and significance of the project*

(1) The degree to which the project description demonstrates attractiveness to travelers, as measured in passengers and passenger-miles

(2) The extent to which implementation of the project will reduce congestion, and attendant delay costs, in other modes of transportation, will reduce emissions and/or energy consumption, or will reduce the rate of growth in needs for additional highway or airport construction. Measures for this criterion will include but not be limited to the present value of congestion reduction, pollution reduction, and/or facility cost-avoidance benefits.

(3) The degree to which the project will demonstrate the variety of operating conditions which are to be expected in the United States

(4) The degree to which the project will augment a Maglev corridor or network that has been identified, by any State, group of States, or the FRA, as having Partnership Potential

(b) *Timely implementation* The speed with which the project can realistically be brought into full revenue service, based on the project description and on the current and projected development status of the Maglev technology selected by the applicant for the project.

(c) *Benefits for the American economy* The extent to which the project is expected to create new jobs in traditional and emerging industries in the United States

(d) *Partnership potential* The degree to which the project description demonstrates Partnership Potential for the corridor in which it is involved, and/or for the project independently.

(e) *Funding limits and sources*

(1) The extent and proportion to which States, regions, and localities commit to financially contributing to the project, both in terms of their own locally-raised, entirely non-Federal funds, and in terms of commitments of scarce Federal resources from non-Maglev funds, and

(2) The extent and proportion to which the private sector contributes financially to the project

Note to § 268.17 FRA recognizes that applicants for preconstruction planning assistance may not have detailed information with respect to each of these criteria, and that

the purpose of the preconstruction planning assistance is to develop much of this information with respect to a particular Maglev project. The preconstruction planning application requirements of this part 268 are designed to elicit whatever information an applicant may have pertaining to these criteria

§ 268.19 Evaluation of applications for preconstruction planning assistance

The FRA will evaluate the applications for their completeness and responsiveness to the requirements listed in § 268.15. In addition, applicants are advised that the Maglev Deployment Program contains a number of project eligibility standards (minimum threshold standards) and project evaluation criteria that will guide the FRA's review of the project descriptions produced under the Planning Grants. The FRA's implementation of these standards and criteria appears in § 268.11 and § 268.17, respectively. Although subject to revision, the information in § 268.11 and § 268.17 should assist the States in completing their applications in the competition for planning grants, since the project descriptions will need to respond to the standards and criteria. In evaluating the applications for planning grants, FRA will consider how consistent the applicant's project is to the standards and criteria, and the application's likelihood of leading to a project that meets all the standards and criteria.

§ 268.21 Down-selection of one or more Maglev projects for further study and selection of one project for final design, engineering, and construction funding.

(a) Upon completion of Phase III of the Maglev Deployment Program, FRA will down-select one or more projects to complete additional environmental studies, investment grade revenue forecasts, and other studies and analyses necessary prior to initiation of construction. Final design and engineering work will also be initiated for the down-selected project(s). To be down-selected a project must appear to meet the project eligibility standards contained in § 268.11 (b), rate highly in the project selection criteria specified in § 268.17, be judged by FRA to have a good chance of being constructed with the Federal funds authorized for this program, and be successfully operated by a public/private partnership

(b) Only one project will be selected in Phase IV of the Maglev Deployment Program and be eligible for any Federal construction funds that Congress chooses to make available. That one project must meet each and every project eligibility standard contained in

§ 268.11 (b). If more than one project down-selected in Phase III and funded through Phase IV meets all of these standards, then FRA will evaluate and compare the eligible projects according to the set of project selection criteria contained in § 268.17

(c) In reviewing competing projects under the project eligibility standards and project selection criteria, the FRA will exercise particular vigilance regarding the following elements of the preconstruction planning process, although not to the exclusion of others:

(1) The credibility of the demand and revenue forecasts, cost estimates, and benefit/cost comparisons, and

(2) The credibility of the financial plan

(d) FRA intends to make periodic reviews of the processes and products of grant recipients. Such reviews may include, at the FRA's option, reviews at key milestones in the preparation of project descriptions

Issued in Washington, DC on January 4, 2000

Jolene M. Molitoris,
Federal Railroad Administrator
(FR Doc. 00-813 Filed 1-13-00, 8:45 AM)
BILLING CODE 4910-06-P

DEPARTMENT OF THE INTERIOR

Fish and Wildlife Service

50 CFR Part 17

RIN 1018-AE39

Endangered and Threatened Wildlife and Plants; Final Rule To List Two Cave Animals From Kauai, Hawaii, as Endangered

AGENCY: Fish and Wildlife Service, Interior.

ACTION: Final rule.

SUMMARY: We, the U.S. Fish and Wildlife Service (Service), determine endangered status pursuant to the Endangered Species Act of 1973, as amended (Act), for two animals—the Kauai cave wolf spider (*Adelocosa anops*), and the Kauai cave amphipod (*Speleorchestia koloana*). These two species are found on the Hawaiian island of Kauai. The Kauai cave wolf spider is known from three populations, and the Kauai cave amphipod is known from five populations. These animals and their habitats have been variously affected or are currently threatened by the following—habitat degradation and loss through the removal of perennial vegetation, soil fill, grading, paving, quarrying, and other activities

information regarding the proposed project can be found at the Coronado City Hall, Coronado Public Library and on the city's Web site <http://www.coronado.ca.us>

Open house public scoping meetings will be held in the City of Coronado on June 9, 2004, from 3–5 p.m. at the Public Library Winn Room located at 640 Orange Avenue and from 6–8 p.m. at the Coronado Middle School Granzer Hall located at 550 F Avenue in the City of Coronado. Prior to the public scoping meeting on June 9, 2004, a tour of the project study area will be conducted from 1:30–2:30 p.m. on that day. The tour will leave at 1:30 p.m. from the Public Library at 640 Orange Avenue. A public hearing will be held at a later date and a public notice will be circulated stating the time and place of the hearing. The draft EIS will be available for public and agency review and comment prior to the public hearing.

To ensure that the full range of issues related to this proposed action are addressed and all significant issues identified, comments and suggestions are invited from all interested parties. Comments or questions concerning this proposed action and the EIS should be directed to the FHWA at the address provided above.

(Catalog of Federal Domestic Assistance Program Number 20.205, Highway Planning and Construction. The regulations implementing Executive Order 12372 regarding intergovernmental consultation on Federal programs and activities apply to this program.)

Issued on: May 14, 2004

Maiser Khaled,

Director, Project Development & Environment, Federal Highway Administration, Sacramento, California
[FR Doc. 04-11439 Filed 5-19-04, 8:45 am]
BILLING CODE 4910-22-M

DEPARTMENT OF TRANSPORTATION

Federal Railroad Administration

Programmatic Environmental Impact Statement: High Speed Rail Corridor Las Vegas, NV to Anaheim, CA

AGENCY: Federal Railroad Administration (FRA), Department of Transportation (DOT)

ACTION: Notice of intent.

SUMMARY: The FRA is issuing this notice to advise the public that FRA will prepare a programmatic environmental impact statement (PEIS) for the California-Nevada Interstate Maglev Project in cooperation with the Nevada Department of Transportation. FRA is

also issuing this notice to solicit public and agency input into the development of the scope of the PEIS and to advise the public that outreach activities conducted by the program participants will be considered in the preparation of the PEIS.

The FRA will establish the purpose and need, examine the regional implications, present site-specific aspects of the project that can proceed to construction, and determine the feasible study areas to be carried forward for second tier assessments of site-specific environmental impacts. **FOR FURTHER INFORMATION CONTACT:** For further information regarding the programmatic environmental review, please contact

Mr. Christopher Bonanti, Environmental Program Manager, Office of Railroad Development, Federal Railroad Administration, 1120 Vermont Avenue (Mail Stop 20), Washington, DC 20590; Telephone (202) 493-6383, e-mail: christopher_bonanti@fra.dot.gov

Mr. Jeffrey Fontaine, P.E., Director, Telephone (775) 888-7440, e-mail: jfontaine@dot.state.nv.us, or Mr. James Mallery, Planning Manager, Telephone (775) 888-7464, e-mail: jmallery@dot.state.nv.us, Nevada Department of Transportation, 1283 South Stewart Street, Carson City, NV 89712.

SUPPLEMENTARY INFORMATION:

Background

For over twenty years, the California Nevada Super Speed Train Commission (CNSSTC), a public agency chartered within the State of Nevada, has sponsored studies to examine the feasibility and the environmental impacts of linking the Las Vegas area with various points in the Los Angeles region using a high-speed ground transportation system. Most of these studies have focused on the use of magnetic levitation technology. More recently, the CNSSTC sponsored the first leg of such a project, linking a point on the outskirts of Las Vegas with the city of Primm, on the California-Nevada border, as one of the entries competing in the FRA's Maglev Deployment Program authorized in Section 1218 (23 U.S.C. 322) of the Transportation Equity Act for the 21st Century (TEA21).

The FRA prepared a programmatic EIS (PEIS) to address the potential for significant environmental impact from the Maglev Deployment Program that included the Las Vegas-Primm project as one of seven projects analyzed in the PEIS. The notice of availability of the final PEIS was published in the Federal Register on May 4, 2001. CNSSTC had

prepared an environmental assessment for the Las Vegas-Primm project in February 2000, which was used by the FRA to assist the agency in preparing the PEIS. The PEIS for the Maglev Deployment Program is available on the FRA Web site at <http://www.dot.fra.gov/s/env/maglev/MagPEIS.htm>

and the environmental assessment is available from Mr. Bruce Aguilera, Chairman, California-Nevada Super Speed Train Commission, 400 Las Vegas Blvd. South, Las Vegas, Nevada 89101, Telephone (702) 229-4949.

Other recent documents related to the Las Vegas-Anaheim project include the preparation by the CNSSTC of Project Descriptions describing the 169-mile Las Vegas-Barstow component as a stand-alone project, which were submitted to the FRA in June 2002, and the Ontario-Anaheim segment, which was submitted to the FRA in June 2003.

The Department of Transportation and Related Agencies Appropriations Act, 2003 (Pub. L. 108-7), which provides appropriations for the FRA and other agencies, included funds specifically to conduct additional design, engineering and environmental studies concerning the California-Nevada Interstate Maglev Project under the FRA's Next Generation High Speed Rail Technology Demonstration Program. Some of these funds will be used to conduct the system-wide Programmatic EIS.

The FRA has entered into a Memorandum of Understanding with the CNSSTC, the Nevada Department of Transportation (NDOT) and the California Department of Transportation (Caltrans) governing the conduct of this Programmatic EIS. FRA is serving as the lead federal agency, NDOT is the lead state agency, and the California Department of Transportation (Caltrans) and CNSSTC are cooperating agencies. Through this PEIS, the FRA, NDOT and the cooperating agencies will examine alternative routes, viable transportation alternatives, and system-wide environmental issues, and identify site-specific problem areas deserving of more detailed analysis. In particular, in light of environmental assessment work previously completed and the likely construction sequencing should a decision be made to proceed with the project following completion of the programmatic environmental review, the PEIS will address the Las Vegas to Primm segment in greater detail that might allow this particular segment to proceed into final design and construction once the PEIS is complete.

Environmental Issues

Possible environmental impacts include displacement of commercial and residential properties, disproportionate impacts to minority and low-income populations, community and neighborhood disruption, increased noise and electromagnetic interference along rail corridors including sterile effects on highway vehicles, traffic impacts associated with stations, effects to historic properties or archaeological sites, impacts to parks and recreational resources, visual quality effects, impacts to water resources, wetlands, and sensitive biological species and habitat, land use compatibility impacts, energy use, and impacts to agricultural lands

Alternatives

The PEIS will consider alternatives including (1) Taking no action, (2) various alignment options and station locations for the entire length of the project and (3) other viable transportation alternatives. The degree of detail in the analysis may vary at different locations. In particular, at the Nevada end, it may be sufficiently detailed to support a site-specific EIS, while in the much longer California segment, it may be of a broader programmatic scale, sufficient to support a decision to go ahead with the entire project, but requiring further analysis to resolve specific detailed routing and design issues

Scoping and Comment

FRA encourages broad participation in the PEIS process and review of the resulting environmental documents. Comments and suggestions related to the project and potential environmental concerns are invited from all interested agencies and the public at large to ensure that the full range of issues related to the proposed action and all reasonable alternatives are addressed and all significant issues are identified. The public is invited to participate in the scoping process, to review the Draft PEIS when published, and to provide input at public meetings. Letters describing the proposed scope of the PEIS and soliciting comments will be sent to appropriate Federal, State and local agencies, elected officials, community organizations, and to private organizations and citizens who have previously expressed interest in this proposal. Several public meetings will be advertised in the local media and held in the project area regarding this proposal. Release of the Draft PEIS for public comment and public meetings and hearings related to that document

will be announced as those dates are established.

Persons interested in providing comments on the scope of the programmatic EIS should do so within thirty days of the publication of this Notice of Intent. Comments can be sent in writing to FRA or NDOT representatives at the addresses listed above.

Public Scoping Meetings will be held at the following respective locations and dates:

Las Vegas, Nevada

Date: June 21, 2004.
Time: 4 p.m.–9 p.m.
Location: City of Las Vegas, City Council Chambers, 400 Stewart Ave., Las Vegas, NV 89101.

Ontario, California

Date: June 22, 2004.
Time: 4 p.m.–9 p.m.
Location: Ontario Convention Center, 2000 Convention Center Way, Ontario, CA 91764

Victorville, California

Date: June 23, 2004
Time: 4 p.m.–9 p.m.
Location: Victorville Activity Center, 15075 Hesperia Rd., Victorville, CA 92392.

Bertham, California

Date: June 24, 2004
Time: 4 p.m.–9 p.m.
Location: Bertham College, Norman Smith Center, 2700 Bertham Rd., Bertham, CA 92311

Anaheim, California

Date: June 28, 2004
Time: 4 p.m.–9 p.m.
Location: City Hall West, 2nd Floor, Gordon Hoyt Conference Room, 201 S Anaheim Blvd., Anaheim, CA 92805.

Issued in Washington, DC, on May 14, 2004

Jo Strang,

Deputy Associate Administrator of Railroad Development

[FR Doc. 04-11397 Filed 5-19-04, 8:45 am]

BILLING CODE 4910-06-P

DEPARTMENT OF TRANSPORTATION**Maritime Administration****Reports, Forms and Recordkeeping Requirements Agency Information Collection Activity Under OMB Review**

AGENCY: Maritime Administration, DOT
ACTION: Notice and request for comments.

SUMMARY: In compliance with the Paperwork Reduction Act of 1995 (44

U.S.C. 3501 seq.), this notice announces that the Information Collection abstracted below has been forwarded to the Office of Management and Budget (OMB) for review and approval. The nature of the information collection is described as well as its expected burden. The Federal Register Notice with a 60-day comment period soliciting comments on the following collection of information was published on February 23, 2004. No comments were received. **DATES:** Comments must be submitted on or before June 21, 2004.

FOR FURTHER INFORMATION CONTACT:

Kelly Farrell, Maritime Administration, 400 7th Street SW, Washington, DC 20590. Telephone: 202-366-9041, FAX 202-366-7485 or e-mail kelly.farrell@marad.dot.gov. Copies of this collection also can be obtained from that office.

SUPPLEMENTARY INFORMATION: Maritime Administration (MARAD).

Title: Elements of Request for Course Approval

OMB Control Number: 2133-NEW.

Type of Request: New Collection

Affected Public Respondents: are public and private maritime security course training providers

Forms: None.

Abstract: Under this proposed voluntary collection, public and private maritime security training course providers may choose to provide the Maritime Administration (MARAD) with information concerning the content and operation of their courses. MARAD will use this information to evaluate whether the course meets the training standards and curriculum promulgated under Section 109 of the Maritime Transportation Security Act of 2002 (MTSA) (Pub. L. 107-295). Courses found to meet these standards will receive a course approval.

Annual Estimated Burden Hours: 3,000 hours

ADDRESSES: Send comments to the Office of Information and Regulatory Affairs, Office of Management and Budget, 725 17th Street, NW, Washington, DC 20503, Attention MARAD Desk Officer.

Comments are invited on whether the proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information will have practical utility, the accuracy of the agency's estimate of the burden of the proposed information collection, ways to enhance the quality, utility and clarity of the information to be collected, and ways to minimize the burden of the collection of information on respondents, including the use of

Administration (RITA), to the Federal Motor Carrier Safety Information (FMCSA) (69 FR 51009, Aug. 17, 2004).

FMCSA IC OMB Control No 2126-0031

Form No MP-1

Type of Review Extension of a currently approved information collection

Respondents Class I Motor Carriers of Passengers.

Number of Respondents. 26.

Estimated Time Per Response 15 hours

Expiration Date August 31, 2006

Frequency. Quarterly and Annually.

Total Annual Burden 195 hours [130 responses x 1.5 hour per response = 195 hours]

Background

The Annual and Quarterly Report of Class I Motor Carriers of Passengers is a mandated reporting requirement applicable to certain motor carriers of passengers. Motor carriers (both interstate and intrastate) subject to the Federal Motor Carrier Safety Regulations are classified on the basis of their gross carrier operating revenues.¹ Class I passenger motor carriers are required to file with the Agency motor carrier quarterly and annual reports (Form MP-1) providing financial and operating data (see 49 U.S.C. 14123). Under the financial and operating statistics (F&OS) program, FMCSA collects balance sheet and income statement data along with information on tonnage, mileage, employees, transportation equipment, and related data. The Agency uses this information to assess the health of the industry and identify industry changes that could affect national transportation policy. The data also indicate company financial stability and operational characteristics. The data and information collected are made publicly available and used by FMCSA to determine a passenger carrier's compliance with the F&OS program.

¹ For purposes of the Financial & Operating Statistics (F&OS) program, passenger carriers are classified into the following two groups: (1) Class I carriers are those having average annual gross transportation operating revenues (including interstate and intrastate) of \$5 million or more from passenger motor carrier operations after applying the revenue deflator formula in the Note of 49 CFR 1420.3; (2) Class II passenger carriers are those having average annual gross transportation operating revenues (including interstate and intrastate) of less than \$5 million from passenger motor carrier operations after applying the revenue deflator formula as shown in Note A of § 1420.3. Only Class I carriers of passengers are required to file Annual and Quarterly Report Form MP-1, but Class II passenger carriers must notify the Agency when there is a change in their classification or their revenues exceed the Class II limit.

requirements set forth in 49 CFR Part 1420.

The F&OS reporting regulations were formerly administered by the Interstate Commerce Commission. They were transferred to the U.S. Department of Transportation on January 1, 1996, by Section 103 of the ICC Termination Act of 1995 (ICCTA) (Pub. L. 104-88, 109 Stat. 803, December 29, 1995), now codified at 49 U.S.C. 14123. On September 30, 1998, the Secretary transferred the authority to administer the F&OS program to BTS (63 FR 52192). Effective September 29, 2004, the Secretary transferred this program responsibility from BTS and redelegated it to FMCSA (69 FR 51009, Aug. 17, 2004). FMCSA will publish a final rule that transfers and redesignates the F&OS program reporting requirements, currently at 49 CFR 1420, from BTS (now RITA) to FMCSA.

We particularly request comments on: (1) Whether the proposed collection of information is necessary for FMCSA to meet its goal of reducing commercial motor vehicle crashes, and the usefulness of the information with respect to this goal; (2) the accuracy of the estimated IC burden; (3) ways to enhance the quality, utility, and clarity of the information collected; and (4) ways to minimize the burden of the collection of information on respondents (including use of automated collection techniques and other information technologies) without reducing the quality of the collected information. The Agency will summarize and/or include your comments in the request for OMB approval of this IC.

Issued on: July 7, 2006

David H. Hugel,

Acting Administrator

[FR Doc. E6-11140 Filed 7-13-06, 8:45 am]

BILLING CODE 4910-EX-P

DEPARTMENT OF TRANSPORTATION

Federal Railroad Administration

Environmental Impact Statement: DesertXpress High Speed Train Between Victorville, CA and Las Vegas, NV

AGENCY: Federal Railroad Administration (FRA), U.S. Department of Transportation (DOT)

ACTION: Notice of Intent to prepare an Environmental Impact Statement.

SUMMARY: The FRA is issuing this notice to advise the public that an Environmental Impact Statement (EIS) will be prepared for the proposed

DesertXpress high-speed train project. The project includes passenger stations, a maintenance facility, and a new railroad line along the I-15 corridor between Victorville, California and Las Vegas, Nevada. FRA is issuing this notice to solicit public and agency input into the development of the scope of the EIS and to advise the public that outreach activities conducted by the FRA will be considered in the preparation of the EIS. Federal cooperating agencies for the EIS are the Surface Transportation Board (STB), the Federal Highway Administration (FHWA) and the Bureau of Land Management (BLM). Alternatives to be evaluated and analyzed in the EIS include (1) take no action (No-Project or No-Build), and (2) construction of a privately financed steel-wheel-on-steel-rail high-speed train, including a proposed station in Victorville and a station in Las Vegas, and a maintenance facility in Victorville. Several alternative routings would be considered in the EIS.

DATES: Three scoping meetings will be held during July of 2006. Scoping meetings will be advertised locally and are scheduled for the following cities on the dates indicated below:

- July 25, 2006, Las Vegas, Nevada at The White House, 3260 Joe Brown Drive, time 5-8 pm
- July 26, 2006, Barstow, California at the Ramada Inn, 1571 E. Main Street, time 12-2 pm, and
- July 26, 2006, Victorville, California at the San Bernardino County Fairgrounds Building 3, time 5-8 pm.

Persons interested in providing comments on the scope of the EIS should do so by August 15, 2006. Comments can be sent to Mr. David Valenstein at the FRA address identified below.

FOR FURTHER INFORMATION CONTACT: Mr. David Valenstein, Environmental Program Manager, Office of Railroad Development, Federal Railroad Administration, 1120 Vermont Avenue, (Mail Stop 20), Washington, DC 20590, (telephone 202/493-6368). Information and documents regarding the environmental review process will be made available through the FRA's Web site, <http://www.fra.dot.gov> at Passenger Rail, Environment, Current Reviews, DesertXpress.

SUPPLEMENTARY INFORMATION: The FRA will prepare an Environmental Impact Statement (EIS) for the proposed DesertXpress high-speed train project. The FRA is an operating administration of the U.S. Department of Transportation and is primarily responsible for railroad safety.

regulation. Federal cooperating agencies for the EIS are the Surface Transportation Board (STB), the Federal Highway Administration (FHWA) and the Bureau of Land Management (BLM). The BLM has approval authority over the use of public lands under their control. The FHWA has jurisdiction over the use and/or modification of land within the I-15 right of way. The STB has exclusive jurisdiction, pursuant to 49 U.S.C. 10501(h), over the construction, acquisition, operation and abandonment of rail lines, railroad rates and services and rail carrier consolidations and mergers. 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. To the extent appropriate, the EIS will address environmental concerns raised by federal, state and local agencies during the EIS process.

Project Description DesertXpress Enterprises, LLC (the project Applicant) proposes to construct and operate a privately financed interstate high-speed passenger train, with a proposed station in Victorville, California and a station in Las Vegas, Nevada, along a 200-mile corridor, within or adjacent to the I-15 freeway for about 170 miles and adjacent to existing railroad lines for about 30 miles.

The need for the project is directly related to the rapid increase in travel demand between Southern California and Las Vegas, coupled with the growth in population in the areas surrounding Victorville, Barstow, Primm and Las Vegas, which has resulted in substantial congestion along the I-15 freeway between Victorville and Las Vegas. Ridership is estimated to be 4.1 million round trips in the first full year of service. To accommodate this level of ridership, trains would operate from 6 a.m. to 10 p.m., daily, 365 days a year at 20 to 30 minute intervals during peak periods.

The project would involve construction of a fully grade-separated, dedicated double track passenger-only railroad along an approximately 200-mile corridor, from Victorville, California to Las Vegas, Nevada. Where the railroad alignment would be within the I-15 freeway corridor, continuous concrete truck barriers, as well as American Railway Engineering and Maintenance of Way Association crash barriers at all supporting columns of bridges at freeway interchanges and overpasses would be provided. The project would include the construction of a passenger station, as well as maintenance, storage and operations

facility in Victorville and one passenger station in Las Vegas.

The proposed Victorville Station would be located along the west side of I-15 between the two existing Stoddard Wells interchanges. The facilities directly associated with the Victorville station would occupy about 60 acres of land, and would have a parking capacity for up to 10,000 automobiles. Access to the Victorville station would be via the two existing Stoddard Wells Road Interchanges.

The Maintenance, Storage and Operations facility is proposed to be located in the City of Victorville on a site that lies within the Victorville Valley Economic Development Area. The facility would require approximately 50 acres and would include a fueling station, train washing facility, repair shop, parts storage, and operations center. It is estimated that approximately 400 employees would be based at this facility.

The Las Vegas passenger station would be located at one of three possible locations: (1) Near the south end of the Las Vegas Strip; (2) in the center section of the Strip; or (3) in downtown Las Vegas. A light maintenance, cleaning, and inspection facility would also be built near the Las Vegas station.

Alternatives A No-Build alternative will be studied as the baseline for comparison with the proposed project. The No-Build Alternative represents the highway (I-15) and airport (McCarran) system physical characteristics and capacity as they exist at the time of the EIS (2006) with planned and funded improvements that will be in place at the time the project becomes operational. The project build alternatives have the same stations and maintenance facility. The railroad alignment between Victorville and Las Vegas can be divided into 6 distinct segments. Within the segments, several build alternatives are being considered as discussed below.

Segment 1 Victorville to Lenwood (south of Barstow, California). Alternative A would depart the Victorville Station in a south-westerly direction before turning north and generally following the existing BNSF Railway Company (BNSF) railroad corridor and Route 66 to a point just south of Barstow. Alternative B would depart the Victorville Station and head north generally following the west side of the I-15 corridor. The alignment would diverge from the I-15 corridor near Hodge Road and head northerly to a point just south of Barstow near the existing BNSF railroad corridor.

Alternative B would be approximately 6.8 miles shorter than Alternative A.

Segment 2 Lenwood (South of Barstow) to Yermo, California: From a point south of Barstow, the build alternative alignment would head north for about five miles, cross the Mojave River and turn east through the City of Barstow. Through Barstow the alignment would utilize an existing, but abandoned, former Atchison Topeka & Santa Fe railroad corridor along the north side of the Mojave River, for approximately three miles before reaching the vicinity of the I-15 / Old Highway 58 interchange on the east side of Barstow. From this point the alignment would head east along the north side of I-15 corridor through the town of Yermo to a point just east of the agricultural inspection station on the I-15 Freeway.

Segment 3 Yermo to Mountain Pass: There are two alignment alternatives in this segment: Alternative A entirely within the median of the I-15 freeway, and Alternative B along the north side of the I-15 corridor.

Segment 4 Mountain Pass to Primm, Nevada. Alternative A would leave the I-15 freeway corridor and head south for approximately four miles before returning to the I-15 freeway corridor south of Primm. A portion of this alignment may encroach on the Mojave Desert Preserve, about one half mile south of the I-15 freeway. Alternative B would leave the I-15 freeway corridor and head north before returning to the I-15 freeway corridor south of Primm. A 4,000-foot long tunnel would be necessary for Alternative B.

Segment 5 Primm to Jean, Nevada. Alternative A would be entirely within the median of the I-15 freeway. Alternative B would continue along the east side of the I-15 freeway corridor between Primm and Jean.

Segment 6 Jean to Las Vegas, Nevada. There are three alternative alignments in this segment. Alternative A would continue in the median of the I-15 freeway into the Las Vegas passenger station. Alternative B would cross the I-15 freeway corridor from the east side to the west side and continue along the west side of the I-15 freeway corridor into the Las Vegas passenger station. Alternative C would diverge to the east and generally follow the existing Union Pacific railroad corridor into the Las Vegas passenger station. To reach the downtown Las Vegas passenger station Alternative A would leave the median of the I-15 freeway corridor near Oakoy Boulevard and diverge to the east to follow the Union Pacific railroad corridor to Bonneville Street. Alternatives B and C would follow the

west side of the I-15 freeway corridor and cross at Oakley Boulevard to the east to join the Union Pacific railroad corridor to Bonneville Street

Scoping and Comments: FRA encourages broad participation in the EIS process during scoping and review of the resulting environmental documents. Comments and suggestions are invited from all interested agencies and the public at large to insure the full range of issues related to the proposed action and all reasonable alternatives are addressed and all significant issues are identified. In particular, FRA is interested in determining whether there are areas of environmental concern where there might be the potential for identifiable significant impacts. FRA invites and welcomes public agencies, communities and members of the public to advise the FRA of their environmental concerns, and to comment on the scope and content of the environmental information regarding the proposed project. Persons interested in providing comments on the scope of the EIS should send them to Mr. David Valenstein at the FRA address identified above by August 15, 2006.

Issued in Washington, DC, on July 11, 2006

Mark E. Yachmetz,

Associate Administrator for Railroad Development

[FR Doc. E6-11154 Filed 7-13-06; 8:45 am]

BILLING CODE 4910-06-P

DEPARTMENT OF TRANSPORTATION

Federal Transit Administration

[Docket Number: FTA-2005-23227]

Notice of Proposed Title VI Circular

AGENCY: Federal Transit Administration (FTA), DOT.

ACTION: Notice of proposed revisions and request for comment.

SUMMARY: The Federal Transit Administration (FTA) is revising and updating its Circular 4702.1, "Title VI Program Guidelines for Urban Mass Transit Administration Recipients." FTA is issuing a proposed Title VI Circular and seeks input from interested parties on this document. After consideration of the comments, FTA will issue a second Federal Register notice responding to comments received and noting any changes made to the Circular as a result of comments received. The proposed Circular is available in Docket Number 23227 at <http://dms.dot.gov>.

DATES: Comments must be received by August 14, 2006. Late filed comments will be considered to the extent practicable.

ADDRESSES: You may submit comments identified by DOT DMS Docket Number FTA-05-23227 by any of the following methods. Web Site: <http://dms.dot.gov>. Follow the instructions for submitting comments on the DOT electronic docket site; Fax: 202-493-2251; Mail: Docket Management Facility; U.S. Department of Transportation, 400 Seventh Street, SW, Nassif Building, PL-401, Washington, DC 20590-0001; Hand Delivery Room PL-401 on the plaza level of the Nassif Building, 400 Seventh Street, SW, Washington, DC, between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays.

Instructions: You must include the agency name (Federal Transit Administration) and the docket number (FTA-05-23227). You should submit two copies of your comments if you submit them by mail. If you wish to receive confirmation that FTA received your comments, you must include a self-addressed, stamped postcard. Note that all comments received will be posted without change to the Department's Docket Management System (DMS) website located at <http://dms.dot.gov>. This means that if your comment includes any personal identifying information, such information will be made available to users of DMS.

FOR FURTHER INFORMATION CONTACT: David Schneider, Office of Civil Rights, 400 Seventh Street, SW., Washington, DC, 20590, (202) 366-4018 or at David.Schneider@fta.dot.gov

SUPPLEMENTARY INFORMATION:

Background

The authority for FTA's Title VI Circular derives from Title VI of the Civil Rights Act of 1964, 42 U.S.C. 2000d, *et seq.*, which prohibits discrimination on the basis of race, color, or national origin in programs and activities receiving Federal financial assistance. Specifically, Section 601 of this Title provides that "no person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance," (42 U.S.C. 2000d). Section 602 authorizes Federal agencies "to effectuate the provisions of [Section 601] * * * by issuing rules, regulations or orders of general applicability," (42 U.S.C. 2000d-1). The U.S. Department of Transportation (DOT), in an exercise of

this authority, promulgated regulations, contained in 49 CFR Part 21 that effectuate the provisions of Section 601 and Title VI in general.

FTA Circular 4702.1, titled "Title VI Program Guidelines for Urban Mass Transit Administration Recipients," provides information on how FTA will enforce the Department of Transportation's Title VI regulations at 49 CFR Part 21. The Circular includes information, guidance, and instructions on the objectives of Title VI, information on specific grant programs covered by Title VI, a description of FTA data collection and reporting requirements, a summary of FTA Title VI compliance review procedures, a description of FTA process for implementing remedial and enforcement actions, information on how FTA will respond to Title VI complaints, and public information requirements. Circular 4702.1 was last updated on May 26, 1988.

The proposed circular would make reference to and in some instances would summarize the text of other FTA guidance, regulations, and other documents. Many of the documents referred to will undergo revision during the life of the proposed circular. In all cases, the most current guidance document, regulation, etc. will supersede any preceding information provided. FTA reserves the right to make page changes to proposed and final circulars regarding updates to other provisions, without subjecting the entire circular to public comment.

Comments Related to Reporting Requirements: In addition to general comments concerning the draft Title VI Circular, FTA is seeking comments from its recipients and subrecipients concerning the costs and benefits associated with meeting the proposed Circular's guidance. Recipients and subrecipients are encouraged to comment on the number of hours and/or financial cost associated with implementing the Circular's guidance as well as the extent to which following the guidance will assist the recipient and subrecipient in achieving its organizational objectives.

I. Why is FTA revising its Title VI Circular?

The DOT Title VI regulations and FTA Circular 4702.1 attempt to transform the broad antidiscrimination ideals set forth in Section 601 of Title VI into reality. In the 18 years since FTA last revised its Title VI Circular, much of FTA's guidance has become outdated. Over those years, legislation, Executive Orders, and court cases have transformed transportation policy and affected Title VI rights and

MEMORANDUM OF UNDERSTANDING
Among
THE FEDERAL RAILROAD ADMINISTRATION,
THE CALIFORNIA DEPARTMENT OF TRANSPORTATION,
THE NEVADA DEPARTMENT OF TRANSPORTATION
And
THE CALIFORNIA-NEVADA SUPER SPEED TRAIN COMMISSION
For
THE PREPARATION OF
A PROGRAM ENVIRONMENTAL IMPACT STATEMENT AND
PROGRAM ENVIRONMENTAL IMPACT REPORT
For
THE PROPOSED CALIFORNIA-NEVADA INTERSTATE MAGLEV PROJECT

1.0 PURPOSE

This Memorandum of Understanding (MOU) is entered into effective April 11, 2003 by and among the Federal Railroad Administration (FRA), an operating administration within the U.S. Department of Transportation (USDOT), the California Department of Transportation (CALTRANS), an agency of the State of California, the Nevada Department of Transportation (Nevada DOT), an agency of the State of Nevada, and the California-Nevada Super Speed Train Commission (Commission), a state-empowered agency with jurisdiction within the state of Nevada over the California-Nevada Interstate Maglev Project pursuant to Nevada Public Law, Section 705.4291. The purpose of this MOU is to provide for coordination between these four entities (the Parties) and to document each entity's respective roles and responsibilities in the preparation of a combined Program Environmental Impact Statement/Program Environmental Impact Report (EIS/EIR) relating to the proposed California-Nevada Interstate Maglev Project to ensure full compliance with the requirements of the California Environmental Quality Act (CEQA), as amended (California Public Resources Code, § 21000 et seq., National Environmental Policy Act of 1969 (NEPA), as amended (42 USC § 4321, et seq.), and related statutes, regulations, and orders.

- MOU FOR THE CALIFORNIA-NEVADA INTERSTATE MAGLEV PROJECT -

2.0 BACKGROUND

- A.** The Commission, in cooperation with the Nevada DOT, is pursuing the development of the California-Nevada Interstate Maglev Project involving the implementation of a transportation system employing magnetic levitation technology between Las Vegas, Nevada and Anaheim, California. The Commission was created in 1987 and has been pursuing the implementation of a Maglev system for fifteen years. The proposed California-Nevada Interstate Maglev Project could ultimately provide high speed maglev service at speeds up to 310 mph between Las Vegas and Anaheim. The Commission is pursuing an initial phase involving maglev service between Las Vegas, Nevada and the California-Nevada state line at Primm, Nevada.
- B.** The Nevada DOT is a state agency, which plans, manages and coordinates the development of transportation services in the state of Nevada. It is supporting the implementation of the Maglev Project in cooperation with the Commission.
- C.** CALTRANS is a state agency, which plans, manages, and coordinates the development of transportation services, including intercity rail and passenger services, in California.
- D.** The FRA is the federal agency with responsibility for overseeing the safety of rail passenger and freight operations across the United States. The FRA is also knowledgeable with respect to Maglev technology and is responsible for implementing the Magnetic Levitation Transportation Technology Deployment Program (Maglev Deployment Program) authorized by section 1218 of the Transportation Equity Act for the 21st Century, Pub. L. No. 105-178, 112, Stat. 107, 216 (codified at 23 U.S.C. 322). The Maglev Deployment Program was created to demonstrate the potential of magnetic levitation technology to provide high-speed ground transportation in the United States.

- MOU FOR THE CALIFORNIA-NEVADA INTERSTATE MAGLEV PROJECT -

- E.** Congress has appropriated funds to FRA for the purpose of funding planning and preliminary design activities in Nevada and California consistent with the proposed California-Nevada Interstate Maglev Project.
- F.** As federal, state and local governmental agencies, the Parties are each subject to a variety of federal, state and local statutes, regulations and executive orders, including the Federal Freedom of Information Act (5 U.S.C. 552) which applies to the FRA and the California Public Records Act (California Government Code Sections 6250 *et seq.*) which applies to CALTRANS.
- G.** Actions and approvals by the FRA concerning the proposed California-Nevada Interstate Maglev Project may be necessary in the future; potentially including action related to the application of federal railroad safety requirements to the corridor. In addition, future opportunities may develop for federal funding for the proposed project, or some portion thereof, consistent with the program environmental review documents, through programs administered by the FRA or other U.S. Department of Transportation agencies. Thus, it is expected that the FRA may take a major federal action, or actions, within the meaning of NEPA concerning the Commission's proposed project.
- H.** The Parties are interested in ensuring that appropriate environmental and related analyses of the proposed project are performed in compliance with the applicable requirements of both state and federal law and are completed in a timely, coordinated and effective manner through the cooperative efforts of the Parties.

3.0 ROLES OF THE PARTIES

- A.** The FRA will serve as the lead federal agency for purposes of compliance with NEPA and related requirements in accordance with sections 1501.5 and 1506.2 of the President's Council on Environmental Quality's regulations implementing NEPA (CEQ Regulations) (40 C.F.R. §§1501.5, 1506.2) and the FRA's "Procedures for Considering Environmental Impacts" (FRA's Procedures) (64

MOU FOR THE CALIFORNIA-NEVADA INTERSTATE MAGLEV PROJECT -

Fed. Reg. 28545, May 26, 1999). The Nevada DOT, a public agency with statewide jurisdiction, will serve as joint lead agency in accordance with section 102(2)(D) of NEPA and the CEQ Regulations (40 C.F.R. §1506.2(a)). The Commission and CALTRANS, because of their interest and special expertise, have agreed to serve as cooperating agencies (40 C.F.R. §1506.2(b)). CALTRANS will also serve as lead agency for purposes of ensuring that the documentation prepared by the lead agencies complies with CEQA and related requirements in accordance with Title 14, California Code of Regulations (CCR) section 15367 of the California regulations implementing CEQA. The parties intend to prepare an EIS/EIR for the project that complies with both NEPA and CEQA.

- B. As co-lead agencies, the FRA and Nevada DOT intend to prepare a Programmatic EIS/EIR to address the proposed California-Nevada Interstate Maglev Project along the 269-mile corridor between Las Vegas, Nevada and Anaheim, California for purposes of compliance with federal environmental statutes and regulations (49 C.F.R. §1501.5). To facilitate early decisions on the potential first phase of the program, the EIS/EIR will also include a site-specific assessment of the implementation of a Maglev system covering the forty-mile corridor between Las Vegas and Primm (40 C.F.R. §1506.4).
- C. The FRA and Nevada DOT will be responsible for determining the level of documentation required, the scope of the study, and the significant issues to be addressed in the EIR/EIS. The documents will be prepared in accordance with the CEQ Regulations and FRA's Procedures. The FRA and Nevada DOT will be responsible for ensuring that the documents prepared pursuant to this MOU meet the standards of NEPA and for approving all notices and documents required for compliance with NEPA. The Commission will be responsible for developing information on issues related to the use of Maglev technology as proposed by the Commission, for engineering studies related to the project, and for the preparation, at the direction of Nevada DOT, of environmental studies addressing

- MOU FOR THE CALIFORNIA-NEVADA INTERSTATE MAGLEV PROJECT -

issues related to the proposed project. CALTRANS will be responsible for assisting in identifying and evaluating impacts in California, for ensuring that the documents prepared pursuant to this MOU meet the standards of CEQA, and for approving all notices and documents required for compliance with CEQA. In carrying out these responsibilities, the parties agree to confer in order to reach agreement on the methodologies to be used in undertaking impact assessments in order to assure that efforts to achieve compliance with NEPA are coordinated to the greatest extent possible, and to assure that the overall scope of the document is mutually satisfactory.

- D. Nevada DOT will be responsible for scoping, including the scheduling of scoping meetings, and for the preparation of the purpose and need statement, the development of preliminary alternatives, the analysis of potential impacts associated with each alternative, and the preparation of the Draft and Final EIS/EIR.
- E. The FRA and Nevada DOT, in consultation with the Commission and CALTRANS, will be responsible for identifying appropriate federal cooperating agencies for this process (40 C.F.R. §§ 1501.6 and 1508.5). CALTRANS and Nevada DOT, in consultation with the Commission, will be responsible for identifying appropriate state and local responsible and trustee agencies for this process.
- F. Nevada DOT will be responsible for selecting and managing any consultants retained to assist in preparation of the EIS/EIR in accordance with Nevada DOT's procurement requirements, and for insuring that contractors meet the conflict of interest requirements of 40 C.F.R. §1506.5(e). The FRA has made grants to Nevada in fiscal years 2001 and 2002 for planning, preliminary design and related studies for this project. The Parties will fund their own staff, travel and related costs. The preparation of the EIS/EIR will be funded by any future appropriations of Federal funds specifically made available for these purposes, and/or any other state, local and private sector funding that are made available for these purposes.

- MOU FOR THE CALIFORNIA-NEVADA INTERSTATE MAGLEV PROJECT -

- G.** The Parties agree, to the extent possible, to expedite the review and approval of the project's environmental documents. It is anticipated that the final screening report, any Project screening report, the Draft EIS/EIR, and the Final EIS/EIR will be formally released on behalf of FRA and Nevada DOT. The Parties agree that neither Party will issue such documents on behalf of both Parties without the other Party's written approval.
- H.** Nevada DOT, with the assistance of the other parties, will develop and implement a public involvement program to keep the public informed on the progress of the environmental studies.
- I.** The Parties will appoint project representatives who will serve as the primary points of contact in EIS/EIR oversight matters. Each Party may change its designated project representative upon written notice to the other Parties.
- J.** The Parties will review and comment on pre-decisional documents (draft technical studies and memoranda, administrative drafts of the scoping report, screening report, and draft and final EIS/EIRs) but will not release them to others without the consent of the originating Party, or as mandated by applicable state or federal disclosure laws.

4.0 TERMINATION

Any Party may terminate their participation in this MOU after providing 30 days written notice to the other Parties.

5.0 RESERVATION OF AUTHORITY

- A.** This MOU does not modify existing agency authority by reducing, expanding or transferring any of the statutory or regulatory authorities and responsibilities of any of the Signatories. The Parties recognize that the Legislatures and the Governors of California and/or Nevada may impose additional requirements on

- MOU FOR THE CALIFORNIA-NEVADA INTERSTATE MAGLEV PROJECT -

CALTRANS or Nevada DOT by enacting new laws or enacting changes in existing California or Nevada laws, that Congress and the President of the United States may impose additional requirements on the FRA by enacting new laws or enacting changes in existing laws, and that such new requirements may affect the preparation of the EIS/EIR.

- B. None of the Parties to this MOU waives any administrative claims, positions, or interpretations it may have with respect to the applicability or enforceability of any law or regulation.

6.0 OBLIGATION OF FUNDS, COMMITMENT OF RESOURCES

- A. Nothing in this MOU shall be construed as obligating any of the Signatories to the expenditure of funds in excess of appropriations authorized by law or as committing any of the Signatories to any action or actions for which it lacks statutory authority, now or in the future.
- B. No CALTRANS funds are encumbered against this MOU.

7.0 NATURE OF UNDERSTANDING

- A. This MOU is not intended to, and does not, create any other right or benefit, substantive or procedural, enforceable at law or equity by any person against the United States, the FRA, the Commission, the State of California, or the State of Nevada, any agencies thereof, any officers or employees thereof, or any other person.
- B. By signing this MOU, the Parties are not committing to any particular action other than the joint preparation and completion of an EIS/EIR for the California-Nevada Interstate Maglev Project, as described herein.

- MOU FOR THE CALIFORNIA-NEVADA INTERSTATE MAGLEV PROJECT -

8.0 AMENDMENTS

The Parties may mutually agree in writing to amend this MOU and to develop such additional provisions and procedures as they determine to be necessary in order to pursue the development of an EIS/EIR for the California-Nevada Interstate Maglev Project.

9.0 CONCLUSION

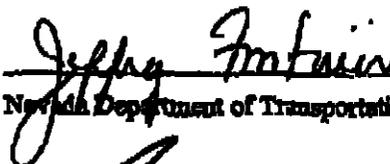
In signing this MOU, the undersigned Parties understand and accept the roles and responsibilities assigned to each of the Parties. Each of the Parties agrees to cooperate to the maximum extent possible to ensure that the EIS/EIR is developed in full compliance with federal and state requirements and to ensure that there is maximum communication and minimum duplication of effort.


Federal Railroad Administration

4/21/03
Date


California Department of Transportation

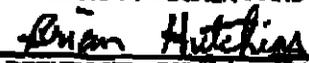
4/17/03
Date


Nevada Department of Transportation

4-10-03
Date


California-Nevada Super Speed Train Commission

0/19/03
Date

APPROVED AS TO LEGALITY AND FORM

DEPUTY ATTORNEY GENERAL
Nevada DEPARTMENT OF TRANSPORTATION

Administration (RITA), to the Federal Motor Carrier Safety Information (FMCSA) (69 FR 51009, Aug 17, 2004)
FMCSA IC OMB Control No 2126-0031

Form No MP-1

Type of Review Extension of a currently approved information collection

Respondents Class I Motor Carriers of Passengers.

Number of Respondents 26

Estimated Time Per Response 1.5 hours.

Expiration Date August 31, 2006.

Frequency Quarterly and Annually

Total Annual Burden 195 hours [130 responses x 1.5 hour per response = 195 hours].

Background

The Annual and Quarterly Report of Class I Motor Carriers of Passengers is a mandated reporting requirement applicable to certain motor carriers of passengers. Motor carriers (both interstate and intrastate) subject to the Federal Motor Carrier Safety Regulations are classified on the basis of their gross carrier operating revenues.¹ Class I passenger motor carriers are required to file with the Agency motor carrier quarterly and annual reports (Form MP-1) providing financial and operating data (see 49 U.S.C. 14123). Under the financial and operating statistics (F&OS) program, FMCSA collects balance sheet and income statement data along with information on tonnage, mileage, employees, transportation equipment, and related data. The Agency uses this information to assess the health of the industry and identify industry changes that could affect national transportation policy. The data also indicate company financial stability and operational characteristics. The data and information collected are made publicly available and used by FMCSA to determine a passenger carrier's compliance with the F&OS program.

¹ For purposes of the Financial & Operating Statistics (F&OS) program, passenger carriers are classified into the following two groups: (1) Class I carriers are those having average annual gross transportation operating revenues (including interstate and intrastate) of \$5 million or more from passenger motor carrier operations after applying the revenue deflator formula in the Note of 49 CFR 1420.3; (2) Class II passenger carriers are those having average annual gross transportation operating revenues (including interstate and intrastate) of less than \$5 million from passenger motor carrier operations after applying the revenue deflator formula as shown in Note A of § 1420.3. Only Class I carriers of passengers are required to file Annual and Quarterly Report Form MP-1, but Class II passenger carriers must notify the Agency when there is a change in their classification or their revenues exceed the Class II limit.

requirements set forth in 49 CFR Part 1420

The F&OS reporting regulations were formerly administered by the Interstate Commerce Commission. They were transferred to the U.S. Department of Transportation on January 1, 1996, by Section 103 of the ICC Termination Act of 1995 (ICCTA) (Pub. L. 104-88, 109 Stat. 803, December 29, 1995), now codified at 49 U.S.C. 14123. On September 30, 1998, the Secretary transferred the authority to administer the F&OS program to BTS (63 FR 52192) Effective September 29, 2004, the Secretary transferred this program responsibility from BTS and redelimited it to FMCSA (69 FR 51009, Aug 17, 2004). FMCSA will publish a final rule that transfers and redesignates the F&OS program reporting requirements, currently at 49 CFR 1420, from BTS (now RITA) to FMCSA.

We particularly request comments on (1) Whether the proposed collection of information is necessary for FMCSA to meet its goal of reducing commercial motor vehicle crashes, and the usefulness of the information with respect to this goal, (2) the accuracy of the estimated IC burden, (3) ways to enhance the quality, utility, and clarity of the information collected; and (4) ways to minimize the burden of the collection of information on respondents (including use of automated collection techniques and other information technologies) without reducing the quality of the collected information. The Agency will summarize and/or include your comments in the request for OMB approval of this IC.

Issued on July 7, 2006

David H. Hugel,

Acting Administrator

[FR Doc. 06-11140 Filed 7-13-06, 8:45 am]

BILLING CODE 4910-EX-P

DEPARTMENT OF TRANSPORTATION

Federal Railroad Administration

Environmental Impact Statement: DesertXpress High Speed Train Between Victorville, CA and Las Vegas, NV

AGENCY: Federal Railroad Administration (FRA), U.S. Department of Transportation (DOT)

ACTION: Notice of Intent to prepare an *Environmental Impact Statement*.

SUMMARY: The FRA is issuing this notice to advise the public that an *Environmental Impact Statement (EIS)* will be prepared for the proposed

DesertXpress high-speed train project. The project includes passenger stations, a maintenance facility, and a new railroad line along the I-15 corridor between Victorville, California and Las Vegas, Nevada. FRA is issuing this notice to solicit public and agency input into the development of the scope of the EIS and to advise the public that outreach activities conducted by the FRA will be considered in the preparation of the EIS. Federal cooperating agencies for the EIS are the Surface Transportation Board (STB), the Federal Highway Administration (FHWA) and the Bureau of Land Management (BLM). Alternatives to be evaluated and analyzed in the EIS include (1) take no action (No-Project or No-Build), and, (2) construction of a privately financed steel-wheel-on-steel-rail high-speed train, including a proposed station in Victorville and a station in Las Vegas, and a maintenance facility in Victorville. Several alternative routings would be considered in the EIS.

DATES: Three scoping meetings will be held during July of 2006. Scoping meetings will be advertised locally and are scheduled for the following cities on the dates indicated below:

- July 25, 2006, Las Vegas Nevada at The White House, 3260 Joe Brown Drive, time 5-8 pm
- July 26, 2006, Barstow, California at the Ramada Inn, 1571 E Main Street, time 12-2 pm, and
- July 26, 2006, Victorville, California at the San Bernardino County Fairgrounds Building 3, time 5-8 pm

Persons interested in providing comments on the scope of the EIS should do so by August 15, 2006. Comments can be sent to Mr. David Valenstein at the FRA address identified below.

FOR FURTHER INFORMATION CONTACT: Mr. David Valenstein, Environmental Program Manager, Office of Railroad Development, Federal Railroad Administration, 1120 Vermont Avenue, (Mail Stop 20), Washington, DC 20590, (telephone 202/493-6368). Information and documents regarding the environmental review process will be made available through the FRA's Web site: <http://www.fra.dot.gov> at Passenger Rail, Environment, Current Reviews, DesertXpress.

SUPPLEMENTARY INFORMATION: The FRA will prepare an *Environmental Impact Statement (EIS)* for the proposed DesertXpress high-speed train project. The FRA is an operating administration of the U.S. Department of Transportation and is primarily responsible for railroad safety.

regulation Federal cooperating agencies for the EIS are the Surface Transportation Board (STB), the Federal Highway Administration (FHWA) and the Bureau of Land Management (BLM). The BLM has approval authority over the use of public lands under their control. The FHWA has jurisdiction over the use and/or modification of land within the I-15 right of way. The STB has exclusive jurisdiction, pursuant to 49 U.S.C. 10501(b), over the construction, acquisition, operation and abandonment of rail lines, railroad rates and services and rail carrier consolidations and mergers. 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. To the extent appropriate, the EIS will address environmental concerns raised by federal, state and local agencies during the EIS process.

Project Description DesertXpress Enterprises, LLC (the project Applicant) proposes to construct and operate a privately financed interstate high-speed passenger train, with a proposed station in Victorville, California and a station in Las Vegas, Nevada, along a 200-mile corridor, within or adjacent to the I-15 freeway for about 170 miles and adjacent to existing railroad lines for about 30 miles.

The need for the project is directly related to the rapid increase in travel demand between Southern California and Las Vegas, coupled with the growth in population in the areas surrounding Victorville, Barstow, Primm and Las Vegas, which has resulted in substantial congestion along the I-15 freeway between Victorville and Las Vegas. Ridership is estimated to be 4.1 million round trips in the first full year of service. To accommodate this level of ridership, trains would operate from 6 a.m. to 10 p.m., daily, 365 days a year at 20 to 30 minute intervals during peak periods.

The project would involve construction of a fully grade-separated, dedicated double track passenger-only railroad along an approximately 200-mile corridor, from Victorville, California to Las Vegas, Nevada. Where the railroad alignment would be within the I-15 freeway corridor, continuous concrete truck barriers, as well as American Railway Engineering and Maintenance of Way Association crash barriers at all supporting columns of bridges at freeway interchanges and overpasses would be provided. The project would include the construction of a passenger station, as well as maintenance, storage and operations

facility in Victorville and one passenger station in Las Vegas.

The proposed Victorville Station would be located along the west side of I-15 between the two existing Stoddard Wells interchanges. The facilities directly associated with the Victorville station would occupy about 60 acres of land, and would have a parking capacity for up to 10,000 automobiles. Access to the Victorville station would be via the two existing Stoddard Wells Road Interchanges.

The Maintenance, Storage and Operations facility is proposed to be located in the City of Victorville on a site that lies within the Victorville Valley Economic Development Area. The facility would require approximately 50 acres and would include a fueling station, train washing facility, repair shop, parts storage, and operations center. It is estimated that approximately 400 employees would be based at this facility.

The Las Vegas passenger station would be located at one of three possible locations: (1) Near the south end of the Las Vegas Strip; (2) in the center section of the Strip; or (3) in downtown Las Vegas. A light maintenance, cleaning, and inspection facility would also be built near the Las Vegas station.

Alternatives A No-Build alternative will be studied as the baseline for comparison with the proposed project. The No-Build Alternative represents the highway (I-15) and airport (McCarran) system physical characteristics and capacity as they exist at the time of the EIS (2006) with planned and funded improvements that will be in place at the time the project becomes operational. The project build alternatives have the same stations and maintenance facility. The railroad alignment between Victorville and Las Vegas can be divided into 6 distinct segments. Within the segments, several build alternatives are being considered as discussed below.

Segment 1 Victorville to Lonwood (south of Barstow, California): Alternative A would depart the Victorville Station in a south-westerly direction before turning north and generally following the existing BNSF Railway Company (BNSF) railroad corridor and Route 66 to a point just south of Barstow. Alternative B would depart the Victorville Station and head north generally following the west side of the I-15 corridor. The alignment would diverge from the I-15 corridor near Dodge Road and head northerly to a point just south of Barstow near the existing BNSF railroad corridor.

Alternative B would be approximately 6.8 miles shorter than Alternative A.

Segment 2 Lenwood (South of Barstow) to Yermo, California: From a point south of Barstow, the build alternative alignment would head north for about five miles, cross the Mojave River and turn east through the City of Barstow. Through Barstow the alignment would utilize an existing, but abandoned, former Atchison Topeka & Santa Fe railroad corridor along the north side of the Mojave River, for approximately three miles before reaching the vicinity of the I-15 / Old Highway 58 interchange on the east side of Barstow. From this point the alignment would head east along the north side of I-15 corridor through the town of Yermo to a point just east of the agricultural inspection station on the I-15 Freeway.

Segment 3 Yermo to Mountain Pass: There are two alignment alternatives in this segment. Alternative A entirely within the median of the I-15 freeway, and Alternative B along the north side of the I-15 corridor.

Segment 4 Mountain Pass to Primm, Nevada: Alternative A would leave the I-15 freeway corridor and head south for approximately four miles before returning to the I-15 freeway corridor south of Primm. A portion of this alignment may encroach on the Mojave Desert Preserve, about one half mile south of the I-15 freeway. Alternative B would leave the I-15 freeway corridor and head north before returning to the I-15 freeway corridor south of Primm. A 4,000-foot long tunnel would be necessary for Alternative B.

Segment 5 Primm to Jean, Nevada: Alternative A would be entirely within the median of the I-15 freeway. Alternative B would continue along the east side of the I-15 freeway corridor between Primm and Jean.

Segment 6 Jean to Las Vegas, Nevada: There are three alternative alignments in this segment. Alternative A would continue in the median of the I-15 freeway into the Las Vegas passenger station. Alternative B would cross the I-15 freeway corridor from the east side to the west side and continue along the west side of the I-15 freeway corridor into the Las Vegas passenger station. Alternative C would diverge to the east and generally follow the existing Union Pacific railroad corridor into the Las Vegas passenger station. To reach the downtown Las Vegas passenger station, Alternative A would leave the median of the I-15 freeway corridor near Oakley Boulevard and diverge to the east to follow the Union Pacific railroad corridor to Bonneville Street. Alternatives B and C would follow the

west side of the I-15 freeway corridor and cross at Oakley Boulevard to the east to join the Union Pacific railroad corridor to Bonneville Street.

Scoping and Comments FRA encourages broad participation in the EIS process during scoping and review of the resulting environmental documents. Comments and suggestions are invited from all interested agencies and the public at large to insure the full range of issues related to the proposed action and all reasonable alternatives are addressed and all significant issues are identified. In particular, FRA is interested in determining whether there are areas of environmental concern where there might be the potential for identifiable significant impacts. FRA invites and welcomes public agencies, communities and members of the public to advise the FRA of their environmental concerns, and to comment on the scope and content of the environmental information regarding the proposed project. Persons interested in providing comments on the scope of the EIS should send them to Mr. David Valenstein at the FRA address identified above by August 15, 2006.

Issued in Washington, DC, on July 11, 2006

Mark E. Yachmetz,
Associate Administrator for Railroad
Development

[FR Doc. E8-11154 Filed 7-13-06, 8:45 am]

BILLING CODE 4910-06-P

DEPARTMENT OF TRANSPORTATION

Federal Transit Administration

[Docket Number: FTA-2005-23227]

Notice of Proposed Title VI Circular

AGENCY: Federal Transit Administration (FTA), DOT

ACTION: Notice of proposed revisions and request for comment

SUMMARY: The Federal Transit Administration (FTA) is revising and updating its Circular 4702.1, "Title VI Program Guidelines for Urban Mass Transit Administration Recipients." FTA is issuing a proposed Title VI Circular and seeks input from interested parties on this document. After consideration of the comments, FTA will issue a second Federal Register notice responding to comments received and noting any changes made to the Circular as a result of comments received. The proposed Circular is available in Docket Number 23227 at <http://dms.dot.gov>

DATES: Comments must be received by August 14, 2006. Late filed comments will be considered to the extent practicable.

ADDRESSES: You may submit comments identified by DOT DMS Docket Number FTA-05-23227 by any of the following methods: Web Site <http://dms.dot.gov>. Follow the instructions for submitting comments on the DOT electronic docket site, Fax 202-493-2251; Mail Docket Management Facility, U.S. Department of Transportation, 400 Seventh Street, SW, Nassif Building, PL-401, Washington, DC 20590-0001; Hand Delivery: Room PL-401 on the plaza level of the Nassif Building, 400 Seventh Street, SW, Washington, DC, between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays.

Instructions: You must include the agency name (Federal Transit Administration) and the docket number (FTA-05-23227). You should submit two copies of your comments if you submit them by mail. If you wish to receive confirmation that FTA received your comments, you must include a self-addressed, stamped postcard. Note that all comments received will be posted without change to the Department's Docket Management System (DMS) website located at <http://dms.dot.gov>. This means that if your comment includes any personal identifying information, such information will be made available to users of DMS.

FOR FURTHER INFORMATION CONTACT: David Schneider, Office of Civil Rights, 400 Seventh Street, SW, Washington, DC, 20590, (202) 366-4018 or at David.Schneider@fta.dot.gov

SUPPLEMENTARY INFORMATION:

Background

The authority for FTA's Title VI Circular derives from Title VI of the Civil Rights Act of 1964, 42 U.S.C. 2000d, *et seq.*, which prohibits discrimination on the basis of race, color, or national origin in programs and activities receiving Federal financial assistance. Specifically, Section 601 of this Title provides that "no person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance," (42 U.S.C. 2000d) Section 602 authorizes Federal agencies "to effectuate the provisions of [Section 601] * * * by issuing rules, regulations or orders of general applicability," (42 U.S.C. 2000d-1). The U.S. Department of Transportation (DOT), in an exercise of

this authority, promulgated regulations, contained in 49 CFR Part 21 that effectuate the provisions of Section 601 and Title VI in general.

FTA Circular 4702.1, titled "Title VI Program Guidelines for Urban Mass Transit Administration Recipients," provides information on how FTA will enforce the Department of Transportation's Title VI regulations at 49 CFR Part 21. The Circular includes information, guidance, and instructions on the objectives of Title VI, information on specific grant programs covered by Title VI, a description of FTA data collection and reporting requirements, a summary of FTA Title VI compliance review procedures, a description of FTA process for implementing remedial and enforcement actions, information on how FTA will respond to Title VI complaints, and public information requirements. Circular 4702.1 was last updated on May 26, 1988.

The proposed circular would make reference to and in some instances would summarize the text of other FTA guidance, regulations, and other documents. Many of the documents referred to will undergo revision during the life of the proposed circular. In all cases, the most current guidance document, regulation, etc. will supercede any preceding information provided. FTA reserves the right to make page changes to proposed and final circulars regarding updates to other provisions, without subjecting the entire circular to public comment.

Comments Related to Reporting Requirements. In addition to general comments concerning the draft Title VI Circular, FTA is seeking comments from its recipients and subrecipients concerning the costs and benefits associated with meeting the proposed Circular's guidance. Recipients and subrecipients are encouraged to comment on the number of hours and/or financial cost associated with implementing the Circular's guidance as well as the extent to which following the guidance will assist the recipient and subrecipient in achieving its organizational objectives.

I. Why is FTA revising its Title VI Circular?

The DOT Title VI regulations and FTA Circular 4702.1 attempt to transform the broad antidiscrimination ideals set forth in Section 601 of Title VI into reality. In the 18 years since FTA last revised its Title VI Circular, much of FTA's guidance has become outdated. Over those years, legislation, Executive Orders, and court cases have transformed transportation policy and affected Title VI rights and

**Before the
SURFACE TRANSPORTATION BOARD**

Finance Docket No. 34914

DESERTXPRESS ENTERPRISES, LLC—PETITION FOR DECLARATORY ORDER

**VERIFIED STATEMENT OF M. NEIL CUMMINGS
IN SUPPORT OF JOINT PETITION BY CALIFORNIA-NEVADA SUPER SPEED
TRAIN COMMISSION AND AMERICAN MAGLINE GROUP
TO REOPEN**

1. My name is M. Neil Cummings, and I am President of a joint venture called the American Magline Group ("AMG"). I have practiced law for 30 years, specializing in business litigation and transactions. My business address is 11150 W. Olympic Blvd., Suite 1050, Los Angeles, CA 90064.
2. AMG was formed in 1994 to develop the public and private political and financial support necessary to design, build, operate and maintain an "Americanized" version of the German engineered Transrapid™ maglev technology to operate within the Southern California – Las Vegas transportation corridor, following, substantially, the Interstate 15 (I-15) highway right-of-way ("I-15 Corridor") between Anaheim, California and Las Vegas, Nevada via the California Inland Empire cities of Ontario, Victorville and Barstow. This 269-mile project has come to be known as the California-Nevada Interstate Maglev Project ("CNIMP"). The partners in the AMG joint venture are General Atomic, Parsons Transportation Group, Hirschfeld Steel and my firm, M. Neil Cummings & Associates PLC. The AMG has an exclusive contractual relationship with the developers and owners of the Transrapid™ technology, to wit: ThyssenKrupp and Siemens (also known as Transrapid International).

3. In 1997, the AMG was selected by and entered into an exclusive public-private partnership agreement with the California-Nevada Super Speed Train Commission ("CNSSTC"), which is a bi-state Commission, and a non-profit public benefit corporation, established by the States of Nevada and California in 1988 to design, build, operate and maintain the CNIMP. The CNSSTC was then, and is now a Nevada "state agency" and California non-profit corporation. The verified statement of the Vice Chairman of the Commission, Ken Kevorkian, filed concurrently herewith, describes the structure and history of the CNSSTC in greater detail

4. CNSSTC and AMG plan to build and operate a high speed train service utilizing maglev technology to move passengers through a 269 mile corridor between Las Vegas and Anaheim, California via Primm, Nevada and Barstow, Victorville and Ontario, California. This service is referred to in the multiple reports and studies submitted to the Federal Railroad Administration ("FRA") and the U.S. Congress over the past 10 years as the CNIMP. Speeds will exceed 300 m.p.h. over portions of the route, with one way transit times as low as 86 minutes for express service between Las Vegas and Anaheim

5. In 1998, acting in reliance upon and in response to (i) the competitive requirements mandated by Congress in TEA-21's "Maglev Deployment Program," and (ii) the "Final Rule" promulgated thereunder by the FRA (i.e. Section 1218 of TEA-21: 23 U.S.C. § 322), and 49 C.F.R. Part 268 et. seq., the CNSSTC and AMG entered into the required Public-Private Partnership Agreement (49 C.F.R. Part 268.11(b)(3)), and submitted the required Certification to the U.S. Department of Transportation ("USDOT") Pursuant to this Certification, the Public-Private Partnership represented and warranted to the USDOT that it stood "ready, willing and able to finance, construct, operate and maintain the [California-Nevada Interstate Maglev] project" ("Certification").

6. In 1999, after submittal of the Certification to the FRA, accompanied by the required pre-construction design, engineering and economic benefits analysis, the CNSSTC was selected by the FRA as an "Eligible Participant," and the CNIMP as an "Eligible Project" to receive federal assistance under the "Maglev Deployment Program "

7. Between 1999 and 2005, Congress appropriated approximately \$7.5 million to the CNIMP to prepare environmental assessment and pre-construction design, engineering and planning studies for the CNIMP. This federal funding was matched with \$212 million in local, state, regional and city funds. In making these funds available to the CNIMP, the FRA negotiated and entered into five (5) separate Cooperative Agreements with the CNSSTC (as the named "Grantee")

8. The environmental processes relevant to the CNIMP began in 1999-2000 with the preparation and issuance by the FRA of an Environmental Assessment. Then, beginning in 2004, the FRA entered into a 4-party agreement with the states of California and Nevada (as well as the CNSSTC) to govern the preparation of a "Programmatic" and "Site Specific" Environmental Impact Statement ("PEIS/EIS"). The FRA agreed to serve as the lead federal agency. The Nevada Department of Transportation ("NDOT") was requested by the FRA to serve as the lead state agency, and NDOT agreed.

9. The PEIS/EIS for the CNIMP was commenced on May 20, 2004 with the publication by the FRA in the Federal Register of a "Notice of Intent" entitled "Programmatic Environmental Impact Statement. High-Speed Rail Corridor, Las Vegas, NV to Anaheim, CA."¹ Acting on the "Notice of Intent," a 4-party agreement was negotiated and entered into in November 2004, pursuant to which the FRA agreed to serve as the lead federal agency in the preparation of a

¹ See 69 Fed. Reg. 29161 (May 20, 2004), attached hereto as Exhibit 1

PEIS for the full corridor CNIMP, and a site-specific EIS for the starter segment in the east (i.e. Las Vegas to Primm. This inter-governmental agreement (attached as Exhibit 2 hereto) is entitled "Memorandum of Understanding among the Federal Railroad Administration, California Department of Transportation, Nevada Department of Transportation and The California-Nevada Super Speed Train Commission For The Preparation of a Program Environmental Impact Statement and Program Environmental Impact Report for The Proposed California-Nevada Interstate Maglev Project " ("MOU"). The CNSSTC is identified in the MOU as a Cooperating Agency, as is the California Department of Transportation ("CALTRANS").

10. The PEIS/EIS that has been underway since 2004 will function as both. (1) A First-Tier environmental document addressing program-level decisions for the overall 269-mile project from Las Vegas to Anaheim; and (2) A Second-Tier environmental document, addressing project-level decisions for the initial segment of the project, "The First Forty Miles" from Las Vegas to Primm. These two tiers of the PEIS will result in separate Records of Decision ("ROD") issued by the FRA for the Programmatic and Project-Specific NEPA documents.

11. In 2006, the FRA entered into a 6th Cooperative Agreement, this one with the Nevada Department of Transportation ("NDOT") to complete Phases 1 and 2 of the Maglev Project's PEIS/EIS.

12. In July 2005, Congress enacted SAFETEA-LU. At Section 1307 of SAFETEA – LU, Congress directed the U.S. Secretary of Transportation to provide "federal assistance" to enable deployment of the "Eligible" maglev projects. This legislation, entitled "Deployment of Magnetic Levitation Transportation Projects," allocated a total of \$90 million to maglev projects in the United States. Of this funding, \$45 million (i.e. 50%) was directed specifically to the CNIMP (particularly, the starter segment in the East: "Las Vegas to Primm, Nevada"). The other

50% (i.e. \$45 million) was directed to “a project east of the Mississippi” to be named later by the Secretary of the USDOT.

13. Due to an inadvertent drafting error, this \$90 million in funding was not identified as “Contract Authority,” and was therefore not guaranteed to the eligible maglev projects. It took almost 3 years to remedy this mistake, but Congress’ original intent was finally correctly expressed in the “SAFETEA-LU Technical Corrections Act of 2008” (“TC Act of 2008”), which granted Contract Authority to the eligible maglev projects. In addition, the TC Act of 2008 added the phrase “as a segment of the high-speed MAGLEV system between Las Vegas, Nevada and Anaheim, California” so as to correctly identify the entire CNIMP interstate corridor (see Section 102(c) of TC Act of 2008).

14. Enactment of the TC Act of 2008 has enabled the CNSSTC to complete the necessary environmental, final design/engineering and financial planning work contemplated by Congress in making \$45 million in guaranteed federal funds available to the CNIMP. The CNSSTC has been working on a plan for funding construction of the “First Forty Miles” of the CNIMP. This plan will be reevaluated in light of the new funding available under the Passenger Rail Investment and Improvement Act of 2008² (“PRIIA”) as well as the American Recovery and Reinvestment Act of 2009 (“Recovery Act”). According to a 2005 study, the estimated cost of constructing the CNIMP is between \$12 and \$15 billion. We believe that the prospects for proceeding with construction of the CNIMP are greatly enhanced by the enactment of the Recovery Act.

² Pub. L. 110-432

15. Ridership studies performed under contract to the FRA forecast that within 10 years of completing the construction of the CNIMP, 42.8 million passenger trips per year, comprised of intermediate and full corridor trips, will utilize this service. This will result in net operating profits (i.e. farebox revenues minus operating and maintenance expenses) of \$517.4 million per year (in year 2000 dollars). This net operating profit projection is based upon a modest one-way fare of \$55.00 for the Anaheim-Las Vegas service (compared with the one-way airfares that now exceed \$125.00, even on the discount airline Southwest Airlines), and a one-way fare of \$4.00-12.00 for the airport connector segments on each end of the CNIMP (i.e. Anaheim-Ontario Airport; Las Vegas-Ivanpah Airport).

17. By comparison, a study completed by the Clark County (Nevada) Regional Transportation Commission in August 2006 found that upgraded, high-speed rail service on the existing Amtrak routes would generate ridership of only 119,000 passengers annually between Riverside, California and Las Vegas, with revenue covering only 17.9% of the annual cost of operation and maintenance. Riverside, California is substantially closer to the population base of the Southern California Basin than Victorville, California.

18. The DesertXpress project surfaced in 2006 with a plan to institute passenger-only rail service over trackage to be constructed along a portion (between Las Vegas and Victorville, 60 miles east of Anaheim) of the right-of-way along the I-15 Freeway that has been designated for use by the CNIMP. The FRA first published a Notice of Intent ("DX Notice") to Prepare and EIS for the DesertXpress project on July 14, 2006³ two years after the Notice of Intent published for the CNIMP. The CNSSTC and AMG participated in the public scoping meetings. It was clear from the DX Notice that the FRA was processing the environmental review process in a

³ 71 Fed. Reg. 40176 (July 14, 2006), attached hereto as Exhibit 2.

manner substantially different, and far less complex than the requirements it had imposed on the CNIMP during the preceding years of study. For example, the roles of the State DOT's were minimized (i.e. there was no lead, or even cooperating state agency designated, ...in California or Nevada...or even mentioned as an interested party in the DX Notice) Furthermore, the DX Notice made no mention of compliance with the California Environmental Quality Act ("CEQA") or local land use or permitting requirements. This was in marked contrast to the CNIMP's Notice of Intent, which required (i) NDOT as the lead state agency and Caltrans as a cooperating state agency, and (ii) full compliance with CEQA and related California land use and permitting requirements. Furthermore, the FRA did not require a comparative analysis between the DesertXpress and the pre-existing CNIMP.

19. The DX Notice also made clear that there would be **no rail freight service** provided on the proposed tracks to be used by DesertXpress. To wit, the DX Notice unequivocally states as follows: "The [DesertXpress] project would involve construction of a fully grade-separated, dedicated double track *passenger-only railroad*..." *Id.* at 40177 (emphasis added). The description of the track segments in the DX Notice mentions no connection or interchange with the interstate network of freight rail carriers. The description of certain segments speak of the route "following the existing BNSF Railway Company (BNSF) railroad corridor..." and "utiliz[ing] an existing, but abandoned, former Atchison, Topeka & Santa Fe railroad corridor..." *Id.* There is no discussion of connection or interchange.

20. The public scoping meetings for the DesertXpress were noticed by the STB and FRA to take place on July 25 and 26, 2006 in Las Vegas, Nevada, Barstow, California and Victorville, California. A representative of the Surface Transportation Board was present at all 3 scoping meetings, all of which I attended. Her name was Catherine Glidden. She is identified in the

“General Information” booklet distributed at the scoping meetings as one of the “Environmental Protection Specialists” with the STB. I asked Ms. Glidden what the basis was for the assertion in the *Federal Register* Notice of Intent, and at the scoping meetings, that the STB had exclusive jurisdiction over the DesertXpress project. She told me she was not sure. After the scoping meetings (at which the Mayor of the City of Barstow submitted written objections, dated July 26, 2006, objecting on numerous grounds to the DesertXpress project, and expressing support for the CNIMP: Exhibit 4 hereto), the CNSSTC submitted extensive written comments to Mr. David Valenstein at the FRA. These written inquiries were sent to the FRA in accordance with the instructions specified in the DX Notice (A copy of the CNSSTC’s comments are attached as Exhibit 5). The CNSSTC posed a number of important questions concerning both the process, and the legal basis for the STB’s assertion of alleged “exclusive jurisdiction” at the scoping meetings. The CNSSTC also inquired as to the seemingly inconsistent standards being applied to the DesertXpress project by the FRA in the DX Notice of Intent, versus the CNIMP Notice of Intent issued in 2004. One of the inquiries posed was

“Must a new railroad line be a ‘common carrier railroad line’ and ‘part of the interstate rail network’ to fall within the jurisdiction of the STB? Please explain. How has the STB defined and applied the terms ‘common carrier railroad lines’ and ‘interstate rail network’ since its inception in 1996?”

The CNSSTC received no response from anyone at the STB or the FRA, to the above inquiries...or to ANY of the 35 comments/questions set forth in Exhibit 5.

21. The next time I, or anyone else within the AMG or the CNSSTC received information (directly or indirectly) originating from the STB, or the FRA, on the subject of the STB’s jurisdiction over the DesertXpress project was an email from the STB to NDOT that was then forwarded NDOT to the Executive Director of the CNSSTC (Richann Johnson) on June 27, 2007. This e-mail (forwarded to me the same day by Ms. Johnson), attached a decision

("Decision") served that day by the STB, ruling on a Petition filed one year earlier on July 24, 2006 by DesertXpress Enterprises, LLC, entitled "Petition for Declaratory Order."⁴ This Decision on its face reveals that the Petition by DesertXpress had already been filed as of the first and only public scoping meetings conducted by the STB, FRA and DesertXpress in Las Vegas (July 25, 2006), Barstow (July 26, 2006) and Victorville (July 26, 2006) No one at AMG or the CNSSTC had actual knowledge of the STB proceeding prior to receipt of the e-mail discussed above on June 27, 2007

22. After becoming aware of the STB's Decision, the AMG and CNSSTC considered, but ultimately decided not to move to immediately intervene in the proceeding because, at that point, the viability of CNIMP was unsettled due to the need for Congress to make the necessary corrections to SAFETEA-LU. In fact, the future viability of the CNIMP was quite unsettled from the time of enactment of SAFETEA-LU in 2005 until June 6, 2008, when President Bush signed the SAFETEA-LU Technical Corrections Act of 2008 into law. Of note, during the period from 2006 until June 2008, DesertXpress was actively lobbying Congress to defeat the correction language that would allocate funding for the CNIMP. With funding for the CNIMP secured as a result of enactment of the Technical Corrections Act in June 2008, AMG and CNSSTC began legal preparations to request that the Board reopen the DesertXpress proceeding and permit CNSSTC and AMG to intervene.

23. The CNSSTC and AMG are injured by the Board's June 27, 2007 Decision in the DesertXpress proceeding. After spending more than 12 years, and many thousands of hours and tens of millions of dollars in gaining the public and private support necessary to build the CNIMP along the I-15 Corridor, the Board's decision finding exclusive jurisdiction over the

⁴ A copy of the STB e-mail is attached hereto as Exhibit 3.

DesertXpress project threatens to deprive the CNIMP of the I-15 corridor right-of-way it needs to build the CNIMP, without a complete understanding of the facts, and without the consent of the states, regions and cities who have gone on record in support of the CNIMP. Over the past 12 years, the States of Nevada and California, all of the cities [Anaheim, Ontario, Victorville, Barstow and Las Vegas], counties [Clark, San Bernardino, Orange and Riverside], regional transportation planning organizations [Orange County Transportation Authority (“OCTA”) and San Bernardino Associated Governments (“SANBAG”)] and metropolitan planning organizations (“MPO’s”) [Southern California Association of Governments [“SCAG”] and Clark County Regional Transportation Commission (“RTC”)] along the entire 269-mile corridor, have expressed their unanimous support for the CNIMP. However, the Board’s finding that DesertXpress is subject to its jurisdiction, and thus exempt from all non-federal environmental, permitting or land use laws allows DesertXpress to move forward on its project through the I-15 Corridor right-of-way without the need for obtaining the same state, regional and local approvals that are being required of the CNIMP by the same federal agency now sponsoring the EIS of the DesertXpress (i.e. the FRA). By focusing the STB’s attention on the question of whether the Board’s jurisdiction preempts state and local environmental laws, land use restrictions, and other permitting restrictions, DesertXpress deprived the Board of crucial facts necessary for it to make a fully informed decision about the status of DesertXpress as a rail carrier.

24. By their Joint Petition, CNSSTC and AMG are simply asking that the DesertXpress be held to the same environmental, land use and permit approval standards to which the CNIMP has been held by the FRA over the past 12 years. Both projects are interstate. Both projects will provide service to passengers (not the interstate freight traffic contemplated to be within the STB

exclusive jurisdiction). Neither project is part of the pre-existing interstate rail network. And both projects seek to attract private funding for construction.

25. The major difference, however, between the DesertXpress and the CNIMP is that the CNSSTC is a Nevada state agency and California non-profit public benefit corporation, with all profits earned from operations to go back into the CNSSTC to carry out its sole, non-profit purpose.

26. The DesertXpress will not be unjustly prejudiced by reopening this Declaratory Judgment proceeding. First, DesertXpress chose not to serve the CNSSTC, AMG and Nevada and California DOT's with its Petition for Declaratory Order filed on June 24, 2006, and chose not to ever give verbal notice of the Petition to the hundreds of interested parties at the public scoping meetings on July 25 and 26, 2006 (including NDOT, the CNSSTC and the AMG). Moreover, DesertXpress chose, in its Petition, not to disclose material facts relevant to the Board's determination of the jurisdictional issues, i.e., that DesertXpress will not become a part of the interstate rail network and will not serve freight shipper along the line or arrange for a third party to do so.

27. It may interest this Board to know that the studies and reports prepared for state and federal agencies to date show the CNIMP will provide a superior service to that offered by DesertXpress because:

- The CNIMP will provide passenger service to an estimated 45 million riders originating from the heart of the Southern California basin in Orange and Los Angeles counties, which is the equivalent of a new 8 lane freeway moving at a constant speed of 60mph, or 50 fully loaded 747s landing every hour at McCarran in the East and LAX in the West. Maglev trains will travel at speeds of up to 310 mph, and make the complete 269 mile trip in less than 86 minutes, even with every train stopping at Ontario International Airport;
- The DesertXpress will provide passenger service to an estimated 4.6 million riders originating from the high desert city of Victorville...an aspiring community of approximately 300,000 people located 90 miles and a 2-2.5 hour car ride from

the heart of the Southern California basin. The maximum speed for the Desert Express' electric diesel locomotive system will be 125mph, which falls 75 mph short of meeting the definition of "high speed rail" as defined by the California High Speed Rail Authority (with whom the Desert Express has not coordinated its activities).

- The CNIMP will benefit two of the most densely populated counties in the United States (Orange and Los Angeles) with highway and airport congestion relief by providing an "Airport Without Runways" between Anaheim and Ontario International Airport with a travel time of 14.5 minutes. vs 1-1.5 hours by car traveling on one of the most congested highways in America (the SR-91). Ontario Airport has three terminals and is operating at only 30% of capacity. The Southern California transportation plan calls for Ontario Airport to be the airport of the future to relieve the congestion at existing airports, both of which (i.e. LAX and John Wayne) have either already reached maximum capacity or will do so within the next five years;
- The DesertXpress does not connect to any airports in the Southern California basin. In fact, its last station stop in San Bernardino County is some 90 miles, and the steeply-graded Cajon Pass, short of Los Angeles or Anaheim. This project does nothing to relieve the serious transportation, air quality and quality of life concerns now challenging the Southern California Basin.
- The CNIMP is supported by the MPO for the Southern California region stretching from the ocean to the California-Nevada border (i.e. SCAG, the Southern California Associated Governments), and is included in the SCAG Regional Transportation Plan voted on by the 70+ cities within the region...including Victorville. The CNIMP is also supported by the MPO for Las Vegas/Clark County (the Regional Transportation Authority (RTC)), and is coordinating its activities with the Clark County Airport Authority and the ongoing EIS for the new Ivanpah International airport;
- Because true high-speed trains do not presently exist in the United States, and regional travel between major metropolitan areas and states will continue to become more difficult and expensive to accomplish with existing modes, the CNIMP presents a unique opportunity to build 21st century, electrically powered, emissions-free "green" 300mph maglev train systems to connect our regional economic, business and residential centers. Open country and expansive highway and freeway rights of way will allow for the easy addition of the CNIMP, which requires a footprint of only approximately 45 feet to build a full, double track "guideway," either "elevated" or "at grade."
- The I-15 highway corridor is an ideal first application of the maglev technology, and this is one of the reasons Congress has funded maglev "Deployment" of the CNIMP as part of the last major federal transportation bill (i.e. SAFETEA-LU).

28. The AMG and CNSSTC, joined by numerous local governments located throughout the 269-mile corridor, support the CNIMP as it will provide superior service (including airport connections in Ontario and Victorville, California) in the key transportation corridor linking the Southern California basin with Las Vegas. Yet, this long planned maglev service throughout the I-15 corridor could be impaired if DesertXpress (which plans service to only a portion of the I-15 corridor) is allowed to pass through the turnstiles of the regulatory oversight process far more quickly because it is not required to comply with state, regional and local environmental, land use or permitting laws/regulations which have been required of the CNIMP. The Board is not in the business of evaluating the policy issues surrounding rail passenger service, and should not interject itself into this debate, particularly when it involves stretching its jurisdiction in unprecedented ways. By asserting exclusive jurisdiction over the DesertXpress...and therefore pre-empting all state, regional and local environmental, land use and permitting requirements...the Board has done just that. It appears that the Board did so, however, without knowing all the facts. Disclosing all of the facts certainly was not high on the DesertXpress' list at the public scoping meetings on July 25 and 26, 2006. The subject Petition seeks to re-level the playing field thereby creating a fair, equitable competition for the best, most meritorious high-speed train service in the I-15 highway corridor.

VERIFICATION

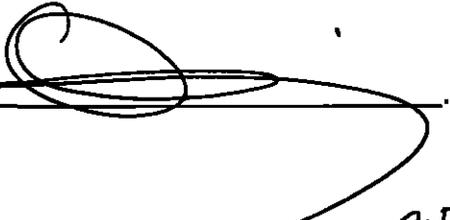
State of California,

County of Los Angeles,

SS:

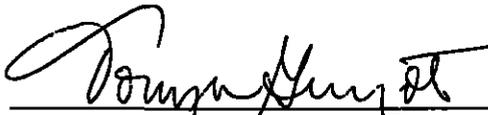
M. Neil Cummings, being duly sworn, deposes and says that he has read the foregoing statement, knows the facts asserted there are true and that the same are true as stated.

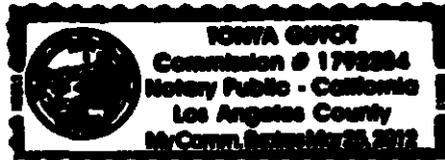
Signed: _____



Subscribed and sworn to before me this 24TH day of March 2009

Notary Public of LOS ANGELES, CA


My Commission expires 3-25-2012



information regarding the proposed project can be found at the Coronado City Hall, Coronado Public Library and on the city's Web site <http://www.coronado.ca.us>

Open house public scoping meetings will be held in the City of Coronado on June 9, 2004, from 3–5 p.m. at the Public Library Winn Room located at 640 Orange Avenue and from 6–8 p.m. at the Coronado Middle School Granzer Hall located at 550 F Avenue in the City of Coronado. Prior to the public scoping meeting on June 9, 2004, a tour of the project study area will be conducted from 1:30–2:30 p.m. on that day. The tour will leave at 1:30 p.m. from the Public Library at 640 Orange Avenue. A public hearing will be held at a later date and a public notice will be circulated stating the time and place of the hearing. The draft EIS will be available for public and agency review and comment prior to the public hearing.

To ensure that the full range of issues related to this proposed action are addressed and all significant issues identified, comments and suggestions are invited from all interested parties. Comments or questions concerning this proposed action and the EIS should be directed to the FHWA at the address provided above.

(Catalog of Federal Domestic Assistance Program Number 20.205, Highway Planning and Construction. The regulations implementing Executive Order 12372 regarding intergovernmental consultation on Federal programs and activities apply to this program.)

Issued on May 14, 2004

Maiser Khaled,

Director, Project Development & Environment, Federal Highway Administration, Sacramento, California
(FR Doc. 04-11439 Filed 5-19-04, 8:45 am)

BILLING CODE 4910-22-M

DEPARTMENT OF TRANSPORTATION

Federal Railroad Administration

Programmatic Environmental Impact Statement: High Speed Rail Corridor Las Vegas, NV to Anaheim, CA

AGENCY: Federal Railroad Administration (FRA), Department of Transportation (DOT)

ACTION: Notice of intent.

SUMMARY: The FRA is issuing this notice to advise the public that FRA will prepare a programmatic environmental impact statement (PEIS) for the California-Nevada Interstate Maglev Project in cooperation with the Nevada Department of Transportation. FRA is

also issuing this notice to solicit public and agency input into the development of the scope of the PEIS and to advise the public that outreach activities conducted by the program participants will be considered in the preparation of the PEIS.

The FRA will establish the purpose and need, examine the regional implications, present site-specific aspects of the project that can proceed to construction, and determine the feasible study areas to be carried forward for second tier assessments of site-specific environmental impacts. **FOR FURTHER INFORMATION CONTACT:** For further information regarding the programmatic environmental review, please contact

Mr. Christopher Bonanti, Environmental Program Manager, Office of Railroad Development, Federal Railroad Administration, 1120 Vermont Avenue (Mail Stop 20), Washington, DC 20590, Telephone (202) 493-6383, e-mail christopher.bonanti@fra.dot.gov

Mr. Jeffrey Fontaine, P.E., Director, Telephone (775) 888-7440, e-mail jfontaine@dot.state.nv.us, or Mr. James Mallery, Planning Manager, Telephone (775) 888-7464, e-mail jmallery@dot.state.nv.us, Nevada Department of Transportation, 1263 South Stewart Street, Carson City, NV 89712.

SUPPLEMENTARY INFORMATION:

Background

For over twenty years, the California Nevada Super Speed Train Commission (CNSSTC), a public agency chartered within the State of Nevada, has sponsored studies to examine the feasibility and the environmental impacts of linking the Las Vegas area with various points in the Los Angeles region using a high-speed ground transportation system. Most of these studies have focused on the use of magnetic levitation technology. More recently, the CNSSTC sponsored the first leg of such a project, linking a point on the outskirts of Las Vegas with the city of Primm, on the California-Nevada border, as one of the entries competing in the FRA's Maglev Deployment Program authorized in Section 1218 (23 U.S.C. 322) of the Transportation Equity Act for the 21st Century (TEA21).

The FRA prepared a programmatic EIS (PEIS) to address the potential for significant environmental impact from the Maglev Deployment Program that included the Las Vegas-Primm project as one of seven projects analyzed in the PEIS. The notice of availability of the final PEIS was published in the Federal Register on May 4, 2001. CNSSTC had

prepared an environmental assessment for the Las Vegas-Primm project in February 2000, which was used by the FRA to assist the agency in preparing the PEIS. The PEIS for the Maglev Deployment Program is available on the FRA Web site at: <http://www.dot.fra.gov/s/cnv/maglev/MagPEIS.htm>

and the environmental assessment is available from Mr. Bruce Aguilera, Chairman, California-Nevada Super Speed Train Commission, 400 Las Vegas Blvd. South, Las Vegas, Nevada 89101, Telephone (702) 229-4949.

Other recent documents related to the Las Vegas-Anaheim project include the preparation by the CNSSTC of Project Descriptions describing the 169-mile Las Vegas-Barstow component as a stand-alone project, which were submitted to the FRA in June 2002, and the Ontario-Anaheim segment, which was submitted to the FRA in June 2003.

The Department of Transportation and Related Agencies Appropriations Act, 2003 (Pub. L. 108-7), which provides appropriations for the FRA and other agencies, included funds specifically to conduct additional design, engineering and environmental studies concerning the California-Nevada Interstate Maglev Project under the FRA's Next Generation High Speed Rail Technology Demonstration Program. Some of these funds will be used to conduct the system-wide Programmatic EIS.

The FRA has entered into a Memorandum of Understanding with the CNSSTC, the Nevada Department of Transportation (NDOT) and the California Department of Transportation (Caltrans) governing the conduct of this Programmatic EIS. FRA is serving as the lead federal agency, NDOT is the lead state agency, and the California Department of Transportation (Caltrans) and CNSSTC are cooperating agencies. Through this PEIS, the FRA, NDOT and the cooperating agencies will examine alternative routes, viable transportation alternatives, and system-wide environmental issues, and identify site-specific problem areas deserving of more detailed analysis. In particular, in light of environmental assessment work previously completed and the likely construction sequencing should a decision be made to proceed with the project following completion of the programmatic environmental review, the PEIS will address the Las Vegas to Primm segment in greater detail that might allow this particular segment to proceed into final design and construction once the PEIS is complete.

Environmental Issues

Possible environmental impacts include displacement of commercial and residential properties, disproportionate impacts to minority and low-income populations, community and neighborhood disruption, increased noise and electromagnetic interference along rail corridors including startle effects on highway vehicles, traffic impacts associated with stations, effects to historic properties or archaeological sites, impacts to parks and recreational resources, visual quality effects, impacts to water resources, wetlands, and sensitive biological species and habitat, land use compatibility impacts, energy use, and impacts to agricultural lands.

Alternatives

The PEIS will consider alternatives including (1) Taking no action, (2) various alignment options and station locations for the entire length of the project and (3) other viable transportation alternatives. The degree of detail in the analysis may vary at different locations. In particular, at the Nevada end, it may be sufficiently detailed to support a site-specific EIS, while in the much longer California segment, it may be of a broader programmatic scale, sufficient to support a decision to go ahead with the entire project, but requiring further analysis to resolve specific detailed routing and design issues.

Scoping and Comment

FRA encourages broad participation in the PEIS process and review of the resulting environmental documents. *Comments and suggestions related to the project and potential environmental concerns are invited from all interested agencies and the public at large to ensure that the full range of issues related to the proposed action and all reasonable alternatives are addressed and all significant issues are identified.* The public is invited to participate in the scoping process, to review the Draft PEIS when published, and to provide input at public meetings. Letters describing the proposed scope of the PEIS and soliciting comments will be sent to appropriate Federal, State and local agencies, elected officials, community organizations, and to private organizations and citizens who have previously expressed interest in this proposal. Several public meetings to be advertised in the local media will be held in the project area regarding this proposal. Release of the Draft PEIS for public comment and public meetings and hearings related to that document

will be announced as those dates are established.

Persons interested in providing comments on the scope of the programmatic EIS should do so within thirty days of the publication of this Notice of Intent. Comments can be sent in writing to FRA or NDOT representatives at the addresses listed above.

Public Scoping Meetings will be held at the following respective locations and dates.

Las Vegas, Nevada

Date: June 21, 2004
Time: 4 p.m.–9 p.m.
Location: City of Las Vegas, City Council Chambers, 400 Stewart Ave., Las Vegas, NV 89101.

Ontario, California

Date: June 22, 2004.
Time: 4 p.m.–9 p.m.
Location: Ontario Convention Center, 2000 Convention Center Way, Ontario, CA 91764

Victorville, California

Date: June 23, 2004
Time: 4 p.m.–9 p.m.
Location: Victorville Activity Center, 15075 Hesperia Rd., Victorville, CA 92392.

Barstow, California

Date: June 24, 2004
Time: 4 p.m.–9 p.m.
Location: Barstow College, Norman Smith Center, 2700 Barstow Rd., Barstow, CA 92311

Anaheim, California

Date: June 28, 2004
Time: 4 p.m.–9 p.m.
Location: City Hall West, 2nd Floor, Gordon Hoyt Conference Room, 201 S Anaheim Blvd., Anaheim, CA 92805

Issued in Washington, DC, on May 14, 2004

Jo Strang,

Deputy Associate Administrator of Railroad Development

[FR Doc. 04-11397 Filed 5-19-04, 8:45 am]

BILLING CODE 4910-06-P

DEPARTMENT OF TRANSPORTATION**Maritime Administration****Reports, Forms and Recordkeeping Requirements Agency Information Collection Activity Under OMB Review**

AGENCY: Maritime Administration, DOT.

ACTION: Notice and request for comments

SUMMARY: In compliance with the Paperwork Reduction Act of 1995 (44

U.S.C. 3501 seq.), this notice announces that the Information Collection abstracted below has been forwarded to the Office of Management and Budget (OMB) for review and approval. The nature of the information collection is described as well as its expected burden. The Federal Register Notice with a 60-day comment period soliciting comments on the following collection of information was published on February 23, 2004. No comments were received. **DATES:** Comments must be submitted on or before June 21, 2004

FOR FURTHER INFORMATION CONTACT:

Kelly Farrell, Maritime Administration, 400 7th Street SW, Washington, DC 20590. Telephone 202-366-9041. FAX 202-366-7485 or e-mail kelly.farrell@marad.dot.gov. Copies of this collection also can be obtained from that office.

SUPPLEMENTARY INFORMATION: Maritime Administration (MARAD).

Title: Elements of Request for Course Approval.

OMB Control Number: 2133-NEW.
Type of Request: New Collection.
Affected Public Respondents: are public and private maritime security course training providers

Forms: Nono

Abstract: Under this proposed voluntary collection, public and private maritime security training course providers may choose to provide the Maritime Administration (MARAD) with information concerning the content and operation of their courses. MARAD will use this information to evaluate whether the course meets the training standards and curriculum promulgated under Section 109 of the Maritime Transportation Security Act of 2002 (MTSA) (Pub. L. 107-295). Courses found to meet these standards will receive a course approval.

Annual Estimated Burden Hours: 3,000 hours

ADDRESSES: Send comments to the Office of Information and Regulatory Affairs, Office of Management and Budget, 725 17th Street, NW, Washington, DC 20503. Attention: MARAD Desk Officer

Comments are invited on: Whether the proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information will have practical utility, the accuracy of the agency's estimate of the burden of the proposed information collection, ways to enhance the quality, utility and clarity of the information to be collected, and ways to minimize the burden of the collection of information on respondents, including the use of

Administration (RITA), to the Federal Motor Carrier Safety Information (FMCSA) (69 FR 51009, Aug. 17, 2004).
FMCSA IC OMB Control No. 2126-0031.

Form No. MP-1

Type of Review: Extension of a currently approved information collection

Respondents: Class I Motor Carriers of Passengers.

Number of Respondents: 26

Estimated Time Per Response: 1.5 hours.

Expiration Date: August 31, 2006.

Frequency: Quarterly and Annually

Total Annual Burden: 195 hours [130 responses x 1.5 hour per response = 195 hours].

Background

The Annual and Quarterly Report of Class I Motor Carriers of Passengers is a mandated reporting requirement applicable to certain motor carriers of passengers. Motor carriers (both interstate and intrastate) subject to the Federal Motor Carrier Safety Regulations are classified on the basis of their gross carrier operating revenues.¹ Class I passenger motor carriers are required to file with the Agency motor carrier quarterly and annual reports (Form MP-1) providing financial and operating data (see 49 U.S.C. 14123). Under the financial and operating statistics (F&OS) program, FMCSA collects balance sheet and income statement data along with information on tonnage, mileage, employees, transportation equipment, and related data. The Agency uses this information to assess the health of the industry and identify industry changes that could affect national transportation policy. The data also indicate company financial stability and operational characteristics. The data and information collected are made publicly available and used by FMCSA to determine a passenger carrier's compliance with the F&OS program.

¹ For purposes of the Financial & Operating Statistics (F&OS) program, passenger carriers are classified into the following two groups: (1) Class I carriers are those having average annual gross transportation operating revenues (including interstate and intrastate) of \$5 million or more from passenger motor carrier operations after applying the revenue deflator formula in the Note of 49 CFR 1420.3. (2) Class II passenger carriers are those having average annual gross transportation operating revenues (including interstate and intrastate) of less than \$5 million from passenger motor carrier operations after applying the revenue deflator formula as shown in Note A of § 1420.3. Only Class I carriers of passengers are required to file Annual and Quarterly Report Form MP-1, but Class II passenger carriers must notify the Agency when there is a change in their classification or their revenues exceed the Class II limit.

requirements set forth in 49 CFR Part 1420.

The F&OS reporting regulations were formerly administered by the Interstate Commerce Commission. They were transferred to the U.S. Department of Transportation on January 1, 1996, by Section 103 of the ICC Termination Act of 1995 (ICCTA) (Pub. L. 104-88, 109 Stat. 803, December 29, 1995), now codified at 49 U.S.C. 14123. On September 30, 1998, the Secretary transferred the authority to administer the F&OS program to BTS (63 FR 52192). Effective September 29, 2004, the Secretary transferred this program responsibility from BTS and redelegated it to FMCSA (69 FR 51009, Aug. 17, 2004). FMCSA will publish a final rule that transfers and redesignates the F&OS program reporting requirements, currently at 49 CFR 1420, from BTS (now RITA) to FMCSA.

We particularly request comments on (1) whether the proposed collection of information is necessary for FMCSA to meet its goal of reducing commercial motor vehicle crashes, and the usefulness of the information with respect to this goal, (2) the accuracy of the estimated IC burden, (3) ways to enhance the quality, utility, and clarity of the information collected, and (4) ways to minimize the burden of the collection of information on respondents (including use of automated collection techniques and other information technologies) without reducing the quality of the collected information. The Agency will summarize and/or include your comments in the request for OMB approval of this IC.

Issued on: July 7, 2006

David H. Hugel,

Acting Administrator

[FR Doc. 06-11140 Filed 7-13-06; 8:45 am]

BILLING CODE 4910-EX-P

DEPARTMENT OF TRANSPORTATION

Federal Railroad Administration

Environmental Impact Statement: DesertXpress High Speed Train Between Victorville, CA and Las Vegas, NV

AGENCY: Federal Railroad Administration (FRA), U.S. Department of Transportation (DOT)

ACTION: Notice of Intent to prepare an Environmental Impact Statement

SUMMARY: The FRA is issuing this notice to advise the public that an Environmental Impact Statement (EIS) will be prepared for the proposed

DesertXpress high-speed train project. The project includes passenger stations, a maintenance facility, and a new railroad line along the I-15 corridor between Victorville, California and Las Vegas, Nevada. FRA is issuing this notice to solicit public and agency input into the development of the scope of the EIS and to advise the public that outreach activities conducted by the FRA will be considered in the preparation of the EIS. Federal cooperating agencies for the EIS are the Surface Transportation Board (STB), the Federal Highway Administration (FHWA) and the Bureau of Land Management (BLM). Alternatives to be evaluated and analyzed in the EIS include (1) take no action (No-Project or No-Build), and, (2) construction of a privately financed steel-wheel-on-steel-rail high-speed train, including a proposed station in Victorville and a station in Las Vegas, and a maintenance facility in Victorville. Several alternative routings would be considered in the EIS.

DATES: Three scoping meetings will be held during July of 2006. Scoping meetings will be advertised locally and are scheduled for the following cities on the dates indicated below:

- July 25, 2006, Las Vegas, Nevada at The White House, 3260 Joe Brown Drive, time 5-8 pm

- July 26, 2006, Barstow, California at the Ramada Inn, 1571 E. Main Street, time 12-2 pm, and

- July 26, 2006, Victorville, California at the San Bernardino County Fairgrounds Building 3, time 5-8 pm

Persons interested in providing comments on the scope of the EIS should do so by August 15, 2006. Comments can be sent to Mr. David Valenstein at the FRA address identified below.

FOR FURTHER INFORMATION CONTACT: Mr. David Valenstein, Environmental Program Manager, Office of Railroad Development, Federal Railroad Administration, 1120 Vermont Avenue, (Mail Stop 20), Washington, DC 20590, (telephone 202/493-6368). Information and documents regarding the environmental review process will be made available through the FRA's Web site <http://www.fra.dot.gov> at Passenger Rail, Environment, Current Reviews, DesertXpress.

SUPPLEMENTARY INFORMATION: The FRA will prepare an Environmental Impact Statement (EIS) for the proposed DesertXpress high-speed train project. The FRA is an operating administration of the U.S. Department of Transportation and is primarily responsible for railroad safety.

regulation. Federal cooperating agencies for the EIS are the Surface Transportation Board (STB), the Federal Highway Administration (FHWA) and the Bureau of Land Management (BLM). The BLM has approval authority over the use of public lands under their control. The FHWA has jurisdiction over the use and/or modification of land within the I-15 right of way. The STB has exclusive jurisdiction, pursuant to 49 U.S.C. 10501(b), over the construction, acquisition, operation and abandonment of rail lines, railroad rates and services and rail carrier consolidations and mergers. 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. To the extent appropriate, the EIS will address environmental concerns raised by federal, state and local agencies during the EIS process.

Project Description. DesertXpress Enterprises, LLC (the project Applicant) proposes to construct and operate a privately financed interstate high-speed passenger train, with a proposed station in Victorville, California and a station in Las Vegas, Nevada, along a 200-mile corridor, within or adjacent to the I-15 freeway for about 170 miles and adjacent to existing railroad lines for about 30 miles.

The need for the project is directly related to the rapid increase in travel demand between Southern California and Las Vegas, coupled with the growth in population in the areas surrounding Victorville, Barstow, Primm and Las Vegas, which has resulted in substantial congestion along the I-15 freeway between Victorville and Las Vegas. Ridership is estimated to be 4.1 million round trips in the first full year of service. To accommodate this level of ridership, trains would operate from 6 a.m. to 10 p.m., daily, 365 days a year at 20 to 30 minute intervals during peak periods.

The project would involve construction of a fully grade-separated, dedicated double track passenger-only railroad along an approximately 200-mile corridor, from Victorville, California to Las Vegas, Nevada. Where the railroad alignment would be within the I-15 freeway corridor, continuous concrete truck barriers, as well as American Railway Engineering and Maintenance of Way Association crash barriers at all supporting columns of bridges at freeway interchanges and overpasses would be provided. The project would include the construction of a passenger station, as well as maintenance, storage and operations

facility in Victorville and one passenger station in Las Vegas.

The proposed Victorville Station would be located along the west side of I-15 between the two existing Stoddard Wells interchanges. The facilities directly associated with the Victorville station would occupy about 60 acres of land, and would have a parking capacity for up to 10,000 automobiles. Access to the Victorville station would be via the two existing Stoddard Wells Road Interchanges.

The Maintenance, Storage and Operations facility is proposed to be located in the City of Victorville on a site that lies within the Victorville Valley Economic Development Area. The facility would require approximately 50 acres and would include a fueling station, train washing facility, repair shop, parts storage, and operations center. It is estimated that approximately 400 employees would be based at this facility.

The Las Vegas passenger station would be located at one of three possible locations: (1) Near the south end of the Las Vegas Strip, (2) in the center section of the Strip, or (3) in downtown Las Vegas. A light maintenance, cleaning, and inspection facility would also be built near the Las Vegas station.

Alternatives. A No-Build alternative will be studied as the baseline for comparison with the proposed project. The No-Build Alternative represents the highway (I-15) and airport (McCarran) system physical characteristics and capacity as they exist at the time of the EIS (2006) with planned and funded improvements that will be in place at the time the project becomes operational. The project build alternatives have the same stations and maintenance facility. The railroad alignment between Victorville and Las Vegas can be divided into 6 distinct segments. Within the segments, several build alternatives are being considered as discussed below.

Segment 1: Victorville to Lenwood (south of Barstow, California). Alternative A would depart the Victorville Station in a south-westerly direction before turning north and generally following the existing BNSF Railway Company (BNSF) railroad corridor and Route 66 to a point just south of Barstow. Alternative B would depart the Victorville Station and head north generally following the west side of the I-15 corridor. The alignment would diverge from the I-15 corridor near Hodge Road and head northerly to a point just south of Barstow near the existing BNSF railroad corridor.

Alternative B would be approximately 6.8 miles shorter than Alternative A.

Segment 2: Lenwood (South of Barstow) to Yermo, California. From a point south of Barstow, the build alternative alignment would head north for about five miles, cross the Mojave River and turn east through the City of Barstow. Through Barstow the alignment would utilize an existing, but abandoned, former Atchison Topeka & Santa Fe railroad corridor along the north side of the Mojave River, for approximately three miles before reaching the vicinity of the I-15 / Old Highway 58 interchange on the east side of Barstow. From this point the alignment would head east along the north side of I-15 corridor through the town of Yermo to a point just east of the agricultural inspection station on the I-15 Freeway.

Segment 3: Yermo to Mountain Pass. There are two alignment alternatives in this segment: Alternative A entirely within the median of the I-15 freeway, and Alternative B along the north side of the I-15 corridor.

Segment 4: Mountain Pass to Primm, Nevada. Alternative A would leave the I-15 freeway corridor and head south for approximately four miles before returning to the I-15 freeway corridor south of Primm. A portion of this alignment may encroach on the Mojave Desert Preserve, about one half mile south of the I-15 freeway. Alternative B would leave the I-15 freeway corridor and head north before returning to the I-15 freeway corridor south of Primm. A 4,000-foot long tunnel would be necessary for Alternative B.

Segment 5: Primm to Jean, Nevada. Alternative A would be entirely within the median of the I-15 freeway. Alternative B would continue along the east side of the I-15 freeway corridor between Primm and Jean.

Segment 6: Jean to Las Vegas, Nevada. There are three alternative alignments in this segment. Alternative A would continue in the median of the I-15 freeway into the Las Vegas passenger station. Alternative B would cross the I-15 freeway corridor from the east side to the west side and continue along the west side of the I-15 freeway corridor into the Las Vegas passenger station. Alternative C would diverge to the east and generally follow the existing Union Pacific railroad corridor into the Las Vegas passenger station. To reach the downtown Las Vegas passenger station, Alternative A would leave the median of the I-15 freeway corridor near Oakey Boulevard and diverge to the east to follow the Union Pacific railroad corridor to Bonneville Street. Alternatives B and C would follow the

west side of the I-15 freeway corridor and cross at Oakey Boulevard to the east to join the Union Pacific railroad corridor to Bonneville Street

Scoping and Comments FRA encourages broad participation in the EIS process during scoping and review of the resulting environmental documents. Comments and suggestions are invited from all interested agencies and the public at large to insure the full range of issues related to the proposed action and all reasonable alternatives are addressed and all significant issues are identified. In particular, FRA is interested in determining whether there are areas of environmental concern where there might be the potential for identifiable significant impacts. FRA invites and welcomes public agencies, communities and members of the public to advise the FRA of their environmental concerns, and to comment on the scope and content of the environmental information regarding the proposed project. Persons interested in providing comments on the scope of the EIS should send them to Mr. David Valonstein at the FRA address identified above by August 15, 2006.

Issued in Washington, DC, on July 11, 2006

Mark E. Yachmetz,
Associate Administrator for Railroad
Development

[FR Doc. 06-11154 Filed 7-13-06, 8:45 am]
BILLING CODE 4910-06-P

DEPARTMENT OF TRANSPORTATION

Federal Transit Administration

[Docket Number: FTA-2005-23227]

Notice of Proposed Title VI Circular

AGENCY: Federal Transit Administration (FTA), DOT.

ACTION: Notice of proposed revisions and request for comment

SUMMARY: The Federal Transit Administration (FTA) is revising and updating its Circular 4702.1, "Title VI Program Guidelines for Urban Mass Transit Administration Recipients." FTA is issuing a proposed Title VI Circular and seeks input from interested parties on this document. After consideration of the comments, FTA will issue a second Federal Register notice responding to comments received and noting any changes made to the Circular as a result of comments received. The proposed Circular is available in Docket Number 23227 at <http://dms.dot.gov>

DATES: Comments must be received by August 14, 2006. Late filed comments will be considered to the extent practicable.

ADDRESSES: You may submit comments identified by DOT DMS Docket Number FTA-05-23227 by any of the following methods. Web Site: <http://dms.dot.gov>. Follow the instructions for submitting comments on the DOT electronic docket site; Fax: 202-493-2251; Mail: Docket Management Facility, U.S. Department of Transportation, 400 Seventh Street, SW, Nassif Building, PL-401, Washington, DC 20590-0001; Hand Delivery Room PL-401 on the plaza level of the Nassif Building, 400 Seventh Street, SW, Washington, DC, between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays.

Instructions: You must include the agency name (Federal Transit Administration) and the docket number (FTA-05-23227). You should submit two copies of your comments if you submit them by mail. If you wish to receive confirmation that FTA received your comments, you must include a self-addressed, stamped postcard. Note that all comments received will be posted without change to the Department's Docket Management System (DMS) website located at <http://dms.dot.gov>. This means that if your comment includes any personal identifying information, such information will be made available to users of DMS.

FOR FURTHER INFORMATION CONTACT: David Schneider, Office of Civil Rights, 400 Seventh Street, SW., Washington, DC, 20590, (202) 366-4018 or at David.Schneider@fta.dot.gov

SUPPLEMENTARY INFORMATION:

Background

The authority for FTA's Title VI Circular derives from Title VI of the Civil Rights Act of 1964, 42 U.S.C. 2000d, *et seq.*, which prohibits discrimination on the basis of race, color, or national origin in programs and activities receiving Federal financial assistance. Specifically, Section 601 of this Title provides that "no person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance," (42 U.S.C. 2000d). Section 602 authorizes Federal agencies "to effectuate the provisions of [Section 601] * * * by issuing rules, regulations or orders of general applicability." (42 U.S.C. 2000d-1). The U.S. Department of Transportation (DOT), in an exercise of

this authority, promulgated regulations, contained in 49 CFR Part 21 that effectuate the provisions of Section 601 and Title VI in general.

FTA Circular 4702.1, titled "Title VI Program Guidelines for Urban Mass Transit Administration Recipients," provides information on how FTA will enforce the Department of Transportation's Title VI regulations at 49 CFR Part 21. The Circular includes information, guidance, and instructions on the objectives of Title VI, information on specific grant programs covered by Title VI, a description of FTA data collection and reporting requirements, a summary of FTA Title VI compliance review procedures, a description of FTA process for implementing remedial and enforcement actions, information on how FTA will respond to Title VI complaints, and public information requirements. Circular 4702.1 was last updated on May 26, 1988.

The proposed circular would make reference to and in some instances would summarize the text of other FTA guidance, regulations, and other documents. Many of the documents referred to will undergo revision during the life of the proposed circular. In all cases, the most current guidance document, regulation, etc. will supercede any preceding information provided. FTA reserves the right to make page changes to proposed and final circulars regarding updates to other provisions, without subjecting the entire circular to public comment.

Comments Related to Reporting Requirements. In addition to general comments concerning the draft Title VI Circular, FTA is seeking comments from its recipients and subrecipients concerning the costs and benefits associated with meeting the proposed Circular's guidance. Recipients and subrecipients are encouraged to comment on the number of hours and/or financial cost associated with implementing the Circular's guidance as well as the extent to which following the guidance will assist the recipient and subrecipient in achieving its organizational objectives.

I. Why is FTA revising its Title VI Circular?

The DOT Title VI regulations and FTA Circular 4702.1 attempt to transform the broad antidiscrimination ideals set forth in Section 601 of Title VI into reality. In the 18 years since FTA last revised its Title VI Circular, much of FTA's guidance has become outdated. Over those years, legislation, Executive Orders, and court cases have transformed transportation policy and affected Title VI rights and

Subj: FW: STB Declaratory Order Approved
Date: 7/3/2007 8:58.30 A.M. Pacific Daylight Time
From: rjohnson@LasVegasNevada.GOV
To: MNCASSOC@aol.com, Dave Roberts@ga.com, baguiera@bellagioresort.com, kenkeyorkian@sbcglobal.net

fyi

From: Mallery, James W [mailto:jmallery@dot.state.nv.us]
Sent: Tuesday, July 03, 2007 8:53 AM
To: Richann Johnson
Subject: FW: STB Declaratory Order Approved

From: Catherine.Glidden@stb.dot.gov [mailto:Catherine.Glidden@stb.dot.gov]
Sent: Tuesday, July 03, 2007 8:12 AM
To: david_bricker@dot.ca.gov; steinwert@circlepoint.com; david.valenstein@dot.gov; rrotte@ca.blm.gov; maiser.khaled@fhwa.dot.gov; ermie_figueroa@dot.ca.gov; rick_deming@dot.ca.gov; Mallery, James W
Subject: STB Declaratory Order Approved

The attached decision, served by the Surface Transportation Board (Board) on June 27, 2007, grants DXE its request for a declaratory order filed with the Board on July 24th, 2006. The filing requested that the Board issue a declaratory order, finding that DXE's proposed construction of an interstate high speed passenger rail service is not subject to state and local environmental review and land use and other permitting requirements because of Federal preemption in 49 U.S.C. 10501(b).

The order clarifies the Board's preemptive authority as it relates to state and local permitting requirements including the California Environmental Quality Act. The order also reaffirms that state and local parties will have ample opportunity to participate in the NEPA process. If you have any questions regarding the specifics of the declaratory order, please feel free to contact me at 202-245-0293 or via email at gliddenc@stb.dot.gov

Catherine Glidden
Environmental Protection Specialist
Surface Transportation Board
Section of Environmental Analysis
Washington, DC 20423-0001
Phone: (202) 245-0293
Fax: (202) 245-0454

3. Is it the position or opinion of the FRA and/or the STB that written certifications, approvals or permits need not be obtained from the State of California under the California environmental laws known as the California Environmental Quality Act ("CEQA") as a condition of the FRA conducting an EIS, approving a draft and final EIS, and/or publishing a "Record of Decision" in connection with the Steel Wheel Project? If so, what is the legal basis and factual basis for this position? If not, please explain why the NOI makes no mention of CEQA.
4. Please explain the legal basis and factual basis for the FRA not requiring that the Steel Wheel Project enter into a Memorandum of Understanding (MOU) among and between all lead and cooperating federal and state agencies, prior to the publication of the NOI for the Steel Wheel Project, whereas the FRA did require, in 2003, that an MOU be entered into by, among and between all lead and cooperating federal and state agencies as a condition of publishing an NOI for the 300 mph high-speed maglev train technology project sponsored by the California-Nevada Super Speed Train Commission ("CNSSTC"), a Nevada State Agency ("Maglev Project"), to operate in the same I-15 highway corridor as the Steel Wheel Project.
5. Please describe the legal basis and factual basis for the FRA requiring that the Maglev Project sponsored by the California-Nevada Super Speed Train Commission ("CNSSTC") obtain the consent, approval and agreement of NDOT to serve as the lead state agency in connection with the ongoing Programmatic Environmental Impact Statement and Environmental Impact Statement ("PEIS/EIS") commenced with the publication of a Notice of Intent in the Federal Register on May 20, 2004, whereas the FRA did not require that the Steel Wheel Project obtain the consent, approval or agreement of NDOT to serve as the lead state agency in connection with the EIS for the Steel Wheel Project.
6. Please explain the legal basis and factual basis for the FRA's refusal to grant the CNSSTC's request to serve as the lead state agency in connection with the PEIS/EIS for the Maglev Project, (even though the CNSSTC is a state agency created by the State of Nevada in 1988 for the express purpose of planning and issuing a franchise for the construction of a high-speed train system to operate between Las Vegas, NV and Anaheim, CA utilizing the same I-15 right-of-way being requested by the Steel Wheel project to operate between Las Vegas, NV and Victorville, CA), whereas the FRA did not require any lead state agency in connection with the EIS for the Steel Wheel Project. Why did the FRA require that only a state agency with statewide jurisdiction (i.e. NDOT) could serve as the lead state agency for the Maglev Project, whereas the FRA allowed the Steel Wheel Project NOI to be published without a state agency serving as either a lead or cooperating state agency?
7. Please describe the legal basis and factual basis for the FRA requiring that the NOI for the Maglev Project could not be published, nor the PEIS/EIS commenced, until the consent, approval and agreement of Caltrans was obtained to serve as a cooperating agency on behalf of the State of California. Why has the FRA not imposed the same requirement on the Steel Wheel Project? Please explain.
8. Please describe the legal basis and factual basis for the FRA requiring that the PEIS/EIS for the Maglev Project consider alternatives which include "other viable transportation

alternatives" (see NOI published on May 20, 2004), whereas the FRA has not required the Steel Wheel Project to consider "other viable transportation alternatives?" Why is the FRA, in the NOI for the Steel Wheel Project, requiring an alternatives analysis which only includes the "No-Build Alternative" versus constructing the Steel Wheel Project? Why is the FRA not requiring the Steel Wheel Project to also consider the Maglev Project as one of the transportation alternatives in the EIS being prepared for the Steel Wheel Project? What is the legal basis and factual basis for the FRA's decision in this regard? Please explain.

9. What is the basis for the FRA stating in the Steel Wheel Project NOI that "ridership is estimated to be 4.1 million roundtrips in the first full year of service?" Are ridership projections customarily included in NOI's published by the FRA in connection with the commencement of EIS's? Why did the FRA do so in this case? Before publishing this statement in the NOI did the FRA give consideration to, or consider that the Clark County Regional Transportation Commission, the MPO for Clark County, NV, had published a draft study indicating that upgraded, high-speed service on the existing Amtrak lines would generate ridership of only 119,000 annually by the year 2010 between Riverside, CA and Las Vegas, with revenue covering only 17.9% of the annual cost of operation and maintenance of a high-speed steel-wheel-on-rail system? Does the FRA intend to require a peer review analysis and/or investment grade ridership projections in the context of the EIS for the Steel Wheel Project? Please explain.
10. Did the FRA investigate or determine whether the Cities of Las Vegas or Barstow had agreed to have a station located in their cities before publication of the NOI for the Steel Wheel Project? If not, why not? Please explain.
11. The NOI for the Steel Wheel Project specifically states that "the STB has exclusive jurisdiction, pursuant to 49 USC 10501(b), over the construction, acquisition, operation and abandonment of rail lines, railroad rates and services and railroad consolidations and mergers." Please explain the condition, breadth and scope of this exclusive jurisdiction. Must a new railroad line be a "common carrier railroad line" and "part of the interstate rail network" to fall within the jurisdiction of the STB? Please explain. How has the STB defined and applied the terms "common carrier railroad lines" and "interstate rail network" since its inception in 1996? What are the existing examples in the United States of newly constructed railroad lines over which the STB has asserted its exclusive jurisdiction since January 1996? Please explain.
12. Is it the position or opinion of the FRA, or the STB, that the STB has exclusive jurisdiction over the Steel Wheel Project? Please explain. If not, what is the nature and extent, if any, of the jurisdiction of the STB over the Steel Wheel Project? Does this jurisdiction still exist or apply if the Steel Wheel Project does not plan to make its operations available to freight traffic? Does the Steel Wheel Project fit within the STB's definition of "common carrier railroad lines that are part of the interstate rail network" (as described in the "General Information" materials distributed by the STB at the July 2006 public scoping meetings for the Steel Wheel Project)? Please explain. What does the STB's "exclusive jurisdiction" mean, if anything, as applied to the Steel Wheel Project? Does the STB's "exclusive jurisdiction" mean that the STB can insist upon the Steel Wheel Project being built in the I-15 right-of-way without obtaining the prior written consent or approval, and over the objections of the States of Nevada or California? Does

"exclusive jurisdiction" mean that no other federal, state, regional or local entity could prohibit the Steel Wheel Project from being built even if the project passes through their respective jurisdictions? Please explain the legal and factual basis for your answers.

- 13 Is it the FRA's contention that the STB has the power and authority to grant the Steel Wheel Project the right-of-way necessary to build the Steel Wheel Project between Victorville and Las Vegas, in whole or in part? If not, what federal or state agencies do? Please explain. Over which portions of this Steel Wheel Project does the STB allegedly have the power to grant right-of-way to the private party intending to build this project?**
- 14. Which federal and state agencies or authorities have the power and jurisdiction to grant the right-of-way necessary to construct the Steel Wheel Project in the I-15 freeway corridor? Please explain. Is the answer any different for the Maglev Project? Please explain**
- 15. Can the FRA, the STB or some other federal agency grant right-of-way to construct the Steel Wheel Project without the written consent or approval of the City of Barstow, Southern California Associated Governments (SCAG) and/or the State of California? Please explain the legal basis and factual basis for your answer.**
- 16. Can the FRA, the STB or some other federal agency grant right-of-way to construct the Steel Wheel Project without the written consent or approval of the City of Las Vegas, Clark County Regional Transportation Commission (RTC) and/or the State of Nevada? Please explain the legal basis and factual basis for your answer.**
- 17. Can the FRA, the STB or some other federal agency grant right-of-way to construct the Steel Wheel Project without the written consent or approval of the California High Speed Rail Authority ("CHSRA")? Please explain the legal basis and factual basis for your answer.**
- 18. Has the FRA been presented with facts or documents proving, to the FRA's satisfaction, that construction of the Steel Wheel Project can in fact be completed utilizing only needed private funds (i.e. no federal, state, regional or local government or financial assistance of any kind) that are immediately available and on hand to construct the Steel Wheel Project? If so, please describe the factual and documentary evidence presented to the FRA, when and by whom. If not, what financial plan has been presented to the FRA by the Steel Wheel Project? Please explain.**
- 19. Has the FRA been presented with facts or documents proving, to the FRA's satisfaction, that the ridership and revenue projections of the Steel Wheel Project are sufficient to offset the anticipated operation and maintenance costs and repay the initial capital investment needed to construct the project? If so, please explain. If not, please explain.**
- 20. Prior to publication of the NOI, did the FRA obtain the written consent or approval of NDOT or the State of Nevada in support of the Steel Wheel Project? If not, please state the legal basis and factual basis for the decision not to do so. Has NDOT or the State of Nevada now gone on record as being supportive or opposed to of the Steel Wheel Project? Please explain.**

21. Prior to publication of the NOI, did the FRA obtain the written consent or approval of Caltrans or the State of California in support of the Steel Wheel Project? If not, please state the legal basis and factual basis for the decision not to do so. Has Caltrans now gone on record as being supportive of or opposed to the Steel Wheel Project? Please explain.
22. Prior to publication of the NOI, did the FRA obtain the written consent or approval of the Clark County, NV, RTC, as the Metropolitan Planning Organization (MPO) for Clark County, in support of the Steel Wheel Project? If not, please state the legal basis and factual basis for the decision not to do so. Has the RTC now gone on record as being supportive of or opposed to the Steel Wheel Project? Please explain.
23. Prior to publication of the NOI, did the FRA obtain the written consent or approval of Southern California Associated Governments (SCAG), as the MPO for the California counties through which the Steel Wheel Project will pass if constructed, in support of the Steel Wheel Project? If not, please state the legal basis and factual basis for the decision not to do so. Has SCAG now gone on record as being supportive of or opposed to the Steel Wheel Project? Please explain.
24. Prior to publication of the NOI, did the FRA obtain the written consent or approval of the City of Barstow in support of the Steel Wheel Project? If not, please state the legal basis and factual basis for the decision not to do so. Has the City of Barstow now gone on record as being supportive of or opposed to the Steel Wheel Project? Please explain.
25. Prior to publication of the NOI, did the FRA obtain the written consent or approval of the CHSRA in support of the Steel Wheel Project? If not, please state the legal basis and factual basis for the decision not to do so. Has the CHSRA now gone on record as being supportive of or opposed to the Steel Wheel Project? Please explain.
26. Prior to publication of the NOI, did the FRA obtain the written consent or approval of the CNSSTC in support of the Steel Wheel Project? If not, please state the legal basis and factual basis for the decision not to do so.
27. What is the FRA doing, or does it plan to do in the future, to make certain that the I-15 interstate or federal land right-of-way granted (if any) to the Steel Wheel Project does not conflict with or impair the right-of-way needed to construct the Maglev Project, which previously commenced its PEIS/EIS in 2004?
28. Are the FRA and STB prepared to provide assurances to the CNSSTC, State of Nevada and/or State of California that they will take the actions necessary to ensure that the necessary federally controlled right-of-way will be made available to build both the Maglev Project and the Steel Wheel Project? If so, what type of assurance is the FRA/STB prepared to give? If not, why not?
29. Is it the intention of the FRA in the context of the EIS's for the Steel Wheel Project to compare and contrast the environmental impacts of a steel-wheel-on-rail, diesel locomotive powered technology operating between Victorville, CA and Las Vegas, NV versus the environmental impacts of an electromagnetic, contact-free, emissions-free technology planned by the Maglev Project? If not, why not? If the emissions impacts of

the Maglev Project are significantly more favorable than the emissions impacts of the Steel Wheel Project, would this be a factor in the FRA's decision whether or not to approve a draft or final EIS and/or "Record of Decision" for the Steel Wheel Project? If not, why not?

30. What consideration, if any, has the FRA given to the potential negative impact of the FRA's actions in connection with the Steel Wheel Project on the franchise issued by the CNSSTC to a private entity (the American Magline Group) to build the Maglev Project in the same I-15 interstate highway corridor which the private party sponsoring the Steel Wheel Project intends to use? Was any consideration given by the FRA to the conflicting needs being created for the same right-of-way and how these conflicting needs might be satisfied? Was any consideration given by the FRA to the competition being created by the FRA's actions for the same sources of private funding? Please explain your answers.
31. What consideration, if any, has the FRA given to the negative impacts of its actions with respect to the Steel Wheel Project on the power and authority of the CNSSTC, as granted to it by Nevada state law?
32. What consideration, if any has the FRA given to the fact that the laws of the United States (specifically beginning with the Maglev Deployment Program in 1997: 23 U.S.C. Section 1307) have been relied upon by the CNSSTC and its private partner/franchisee (the AMG) in spending many thousands of hours and millions of dollars over the past 8 years on the planning necessary to design, build and operate the Maglev Project in the same I-15 highway corridor as the Steel Wheel Project intends to use, as identified in the FRA's recently published NOI? Please explain.
33. Did the State of Nevada, or any of its agencies or representatives request that the FRA prepare and publish a NOI for the Steel Wheel Project? If so, please explain.
34. Did the State of California, or any of its agencies or representatives request that the FRA prepare and publish a NOI for the Steel Wheel Project? If so, please explain.
35. Who contacted the FRA to request that an NOI be published to commence an EIS for the Steel Wheel Project? Was it a private party, and if so who? When was this request first made, and why has the NOI been published now, on July 14, 2006, rather than sooner or later? Please explain.

Written Testimony of Matthew K. Rose
Chairman, President and Chief Executive Officer
BNSF Railway Company



Before the House Committee on Appropriations
Subcommittee on Transportation, Housing and Urban Development
For a Hearing on "The Future of High Speed Rail, Intercity Passenger
Rail and Amtrak"

Wednesday, April 1, 2009

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Good afternoon Chairman Olver, Ranking Member Latham and members of the Subcommittee. I am Matt Rose, the CEO of the BNSF Railway, and I appreciate the opportunity to testify before the Subcommittee today on the issue of high speed rail. As a freight railroad CEO, a member of the National Surface Transportation Policy and Revenue Study Commission, and an early supporter of the One Rail coalition, I've had a lot of opportunity to think about what our country's vision for passenger rail ought to be.

I, too, have traveled to Europe and Asia and appreciate the perspective of those in the United States who ask why Americans can't have what they have – 200 mph corridor service connecting dense population centers which, themselves, have efficient regional transit distribution. However, as I discovered in my work on the Commission, while many passenger rail advocates and policy makers at all levels of government are intercity passenger rail advocates, they are somewhat skeptical of this vision. Their appetite is for a more incremental approach of improving existing intercity passenger rail service. Perhaps conditioned by years of scant Amtrak budgets and Congress's disinterest in a formal federal intercity passenger rail program, many also are concerned that some large metropolitan areas might not be included in a "bullet train" network, either due to unavailability of right of way or other market-based demand reasons. In the Commission deliberations, we had a very robust discussion about these issues.

The Commission clearly called for the kind of investment needed to support passenger trains operating at the highest speeds in sealed, passenger-only, separated right of way. It called upon Congress to see the future, as Europe and Asia have, and begin the

process of developing a corridor system of truly high speed rail. Make no mistake about it – this is a trillion-dollar funding proposition. Such a system may be beyond our current means; but one certainly can envision the development of five to ten truly high speed passenger regional rail corridors that make economic and operational sense. California – where you would expect some of these corridors should be – has taken the difficult yet necessary steps toward a vision of 200-plus mph passenger trains, despite a challenging budgetary environment.

Importantly, the Commission report also specifically recognizes the contribution that less-than-highest speed passenger trains in corridors of fewer than 500 miles can make to the Nation’s transportation system. Existing Amtrak service outside the Northeast Corridor generally achieves 79 mph on freight rail tracks. Public investments made to enhance reliability of this service can yield tremendous on-time performance reliability benefits, which is often all that is needed to successfully satisfy demand for passenger service in certain markets. There are many examples of this, but most recently, BNSF completed several double track construction projects on behalf of the State of California, which are intended to further improve already good on-time performance levels for 79 mph service.

Speaking as a freight railroad CEO, it is possible to increase speeds from 79 mph to 90 mph on tracks that both freight and passenger trains use. Upgrades would include the implementation of Positive Train Control (PTC), which I’ll touch on again shortly. Track would need to be upgraded from Class IV to Class V track, which would lead to a step

level increase in track maintenance and track component replacement. For example, a larger number of ties per mile would have to be replaced each year. Rail joints would have to be eliminated. Extensive and regular undercutting would have to be undertaken to eliminate sub-grade defects. Rail would have to be re-surfaced much more often. All of this, in turn, would lead to more frequent outages for needed work, which will make joint freight/passenger operations more challenging and expensive.

At sustained speeds in excess of 90 mph, passenger train operations will need to be segregated from freight operations on separate track. The level of maintenance work required, the very different impacts passenger and freight rolling stock have on the surface of the rail and managing the flow of train traffic with such differences in speeds would make the joint use of track uneconomic and impracticable. Furthermore, it is my belief that at these speeds all interface between passenger trains and road crossings will need to be eliminated by grade separations or crossing closures. While it may be possible in some instances to co-locate higher speed passenger tracks with freight tracks in a freight railroad's existing right of way, that won't always be the case, and other right of way should be obtained. Where it is possible for the public to purchase freight railroad right of way, we must ensure sufficient capacity remains to operate safely and protect the ability to serve freight rail shippers, present and future, on a corridor.

In sum, the Commission's model for intercity passenger rail in this country is to develop the highest speed rail where feasible and economically viable, coupled with more reliability for 79-90 mph passenger service in other key corridors where it will continue to

make sense from a density, utilization and cost perspective. We believe that this vision could finally generate the public support and political will necessary for a successful passenger rail system in this country.

During the Commission's deliberations, Wisconsin DOT Secretary and Chairman of States for Passenger Rail Frank Busalacchi and the late, great Paul Weyrich and I spent a lot of time debating the provisions of the report that dealt with the passenger and freight rail interface. It was a worthy exercise because from it came a clear understanding of the importance of how freight and passenger rail are interdependent in today's policy, political and economic environment. This is the origin of the OneRail coalition, which consists of passenger, freight and environmental interests and advocates for the benefits of both freight and passenger operations.

There were some basic principles around this interface upon which the Commission agreed. These are basic rules of fairness, which make public-private cooperation possible and fruitful. In my own experience, they have helped BNSF and many communities on the BNSF network – including Seattle, Chicago, Albuquerque, St. Paul/Minneapolis, and Los Angeles -- realize a partnership that achieves outstanding commuter rail service without degrading present or future freight service. These communities recognize their stake in both passenger and freight rail service.

The first key principle is that access by passenger providers to freight rail networks, where reasonable, must be negotiated at an arm's length with freight railroads. This

includes joint use tracks and rights of way, as well as opportunities for shared corridors with separate track structure for freight and passenger service. The second is that the impact on present and future corridor capacity must be mitigated to ensure that rail freight capacity is not reduced, but enhanced. This recognizes that speed differences between passenger and freight trains and certain well-defined passenger service requirements must be taken into account. There must be a fair assignment of costs based on the ongoing cost of passenger services, including the cost of upgrading and maintaining track, signals and structures to support joint freight and passenger operations and the cost of maintaining and improving the safety and reliability of highway/railroad intersections in joint use corridors. Finally, all host railroads must be adequately and comprehensively protected through indemnification and insurance for all risks associated with passenger rail service on their lines and in their rights of way.

I'd now like to turn your attention to an issue that has become very important in the discussion about the passenger-freight interface: positive train control (PTC). Congress has placed a non-risk based, multi-billion-dollar mandate to install PTC on what effectively could be 90% of the freight rail network. This is driven by the requirement to implement this technology where passenger rail or shipments of certain hazardous materials utilize the network.

BNSF began developing this train control technology in 1984, which led us to the development of what we now call Electronic Train Management System (ETMS). However, it was never intended to be implemented on the scale envisioned by the mandate

included in the rail safety bill enacted last year by Congress. The unprecedented cost – which we estimate could be in excess of \$1 billion when fully implemented on BNSF in 2015 – is driven by factors mostly outside of our control, such as the presence of passenger trains and our statutory common carriage obligation to haul toxic chemicals. The cost will have to be fairly allocated between BNSF, its shippers and the public.

This mandate represents a tremendous financial burden not just on the freight railroads, but also on Amtrak and the commuter lines. If you have not yet heard about this issue from these constituencies, you soon will. They are partners in the cost of implementing this technology across jointly used lines. While the rail safety bill did authorize a relatively small technology grant program (\$50 million per year for Fiscal Years 2009-13), no funding has yet been appropriated. I urge you to fully fund this program.

However, you should also ensure that other funding sources are available to the public passenger and private freight railroads to help defray the tremendous financial impact the mandate will have. For example, the intercity passenger and high speed rail programs at the Federal Railroad Administration received significant funding in the American Recovery and Reinvestment Act. The intercity passenger program has previously been tapped for safety technology investments like centralized traffic control and cab signal systems and makes sense as a funding source going forward, given the PTC mandate's intense focus on passenger train operations.

In addition, the Department of Homeland Security's rail security grant program was created by Congress with specific statutory language making train control, tracking and communications systems eligible for funding. The Transportation Security Administration's long time focus on reducing security risks surrounding shipments of Toxic Inhalation Hazards fits squarely with the mandate's inclusion of rail lines carrying these highly hazardous materials.

Finally, the freight railroads continue to support a rail infrastructure tax credit bill, sponsored by Congressman Kendrick Meek (D-FL) and Congressman Eric Cantor (R-VA) in the House. This bill provides a 25% tax credit and expensing for rail infrastructure expansion activities, of which PTC implementation is eligible. I believe this is a significant way that Congress can soften the impact this mandate will have on the railroads, in what is one of the most economically challenging times we've seen in decades.

In closing, my recommendations to you are two-fold:

1) Observe the principles for passenger/freight joint use of rail right of way that the Commission recognized, and be realistic about the kind of passenger service that can be achieved, given the limitations of joint use. Generally, those limitations are based on nothing less than the laws of physics and the consequences that flow from them.

2) Develop a realistic vision for passenger service that works for all stakeholders -- including freight railroads and the nation's shippers -- and fully fund it.

It took \$4 a gallon gas to show us that passenger train options are important to providing a fuel efficient alternative to the highway for millions of Americans. In addition, though, a comprehensive passenger rail program may shift a portion of the congested short-medium haul air traffic to rail, expand employment in the passenger rail industry and engender vibrant economic development around these networks. The choice to fund passenger rail over the next 20 years can have as significant an impact on this country as funding Air Traffic Control and runways have had in the last 20 years.

I appreciate the opportunity to present these views and I would be happy to answer any questions you have about passenger rail or freight rail policy.