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APRIL 9, 2009



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BY HAND DELIVERY

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

ENTERED
Office of Proceedings

APR - 9 2009

Part of
Public Record

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

Dear Secretary Quinlan:

We are supplementing our filing of April 8, 2009 in the above-referenced proceeding. We include an original notarized copy of the Verified Statement of Kenneth Kevorkian (Exhibit 1) along with a signed copy of our original Petition (Exhibit 2) which was inadvertently submitted without Counsel's signature. We also include a letter in support of our Petition from the City Manager of Barstow, California (Exhibit 3).

Sincerely yours,

A handwritten signature in black ink, appearing to read 'Robert P. vom Eigen'.

Robert P. vom Eigen

RVE:dmo

Encls:

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EXHIBIT 1

**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*TM ("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 CNIMP 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.

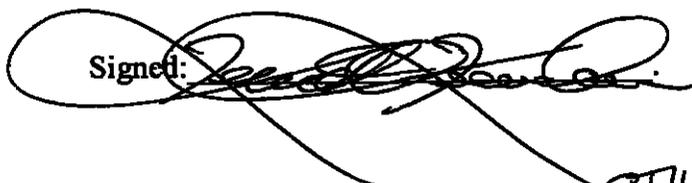
VERIFICATION

State of California,

County of Los Angeles,

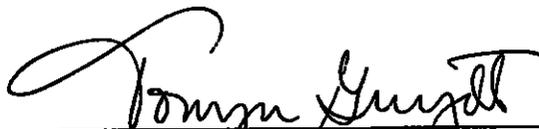
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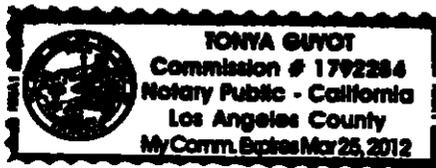
Kenneth Kevorkian, being duly sworn, deposes and says that he has read the foregoing statement, knows the facts asserted there are true and that the same are true as stated

Signed: 

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

Notary Public of LOS ANGELES CA


My Commission expires MARCH 25, 2012



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EXHIBIT 2

**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**

**Robert P. vom Eigen
Sarah Sunday Key
Foley & Lardner LLP
3000 K Street, N W.
Washington, D C. 20007
202-672-5367**

**Counsel to
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 corridor.¹ 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 development³ 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 tracks⁴ 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 or 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, Topeka & 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 incorrectly¹⁶

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 – Sils 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 DesertXpress 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, Nevada.³⁵

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 procedures.³⁶ 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 railroads.³⁷ 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 authority³⁸ 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.R. Co.-Acquisition and Operation Exemption-Line of Norfolk Southern Ry. Co. and Pennsylvania Lines, L.L.C.*, 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.” PRTIA 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 \$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

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

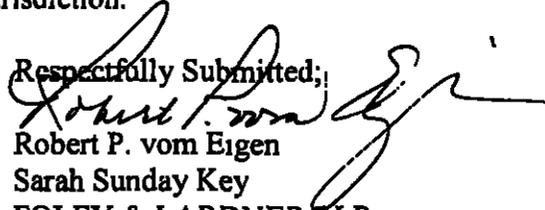
CONCLUSION

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;



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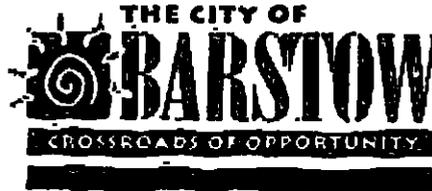
Filed April 8, 2009

<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 State authority fails to act finally within 120 day the carrier request, was addressed in accordance with this section</p>	
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EXHIBIT 3



April 8, 2009

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

Re: Finance Docket No. 34914 – *DesertXpress Enterprises LLC, Petition for Declaratory Order*

Dear Acting Secretary Quinlan:

I am writing regarding the petition submitted by the California-Nevada Super Speed Train Commission ("CNSSTC") and the American Magline Group ("AMG") to reopen and intervene in the above-captioned *DesertXpress* proceeding.

The City of Barstow is at the crossroads of a high-speed train that would connect Anaheim, California with Las Vegas, Nevada along the Interstate 15 corridor. Located within Barstow is the eastern terminus of California Highway 58 and western terminus of Interstate 40, both of which connect with Interstate 15. The California-Nevada Interstate Maglev Project (CNIMP), which has been authorized by Congress to receive \$45 million in federal funds, is an important project for the City of Barstow. The project will provide safe, reliable, environmentally-friendly, rapid transportation between heavily-populated Southern California and Las Vegas, via the rapidly growing Inland Empire cities of Ontario, Victorville and Barstow. As such, this route also provides rapid transportation between the valley areas of the Inland Empire, including Ontario International Airport, and the High Desert cities, including Barstow.

Just as importantly, the maglev project will provide a 14.5 minute connection from Anaheim to the Ontario International Airport so as to relieve the already overburdened airports in Los Angeles (LAX) and Orange (John Wayne) counties (i.e. an "Airport Without Runways"). This is a trip that can easily take 1-2 hours by car over the heavily congested I-10, I-15 and SR-91 highways. The Ontario International Airport is operating at only 30% capacity, and the stated goal of Southern California county transportation planning agencies and city leaders is to direct the growth of future airport passenger service to Ontario International Airport. However, the time it takes to drive to Ontario, coupled with the rising price of gas, has made and will continue to make reaching this goal a serious challenge. The CNIMP project offers Southern California a much needed solution to this airport access challenge, while at the same time relieving congestion on one of the most congested roads in America (SR-91).

In light of Congress's strong support for the CNIMP, as well as the strong local support and need for this project, I would strongly encourage the Board to grant the petition of the CNSSTC and AMG to reopen and intervene in the *DesertXpress* proceeding. It would be unfair and unjust for the *DesertXpress* to be exempted from the same California state and local environmental, land

use and permitting laws/regulations that the CNSSTC must abide by in the planning of the CNIMP. The only difference between the DesertXpress and the CNSSTC's projects are (1) the train technology (steel-wheel vs. electromagnetic propulsion), and (2) the end points in California (Victorville vs. Anaheim). These differences do not provide a basis for exempting one entity (DesertXpress) and not the other (CNSSTC) from state laws.

I appreciate the opportunity to comment on this matter.

Sincerely,

A handwritten signature in black ink, appearing to read "Richard Rowe", written in a cursive style.

Richard Rowe
City Manager
City of Barstow

CERTIFICATE OF SERVICE

I hereby certify that I have caused the foregoing transmittal letter and the letter dated April 8, 2009 from Richard Rowe, City Manager, City of Barstow, California, to be served by first class mail this 9th day of April, 2009 on the following:

**The Honorable Ray LaHood
Secretary of Transportation
U.S. Department of Transportation
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Washington, DC 20590**

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Director
Nevada Department of Transportation
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Carson City, Nevada 89712**

**Will Kempton
Director
California Department of Transportation
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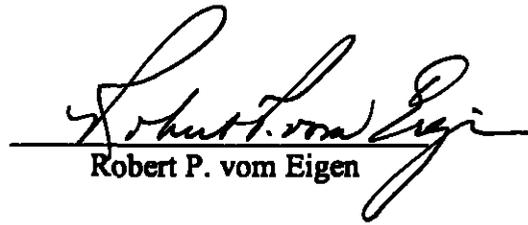
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