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

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

Dear Acting Secretary Quinlan:

Enclosed for filing in the above-referenced proceeding are the following:

- (1) Joint Petition of California-Nevada Super Speed Train Commission (“CNSSTC”) and the American Magline Group (“AMG”) for Leave to File a Rebuttal in Response to the Replies by DesertXpress and the International Brotherhood of Teamsters Rail Conference (“IBT”) in Opposition to the Joint Petition to Intervene and Reopen this proceeding; and
- (2) Rebuttal by CNSSTC and AMG to Replies in Opposition to Petition to Intervene and Reopen.

Sincerely yours,

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

Robert P. vom Eigen

RVE:dmo

Enclosures

**Before the
SURFACE TRANSPORTATION BOARD
Washington, D.C.**

Finance Docket No. 34914

DESERTXPRESS ENTERPRISES, LLC—PETITION FOR DECLARATORY ORDER

**REBUTTAL BY CALIFORNIA-NEVADA SUPER SPEED TRAIN COMMISSION AND
AMERICAN MAGLINE GROUP TO REPLIES IN OPPOSITION TO PETITION TO
INTERVENE AND REOPEN**

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AMERICAN MAGLINE GROUP

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**Before the
SURFACE TRANSPORTATION BOARD
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AMERICAN MAGLINE GROUP TO REPLIES IN OPPOSITION TO PETITION TO
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INTRODUCTION

Joint Petitioners submit this rebuttal to respond to new theories advanced by DesertXpress and the IBT Rail Conference (“IBT”), theories never before mentioned in this docket, as to why this Board may have jurisdiction over passenger-only rail lines that do not connect with the interstate rail network of freight railroads. DesertXpress and IBT claim that magnetic levitation guideways are also capable of being part of this new passenger-only segment of the interstate rail network, and suggest that Joint Petitioners should indulge in the same fiction as they propound – that Congress has granted the STB jurisdiction over passenger-only railroads that are incapable of providing common carrier service to rail shippers. *See* DesertXpress Reply at 2 and IBT Reply at 3. Their king has no clothes, and Joint Petitioners will explain why their efforts to dress it up fail.

DesertXpress and IBT also make incorrect factual assertions about the viability of CNIMP, about the motives of Joint Petitioners, and about the harm and prejudice that are alleged to be perpetrated if the Board were to grant the Joint Petition to Reopen this case. Joint Petitioners will show that AMG has committed to fund the local match for the \$45 million contract authority created by the 2008 Technical Corrections Act, that the CNIMP is moving

forward on a sound and reasonable basis and, by the way, why it is the superior proposal for meeting the transportation needs in the Las Vegas – Southern California Corridor. Joint Petitioners will further show that DesertXpress’s investment in its project will not be lost or wasted if the STB finds it does not have jurisdiction.

The issue of the Board’s jurisdiction should be addressed and resolved now so that all parties contemplating investments in high-speed rail that cannot be operated as part of the interstate freight rail network understand the rules under which they must operate. The issues were not clearly presented to the STB in DesertXpress’s Petition for Declaratory Order, and the parties in the original proceeding did not have adverse interests. The Board now has the opportunity to review this important issue in the full light of all arguments over the case law and legislative history, which now for the first time has been briefed by adversaries.

I. DesertXpress and IBT Fail to Confront the Key Element Triggering the STB’s Jurisdiction Under ICCTA: Rail Operations Must be “Part of” the Interstate Rail Network or the General System of Rail Transportation

Counsel for DesertXpress start their Reply to the Joint Petition by claiming that reopening this proceeding “would undermine the ... Board’s ... jurisdiction over the development of the nation’s first high-speed passenger rail network—one of the top priorities of the Obama Administration—[and]...would cause DesertXpress significant harm.” DesertXpress Reply at 2. These contentions are untrue in fact, and are irrelevant under the law. Untrue in fact because:

- the President’s high speed passenger network is not solely limited to rights of way that are separate from the interstate rail network and incapable of serving rail shippers;
- compliance with State and local land use controls has not been shown to be an impediment to development of either the DesertXpress or CNIMP, as many communities welcome transportation alternatives that reduce congestion; and
- the alleged \$25 million of investment made by DesertXpress is not wasted because DesertXpress will need approvals for its project from the Federal Highway

Administration (“FHWA”) and the Bureau of Land Management (“BLM”) to acquire its right of way over the public transportation corridors between Las Vegas and Victorville.

The factual assertions by DesertXpress and IBT will be further rebutted below.

However, these factual assertions are also irrelevant because, even if true, DesertXpress and IBT have failed to produce one case, or one piece of statutory language, or one note from the legislative history that justifies extension of the STB’s jurisdiction over rail track that is not a part of the interstate freight rail network or incapable of serving freight shippers. Congress alone conveys jurisdiction to the Board, and it has never done what counsel for DesertXpress and BLT contend.

- Congress and this Board have never said that there is more than one interstate rail network or general system of rail transportation;
- To the contrary, the law of this Board has stated that, if the connection to the general system of rail transportation is broken, the Board no longer has jurisdiction over such track; and
- Congress and this Board have never said that carriers on the interstate rail network can be relieved of their common carrier obligation under 49 U.S.C. §11101 to serve shippers on reasonable request.

However, Congress in its legislative history preceding the enactment of ICCTA has stated that “...regulation of passenger transportation is generally eliminated [under ICCTA] ...”¹

DesertXpress and BLT fail to cite contrary legislative history or case law. DesertXpress and BLT do not dispute Petitioners’ assertion that the *American Orient Express* decision,² the only case cited in the Board’s June 27, 2007 Decision, fails to support the assertion of jurisdiction over the tracks to be constructed by DesertXpress.

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

² *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).

The lead argument in the DesertXpress Reply – that the STB “is clearly the appropriate agency to exercise jurisdiction” – is also not relevant to this Board’s resolution of the Joint Petition. *See* DesertXpress Reply at 5. Congress decides what matters are “appropriate” for the STB to review, and the general policy statement at 49 U.S.C. § 10101(4) does not provide the Board with a license to venture into new areas of regulation not otherwise authorized in the statute. In fact, the thrust of this element of rail policy appears to be in creating competition “among rail carriers and with other modes,” and does not suggest anything about assisting development of new rail passenger-only transportation systems.³ The Board’s authority under section 10901 over construction and extension of rail lines relates only to those that comprise or will become a part of the interstate rail network. Congress in ICCTA stripped away provisions relating to passenger transportation; how could it be that it also contemplated that section 10901 could be used to create a separate, new system of passenger-only rail lines? More recently, in the Passenger Rail Investment and Improvement Act of 2008, Pub. L. 110-432 (“PRIIA”), Congress authorized additional STB oversight over Amtrak on-time service performance and the potential rail freight interference with that service. However, in doing so, it did not grant a *carte blanche* authority to launch into new fields of regulation.

DesertXpress also misstates Petitioner’s argument about oversight of interstate high-speed passenger service over tracks not part of the interstate rail network. *See* DesertXpress Reply at 5. Petitioners stated that DesertXpress and CNIMP, like Amtrak, are each a “railroad” within the meaning of 49 U.S.C. § 20102, and subject to the jurisdiction of the FRA over the safe

³ Competition with Amtrak is not contemplated by this portion of the policy statement because Congress in reclassified Amtrak as a “railroad” under §20102 eliminating its prior designation as a “rail carrier” under §10102(5). *See* Joint Petition at 34. Moreover, Section 214 of PRIIA created the first possibility for replacement of Amtrak service under very limited and highly constricted circumstances established for the Alternative Passenger Rail Service Pilot Program. *See* 49 U.S.C. §24711.

operation of these systems. Joint Petition at 32-35. They will not be “unregulated” in their operations; indeed, they do need to comply with state and local land use regulations until Congress decides that regulation is contrary to national interests. Moreover, CNIMP will be regulated in its rates charged to passengers by virtue of its ownership by CNSSTC, a public agency of Nevada. DesertXpress, which alleges that it will be privately owned and funded, may not have a regulator to oversee those rates, but the STB is not currently equipped with standards or legislative authority to fill that gap.

The regulatory regime described by Joint Petitioners is not an “improbable state of affairs” that violates any expressly stated Congressional design. DesertXpress Reply at 5. It is the DesertXpress vision of separate rail networks for passenger and for freight service – each with different rules, but each with Federal preemption – that lacks foundation in the statute. The Joint Petition explains that the Congressional design in 1995 was to eliminate sections relating to passenger rail service from ICCTA that involved matters then viewed as extraneous to the Board’s mission of regulating rail freight transportation, with only discrete and limited exceptions for Amtrak matters involving conflicts with freight railroads on the interstate rail network conferred by the Rail Passenger Services Act. *See* Joint Petition at 22, 24-25.⁴

DesertXpress takes comfort from declarations by the Federal Railroad Administration (“FRA”), issued in connection with its environmental review of the DesertXpress project, that construction and operation of the project are subject to STB jurisdiction. DesertXpress Reply at 6. Those statements evidence no thoughtful analysis of the STB’s jurisdiction, and are not

⁴ The definition of “transportation in ICCTA [section 10102(9)] remains unchanged from the prior definition in the IC Act [section 10102(26)], and retains the references to “equipment . . . related to the movement of passengers or property . . .” and “services related to that movement . . . and interchange of passengers and property.” This appears to be an oversight in ICCTA, which otherwise removed all vestiges of passenger rail jurisdiction. At most, this provision authorizes the Board jurisdiction over entities that operated over the general system of rail transportation referred to in the definition of “rail carrier” in section 10102(5).

entitled to any special deference. Indeed, the FRA's July 14, 2006 Federal Register Notice of Intent relating to the DesertXpress EIS describes the STB's jurisdiction as extending to regulation of abandonments of rail passenger service and rates charged by such carriers, matters for which the STB has no authority or regulations to implement.

When counsel for DesertXpress and IBT do venture beyond colorful rhetoric and into the substance of prior case law for their argument, the authority they cite for their vision falls short. DesertXpress cites four cases for the proposition that rail lines under section 10901 do not need to be connected to the interstate rail network in order to be "part of" the network. *See* DesertXpress Reply at 10-11. All four cases are "Trails Act" cases⁵ involving the abandonment of freight rail lines that, but for the Trails Act, would have been severed from the network. These decisions do not support DesertXpress's contention.

In Union Pacific RR. – Abandonment - Fort Bent, Austin, Wharton, and Colo. Counties, Tx, STB Docket AB-33 (Sub. No. 156) served December 1, 2006, a transit authority sought to terminate trail use over a five mile portion of the right-of-way in order to permit construction of a highway, but at all points along the five-mile segment there was preserved a five foot wide strip for trail use and a 50 foot wide corridor to "permit the future restoration of rail service." No separate system is contemplated by the facts of that case.

Chicago & N.W. Transp. Co. – Abandonment Exemption – Guthrie and Dallas Counties, IA, 1996 WL 360660 (June 11, 1996) involved replacement of a 0.6 mile segment of a 33-mile trail with a newly acquired adjacent piece of land to permit construction of a road. The STB found that nothing in the proposal would "contravene either the spirit or letter of the provision" preserving freight rights-of-way for future reactivation. *Id.* at 2.

⁵ *See*, 16 U.S.C. § 1247(d)

In *Chelsea Property Owners – Abandonment – Portion of the Consol. Rail Corp’s W. 30th St. Secondary Track in New York, NY*, AB-167(Sub-No. 1094A), served June 14, 2005, the STB rejected the argument that the Trails Act cannot be invoked in an adverse abandonment proceeding, particularly when the city had plans for alternative development. The Board reasoned that the City’s plans were still just plans, and because, even if restoration of rail service were difficult, the City was obligated to do whatever was necessary to make it possible. *Id.* at 9.

DesertXpress derives comfort for its position from language in the decision in *RLTD Ry. – Abandonment Exemption – in Leelanau Co., MI*, 1997 WL 671912 (October 20, 1997), a case cited in the Joint Petition for the proposition that, once a line of railroad is severed from the interstate network, the Board loses jurisdiction. *See* Joint Petition at 28-29. Notwithstanding the Board’s finding of no jurisdiction in that case, DesertXpress cites language in the decision that the severance of the network was “irrevocable” and “forever” in that case presumably because DesertXpress contemplates a possible future connection with the California High Speed Rail Authority (“CHSRA”) at Palmdale, California.⁶ There are several problems with this argument:

- CHSRA is proceeding to construction of its high speed service without seeking to invoke the STB’s jurisdiction under section 10901, and, therefore, cannot be part of the interstate rail network.⁷
- The Board’s core ruling in the *RLTD* case is that “[i]t is well settled that neither the ICC nor the Board has jurisdiction over lines that are not linked to and part of the interstate rail system.” *Citing, Magner – O’Hara Scenic Ry. v. ICC*, 672 F.2d 441 (6th Cir. 1982).

⁶ Clearly, this is a last minute effort to deal with the central flaw of the DesertXpress project: like the infamous bridge in Alaska, it is the train from Las Vegas to (with all due respect to the lovely town of Victorville) – nowhere. The service does not extend to the high congestion area of the Southern California Basin. The Verified Statement of Dr. Stone mentions nothing more than some meetings with CHSRA staff and local officials – no agreements or comments or timetable. *See* Stone V.S. at ¶ 4. In contrast, CNIMP will serve the intermodal hub at Anaheim in the core of the Southern California Basin with connections, not only to CHSRA, but to the Southern California Regional Rail Authority’s Metrolink commuter rail service.

⁷ *See* Joint Petition at 29.

- In *RLTD*, the line was found to be abandoned years prior to *RLTD*'s effort to revive STB jurisdiction in 1995 by filing a notice of interim trail use on the logic that the prior abandonment or discontinuance had never been consummated. Evidence that the former owner of the line had second thoughts about abandoning the line and that there was "the mere physical possibility" of connecting the abandoned segment to the network through an intermodal motor carrier connection were found not sufficient to overcome the evidence that the abandonment had been consummated. *Id.* Similarly, second thoughts by DesertXpress to possibly connect with another non-rail carrier system in California does not patch up its problem of not being part of the interstate rail network.

DesertXpress claims that its project "as envisioned" will operate as part of the interstate rail network because it will hold itself out to passengers as a common carrier and transports them across a state line. *See* DesertXpress Reply at 12. It contends that its passenger-only rail service over tracks that are not linked to the rail network that serves freight shippers is somehow consistent with section 10501(a)(2)(A). *Id.* It then attempts to explain away the language about removing STB jurisdiction over passenger transportation in the Committee reports preceding enactment of ICCTA by contending that the report language relates only to the exemption for mass transportation in 49 U.S.C. §10501(c)(2), and cites *Removal of Obsolete Regulations Concerning Rail Passenger Fare Increases*, STB Ex Parte No. 624, 2 S.T.B. 306, 308-09 and n. 6 (June 6, 1997).

This argument is without merit. First, the Senate and Conference Committee reports quoted in the Joint Petition are not limited to section 10501(c)(2) – they relate expressly to section 10501 in its entirety. *See* Joint Petition at 23.

Second, the partial exemption for mass transportation predated ICCTA, and would not have been the only change referred to in the quoted report language. The further narrowing of the STB role over "mass transportation" could not have been the sole action referred to by the

Conference Committee when it declared in the same sentence that “regulation of passenger transportation is generally eliminated.” *See* 49 U.S.C. §10504 in the pre-ICCTA code.⁸

Third, ICCTA deleted sections 10722, 10908 and 10909 from the IC Act that authorized the ICC to regulate passenger rates, to discontinue passenger service and discontinue or change intrastate passenger service. *See* Joint Petition, Appendix A at 39-40.

Finally, the *Removal of Obsolete Regulations* decision does not suggest in any way that the conference report language should be construed as a reference only to the mass transportation limitation in section 10501(c)(2). Rather, the *Removal of Obsolete Regulations* decision involved the elimination of regulations governing the filing by freight railroads of tariffs and statements with the ICC concerning commutation on suburban fare increases for services provided over their lines. A rail union opposed the total elimination of these regulations, and argued that the Board had jurisdiction under 49 U.S.C. § 721(b) to “require the submission of information [similar to the disclosure of rail common carrier freight rates under 49 U.S.C. § 11101(b) and (d)] concerning freight carrier participation in mass transportation related to local authorities.” *Id.* at 308. The Board rejected the suggestion citing the mass transportation exemption and proceeded to say:

Even as to rail passenger transportation that might not qualify for that exemption, our regulatory authority is quite limited. The vast bulk, if not all such transportation, is currently provided by Amtrak, over which we have no rate regulatory authority. The tariff filing requirements formerly applicable to rail carriers...have been repealed, and the circumstances under which we have authority to determine the reasonableness of rates are extremely limited.

⁸ Subsection 10504(b) provided that the ICC would not have jurisdiction over passenger fares unless the jurisdiction over such fares were conferred upon the ICC by a different statute and the chief executive officer of the state involved had no authority to approve or disapprove changes in fares.

Id. at 309. The Board cites no authority for its conclusion that there remains “extremely limited” jurisdiction over the reasonableness of passenger rates. In footnote 6, it cites the same language cited by Joint Petitioners from the Conference Report on ICCTA that speaks of “the curtailment of regulatory jurisdiction in such areas as passenger transportation” and the fact that “regulation of passenger transportation is generally eliminated” The quotation goes on to cite the exception to the mass transportation exemption that was added by ICCTA in section 10501(c)(3)(B) permitting certain local authorities that qualified as rail carriers prior to ICCTA to seek terminal access remedies under section 11102 and section 11103. That exception does not support the Board’s assertion in *dicta* that there may be “extremely limited” circumstances under which it could review the reasonableness of passenger rates. The only other citation in the Board’s decision is to section 11101(b) and (d). *Id.* at fn 7.⁹

The common carrier obligation created by section 11101, which is binding on all rail carriers, simply does not extend to passenger service. That ended with the creation of Amtrak. *See National Railroad Passenger Corporation v. Atchison, Topeka and Santa Fe Railroad Co., et al*, 470 U.S. 451, 455-56 (1985). Freight railroads are not required to provide rates for passenger services they are not required to perform. There is no indication that the Board’s regulations in 49 C.F.R. Part 1300 were intended to encompass passenger rates. Indeed, there are references to shippers and shipments in those regulations, but no reference to passengers. *See, e.g.*, 49 C.F.R. § 1300.3. However, the regulations do state that the requirements of Part 1300 “apply to any common carriage transportation or service provided by a rail carrier subject to the jurisdiction of the [Board]...under 49 U.S.C. 10501.” *Id.* at 1300.1(b). The only way to

⁹ Subsection (b) requires rail carriers to provide anyone who requests them the carrier’s rates and service terms. Subsection (d) creates a special publication requirement for certain agricultural products, and is not potentially relevant to passenger service.

construe these provisions consistently with one another is to construe the language of 49 U.S.C. § 10501(a)(2)(A) the way the Members of the Senate and House expressed it in their Conference Report in 1995, as being limited to carriers that are “part of” the interstate rate network operated by freight railroads.

DesertXpress and IBT contend the *State of Maine* line of cases relied upon by Joint Petitioners (*See* Joint Petition at 30-31) are not “particularly relevant” to the issue of interstate passenger-only rail lines because the entities involved in these cases are all local commuter rail authorities. DesertXpress Reply at 13 and IBT Reply at 8. These cases are relevant, not because of the limited geographical reach of these entities, but because they can become rail carriers under ICCTA in spite of their limited geographical reach simply by restricting the ability of freight carriers to fulfill their freight common carrier obligations. The importance of these cases is the nexus with freight transportation.

ICCTA extended the Board’s jurisdiction to intrastate movements, provided they were performed over lines that were “part of the interstate rail network.” *See* Joint Petition at 25. In doing so, ICCTA shifted the focus from whether specific services were or were not interstate, to whether they were related and “part of” the interstate rail network.

The DesertXpress Reply does not respond to the cases cited by the Petitioners construing the exception to the definition of “rail carrier” in 49 U.S.C. §10102(5), and IBT chose to ridicule the argument by focusing on the reference to the “steam” system of rail transportation in the original version of the exception in the Transportation Act of 1920. *See* IBT Reply at 11. The change of motive power technology used by the freight industry since 1920 is irrelevant because the focus of the language relating to the general system of rail transportation has not changed. The cases cited by Joint Petitioners hold that, if an interurban electric system interchanges cars

with a freight railroad, they are a rail carrier subject to ICC or STB jurisdiction and not subject to the exception. *See* Joint Petition at 25-27. “Street, suburban, or interurban electric railways” were passenger railways that once linked regions of the country, but they were exempt from ICC jurisdiction if they were not operated as part of the general system of rail transportation, regardless of whether the carriers operating on the system was powered by steam, diesel or electricity. The focus was freight service in conjunction with carriers engaged in that business on the general system of rail transportation.

IBT claims that the exception in section 10102(5) is irrelevant because it relates only to presumably intrastate street, suburban, and interurban railways and not to interstate passenger railroads. *See* IBT Reply at 11. The express language of the exception does not say anything about intrastate or interstate carriers. The only characteristic that converts these passenger rail entities to rail carriers under ICCTA is their participation in the interchange of freight with the carriers that operate on that network. IBT’s effort to distinguish *Ry. Labor Executives’ Association v. Interstate Commerce Commission*, 859 F.2d 996 (D.C. Cir. 1988) on the ground that the entity that owned the line in question “was an intrastate railroad” fails because, prior to the abandonment of the freight service over the line, it had been considered a rail carrier under the Railway Labor Act.¹⁰ The stripes on the zebra changed when it terminated the freight service over the line and it had nothing to do with whether the entity was interstate or intrastate.

IBT takes a slightly different tact on the *States of Maine* Cases, contending that they are wrongly decided: “[s]imply put, the acquisition of a line of railroad that is used in interstate commerce is a transaction subject to STB jurisdiction.” IBT Reply at 13. That may be simple,

¹⁰ Section 151 First of the Railway Labor Act incorporates the same language as appears in section 10102(5).

but it is not what ICCTA says. Rather, the rail line acquired must be operated “as part of the interstate rail network.” There is no question that such lines are subject to the STB jurisdiction, and the *State of Maine* cases simply hold that transactions that do not impact the freight transportation on those lines are not subject to the STB’s jurisdiction. *A fortiori*, when the rail trackage does not transport freight or serve rail shippers, there is no jurisdiction.

II. Petitioners’ Delayed Filing Cannot Confer Jurisdiction Where Congress Has Not Done So

DesertXpress and IBT speculate about the sinister motives that explain the timing of the filing of the Joint Petition.¹¹ AMG’s President has testified that the filing did not occur earlier because the prospects for raising seed funding for the CNIMP were uncertain. Even with the enactment of the Technical Corrections Bill there remained the issue of finding the matching funds to qualify for receiving the \$45 million designated for the project. Enactment of the Recovery Act funding for high speed rail projects has now provided impetus for AMG’s joint venture partners to contribute those funds so that the final studies could be promptly completed. *See Cummings Rebuttal Verified Statement at ¶ 6, attached hereto at Exhibit 1.*

IBT claims that the reasons cited by Joint Petitioners explaining the lateness of their filing are “obviously frivolous,” but concedes that subsequent events concerning potential funding of CNIMP “tipped the cost-benefit analysis for them so they now feel it worth the effort and expenditure of money to contest the status of DesertXpress.” *See IBT Reply Brief at 4, 5.* Joint Petitioners object, not to the characterization of the changed circumstances that led to their

¹¹ DesertXpress states that the decision to file Joint Petition at this “is certainly suspicious,” and that it was done only after a great deal of time, effort, and resources had been spent on the draft EIS. *See DesertXpress Reply at 7-8.* Joint Petitioners show *infra* that the time, effort and resources devoted to the draft EIS are not wasted, and there is simply no basis to suggest Joint Petitioners sought to lull DesertXpress into unneeded expenditures. Joint Petitioners have made clear that its position is that DesertXpress and CNIMP must be processed in the same manner – both requiring preparation of EIS’s and both complying with state and local land use controls.

filing, but to the alleged consequence upon the inquiry into the Board's subject matter jurisdiction.

IBT makes two arguments for not reopening the proceeding: (1) a non-party's assertion of material error two years after the decision, "even if CNSSTC and Magline were correct in their assertions of material error," would not justify reopening; and (2) because the Board is not subject to the constraints (such as adhering to precedent) imposed upon lower Federal courts under Article III of the Constitution, the *Central States* ruling, cited in the Joint Petition at 17-18 for the proposition that subject matter jurisdiction can be raised at any time, does not apply to decisions by the STB. *See* IBT Reply at 5-6.

There are two responses to these arguments: (1) the STB has acknowledged under its jurisprudence that jurisdictional issues can be raised at any time; and (2) DesertXpress has not yet applied for its section 10901 application to construct a rail line, and the issue will need to be reexamined at that time in any event.

In *Consolidated Papers, Inc. et al. v. Chicago and Northwestern Transportation Co., et al.*, 7 I.C.C.2d 330, at 332 (February 19, 1991), a case remanded from the U.S. court of Appeal for the Seventh Circuit, the I.C.C. accepted additional testimony about jurisdictional issues six years after the initial decision, and stated:

We are not legally precluded from reopening an issue. Indeed, our jurisdiction over the rate reasonableness issues hinges on whether the railroads have market dominance, and jurisdictional questions may always be reexamined.

See also, Kansas City Power & Light Co. v. Union Pacific Railroad Company, 2006 WL 2088353 at 3 (served July 27, 2006) (" . . . subject matter jurisdiction can be raised at any time and cannot be waived by a party."); *CSX Transportation Inc. – Abandonment Exemption – In Rocky Mount, Nash County, NC*, 2000 WL 1092878 at 2 (served July 27, 2000) ("Furthermore, it

is well-established that subject matter jurisdiction may be raised at any time . . . Therefore, the timing of the City’s filing of its motion is irrelevant to the question of our jurisdiction over the involved trackage.”); *Amstar Corp. v. The Alabama Great Southern Railroad et al.*, 1989 WL 238036 (served January 25, 1989) at 2 (“Our decision noted that our subject matter jurisdiction is defined by statute, is always in issue and may be raised at any time . . . Although courts frequently have recognized the need for administrative finality, they have not done so where the submission of germane evidence is pertinent to an agency’s jurisdiction.”).

Aside from the legal precedent, there is the pragmatic point that the Board will need to face this issue sooner or later when DesertXpress files its section 10901 case. It is better for all parties to this proceeding, as well as third parties, that this issue be resolved now. The Board should grant the Joint Petition to Reopen, and resolve the significant issues raised by it.

III. CNIMP is a Viable Project that Offers the Potential for Superior Service in the Las Vegas-Southern California Market

Rather than addressing the legal and jurisdictional issues raised by Petitioners, DesertXpress opts to attack the viability of CNIMP on the basis of its ability to obtain funding, as well as its ridership and cost estimates. However, despite DesertXpress’s attempts to discredit the project, CNIMP is quite viable and offers the potential for superior service in the Las Vegas-Southern California Corridor.

A. CNIMP is the Better Proposal for High Speed Service in the Corridor and Petitioners are Moving Forward to Develop the Project

CNIMP is the better proposal for high speed service in the Southern California to Las Vegas corridor, and petitioners are making progress in obtaining the funding necessary for the project to move forward.

First, Despite DesertXpress's assertion that there is a "very real possibility that this hurdle [obtaining non-federal matching funds] will never be overcome,"¹² approximately \$12 million in non-federal matching funds have now been committed by AMG. In particular, as demonstrated by a letter of support dated April 17, 2009, AMG has committed to provide the 20% of non-federal matching funds necessary to access the federal share of up to \$45 million provided for in the 2008 SAFETEA-LU Technical Corrections Act. *See Cummings Rebuttal V.S. at ¶ 5.*

Second, Petitioners are eligible for funding pursuant to the American Recovery and Reinvestment Act of 2009, P. L. 111-5 ("ARRA"), which appropriated \$8 billion for capital assistance for high speed rail corridors and intercity passenger rail service, and President Obama has included an additional \$1 billion for this program in his FY 2010 budget.¹³ While funding availability under section 502 of ARRA is limited to corridors designated by the FRA, and Los Angeles to Las Vegas is not now a designated corridor, CNIMP remains eligible for funding pursuant to 49 U.S.C. 26101 et. seq. (intercity passenger rail capital assistance grants) and 49 U.S.C. 24105 (congestion grants) under ARRA. *See Cummings Rebuttal V.S. at ¶ 6.* In addition, future opportunities exist to obtain Section 502 funding based upon the "Strategic Plan" recently released by the U.S. Department of Transportation, which expressly identifies the new, soon to be released "National Rail Plan" as "an opportunity to revise the high-speed rail designations [i.e. the previous 10], including a new category of approved corridors, i.e. those corridors for which a detailed corridor plan and institutional framework are in place to permit

¹² DesertXpress Reply at 15.

¹³ *See* President Obama's Fiscal Year 2010 Budget, Federal Railroad Administration, Capital Assistance for High Speed Rail and Intercity Passenger Grants.

development of a successful corridor that meets the national goals.”¹⁴ *See id.* Several localities in California have submitted letters in support of CNSSTC’s request for funding pursuant to ARRA.¹⁵ *See Cummings Rebuttal V.S. at ¶ 7.*

B. CNIMP is Part of Key State and Regional Plans of California and Nevada

The viability of CNIMP is also evidenced by its inclusion as part of the key transportation plans of California and Nevada, and also the regional transportation plans for both Southern California and Southern Nevada, while the DesertXpress project is not identified in any of the regional transportation plans. *See Cummings Rebuttal V.S. at ¶ 8.*

CNIMP is included in the Regional Transportation Commission of Southern Nevada’s (“RTCSNV”) Unified Planning Work Program (“UPWP”) as a non-UPWP funded project.¹⁶ DesertXpress is not mentioned in the UPWP, nor is it listed in RTCSNV’s Transportation Improvement Program (“TIP”) or in the project list in the Regional Transportation Program (“RTP”). *See Cummings Rebuttal V.S. at ¶ 8.* In addition, CNIMP is identified in the Southern California Association of Governments’ (“SCAG”) most recent RTP.¹⁷ *See id.* CNIMP is also included

¹⁴ *See Vision for High-Speed Rail in America*, at p. 18, *available at* <http://www.fra.dot.gov/Downloads/RRdev/hsrstrategicplan.pdf>.

¹⁵ Letters of support have been sent to Secretary LaHood by the Mayors of the cities of Ontario and Anaheim, California, and Las Vegas, Nevada, as well as the Chairman of the Orange County Transportation Authority, and the Chairman of the San Bernadino County Board of Supervisors.

¹⁶ *See Regional Transportation Commission of Southern Nevada, Amendment to Unified Planning Work Program for FY 2008-2009*, p. 70, *available at* http://www.rtcsonthernnevada.com/mpo/plansstudies/documents/amend_upwpfy08-08.pdf.

¹⁷ SCAG is the California regional metropolitan planning organization (“MPO”) that stretches from the California coast to the Nevada state line. *See Southern California Association of Governments, Regional Transportation Program 2008*, at p. 114, *available at* http://www.scag.ca.gov/rtp2008/pdfs/finalrtp/f2008RTP_Complete.pdf.

in the Orange County Transportation Authority's ("OTCA") RTP.¹⁸ *See id.* The DesertXpress project is not included in SCAG's RTP, and is not supported by SCAG, nor is it referenced in the OTCA's RTP. *See id.*

In addition, CNIMP will be included in the Caltrans Division of Rail's "2009-10 to 2019-20 California State Rail Plan" and is currently included in 2007-08 Plan *See Cummings Rebuttal V.S. at ¶ 9.* CNIMP is also included in the State of Nevada Department of Transportation's ("NDOT") "Statewide Transportation Plan – Moving Nevada Through 2028." *See Cummings Rebuttal V.S. at ¶ 9.*

C. Criticism of Traffic Studies Reflects Ignorance of Transportation Markets Served by CNIMP that are not Part of the DesertXpress Proposal

In addition to attacking the viability of CNIMP from a funding perspective, DesertXpress challenges the project's ridership estimates of more than 42 million passenger trips per year as being incredible in light of the population of California, which is 37 million. *See Stone V.S. at ¶ 8.* Importantly, CNIMP's ridership forecasts are based on estimates for 2025, using adopted regional-growth forecasts. *See Cummings Rebuttal V.S. at ¶ 10.* The ridership forecasts were prepared by Parsons and URS using the SCAG regional travel demand model for the Southern California region and travel information supplied by member jurisdictions of the CNSSTC.¹⁹ *Id.*

The CNIMP ridership estimates prepared by URS and Parsons are supported by ridership studies prepared by other organizations independent from CNIMP. *See Cummings Rebuttal V.S.*

¹⁸ *See* Orange County Transportation Authority 2006 Long-Range Transportation Plan, p. 42, available at <http://www.octa.net/uploadedfiles/Files/pdf/lrtp06.pdf>.

¹⁹ The member jurisdictions are SCAG, San Bernadino Associated Governments ("SANBAG"), Orange County Transportation Authority ("OCTA"), City of Anaheim, City of Ontario, City of Victorville and City of Barstow.

at ¶ 11. For instance, a ridership model prepared by SCAG generates an average of 55.5 million individual passenger trips per business day for all modes in the Southern California market during 2000. *See id.* CNIMP projects that it will attract between 7-9% of those trips in the submarkets it will serve. *Id.* These data were part of the Full Corridor Project Study for CNIMP submitted to FRA on June 1, 2005. *See id.* FRA has never questioned or rejected those estimates. In addition, CNIMP will also serve the Las Vegas to Primm/Ivanpah International Airport and the Anaheim to Ontario International Airport markets, both of which will contribute to the rides projected for the CNIMP. These segments will serve as airport connectors to (1) a modern new airport in Southern California (Ontario), which is now operating at only 30% of capacity and is the airport that will experience growth in the future as LAX (Los Angeles) and John Wayne (Orange County) airports reach their maximum capacities in the next 5-10 years; and (2) the proposed Ivanpah International Airport at Primm, Nevada. These are the new airports in Nevada and Southern California that are projected to accommodate the immense future growth in the region.

It is important to understand one fundamental difference between CNIMP and DesertXpress: CNIMP is designed to serve passenger trips within the Los Angeles Basin between Anaheim and Barstow; and DesertXpress is not. DesertXpress proposes to serve only one market – Las Vegas to Victorville – with no direct service into the major area of traffic congestion between Victorville and the Los Angeles Basin. In fact, the RCTSNV formed an Advisory Panel and retained an independent consultant (IBI Group) to conduct a feasibility study analyzing the different high-speed train options for traveling between Los Angeles and Las

Vegas.²⁰ The study rejected the concept of a Las Vegas to Victorville stand-alone train as not feasible due to low ridership.²¹ This conclusion is supported by findings in other contexts. Sponsors of other high speed projects stated that high levels of demand for *intercity* travel are needed to justify a new high speed rail line.²² For instance, officials in Japan stressed the importance of connecting several high-population areas along a corridor as a key factor in the high number of riders on their system. The CNIMP will connect several high-population areas along its corridor while DesertXpress will serve only one high-population market.

Finally, there is no evidence that DesertXpress's purported coordination of its project with the CHSRA to facilitate connection of DesertXpress with the planned CHSRA high-speed rail system at the proposed intermodal station in Palmdale, California has moved beyond the preliminary discussion stage. No plans, no agreements and no time schedule have been offered for implementation of such an extension.

D. Costs of CNIMP Do Not Approach the Levels Suggested by DesertXpress

Moreover, the costs of building CNIMP do not approach the levels suggested by DesertXpress in their reply. For instance, DesertXpress cites to a study conducted by BSL Management Consultants comparing the option of Maglev with high speed rail in the Las Vegas

²⁰ See "Regional Transportation Commission of Southern Nevada Las Vegas to Los Angeles Rail Corridor Improvement Feasibility Study," (June 2007), available at <http://www.rtcsonthernnevada.com/mpo/plansstudies/documents/la-vegas-RailStudy.pdf>.

²¹ *Id.* at p. 66.

²² See General Accountability Office ("GAO") Report to Congressional Requesters, *High Speed Passenger Rail: Future Development Will Depend on Addressing Financial and Other Challenges and Establishing a Clear Federal Role*, March 2009, p. 12, available at <http://www.gao.gov/new.items/d09317.pdf>, [hereinafter GAO Report]. For instance, officials in Japan stressed the importance of connecting several high-population areas along a corridor as a key factor in the high number of riders on their system.

to Southern California Corridor.²³ *See* DesertXpress Reply at p. 14. The study compared recent Maglev studies and concluded that CNIMP's cost per mile would likely be somewhere between \$60 and \$199 million, for an overall total construction cost of between \$16 and \$52 billion.²⁴

What DesertXpress fails to note is that the BSL study uses the German Transrapid projects as the main source for the Maglev data, asserting that the "German Transrapid experience undoubtedly provides the best commercial reference for the California-Nevada case."²⁵ However, the BSL study relies on data generated in Germany, principally with the Berlin-Hamburg project that is not applicable to CNIMP. First, these types of projects are site specific and depend to a high degree on the geography, the extent of elevated and at-grade construction and other characteristics. Cost estimates from completely different markets cannot reliably be used as determinative of costs associated with CNIMP. CNIMP will construct large segments of its route at grade with lower costs than the Berlin-Hamburg proposal. *See* Cummings Rebuttal V.S. at 12.

Second, Joint Petitioners filed an estimate of \$12 billion in 2005. *See* Cummings Rebuttal V.S. at ¶ 12. The estimate was prepared by the AMG partners, General Atomic, Hirschfield Steel, and Parsons Transportation Group, and AMG team member Transrapid International – USA representing the maglev technology developers, which are the parties that have contracted to build the CNIMP under licenses from *Transrapid*TM. *See id.* Because prices of components have fluctuated, *e.g.*, steel has gone up and down since 2005, estimates now

²³ *See* Southern California Logistics Rail Authority, *Maglev or High Speed Rail in the Las Vegas to Southern California Corridor*, Hamburg, Nov. 2008, available at <http://www.victorvillecity.com/documents/bslreport.pdf>.

²⁴ *Id.* at pp. 15-16.

²⁵ *Id.* at 5.

project that the CNIMP will cost between \$12 and \$15 billion to construct, or \$44.6 million to \$57.8 million per mile. *See id.* However, in light of the current state of the economy, and economies of scale learned during construction, the total cost could be well less than \$12 billion. *Id.*

E. CNSSTC Remains A State Agency of Nevada and has a Bi-State Board

CNSSTC is a public agency chartered within the state of Nevada which has operated from its inception as a California non-profit public benefit corporation. It was established by the States of Nevada and California in 1998,²⁶ is a state agency of Nevada, and has a bi-state Board comprised of representatives who are public officials from both Nevada and California. *See Cummings Rebuttal V.S. at ¶ 3.* Further, as a non-profit public benefit corporation, all net operating profits will accrue to the public entity.

F. DesertXpress Claims to be Privately-Funded but Seeks Public Subsidization in Form of Right-of-Way from Las Vegas to Victorville

DesertXpress proudly claims to be a privately financed project that will not require public tax dollars. *See DesertXpress Petition at p. 4.* However, the majority of the track used for the project would be constructed through public rights-of-way on property owned by the BLM, with easements permitted for transportation use to the California and Nevada Departments of Transportation for Interstate-15.²⁷ *Id.* at 4-5. DesertXpress's plan to seek use of the public right-

²⁶ The DesertXpress Reply notes that the legislation enabling the CNSSTC in California is no longer in effect. *See DesertXpress Reply at 5.* However, this point is largely without significance. The enabling legislation in California was allowed to expire because California formed a commission to look at the Los Angeles to San Francisco corridor instead of the Anaheim to Las Vegas corridor. The practical effect of the enabling legislation no longer being in place has no relevance for the viability of CNIMP. *See Cummings V.S. at ¶ 3.*

²⁷ Even with some public subsidization, privately-funded high speed rail projects fail before they are built. One example of this cited in the GAO report is the proposed "Texas TGV" which would have provided service to Dallas, Forth Worth, Dallas/Fort Worth Airport, Houston, Austin, and San Antonio, and was prohibited by the Texas High Speed Rail Authority Act from using public funds for constructing the system. The GAO report also found

of-way along I-15 under easements from BLM to Caltrans and NDOT indicate that this project will, rather than being “privately-financed,” in fact be heavily subsidized by the public. If the project were capable of generating net income after paying debt service and operating expenses, there has been no comment that the public will receive any of the revenues from the project.

IV. DesertXpress Will Not Suffer Serious Harm or Prejudice as a Result of Reopening This Proceeding

A. The \$25 Million DesertXpress has Spent Will Not Be Wasted

Despite DesertXpress’s assertion, reopening this proceeding after two years will not result in significant harm and unjust prejudice to DesertXpress. In particular, DesertXpress claims that it has relied upon the Board’s 2007 decision, and has invested over \$25 million to bring its project closer to the point of implementation in specific reliance on the Board’s declaratory order. *See* DesertXpress Reply at p. 9. However, DesertXpress fails to explain why the \$25 million it has spent to generate environmental and engineering data for FRA’s DEIS and other activities will have been wasted if Petitioners are allowed to intervene in a reopened proceeding that overturns the original DesertXpress decision.

The Joint Petition does not request, and will not result in, termination of the DesertXpress project. Regardless of whether the Board has jurisdiction over DesertXpress, the expenditures to support environmental studies for the DEIS will be necessary. DesertXpress will require BLM and FHWA approvals to proceed with its project, and thereby will trigger the need to comply with NEPA. The only effect of the Board’s granting of Petitioners’ request to reopen and

that the success of high speed rail projects in foreign countries was due to the willingness of the governments to pay up-front construction costs with no expectation that the investments would be recouped through ticket revenues. *See* GAO Report, p. 5.

intervene in this proceeding is that DesertXpress can no longer presume that state and local land use restrictions are preempted.

B. DesertXpress is Not Blameless for Its Failure to Address the Language of 10501(a)(2) of ICCTA in its Original Petition

Finally, while Petitioners believe DesertXpress has greatly overstated the prejudice and harm that will result to them should the Board reopen this proceeding and permit Petitioners' intervention, DesertXpress bears responsibility for its failure to address the issue of its absence of connection with the interstate rail network. DesertXpress's theory of separate, unconnected segments of the interstate rail network did not surface until the Reply it filed in response to the Joint Petition. That failure is at least partially responsible for the need to revisit the Board's ruling because of its failure to cite and discuss section 10501(a) of ICCTA. By avoiding any discussion in its Petition of this key threshold issue,²⁸ DesertXpress created a situation in which it asked for a decision to be rendered on incomplete facts.

V. **Possible Prejudice Created by Congressional Communication**

Counsel for DesertXpress provided counsel for Petitioners a copy of a letter, dated April 29, 2009, from U.S. Senator Harry Reid to Acting Chairman Mulvey which purports to express the Senator's views on the pending Joint Petition. To Joint Petitioners' knowledge, the letter has not been placed on the public record or served upon the parties of record.

Senator Reid has been a supporter of the CNIMP, and he was instrumental in assisting Joint Petitioners in obtaining enactment of the legislative language in the SAFETEA-LU

²⁸ As noted in the Joint Petition, DesertXpress's petition makes only a fleeting reference to the requirement that the transportation be part of the interstate rail network, and summarily asserts that its construction should be equivalent to the reactivation of the BNSF Stampede Pass rail freight line that had been abandoned, yet remained connected to the rail network by operation of the Trails Act. *See* Joint Petition at 6.

Technical Corrections Act of 2008 that directs allocation of \$45 million for studies to implement the CNIMP, for which Joint Petitioners are grateful. Nevertheless, Joint Petitioners are concerned that this communication, in the context of this formal adjudicatory proceeding, could raise questions about the ability of Acting Chairman Mulvey to exercise independent judgment in resolving the merits of the pending Joint Petition, particularly in the context of role Congress plays in the confirmation of a new member of the Board who may or may not fill the position of the Board's Chairman. *See Congressional Ethics and Constituent Advocacy in an Age of Mistrust*, 95 Mich. L. Rev. 1 (October, 1996) at 39-43.

Under these circumstances, Joint Petitioners contend that the letter is objectionable, and request that it be disregarded in the Board's resolution of the Joint Petition.

CONCLUSION

Joint Petitioners have shown that there simply is no statutory language, no case law and no legislative history to support the notion that the Board has jurisdiction over passenger-only interstate railroads not connected with interstate rail network, that cannot be operated as a part of the interstate rail freight network and that cannot serve rail shippers along their rights-of-way. Moreover, reopening this case nearly two years after the STB's initial decision imposes no significant harm or injustice upon DesertXpress or third parties who could have relied upon that decision. The STB has issued no authority under section 10901, and it should resolve this

question before it is asked to do so. The Board should grant the Joint Petition, reopen the proceeding and correct the error made in its June 27, 2007 decision.

Respectfully submitted,

A handwritten signature in black ink, appearing to read "Robert P. vom Eigen". The signature is fluid and cursive, with a large, stylized initial 'R'.

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

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

Filed May 11, 2009

EXHIBIT 1

**Before the
SURFACE TRANSPORTATION BOARD
Washington, D.C.**

Finance Docket No. 34914

DESERTXPRESS ENTERPRISES, LLC—PETITION FOR DECLARATORY ORDER

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

1. My name is M. Neil Cummings, and I am President of a joint venture called the American Magline Group ("AMG"). I have practiced law for 30 years, specializing in business litigation and transactions. My business address is 11150 W. Olympic Blvd., Suite 1050, Los Angeles, CA 90064.
2. This statement supplements the Verified Statement that I provided in support of the Joint Petition by California-Nevada Super Speed Train Commission and American Magline Group to Reopen which was filed with the Board on April 8, 2009.
3. In 1997, AMG was selected by, and entered into, an exclusive public-private partnership agreement with the California Nevada Super Speed Train Commission ("CNSSTC"), a bi-state Commission, and a non-profit public benefit corporation, established by the states of Nevada and California in 1988 to design, build, and operate the California-Nevada Interstate Maglev Project ("CNIMP). CNSSTC was then, and is now, a Nevada "state agency." While the statute enabling CNSSTC in California was allowed to expire because the state formed a commission to look at the Los Angeles to San Francisco corridor rather than the Los Angeles to Las Vegas corridor, the practical effect of the expiration of the enabling legislation has no relevance for the viability of

CNIMP. CNSSTC continues to be comprised of 16 Commissioners, 8 of whom are from California and include the Mayor of Anaheim, the former Mayor of Barstow, a Supervisor representing San Bernardino County, and a Councilman representing the City of Ontario.

4. In my prior Verified Statement, I indicated that I first obtained knowledge of the DesertXpress project on July 14, 2006 when the Federal Railroad Administration ("FRA") first published its notice of intent to Prepare an EIS for the DesertXpress Project.¹ However, in their Reply to the Joint Petition, DesertXpress states that "Petitioners have been aware of the Project's existence since at least July 14, 2004, when Transmax, a founding DesertXpress partner, submitted comments at the environmental scoping meetings for the CNIMP" DesertXpress Reply at 4. Despite this assertion, I was not aware of Transmax's involvement in the CNIMP environmental scoping meetings. To my knowledge, no other person associated with either AMG or CNSSTC had knowledge of Transmax's participation in the 2004 CNIMP scoping meetings.

5. Since submission of my prior Verified Statement, AMG has committed to provide the 20% of non-federal funding that is necessary to match the 80% federal share of up to \$45 million in contract authority required by law to be allocated "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." This funding is provided pursuant to the SAFETEA-LU Technical Corrections Act of 2008 ("TC Act"), at Section 102(d)(1).

¹ Cummings V.S. ¶ 18.

6. In addition to the \$45 million of TC Act funding allocated to CNIMP, CNIMP is also eligible for funding pursuant to the American Recovery and Reinvestment Act of 2009 ("ARRA"), which appropriated \$8 billion for capital assistance for high speed rail corridors and intercity passenger rail service; and President Obama has included an additional \$1 billion per year in his FY2010 budget. Enactment of the ARRA funding for high speed rail projects provided the impetus for AMG's joint venture partners to contribute the non-federal funding necessary to obtain funding under the TC Act. While funding availability under section 502 of ARRA is limited to corridors designated by the Federal Railroad Administration, and Anaheim to Las Vegas is not now a designated corridor, CNIMP remains eligible under ARRA for funding pursuant to 49 U.S.C. 26101 et. seq. (intercity passenger rail capital assistance grants) and 49 U.S.C. 24105 (congestion grants) under ARRA, and could become eligible for Section 502 funding in the future.

7. CNIMP is widely supported by the States of California and Nevada, as well as by the affected localities in these states.² In fact, the Mayors of the cities of Anaheim and Ontario, California and Las Vegas, Nevada, the Chairman of the San Bernardino County Board of Supervisors, and the Chairman of the Orange County Transportation Authority ("OCTA") have all submitted letters supporting CNIMP's request for funding pursuant to ARRA.³

² See, e.g., Letter from Will Kempton, Director of California Department of Transportation, to Secretary Ray LaHood, U.S. Department of Transportation, March 31, 2009, attached hereto as Exhibit 2.

³ Letter from Paul S. Leon, Mayor, City of Ontario, California, to Secretary Ray LaHood, U.S. Department of Transportation, March 20, 2009; letter from Curt Pringle, Mayor, City of Anaheim, California, to Secretary Ray LaHood, U.S. Department of Transportation, March 25, 2009; letter from Peter Buffa, Chairman, Orange County Transportation Authority, to Secretary Ray LaHood, U.S. Department of Transportation, March 23, 2009, attached hereto as Exhibit 3.

8. CNIMP is included as part of the key transportation plans for both California and Nevada, as well as the regional transportation plans for both Southern California and Southern Nevada. In addition, CNIMP is also identified in the Southern California Association of Governments' most recent Regional Transportation Plan ("RTP"), as well as in the Orange County Transportation Authority RTP. To my knowledge, the DesertXpress project is not included in any of the regional (RTP) plans.

9. CNIMP will be included in the Caltrans Division of Rail's "2009-10 to 2019-20 California State Rail Plan" and is currently included in 2007-08 Plan. CNIMP is also included in the State of Nevada Department of Transportation's ("NDOT") "Statewide Transportation Plan – Moving Nevada Through 2028."

10. CNIMP's ridership estimates were prepared by URS and Parsons using the SCAG (the regional MPO for the entire Southern California region from the ocean to the California-Nevada state line) regional travel demand model for the Southern California region and travel information supplied by member jurisdictions of the CNSSTC. The ridership forecasts are based on estimates for 2025, using adopted regional-growth forecasts.

11. The CNIMP ridership estimates prepared by URS and Parsons are supported by ridership studies prepared by other organizations independent from CNIMP. For example, SCAG generated a ridership model that estimates an average of 55.5 million individual passenger trips per business day for all modes in the Southern California market during 2000. CNIMP projects that it will attract between 7-9% of those trips in the submarkets it will serve. These data were part of the Full Corridor Project Study for CNIMP submitted to FRA on June 1, 2005. To my knowledge, FRA has never questioned those estimates.

12. AMG Partners, General Atomic, Hirschfield Steel, and Parsons Transportation, and AMG team member Transrapid International – USA (representing the maglev technology developers), prepared the cost estimate for construction of CNIMP. They are the parties that will construct CNIMP, and have offered good faith estimates of their own costs of construction. The project will be constructed over long stretches at grade, and costs for other projects are not comparable. In 2005 dollars, the estimate is approximately \$12 billion. Because prices of certain project components such as steel have fluctuated in recent years, current estimates conservatively project that the cost for constructing CNIMP will be between \$12 and \$15 billion for the 269 mile project, but given the poor state of the economy and economies of scale learned during construction the total cost could well be less than \$12 billion.

13. Commissioners are nominated and appointed pursuant to the Bylaws of the CNSSTC, which is now and always has been a California non-profit public benefit corporation created for the sole purpose of building the CNIMP, with the support of a franchisee to be selected by the CNSSTC (the AMG was selected in 1996). The 8 Commissioners representing Nevada also continue to receive appointments from the Governor of Nevada. The 8 Commissioners representing California do not receive appointments from the Governor but many are elected officials who represent the cities and counties along the corridor (e.g. the Mayor of Anaheim (Curt Pringle) and the Chairman of the San Bernardino County Board of Supervisors (Gary Ovitt)). This is consistent with transportation planning in California, where virtually all transportation planning, funding and construction originates from and is authorized first by the county (not state) transportation authorities (such as the OCTA and San Bernardino Associated Governments (SANBAG) in the CNIMP Corridor). The CNIMP has enjoyed the support of the OCTA and SANBAG for many years.

VERIFICATION

State of California

County of Los Angeles,

SS:

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

Signed: _____



Subscribed and sworn to before me this __ day of May 2009.

Notary Public of _____

My Commission expires _____

CALIFORNIA JURAT WITH AFFIANT STATEMENT

State of California

County of LOS ANGELES } ss.

- See Attached Document (Notary to cross out lines 1-6 below)
- See Statement Below (Lines 1-5 to be completed only by document signer[s], not Notary)

1 _____
 2 _____
 3 _____
 4 _____
 5 _____
 6 _____

 Signature of Document Signer No. 1

 Signature of Document Signer No. 2 (if any)

Subscribed and sworn to (or affirmed) before me on this

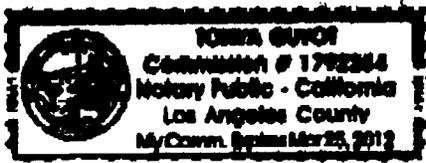
11th day of May 2009 by
Date Month Year
 (1) M. NEIL CUMMINGS
Name of Signer

- Personally known to me
- Proved to me on the basis of satisfactory evidence in the person who appeared before me (,) (,)

(2) _____
Name of Signer

- Personally known to me
- Proved to me on the basis of satisfactory evidence to be the person who appeared before me.)

[Signature]
 Signature of Notary Public



Place Notary Seal Above

OPTIONAL

Though the information below is not required by law, it may prove valuable to persons relying on the document and could prevent fraudulent removal and reattachment of this form to another document.

Further Description of Any Attached Document

VERIFIED STATEMENT OF M. NEIL CUMMINGS IN SUPPORT OF THE BATTLE BY CALIFORNIA-NEVADA SUPER SPEED RACING COMMISSIONS AND A RACE TRACK MANGINE GROUP

Document Date: 5-11-09 Number of Pages: 7 PAGES

Signer(s) Other Than Named Above: NONE

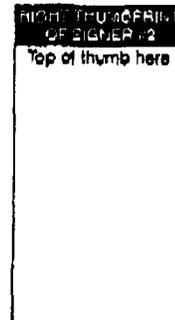
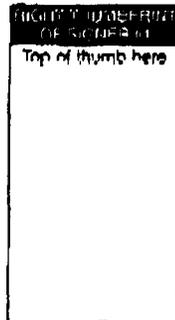


EXHIBIT 2

DEPARTMENT OF TRANSPORTATION

OFFICE OF THE DIRECTOR
1120 N STREET, MS-49
SACRAMENTO, CA 95814-5680
PHONE (916) 654-5266
FAX (916) 654-6608
TTY 711



*Flex your power!
Be energy efficient!*

March 31, 2009

The Honorable Raymond H. LaHood
Secretary of Transportation
U.S. Department of Transportation
1200 New Jersey Avenue SE
Washington, DC 20590

Dear Secretary LaHood:

The California Department of Transportation (Caltrans), as a cooperating agency under a four-party Memorandum of Understanding (MOU) with the Nevada Department of Transportation (NDOT) the California-Nevada Super Speed Train Commission (Commission), and the Federal Railroad Administration (FRA) in the preparation of a combined Program Environmental Impact Statement/Program Environmental Impact Report relating to the proposed California-Nevada Interstate Maglev Project between Las Vegas, Nevada and Anaheim, California, is pleased to learn that the Commission will be meeting with you on April 1, 2009, to discuss the status of this project. It is my understanding that the local support for this project includes the Southern California Associated Governments, the Orange County Transportation Authority, and the San Bernardino Association of Governments as well as the California cities (Anaheim, Ontario, Victorville, and Barstow) along the planned 269-mile route.

A notice was published in the Federal Register on May 20, 2004, initiating the Programmatic Environmental Impact process for this project. Caltrans has been an ongoing participant in this process and looks forward to cooperating further with NDOT, the Commission, and FRA to achieve the required "Record of Decision," which will allow this project to move forward to construction.

High-speed rail and the new technologies it offers (including maglev) have the potential to create new jobs and industries while offering "green" transportation options. Caltrans will continue to participate in this effort, which will place California at the nation's forefront for implementing high-speed ground transportation.

Sincerely,

A handwritten signature in black ink, appearing to read "Will Kempton".

WILL KEMPTON
Director

The Honorable Raymond H. LaHood

March 31, 2009

Page 2

c: Mark Yachmetz, Associate Administrator, Office of Railroad Development, FRA
Senator Harry Reid
Congresswoman Shelley Berkley, 1st District, Nevada
Congresswoman Dina Titus, 2nd District, Nevada
Congressman Gary Miller, 42nd District, California
Congressman David Dreier, 26th District, California
Congressman Jerry Lewis, 41st District, California
Congressman Joe Baca, 43rd District California
Congresswoman Loretta Sanchez, 47th District, California
Regina V. Evans, Deputy Cabinet Secretary, Office of the Governor
Dale E. Bonner, Secretary, Business, Transportation and Housing Agency

EXHIBIT 3

CITY OF



ONTARIO

303 EAST "B" STREET, CIVIC CENTER

ONTARIO

CALIFORNIA 91764-4105

(909) 395-2000
FAX (909) 395-2070

PAUL S. LEON
MAYOR

JIM W. BOWMAN
MAYOR PRO TEM

ALAN D. WAPNER
SHEILA MAUTZ
DEBRA DORST-PORADA
COUNCIL MEMBERS

GREGORY C. DEVEREAUX
CITY MANAGER

MARY E. WIRTES, MMC
CITY CLERK

JAMES R. MILHISER
TREASURER

March 20, 2009

VIA FEDERAL EXPRESS

Ray LaHood, Secretary
U.S. Department of Transportation
1200 New Jersey Avenue SE
Washington DC 20590

Re: California-Nevada Interstate Maglev Project

Dear Secretary LaHood:

The City of Ontario would like to take this opportunity to express its support for the letter sent to you by the California-Nevada Super Speed Train Commission, dated March 2, 2009, and its request that this important project be one of those you select for funding with the \$8 billion made available to you by President Obama and Congress under the American Recovery & Reinvestment Act (ARRA).

Over the past 10 years the City of Ontario has been supportive of the Commission's efforts to perform pre-construction design, engineering and environmental studies including a Cooperative Agreement dated August 21, 2002, pursuant to which the City of Ontario contributed matching funds to the Commission to prepare a study specifically relating to the Anaheim-Ontario segment of the project. This segment is particularly exciting to not only the City of Ontario, but all of Orange, Los Angeles and San Bernardino Counties as well, as it will facilitate access and usage of Ontario International Airport with a 14.5 minute ride on the maglev train from Anaheim (at its newly planned ARTIC multi-modal station) directly to Ontario International Airport. This high-speed rail connection has strong support throughout Southern California as attempts are being made by city and county transportation planners and political leaders to encourage additional use of Ontario International Airport by Los Angeles, Orange County and San Bernardino residents who must now make the trip on heavily congested highways (i.e., SR-91, HW-57, I-10 and I-15) to catch their flight connections at Los Angeles International Airport (LAX) or John Wayne Airport, both of which are already operating at near capacity.

Secretary Ray LaHood

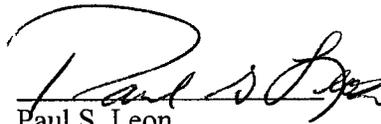
March 20, 2009

Page 2

It is estimated that by 2015 there will be 52 million people traveling along the I-15 corridor to be serviced by the California-Nevada Interstate Maglev Project. Existing highways and airports, however, have an annual capacity of only 38 million people, leaving 14 million with no means of travel. Building the California-Nevada Interstate Maglev Project will avoid the need to expand airports and freeways, reduce existing congestion and avoid future congestion while providing far fewer emissions and other lifestyle benefits utilizing a 300 mph emissions-free "green" high-speed train technology. This system will also service the Inland Empire cities of Victorville and Barstow, California. It is worth noting in this regard that the growth in Southern California over the next 20 years will be eastward into the Inland Empire, which is in dire need of upgrading its infrastructure capacity.

Thank you very much for your attention to this letter, and recognition of the widespread support for the California-Nevada Interstate Maglev Project, 80% will be built within the state of California.

Very truly yours,



Paul S. Leon

Mayor

City of Ontario

- cc: Mark Yachmetz (FRA: Associate Administrator – Office of Railroad Development)
- cc: U.S. Senator Harry Reid
- cc: Congresswoman Shelley Berkley (1st District-NV)
- cc: Congresswoman Dina Titus (2nd District-NV)
- cc: Congressman Gary Miller (42nd District-CA)
- cc: Congressman David Dreier (26th District-CA)
- cc: Congresswoman Loretta Sanchez (47th District-CA)
- cc: Congressman Joe Baca (43rd District-CA)
- cc: Congressman Jerry Lewis (41st District-CA)



CITY OF ANAHEIM
MAYOR CURT PRINGLE

March 25, 2009

Ray LaHood, Secretary
U.S. Department of Transportation
1200 New Jersey Avenue SE
Washington DC 20590

Re: California-Nevada Interstate Maglev Project

Dear Secretary LaHood:

The City of Anaheim would like to take this opportunity to express its support for the California-Nevada Interstate Maglev Project and to ask that the project be designated as a high speed rail corridor and considered for funding as part of the \$8 billion Federal Railroad Administration capital assistance program made available under the American Recovery & Reinvestment Act (ARRA).

Over the past 10 years the City of Anaheim has been supportive of the Commission's efforts to perform pre-construction design, engineering and environmental studies, including a Cooperative Agreement dated September 24, 2002 pursuant to which the City of Anaheim contributed matching funds to the Commission to prepare a study specifically relating to the Anaheim-Ontario segment of the project. This segment is critical since the maglev corridor will facilitate increased access and usage of Ontario International Airport with a 15 minute ride on the maglev train from the Anaheim Regional Transportation Intermodal Center (ARTIC) directly to Ontario International Airport. With the Los Angeles International Airport and John Wayne Airport both operating at or near capacity, the high speed rail connection between Anaheim and Ontario is essential to relieving airport congestion and heavy congestion on local highways.

It is estimated that by 2015 there will be 52 million people traveling along the I-15 corridor to be serviced by the California-Nevada Interstate Maglev Project. Existing highways and airports, however, have an annual capacity of only 38 million people, leaving 14 million with no means of travel. Building the California-Nevada Interstate Maglev Project will avoid the need to expand airports and freeways, reduce existing congestion and avoid future congestion while providing far fewer emissions. Considering the amount of growth estimated in Southern California over the next 20 years, the system will play an important role in upgrading the infrastructure capacity of the region.

Just last year Congress passed the SAFETEA-LU technical corrections bill that established Anaheim as the western terminus of the California-Nevada Maglev Project. It is also worth noting that the ARTIC station in Anaheim will also be the southern terminus for the San Francisco-Anaheim high-

Secretary Ray LaHood
March 25, 2009
Page 2 of 2

speed rail project now being planned by the California High Speed Rail Authority. The city of Anaheim looks forward to accommodating both systems at a multi-modal station that will also be home to Metrolink, Amtrak, buses, taxis and other modes of transportation. Indeed, ARTIC will be a model for future multi-modal station development as high-speed, intercity, commuter and highway modes of transportation will all have a common home.

Thank you for your attention to this matter and for your consideration of the California-Nevada Interstate Maglev Project for federal funding under the ARRA.

Sincerely,

A handwritten signature in black ink, appearing to read 'Curt Pringle', with a stylized flourish at the end.

Curt Pringle
Mayor

CC: Mark Yachmetz (FRA: Associate Administrator – Office of Railroad Development)
United States Senator Diane Feinstein
United States Senator Barbara Boxer
United States Senator Harry Reid
United States Congresswoman Loretta Sanchez
United States Congressman Gary Miller
United States Congressman Ed Royce
United States Congresswoman Corrine Brown
United States Congressman Ken Calvert
United States Congressman David Dreier
United States Congressman Joe Baca
United States Congressman Jerry Lewis
United States Congresswoman Shelley Berkley
United States Congresswoman Dina Titus



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Arthur T. Leahy
Chief Executive Officer

March 23, 2009

Ray LaHood, Secretary
U.S. Department of Transportation
1200 New Jersey Avenue SE
Washington DC 20590

Re: California-Nevada Interstate Magnetic Levitation (Maglev) Project

Dear Secretary LaHood:

The Orange County Transportation Authority (OCTA) would like to take this opportunity to express its support for the request by the California-Nevada Super Speed Train Commission (Commission) that the California-Nevada Interstate Maglev Project (Cal-Nev Project) be designated as a high-speed rail corridor and selected for funding as part of the \$8 billion Federal Railroad Administration capital assistance program made available under the American Recovery & Reinvestment Act.

OCTA has been supportive of the Commission's efforts to perform pre-construction design, engineering, and environmental studies for the Cal-Nev Project, including a cooperative agreement dated January 9, 2003, pursuant to which OCTA contributed \$125,000 in matching funds to the Commission to prepare a study specifically relating to the Anaheim-Ontario California segment of the Cal-Nev Project. This segment will facilitate access and usage of Ontario International Airport with a 15-minute ride on the maglev train from Anaheim directly to the airport. This high-speed rail connection will permit additional use of Ontario International Airport by Orange County, Los Angeles, and San Bernardino residents who must now make the trip on heavily congested highways (i.e. Riverside Freeway [State Route 91], Orange Freeway [State Route 57], Santa Monica Freeway [Interstate 10], and the San Bernardino Freeway [Interstate 15]) for flights at Los Angeles International Airport or John Wayne Airport, both of which are already operating at or near capacity.

Language in the Safe, Accountable, Flexible, and Efficient Transportation Equity Act: A Legacy for Users technical corrections act, passed last year, established Anaheim as the western terminus of the Cal-Nev Project corridor. OCTA and Anaheim are jointly constructing a public private partnership multimodal terminal, called the Anaheim Regional Transportation Intermodal Center, which will be a major transportation gateway to connect the Cal-Nev Project with the California high-speed rail line from Anaheim to Los Angeles and

Secretary Ray LaHood
March 23, 2009
Page 2

northern California, Amtrak service to San Diego, Metrolink commuter rail service, and major bus services in Orange County.

A federal commitment to the Cal-Nev Project will reduce existing and future congestion at airports and freeways in the region, while providing greater transportation convenience and far fewer emissions, utilizing a 300-mph emissions-free high-speed train technology.

Thank you for your consideration of this request. Should you have any questions about this project, please contact Darrell Johnson, OCTA's Director of Transit Project Delivery, at (714) 560-5343.

Sincerely,



Peter Buffa
Chairman

PB:rb

c: Mark Yachmetz, Federal Railroad Administration, Associate Administrator -
Office of Railroad Development
United States Senator Barbara Boxer
United States Senator Diane Feinstein
United States Senator Harry Reid
United States Congresswoman Shelly Berkley
United States Congresswoman Corrine Brown
United States Congressman Ken Calvert
United States Congressman Gary Miller
United States Congressman Ed Royce
United States Congresswoman Loretta Sanchez
United States Congresswoman Dina Titus

CERTIFICATE OF SERVICE

I hereby certify that I have caused the foregoing Joint Petition of the California-Nevada Super Speed Train Commission and American Magline Group for Leave to File Rebuttal to the Replies in Opposition to Petition to Intervene and Reopen, and Rebuttal by California-Nevada Super Speed Train Commission and American Magline Group to Replies in Opposition to Petition to Intervene and Reopen to be served by first class mail this 11th day of May, 2009 on the following:

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

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

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

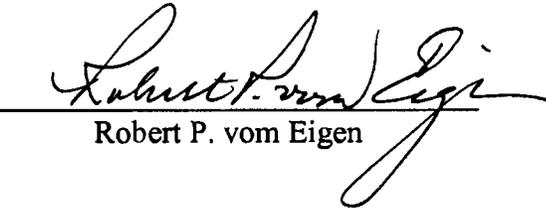
S. Mark Lindsey
Chief Counsel
Federal Railroad Administration
1200 New Jersey Avenue, SE
Washington, D.C. 20590

Mark Yachmetz
Associate Administrator for Railroad Development
Federal Railroad Administration
1200 New Jersey Avenue, SE
Washington, D.C. 20590

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Washington, D.C. 20005

Edward D. Greenberg
Galland, Kharasch, Greenberg, Fellman & Swirsky, P.C.
Canal Square
1054 Thirty-First Street N.W.
Washington, D.C. 20007



Robert P. vom Eigen