

**Memorandum of Understanding
Related to the DesertXpress Enterprises High-Speed Rail
Cajon Pass Project**

This Memorandum of Understanding ("**MOU**") is entered into as of _____, 2021 by and among DesertXpress Enterprises, LLC, a Nevada limited liability company, which does business as Brightline West (formerly dba XpressWest), having its main offices at 6700 Via Austi Parkway, Suite B, Las Vegas, Nevada 89119 ("**DXE**"); the California State Transportation Agency, a California State entity having offices at 915 Capitol Mall, Suite 350B, Sacramento, California 95814 ("**CalSTA**"); the State of California Department of Transportation, a California State entity having offices at 1120 N Street Sacramento, California 95864 ("**Caltrans**"); and the California High-Speed Rail Authority, a California State entity having offices at 770 L Street, Suite 620, Sacramento, California 95864 ("**CHSRA**"). All parties (DXE, CalSTA, Caltrans, and CHSRA) are collectively referred to as "Parties."

RECITALS

A. CalSTA is a California State agency responsible for developing and coordinating the policies and programs of the State's transportation entities to achieve the State's mobility, safety, and air quality objectives from its transportation system.

B. CHSRA was formed and organized under the laws of the State of California in 1996, and is responsible for planning, designing, building, and operating an intercity high-speed rail service in California and for coordinating connections with other passenger rail lines. CHSRA's Phase 1 between San Francisco and Anaheim includes a proposed route connecting Palmdale, California to Los Angeles and Anaheim to the South and Fresno, San Jose, and San Francisco to the North.

C. Caltrans is a California state agency with full possession and control of all state highways, property, and rights in property acquired for state highway purposes, and is authorized under sections 90, 91, 91.2, 92, and 660 (et seq.) of the **Streets and Highways Code** and sections 14000(c) and 14520.3(b) of the **Government Code** to oversee impacts to and projects on the California State Highway System, including the ability to make final agency decisions regarding the use and disposition of its assets. Pursuant to section 14038(b) of the **Government Code**, Caltrans may contract with the private sector for the design, improvement, or construction of rail lines and related facilities. Pursuant to sections 14036 and 14038(b) of the **Government Code**, Caltrans is charged with the responsibility to prepare a State Rail

Plan, approved by the Secretary of CalSTA, which currently includes the integration of interstate rail service to Las Vegas with the statewide rail and transit network, including connections via the High Desert Corridor at Palmdale to the California high-speed and regional train services, and also via a transit connection through Cajon Pass to the rail services in the vicinity of San Bernardino and Rancho Cucamonga.

D. Caltrans completed the 2018 California State Rail Plan ("**2018 Rail Plan**"), which presents a vision and strategy for California's passenger and freight rail network of the future that will guide the development of an integrated passenger rail network and investments to support movement of freight by rail. The 2018 Rail Plan is an important element in the comprehensive examination of statewide transportation investment strategies tied to the 2040 California Transportation Plan.

E. The 2018 Rail Plan expressed California's interest in developing specific passenger rail improvements in coordination with the State of Nevada and its intention to coordinate with private project sponsors and local planning authorities on detailed operating plans to promote the integration of CHSRA's high-speed train system and both the existing and planned statewide rail network with interstate high-speed rail service to Las Vegas, including support for investments in the proposed High Desert Corridor alignment between Victorville and Palmdale, California.

F. DXE proposes to construct a series of privately owned and operated electrified high-speed passenger rail projects between Southern California and Las Vegas, Nevada. The first project will connect Apple Valley, California with Las Vegas on 170 miles of track (the "**High Desert Project**"). The fully grade-separated High Desert Project will be constructed primarily in the Interstate 15 ("**I-15**") right of way on an alignment that will largely run in the median of the existing freeway. DXE is working closely with CalSTA, Caltrans, the Nevada Department of Transportation ("**NDOT**"), the Federal Highway Administration ("**FHWA**"), the Federal Railroad Administration ("**FRA**"), and other stakeholders to advance the High Desert Project.

G. CalSTA, CHSRA, Caltrans, and DXE entered a Memorandum of Understanding dated January 28, 2019 (the "**2019 MOU**") to assist in developing the High Desert Project and other passenger rail projects under development in California, to promote the design and construction of systems with the potential for future interoperability and operational synergies, and to maintain and protect the integrity and safety of existing highway infrastructure as it may be updated and reconstructed from time to time. Progress since the execution of the 2019 MOU includes execution of these agreements:

- A Right of Way Use Agreement Related to the DesertXpress High-Speed Rail Project – Apple Valley to California/Nevada Border dated June 19, 2020 between DXE and Caltrans (under delegation of authority from CalSTA) to authorize use of a portion of the Caltrans I-15 right of way for the High Desert Project.
- A Design and Construction Agreement dated August 24, 2020 between DXE and Caltrans related to development of the High Desert Project on the California side of the border.
- A Developer Agreement dated June 10, 2020 between DXE and NDOT in anticipation of construction of a portion of the High Desert Project within NDOT's right of way along the I-15 corridor.
- A Design and Construction Agreement dated September 4, 2020 between DXE and NDOT related to development of the High Desert Project on the Nevada side of the border.
- DXE is also developing separate Operating & Maintenance Agreements with Caltrans and NDOT.

Plans are in process of being developed to begin construction on the High Desert Project in 2021 and to start revenue service in 2024. Studies performed by DXE forecast that the High Desert Project will provide 30,000 jobs, improve safety, eliminate 100,000 tons of CO₂ per year, and support \$6 billion of economic output, while improving quality of life and providing an additional transportation option for the region.

H. An additional DXE improvement being pursued, which will provide additional economic, safety, and environmental benefits, is a connection from Apple Valley, California to the Greater Los Angeles Basin area. To achieve this, DXE is exploring two additional and independent routes:

- 1) Building high-speed track south primarily within the existing I-15 corridor right of way from Apple Valley to Rancho Cucamonga, where a station would be constructed adjacent or connected to the Rancho Cucamonga Metrolink train station (the “**Cajon Pass Project**”).
- 2) Constructing a high-speed rail line between Victorville and the Palmdale Metrolink station in conjunction with the proposed High Desert Corridor rail alignment (the “**Palmdale Project**”). (Caltrans does not have existing highway right of way in the Palmdale Project proposed rail alignment.)

I. DXE has executed separate memorandums of understanding with the Southern California Regional Rail Authority (“**Metrolink**”) dated September 23, 2020 related to exploring the Cajon Pass Project and Palmdale Project. DXE has also entered a memorandum of understanding with the San Bernardino County Transportation Authority (“**SBCTA**”) dated July 7, 2020 to advance discussions related to development of the Cajon Pass Project. By letter of intent dated August 25, 2020, DXE has begun working with Caltrans on initial project scoping and project development for the Cajon Pass Project.

J. The Parties believe that construction of the Cajon Pass Project will serve the important purposes of increasing passenger rail transportation within Southern California, including interconnectivity between systems, and promoting the region’s mobility, safety, and air quality objectives. In pursuit of those goals and separate from and in addition to any agreements and discussions related to the Palmdale Project, the parties wish to enter this MOU to advance discussions related to the Cajon Pass Project.

AGREEMENT

Now, therefore, the Parties hereby agree as follows:

Section 1. Project Development.

1.1 Mutual Cooperation.

1.1.1 The Parties agree to cooperate with each other and other stakeholders, including Metrolink, SBCTA, the City of Rancho Cucamonga, and other local communities along the high-speed rail route, in evaluating the design and transportation system benefits related to the Cajon Pass Project, including traffic analysis, ridership impacts on the interconnected rail and transit network, track alignments, station designs, parking, and access to and between the Metrolink, DXE, and any other proposed future rail services in Rancho Cucamonga. The Parties acknowledge that the Cajon Pass Project may provide the foundation for additional future service to regional stations that could address intrastate travel markets and that the nature of connections at the prospective Rancho Cucamonga hub station will help meet the state’s transportation goals.

1.1.2 DXE will develop an initial high-level project feasibility study for the Cajon Pass Project and provide it to the Parties within sixty (60) days of execution of this MOU. The project feasibility study will include a preliminary project schedule and commitment, preliminary order of magnitude cost estimates related solely to SHS

improvements, description of physical elements, environmental considerations related to proximate locations, preliminary identification of Caltrans structures requiring reconstruction or replacement, anticipated safety provisions, preliminary seismic analysis, description of rail operations, description of route hydrology, description of the regional service rail station within the I-15 right of way near the northern end of the Cajon Pass, and intended and/or existing agreements. The study will identify the nature of the regional service being provided as part of the Cajon Pass Project, and the plans for connecting it to the state rail and transit system in Rancho Cucamonga, with a convenient transfer to other services. DXE will design the Cajon Pass Project for 45 minute headways, consistent with the High Desert Project. The Parties will work together to study how to increase frequency of service in the future, including locations for double track and a prospective service plan that would enable bi-directional, 30-minute headway services for future regional service that will stop at the Cajon Pass station and potential additional infill stations. The capital improvements to support such increased service frequencies are not anticipated to be made as part of the initial Cajon Pass Project.

1.1.3 DXE agrees to provide the results of an analysis confirming the following project benefits of the Cajon Pass Project: Positive economic impact with direct and indirect jobs and added tax revenues for the State; ridership that will result in the removal of automobiles and related reductions in carbon emissions; and potentially minimal environmental impacts due to its existence in an already established transportation corridor. DXE will also reasonably cooperate with information requests for Caltrans to model the benefits of the RC Project in the context of the 2022 State Rail Plan.

1.1.4 DXE, with cooperation from Caltrans and other stakeholders, will work to place the Cajon Pass Project in relevant transportation planning documents, including the Regional Transportation Plan, and subsequently the Federal Transportation Improvement Program. DXE will also cooperate with Caltrans in providing the information necessary to consider the Cajon Pass Project in the 2022 State Rail Plan.

1.1.5 Potential financial and operating impacts on DXE will be considerations for any future studies or decisions related to rail facilities to be constructed or service to be added on the Cajon Pass Project corridor.

1.2 Ridership. DXE, Caltrans and CHSRA agree to work together to enhance ridership and the customer experience in connection with current and planned high-speed, intercity, and regional train services. The Parties may engage in additional ridership studies to assess ridership demand throughout the Southwest Region.

1.3 Caltrans' QMA. The Parties understand and agree that Caltrans' Quality Management Assessment ("**QMA**") governs all modifications or additions to the State Highway System regardless of project sponsor or funding source; verifies that projects and project components are safe, operational, maintainable, and compatible; ensures that all work is planned, developed, and constructed in accordance with standards and practices as set forth in state policies, procedures, manuals, and guidance documents with respect to portions of the Cajon Pass Project that affect I-15 and its operation. DXE will be responsible for creating and executing a Quality Control Plan and a Quality Management Plan. Caltrans guidance includes prompt reviews to assure that all work and products delivered or incorporated into those portions of the Cajon Pass Project within the I-15 rights-of-way by DXE conform to then-existing appropriate standards. QMA does not include any project-related work deemed necessary to actually develop and deliver the Cajon Pass Project. The Caltrans QMA process is only intended to evaluate the Cajon Pass Project's effects on the highway system, not the Cajon Pass Project itself. DXE agrees that it will reimburse Caltrans for all costs incurred for its QMA activities as a result of the Cajon Pass Project. These costs will include but are not limited to plan review and construction inspection services. QMA activities are for the benefit of the State and will not constitute acceptance, approval, or ratification of any work or process.

1.4 Future Service Review. DXE will provide its plans for current and future service capabilities for review by Caltrans and will cooperate in discussions related to planning by the State and other stakeholders in relation to future passenger rail capacity and service in Southern California. DXE acknowledges the State's interest in ensuring that impacts to the right of way at the Rancho Cucamonga station are consistent with preserving the capability for a four-track, two-platform hub station serving future high-speed, intercity, and regional rail services that are planned for the east-west Los Angeles to San Bernardino corridor, as well as planned future connections to San Diego in or near the I-15 Corridor. DXE also acknowledges the State's goals of seamless transfers among services, coordinated schedules organized around a pulse timetable, and participation in the standards and tools of the California Integrated Travel Project (Cal-ITP) as they relate to open standards for trip planning and traveler information, integrated ticketing, and payments.

1.5 Caltrans Review and Approval. DXE further agrees to provide plans and specifications for the Cajon Pass Project's rail alignment for all segments that will be constructed within or adjacent to the I-15 corridor to Caltrans staff for engineering review and approval. Caltrans staff will review such plans and specifications in a timely manner and identify for DXE any engineering concerns. DXE will comply with the standards and processes identified in section 1.3 above, as well as any relevant project-specific Caltrans requirements and

address engineering issues raised to the reasonable satisfaction of Caltrans engineers. Caltrans review and approval of DXE's plans will in no way relieve DXE from its responsibilities, obligations, and/or liabilities for its Cajon Pass Project, and any approval given will be done with the understanding that the State makes no representations or warranty as to the validity, legal compliance, or completeness of the plans and that any reliance by DXE on its plans remains at the risk of DXE.

1.6 DXE Review of Caltrans Plans and Specifications. DXE agrees to review Caltrans plans and specifications for any project adjacent to or within the I-15 corridor which may affect DXE. DXE will, at its sole cost and expense, review such plans and specifications in a timely manner and identify for Caltrans any engineering concerns.

1.7 DXE Flagging. DXE agrees to provide flagging services for the protection of rail and highway facilities and users at no charge to State or anyone working on behalf of State whenever flagging services are required by regulation, operating rule, or contract with respect to highway facilities.

1.8 Environmental Review. The Parties agree to cooperate with each other, other stakeholders, and third-party consultants with respect to any environmental review or permitting that may be required for construction of the Cajon Pass Project.

Section 2. Caltrans Grant of Shared Use.

2.1 DXE and Caltrans agree to work in good faith to execute a grant of shared use of the right of way and appropriate supplemental agreements to allow DXE the ability to utilize land within any portion of highway owned by the State of California which is not otherwise disposed of or in use, not to exceed 200 feet in width, that is necessary for DXE to construct and operate the Cajon Pass Project.

2.1.1 The grant of shared use issued to DXE is anticipated to be in the form of a Right of Way Use Agreement, which will provide for a term of 99 years.

2.1.2 DXE acknowledges that the Secretary of CalSTA must make a delegation of his or her discretionary authority, pursuant to **Public Utilities Code** section 7551.1, to Caltrans prior to Caltrans executing any Right of Way Use Agreement.

2.1.3 A delegation of the Secretary of CalSTA's discretionary authority pursuant to **Public Utilities Code** section 7551.1 will first require DXE to obtain authorization from the Surface Transportation Board to construct and operate the Cajon Pass Project.

2.2 DXE acknowledges that FHWA consent is required for the shared use of the I-15 right of way for the Cajon Pass Project. The Parties agree to engage in discussions with FHWA to develop a mutual understanding of the consent process and to work in good faith to obtain FHWA support in a manner consistent with the project schedule.

Section 3. Supplemental Agreements.

3.1 Supplemental Agreements. The Parties agree that in addition to the grant of shared use, the following supplemental agreements must be executed between DXE and Caltrans prior to DXE beginning construction of the Cajon Pass Project:

3.1.1 Design Reimbursement Agreement.

3.1.2 Design and Construction Agreement.

3.1.3 Construction Reimbursement Agreement.

3.1.4 Operating and Maintenance Agreement.

3.2 Good Faith. DXE and Caltrans agree to work together in good faith and in a timely manner regarding execution of the agreements listed in Section 3.1 and any agreements not listed in Section 3.1 that may be required with third parties, such as other government agencies, with respect to constructing the Cajon Pass Project.

Section 4. Conditions Precedent to Construction.

4.1 DXE may not begin construction of the Cajon Pass Project on Caltrans' right of way until the following conditions have been met:

4.1.1 DXE and Caltrans have executed the Right of Way Use Agreement described in Section 2;

4.1.2 DXE and Caltrans have executed the supplemental agreements identified in Section 3.1;

4.1.3 Any environmental review required for the Cajon Pass Project under applicable laws has been completed;

4.1.4 Caltrans has provided a favorable assessment of the Cajon Pass Project with regards to the then-current State Rail Plan consistency;

4.1.5 Caltrans has provided to DXE approval of the final plans for the applicable project segment and documented such approval by issuing the related encroachment permits for construction;

4.1.6 DXE (and its contractors, as applicable) has obtained from Caltrans the encroachment permits for construction related to the project segment where work is to be performed;

4.1.7 Caltrans has received written consent from the Federal Highway Administration for any Right of Way Use Agreement entered into between DXE and Caltrans; and

4.1.8 DXE has obtained all necessary governmental permits, approvals, and agreements for commencement of construction of the Cajon Pass Project.

Section 5. Guiding Principles for Future Agreements.

The following principles will apply to negotiating future definitive agreements between DXE and Caltrans related to the construction, operation, and maintenance of the Cajon Pass Project.

5.1 Prior to the commencement of construction on those portions of the Cajon Pass Project within the I-15 corridor or on other rights-of-way owned or controlled by Caltrans, DXE will demonstrate to the reasonable satisfaction of Caltrans that it has the financial ability to complete such portions of the Cajon Pass Project through equity or financing. In the event that DXE seeks any federal financing assistance for the Cajon Pass Project, DXE will share with CalSTA and Caltrans financial information provided to the applicable federal agency.

5.2 Any valuation of the rights-of-way granted to DXE by CalSTA or Caltrans will be conducted pursuant to the terms of the Caltrans Right of Way Manual or other appropriate valuation method agreed upon by the Parties.

5.3 DXE will own or control all railroad structures and improvements it constructs within the publicly owned rights-of-way. Caltrans will own or control all infrastructure that is part of the state highway system.

5.4 Future agreements will provide that DXE will defend, indemnify, and hold harmless CalSTA, Caltrans, the State of California, and their respective officers and employees from and against any and all claims proximately caused by improvements constructed or placed on Caltrans right of way by DXE and for any damage or harm proximately caused by reason of the uses authorized by future agreements, unless, in each case, caused by an indemnified party's sole or active negligence or willful misconduct.

5.5 DXE will not use any of the Caltrans right of way for non-high-speed passenger rail uses, including, but not limited to the placement of utilities, pipelines, fiber optic cables, wire lines, conduits, fences, or any other non-railroad improvement without prior written approval, which approval will not be unreasonably withheld. Any access for the installation, operations, or maintenance of non-railroad uses will be determined at the time (if any) when Caltrans grants rights for such use.

5.6 Use of the corridor by DXE to add stations or stops at stations, such as the one to be built at the top of Cajon Pass, is expressly permitted. Nothing in this MOU requires DXE to construct additional stations at the request of any of the other Parties, although DXE agrees not to withhold its cooperation in considering such requests. The primary considerations for evaluating a request for an additional station by another Party will be not harming the financial and operating interests of DXE for its Cajon Pass and High Desert line services. DXE remains committed to expanding service under future financial agreements negotiated with the state or local governments.

5.7 DXE and/or any successor to or person or entity acquiring controlling interest in DXE, may, at its sole cost and expense and with the consent of CalSTA, which will be given as long as any encumbrance described below in this term is permissible under **Public Utilities Code** section 7551.1, execute, deliver, and record (or cause or permit to be recorded) one or more mortgages or security agreements against (i) the grant of shared use or right-of-way interest granted to DXE over State-owned real property in connection with the Cajon Pass Project and (ii) any tracks, stations, improvements, and other facilities constructed by DXE thereon; provided, however, that no mortgage or other instrument purporting to pledge, encumber, or create a lien, charge or security interest (collectively, "**Encumbrances**") on or against DXE's right-of-way interest will extend to or otherwise affect the State's fee simple interest in State-owned real property. DXE and/or any successor to or person or entity acquiring controlling

interest in DXE, will not allow any Encumbrances to attach to the State's fee simple interest in the real property that is subject to DXE's right-of-way as a result of the financing or construction of the Cajon Pass Project, or the use of the right-of-way by DXE.

5.8 The Cajon Pass Project will be constructed at no cost to Caltrans. DXE will reimburse Caltrans for Caltrans' actual costs of design review and construction oversight activities. Caltrans will maintain its standard forms of records showing actual time spent and costs incurred.

5.9 DXE and Caltrans agree that in the event that the Cajon Pass Project ceases to operate, the use of rights-of-way recognized and granted by the Secretary of CalSTA will revert to Caltrans. The Parties will come to a further agreement about how project removal and potential hazardous cleanup will be addressed.

5.10 Future agreements will include appropriate provisions, including communication and flagging protocols, related to Caltrans access to the Cajon Pass Project site during construction and operations.

5.11 The safe and efficient operation and maintenance of the highway will be maintained during the construction, operation, and maintenance of the Cajon Pass Project: *provided* that the Parties understand and agree that temporary lane closures may be required from time to time during the construction of the Cajon Pass Project. Closures will be subject to traffic control plans approved by Caltrans and will be scheduled at times to mitigate impact to highway use as determined in the sole discretion of Caltrans.

5.12 Prior to the start of construction, DXE will ensure that its contractors or subcontractors obtain sufficient construction insurance coverage as agreed to by Caltrans and DXE. Upon the commencement of rail operations over any State-owned rights-of-way, the operator will obtain and maintain at all times a policy (or policies) of insurance for personal injury, death of passengers, and property damage in an amount no less than Two Hundred Ninety-Five Million Dollars (\$295,000,000), or such other limit of liability as Congress may establish from time to time. Such policy (or policies) will name the State of California and its officers as additional named insureds

5.13 If a state highway project requires any rights of way in use by DXE, Caltrans and DXE will work together to find engineering solutions and apportion expenses to allow continuing shared use of rights of way that limit negative impacts to the Cajon Pass Project or the interstate highway system, or interrupt passenger

service or the movement of goods and the traveling public to the extent possible.

5.14 If the State wishes to increase use of the corridor for intrastate rail travel, DXE will cooperate with Caltrans to identify methods by which such service increases can be provided. Funding for any such studies or projects is not committed as part of this MOU.

Section 6. Press Releases.

No Party will make any announcement to the media regarding this agreement without prior written approval of the other Parties. The Parties agree to cooperate in the drafting of any press releases, interviews, or other form of media announcements.

Section 7. Public Records.

Pursuant to the California Public Records Act codified at section 6250 et seq. of the Government Code, certain information or documents in the possession or control of public entities are open to public inspection and copying. The Parties acknowledge that upon receipt of a valid request under the California Public Records Act for documents related to this MOU, CHSRA, Caltrans, and/or CalSTA will have a duty to disclose unless a particular record is exempt by statute or dispositive decisional law.

Section 8. Term.

This MOU will remain in effect for a period of five (5) years from the date first written above and will automatically be extended for one (1) year, after which any extension will require formal amendment or a new memorandum of understanding. Once DXE and Caltrans execute applicable definitive agreements, this MOU will no longer remain in effect with respect to the matters addressed in such definitive agreements.

Section 9. General Terms.

9.1 No Representations or Warranties. The Parties are not making any representation or warranty, express or implied, as to the accuracy or completeness of any confidential information, and no Party nor any of its representatives will have any liability to the other Parties, their representatives, or any other person relating to or resulting from their use of the confidential information or any errors therein or omissions therefrom.

9.2 Best Efforts. The Parties acknowledge that the Cajon Pass Project, and the passenger rail services that DXE intends to provide, will promote the State of California's mobility, safety, and air quality objectives. The Parties agree to make best efforts to achieve those objectives by implementing the provisions of this MOU.

9.3 No Assignment without Written Assent. The Parties will not assign this MOU or any of its obligations hereunder to any third party without the prior written consent of the other Parties.

9.4 Miscellaneous. If any provision of this MOU is declared void or unenforceable, such provision will be severed from this MOU, which will otherwise remain in full force and effect, but only to the extent the original intent of this MOU would not be altered in any material respect. This MOU may be amended only by a writing executed by all Parties. No delay or failure of any Party to exercise any right or remedy available to it pursuant to this MOU will operate as a waiver of such right or remedy.

9.5 Executed Copies. This MOU may be executed in one or more counterparts, each of which will for all purposes be deemed an original and all of which will constitute the same instrument. This MOU may be executed with electronic originals and each copy of this MOU bearing the electronic transmitted signature of a Party's authorized representative will be deemed to be an original.

[Signature Page Follows]

IN WITNESS WHEREOF, the Parties have caused this MOU to be executed by their duly authorized officers to be effective as of the date first written above.

DESERTXPRESS ENTERPRISES, LLC

**CALIFORNIA DEPARTMENT OF
TRANSPORTATION**

By: _____
Sarah Watterson
President
DesertXpress Enterprises, LLC

By: _____
Toks Omishakin
Director
California Department of
Transportation

**CALIFORNIA HIGH-SPEED RAIL
AUTHORITY**

**CALIFORNIA STATE TRANSPORTATION
AGENCY**

By: _____
Brian Kelly
CEO
California High-Speed Rail
Authority

By: _____
David Kim
Secretary
California State Transportation
Agency