



**BEFORE THE PUBLIC UTILITIES COMMISSION
OF THE STATE OF CALIFORNIA**

FILED

11-09-12
04:59 PM

Application of Neighbors for Smart Rail)
for Rehearing of Resolution SX-100 and)
for Oral Argument.)
_____)

Application 11-12-010
(Filed December 14, 2011)

**OPENING LEGAL BRIEF OF
EXPOSITION METRO LINE CONSTRUCTION AUTHORITY**

NOSSAMAN LLP

Robert D. Thornton
Martin A. Mattes
Robert C. Horton
Mari R. Lane

50 California Street, 34th Floor
San Francisco, CA 94111
Telephone: (415) 398-3600
Facsimile: (415) 398-2438
E-mail: mmattes@nossaman.com

Attorneys for EXPOSITION METRO
LINE CONSTRUCTION AUTHORITY

November 9, 2012

273239_5.DOC

SUBJECT INDEX

Page

I.	SUMMARY OF ARGUMENT	1
A.	Additional Environmental Review of the Crossings Approved in Resolution SX-100 Is Neither Required, Nor Permitted	1
B.	The RCHAR Process Complies With the Requirements of Due Process.....	3
C.	The Commission’s Practicability Criteria Including Consideration of Relevant Costs Have Been Satisfied Through the Process By Which the Expo Rail Phase 2 Crossings Have Been Designed.....	3
D.	No Further CEQA Analysis Need Be Done Regarding the Two Overhead Structures Noted in D.12-06-041	4
II.	FACTUAL AND PROCEDURAL BACKGROUND.....	5
A.	The Expo Rail Project.....	5
B.	Environmental Review of Phase 2 of the Expo Rail Project	5
C.	History of General Order 164-D and the RCHAR Procedures.....	6
D.	The RCHAR Procedures Applied.....	7
E.	The Rehearing Process.....	8
III.	ARGUMENT	10
A.	The Commission Review and Approval of the Phase 2 Grade Crossings Complied With the California Environmental Quality Act (“CEQA”).....	10
1.	The Commission Fulfilled Its Role as a Responsible Agency Under CEQA by Considering the Relevant Information in the Final EIR Before Approving SX-100.....	10
2.	Because CEQA Requires the Commission to Conclusively Presume the Final EIR Complies with CEQA, the Commission May Not Re-Litigate the Validity of the Final EIR or Assume the Role of Lead Agency and Re-Evaluate Every Project Impact as Requested by NFSR.....	12
3.	CEQA Prohibits the Commission From Requiring the Preparation of a Supplemental or Subsequent EIR	14

SUBJECT INDEX

Page

4.	It Would Be Appropriate for the Commission to Prepare CEQA Findings for Each Significant Impact Within Its Jurisdiction as a Responsible Agency, Accompanied by a Brief Explanation of the Rationale for Each Finding	15
B.	The Commission Procedure Approving the Phase 2 Grade Crossings Satisfied the Requirements of Due Process	17
1.	The RCHAR Process Accorded Due Process to Interested Parties Including NFSR	18
2.	NFSR Had Opportunity to Participate in the Development of the Expo Rail Project Even Prior to the Commencement of the RCHAR Process	19
3.	Although Not Necessary to Satisfy Due Process, the Commission Has Instituted Supplementary Procedures Facilitating Additional Public Participation and Confirming the Allowance of Due Process to NFSR	21
C.	The Commission Properly Considered Cost and Complied With the Standards of Practicability in Approving the Expo Rail Project Phase 2 Rail Crossings	22
D.	Resolution SX-100 Need Not Be Modified to Specifically Consider Two Unchanged Overhead Structures and No Addendum to the Project EIR Is Required	26
1.	The Commission Need Not Prepare an Addendum to the Final EIR Because the Final EIR Disclosed the Existence of the Palms Park Pedestrian Overcrossing and the Relationship of the I-405 to the Expo Rail Project	27
2.	Resolution SX-100 Need Not Be Modified to Include the Two Overhead Structures Because They Are Not Relevant to the RCHAR Process	29
IV.	CONCLUSION	30

TABLE OF AUTHORITIES

Page

FEDERAL CASES

<i>Cafeteria & Restaurant Workers Union v. McElroy</i> , 367 U.S. 886 (1961).....	17
<i>Mathews v. Eldridge</i> , 424 U.S. 319 (1976).....	17
<i>Ohio Bell Tel. Co. v. Public Utility Com. of Ohio</i> , 301 U.S. 292 (1937).....	17

CALIFORNIA CONSTITUTION

ARTICLE XII, Section 2	17
------------------------------	----

CALIFORNIA CASES

<i>Bowman v. City of Petaluma</i> , 185 Cal.App.3d 1065 (1986)	14
<i>City of Redding v. Shasta County Local Agency Formation Commission</i> , 209 Cal.App.3d 1169 (1989)	13, 14
<i>Consumers Lobby Against Monopolies v. Public Utilities Comm.</i> , 25 Cal.3d 891 (1979)	17
<i>Neighbors for Smart Rail v. Exposition Metro Line</i> , 204 Cal.App.4 th 1480 (2012)	12
<i>Resource Defense Fund v. Local Agency Formation Commission</i> , 191 Cal.App.3d 886 (1987)	15
<i>San Diego Navy Broadway Complex Coalition v. City of San Diego</i> , 185 Cal.App.4 th 924 (2010)	15
<i>Wise v. Pacific Gas & Electric Co.</i> , 77 Cal.App.4 th 287 (1999).....	17

TABLE OF AUTHORITIES

Page

CALIFORNIA PUBLIC UTILITIES COMMISSION CASES AND ORDERS

<i>Application of Neighbors for Smart Rail, A.11-12-010,</i> Assigned Commissioner and ALJ's Scoping Memorandum and Ruling, October 23, 2012.....	1, 9, 26
Decision 12-06-041.....	1, 4, 8, 26
Ruling of ALJ Mason, July 27, 2012.....	9, 21
Ruling of ALJ Mason, September 5, 2012	9
 <i>Application of Santa Clara Valley Transportation Authority,</i> Decision 01-08-016.....	 22
 General Order 164-D	 3, 6, 7, 8, 18, 21, 23, 29
 <i>Re City of San Mateo,</i> Decision 82-04-033, 8 CPUC 2d 572 (1982).....	 22
 <i>Re City of Oceanside,</i> Decision 92-01-017, 43 CPUC 2d 46 (1992).....	 22
 <i>Re Exposition Metro Line Construction Authority,</i> Decision 09-02-031.....	 23
 <i>Re Los Angeles to Pasadena Metro Blue Line Construction Authority,</i> Decision 02-05-047.....	 23
 <i>Rulemaking to Revise General Order 164-C</i> Decision 07-05-014, May 3, 2007	 6
 Rules of Practice and Procedure, Rule 13.11	 1
Rule 14.5	7, 8, 18

CALIFORNIA STATUTES

Public Resources Code	
Section 21000 <i>et seq.</i> (CEQA).....	<i>passim</i>
Section 21002.1.....	10, 15
Section 21067.....	10
Section 21068.....	10
Section 21081.....	15
Section 21166.....	14
Section 21167.3.....	12, 13, 14

TABLE OF AUTHORITIES

Page

CALIFORNIA STATUTES (continued)

Public Utilities Code	
Section 311(g).....	7, 8
Section 1701.....	17
Section 132600.....	5
Senate Bill 504, issued October 2003	5

CALIFORNIA REGULATIONS

Guidelines for California Environmental Quality Act, Cal. Code Regs., Title 154, Ch.3	
Section 15004.....	11
Section 15041.....	11
Section 15050.....	11
Section 15052.....	14
Section 15086.....	10
Section 15091.....	15
Section 15093.....	15
Section 15096.....	10, 14, 15
Section 15162.....	14, 26
Section 15233.....	12
Section 15367.....	10
Section 15381.....	10

OTHER AUTHORITIES

Kostka & Zischke, <i>Practice Under the California Environmental Quality Act</i> , CEB 2d ed. 2012	15
---	----

**BEFORE THE PUBLIC UTILITIES COMMISSION
OF THE STATE OF CALIFORNIA**

Application of Neighbors for Smart Rail)	
for Rehearing of Resolution SX-100 and)	Application 11-12-010
for Oral Argument.)	(Filed December 14, 2011)
_____)	

**OPENING LEGAL BRIEF OF
EXPOSITION METRO LINE CONSTRUCTION AUTHORITY**

In accordance with Rule 13.11 of the Rules of Practice and Procedure (“Rules”) of the California Public Utilities Commission (the “Commission”) and the schedule established by the Assigned Commissioner and Administrative Law Judge’s Scoping Memo and Ruling issued October 23, 2012 (the “October Scoping Memo”), Exposition Metro Line Construction Authority (“Expo Authority”) hereby respectfully submits its Opening Legal Brief in the above-captioned proceeding to address the issues set forth in the Commission’s Decision (“D.”) 12-06-041, an Order granting limited rehearing of Resolution SX-100, and summarized in Section 2 of the October Scoping Memo.

I.

SUMMARY OF ARGUMENT

A. Additional Environmental Review of the Crossings Approved in Resolution SX-100 Is Neither Required, Nor Permitted.

In its application for rehearing and again in its recent motion for clarification of the record, a stay, a continuance, and revocation of SX-100 (“Motion for Stay”), which Administrative Law Judge (“ALJ”) Mason properly denied, Neighbors for Smart Rail (“NFSR”) asked the Commission to re-litigate the issues it has litigated, and lost, in the courts. NFSR

requests that the Commission assume the role of a CEQA lead agency to re-evaluate a host of impacts resulting from Phase 2 of the Exposition Corridor Light Rail Transit Project (the “Expo Rail Project”). The CEQA issues raised by NFSR range far beyond the Commission’s safety oversight of the Expo Rail Project’s at-grade and grade-separated roadway crossings. In any event, the Commission must reject NFSR’s attempt to mount a collateral attack on the validity of the Final EIR.

Under the relevant CEQA provisions, the Commission is not permitted to re-litigate the validity of the Final EIR. The Commission fulfilled its role as a responsible agency under CEQA by commenting on the Draft EIR, and by considering the Final EIR’s analysis of the safety of the project’s at-grade crossings before it approved the 16 at-grade, and 11 grade-separated crossings in Resolution SX-100. CEQA requires the Commission to presume that the Final EIR complies with CEQA. CEQA also prohibits the Commission from requiring the preparation of a supplemental or subsequent EIR.¹

With respect to the adequacy of CEQA findings, the Commission certified in Resolution SX-100 that it considered the relevant information in the Final EIR, and expressly found that the Final EIR, Notice of Determination, and Statement of Overriding Considerations that Expo Authority prepared and adopted were adequate for the Commission’s decision-making purposes. However, it would be appropriate for the Commission to adopt express CEQA findings for each significant impact related to the authorizations the Commission granted by Resolution SX-100. Accordingly, Expo Authority includes as an attachment to this Opening

¹ Expo Authority fulfilled its duty as lead agency under CEQA to consult with the Commission during preparation of the Final EIR, and the EIR’s rigorous analysis of the safety of the at-grade crossings has withstood legal challenges at trial and on appeal. The questions pending before the Supreme Court involve operational impacts on traffic level of service at a handful of intersections, traffic-related air quality impacts, and near-station parking. Thus, there is no outstanding question that the safety analysis in the Final EIR complies with CEQA.

Brief a draft of such findings, accompanied by a brief explanation of the background and rationale for each finding, for the Commission's independent consideration.

B. The RCHAR Process Complies With the Requirements of Due Process.

The Rail Crossing Hazard Analysis ("RCHAR") process, by which Expo Authority cooperated with the rail safety staff of the Commission's Consumer Protection and Safety Division ("Rail Safety Staff") in the analysis of proposals for roadway/rail crossings along the route of the Expo Rail Project, culminated in the Commission's approval of Resolution SX-100. The RCHAR process provided a comprehensive and thorough set of procedures by which Expo Authority, the Commission's Rail Safety Staff, and other stakeholder agencies collaborated to assure the safe and efficient design of these crossings, and enabled other interested parties such as NFSR, as well as members of the general public, to review the resultant crossing designs and to submit comments on the resolution proposed for their approval prior to its adoption as Resolution SX-100. Expo Authority actively disseminated information to the public during the CEQA review process and thereafter during the RCHAR process in order to solicit public comment and in accordance with Commission General Order ("GO") 164-D and applicable Commission rules and statutory requirements. There was no failure to accord due process to NFSR or to any other interested party.

C. The Commission's Practicability Criteria Including Consideration of Relevant Costs Have Been Satisfied Through the Process By Which the Expo Rail Phase 2 Crossings Have Been Designed.

The Joint Prehearing Conference Statement and the Testimony of Expo Authority witness Richard D. Thorpe provide detailed accounts of the Commission's practicability criteria and of the process by which those criteria were considered in the development of the roadway/rail crossing plans approved by Resolution SX-100. Mr. Thorpe's testimony and that of

Expo Authority witness Monica Born, along with the Joint Prehearing Conference Statement, also address the cost studies that were an important element of the practicability determination in Expo Authority's assessment of grade separated alternatives for the Westwood Boulevard and Overland Avenue crossings. These materials confirm the consistency of the crossing plans approved by Resolution SX-100 with the Commission's practicability criteria.

D. No Further CEQA Analysis Need Be Done Regarding the Two Overhead Structures Noted in D.12-06-041.

The decision granting rehearing, D.12-06-041, expressed concern as to whether two overhead structures situated above new crossing locations – the I-405 freeway and the Palms Park pedestrian bridge – had been adequately addressed for CEQA purposes. The decision directed the assigned ALJ to consider whether Resolution SX-100 should be modified to include these two overhead structures and whether an addendum is required by CEQA.²

Expo Authority will demonstrate that there is no need either to include references or authorizations regarding the two overhead structures in Resolution SX-100 or to create an addendum to the project EIR in this regard. The Draft and Final EIR properly and adequately took account of these structures, and they were not relevant to the RCHAR process that resulted in Resolution SX-100.

Accordingly, the Commission should affirm its authorization of the roadway/rail crossings previously approved by Resolution SX-100 without unnecessary delay so that Expo Authority may complete construction of Phase 2 of the Expo Rail Project and place it into service in completion of its statutory obligations.

² D.12-06-041, at pp. 8-9.

II.

FACTUAL AND PROCEDURAL BACKGROUND

A. The Expo Rail Project

In October 2003, the Governor signed Senate Bill 504 (Kuehl), which created Expo Authority “for the purpose of awarding and overseeing final design and construction contracts” for completing the Expo Rail Project from downtown Los Angeles to downtown Santa Monica.³ Phase 1 of the Expo Rail Project extended the light rail system from downtown Los Angeles to Culver City. Service began on April 28, 2012, with trains running to the Culver City station on June 20, 2012. Phase 2 of the Expo Rail Project will extend the line approximately 6.7 miles from the Phase 1 terminus in Culver City to downtown Santa Monica, with construction scheduled to be completed by 2015.⁴

B. Environmental Review of Phase 2 of the Expo Rail Project

As described in the testimony of Expo Authority’s Project Director, Monica Born, Expo Authority initiated the environmental impact review for Phase 2 of the Expo Rail Project, by issuing a notice of preparation of an Environmental Impact Report (“EIR”) in February 2007. The numerous public meetings and massive public input into the EIR process that occurred are summarized in Ms. Born’s testimony.⁵ Expo Authority circulated a Draft EIR for Expo Rail Phase 2 in January 2009, evaluating six alternatives, including a “No-Build” alternative, a transportation system management alternative (bus and other transportation improvements without major new capital investment), and four different light rail transit (“LRT”) alignments. After circulation of the Draft EIR for comment, Expo Authority conducted over 100 meetings

³ SB 504 is codified at Sections 132600 *et seq.* of the Public Utilities Code.

⁴ Prepared Testimony of Monica Born, served November 2, 2012 (“Born Testimony”), at pp. 2-3.

⁵ Born Testimony, at pp. 5-7.

with cities, public agencies, and other stakeholders, including three formal public hearings, business outreach meetings, and group presentations. Agencies (including the CPUC), individuals and interest groups submitted some 9,000 oral and written comments on the Draft EIR, overwhelmingly supporting extension of the light rail line to Santa Monica.

In addition to responding to each of the comments received, Expo Authority also conducted additional environmental analysis on issues raised by the public, including NFSR. In December 2009, Expo Authority made the Final EIR available for additional public review and comment. On February 4, 2010, after considering all public comments, Expo Authority certified the Final EIR and approved the project, adopting detailed findings, a Statement of Overriding Considerations, and a Mitigation Monitoring and Reporting Program. Conceptual engineering drawings of each of the proposed grade crossings were issued in December 2009 as Appendix E to the Final EIR, and are presented as Appendix D to the Final Hazard Analysis Report (“RCHAR”) for the Expo Rail Phase 2 project. The Expo Authority Board certified the Final EIR on February 4, 2010.

C. History of General Order 164-D and the RCHAR Process

In October 2006, the Commission instituted a rulemaking, R.06-10-004, to revise General Order (“GO”) 164-C, its general order defined Rules and Regulations Governing State Safety Oversight of Public Transit Guideway Systems. R.06-10-004 culminated in D.07-05-014, adopting GO 164-D effective May 3, 2007. Among other changes, the new GO 164-D included Part 10, defining a new, expedited procedure for reviewing and approving at-grade light rail crossings. GO 164-D gives a rail transit agency, such as Expo Authority, the option of pursuing a comprehensive safety assessment process as an alternative to filing a formal application in every instance.

The GO 164-D alternative requires submission of a Rail Crossing Hazard Analysis Report (“RCHAR”) to the Commission’s staff responsible for rail safety oversight (the “Rail Safety Staff”). The RCHAR must include detailed information, including, but not limited to, engineering drawings, proposed rail operations and an analysis of identified hazards, for every at-grade rail crossing. An RCHAR that contains all GO 164-D-required elements is then subject to field diagnostic reviews with the Commission’s Rail Safety Staff and all affected agencies. Rail Safety Staff then develops recommendations for changes to the design to address identified safety concerns. To the extent that the rail transit agency agrees with Rail Safety Staff’s recommendations, changes are made to the crossing design(s). If Rail Safety Staff and the rail transit agency are unable to reach agreement on the design of a particular rail crossing, the rail transit agency’s recourse is to file a formal application for Commission approval of the disputed design(s). But if Commission staff and the rail transit agency do reach agreement, Commission staff drafts a resolution for Commission approval to authorize rail crossings consistent with the terms agreed upon by Commission staff and the rail transit agency. Such draft resolutions are subject to the public review and comment procedures specified in Public Utilities Code Section 311(g) and Rule 14.5 of the Commission’s Rules.

D. The RCHAR Process Applied

As detailed more fully in the testimony of Expo Authority witnesses Richard D. Thorpe and John Van Hoff, served November 2, 2012, Expo Authority has worked with the Commission’s Rail Safety Staff since 2007 to address safety-related concerns specific to the at-grade crossing designs proposed for Phase 2 of the Expo Rail Project. Consistent with GO 164-D, Expo Authority submitted its draft RCHAR to the Commission’s Rail Safety Staff for review on June 9, 2010. Pre-diagnostic field meetings were held on the 27th and 29th of July 2010. Field diagnostic meetings, which included a field evaluation of each proposed crossing, were held on

the 2nd and 4th of August 2010. On November 12, 2010, the Commission’s Rail Safety Staff provided its preliminary recommendations to Expo Authority, requesting that three proposed at-grade crossings be further evaluated. Expo Authority incorporated changes to the three at-grade crossings identified in Rail Safety Staff’s preliminary recommendations in its Final Draft RCHAR, submitted on March 11, 2011. On April 1, 2011, Expo Authority submitted revisions to its Final Draft RCHAR that included grade-separation for the Sepulveda Blvd. crossing.

On September 26, 2011, in accordance with Section 311(g) of the Public Utilities Code and Rule 14.5 of the Commission’s Rules, the Commission published Draft Resolution SX-100. The draft resolution was served on NFSR and United Community Associations (“UCA”), among other potentially interested parties. On October 21, 2011, NFSR and UCA each filed comments on Draft Resolution SX-100, opposing its adoption. The Commission revised the draft resolution to include a summary of the NFSR and UCA comments and noting their receipt, but without changing the substance of the resolution. On November 14, 2011, the Commission issued Resolution SX-100 and, pursuant to the procedures authorized by GO 164-D, authorized Expo Authority to construct 16 new at-grade and 11 grade-separated highway-light rail crossings along the Phase 2 alignment.

E. The Rehearing Process

On December 14, 2011, NFSR filed an Application for Rehearing of Resolution SX-100 and for Oral Argument (the “Application”).⁶ Expo Authority filed its response to the Application on January 25, 2012. On June 25, 2012, the Commission issued D.12-06-041, granting limited rehearing of Resolution SX-100 on the following four issues: (1) CEQA

⁶ NFSR’s Application was dated, verified, and apparently served on December 23, 2011, but apparently was accepted for filing as of December 14, 2011. A copy of the Application was received by counsel for Expo Authority in the U.S. mail on or about December 30, 2011. In consideration of the late service of the Application, the Commission’s Legal Division extended the time for responses to the Application until January 25, 2012.

compliance; (2) due process; (3) allegations of error regarding cost issues and standards of practicability; and (4) whether Resolution SX-100 should be modified or revised to include two overhead structures (the Interstate Highway 405 and the Palms Park pedestrian bridge) that are situated above new crossing locations. The Commission denied rehearing on claims relating to an alleged loss of objectivity by the Commission, intervenor compensation, oral argument, among other issues.

Pursuant to a ruling issued July 27, 2012, by ALJ Mason, Expo Authority and NFSR filed their Joint Prehearing Conference Statement on September 28, 2012. The parties then participated in a Prehearing Conference (“PHC”) before ALJ Mason on October 5, 2012, during which the parties discussed the scope of the proceeding and addressed procedural issues, including the briefing and hearing schedule.

In accordance with a further ALJ’s ruling, issued September 5, 2012, and the revised schedule tentatively set at the PHC and confirmed by the October Scoping Memo, Expo Authority proceeded to prepare testimony for service on November 2, 2012 and this Opening Legal Brief for filing on November 9, 2012.

III.

ARGUMENT

A. The Commission’s Review and Approval of the Phase 2 Grade Crossings Complied With the California Environmental Quality Act (“CEQA”).

1. The Commission Fulfilled Its Role as a Responsible Agency Under CEQA by Considering the Relevant Information in the Final EIR Before Approving SX-100.

Pursuant to CEQA,⁷ Expo Authority is the CEQA lead agency responsible for preparing and certifying the Final EIR.⁸ As such, it is “responsible for considering the effects, both individual and collective, of all activities involved in a project.”⁹ The Commission is a responsible agency under CEQA because it has discretionary approval authority over the at-grade and grade-separated rail crossings.¹⁰

As a responsible agency under CEQA, the Commission’s role is limited. It is “responsible for considering only the effects of those activities involved in a project which it is required by law to carry out or approve.”¹¹ Accordingly, responsible agencies “should review and comment on Draft EIRs and Negative Declarations for projects which the Responsible Agency would later be asked to approve[,]” and such “comments shall be limited to those project activities which are within the agency’s area of expertise or which are required to be . . . approved by the agency”¹² As the Guidelines make clear: “By this means [*i.e.*, **by consulting with the lead agency in the course of the lead agency’s preparation of the EIR**], the Responsible Agency will ensure that the documents it will use will comply with CEQA.”¹³

⁷ Pub. Resources Code, § 21000 *et seq.*

⁸ Pub. Resources Code, § 21067; Cal. Code Regs., Tit. 14, Div. 6, Ch. 3 (“Guidelines”), § 15367.

⁹ Pub. Resources Code, § 21002.1, subd. (d).

¹⁰ Pub. Resources Code, § 21068; Guidelines, § 15381.

¹¹ Pub. Resources Code, § 21002.1, subd. (d).

¹² Guidelines, § 15096, subd. (d); *id.*, § 15086, subd. (c) (same).

¹³ Guidelines, § 15096, subd. (b).

Once an EIR is final, “[a] Responsible Agency complies with CEQA by considering the EIR . . . prepared by the Lead Agency and by reaching its own conclusion on whether and how to approve the project involved.”¹⁴ In addition, the decision-making body of a responsible agency must consider the lead agency’s EIR prior to issuing a discretionary approval, and “shall certify that its decision-making body reviewed and considered the information in the EIR”¹⁵ The responsible agency also has the discretion to require additional mitigation to lessen or avoid only the direct or indirect effects “of that part of the project which the agency will be called upon to carry out or approve.”¹⁶

In accordance with these provisions of CEQA, the Commission considered the information in the Final EIR relevant to its approval of the 11 grade-separated and 16 at-grade crossings in addressed in Resolution SX-100, adopted a suite of safety measures and reporting requirements,¹⁷ and found that the Final EIR, Notice of Determination, and Statement of Overriding Considerations certified and adopted by Expo Authority were adequate for the Commission’s decision-making purposes.¹⁸ Specifically, the Commission stated:

The Commission reviewed and considered the lead agency’s FEIR and finds, where feasible, Expo Authority adopted mitigations to reduce the impacts to less-than-significant levels, and that remaining significant impacts were lessened to the extent possible through adoption of additional mitigations. The Commission finds the FEIR, NOD, and SOC adequate for our decision-making purposes.¹⁹

¹⁴ Guidelines, § 15096, subd. (a); see also, *id.*, § 15004, subd. (a) (before issuing a discretionary project approval, responsible agencies shall consider the final EIR or negative declaration).

¹⁵ Guidelines, §§ 15050, subd. (b), 15096, subd. (f).

¹⁶ Guidelines, §§ 15041, subd. (b), 15096, subd. (g).

¹⁷ Resolution SX-100 at pp. 8, 12-13.

¹⁸ Because the Commission must presume that the Final EIR complies with CEQA, it is not required to certify that the Final EIR complies with CEQA, but only that it has considered the relevant information in the Final EIR. Guidelines, §§ 15096, subd. (i), 15050, subd. (b), 15096, subds. (a), (f), and (i).

¹⁹ Resolution SX-100 at p. 8.

Thus, the Commission fulfilled its role as a responsible agency under CEQA in its approval of SX-100.

2. Because CEQA Requires the Commission to Conclusively Presume the Final EIR Complies with CEQA, the Commission May Not Re-Litigate the Validity of the Final EIR or Assume the Role of Lead Agency and Re-Evaluate Every Project Impact as Requested by NFSR.

Expo Authority consulted with the Commission in preparing the Draft EIR, as CEQA requires; the comments of the Commission’s Rail Safety Staff were addressed in the Final EIR and noted in the RCHAR.²⁰ The Commission has not challenged the validity of the Final EIR.

Because NFSR has challenged the validity of the Final EIR in court, the Commission has no discretion at all to adjudicate the adequacy of the EIR or to assume the lead agency role and revisit the analysis in the Final EIR. The Commission must “conclusively presume” that the Final EIR complies with CEQA pending the final outcome of the litigation.²¹ The Superior Court and the Court of Appeal both held that the Final EIR complied with CEQA.²² The Supreme Court’s grant of the petition for review in *Neighbors for Smart Rail v. Exposition Metro Line Construction Authority* simply prolongs the duration of this conclusive presumption.

Section 21167.3 of CEQA states:

If an action or proceeding alleging that an [EIR] . . . does not comply with [CEQA] is commenced . . . ***pending final determination of the issue of such compliance, responsible agencies shall assume that the EIR . . . does comply with [CEQA]***²³

²⁰ Final EIR, vol. 1, § 3.2 at pp. 30-31; RCHAR App. F (Letter from Commission to Expo Authority regarding Final EIR dated Dec. 4, 2009).

²¹ Pub. Resources Code, § 21167.3; Guidelines, § 15233.

²² *Neighbors for Smart Rail v. Exposition Metro Line Construction Authority* (2012) 204 Cal.App.4th 1480, petition for review granted August 8, 2012, S202828.

²³ Pub. Resources Code, § 21167.3 (emphasis added); Guidelines, § 15233 (“If a lawsuit is filed challenging an EIR . . . for noncompliance with CEQA, Responsible Agencies shall act as if the EIR . . . complies with CEQA and continue to process the application for the project according to the time limits for Responsible Agency Action [in the Permit Streamlining Act]”).

As the court of appeal held in *City of Redding v. Shasta County Local Agency Formation Commission*, the Legislature enacted section 21167.3 in order to expedite CEQA review, and to avoid the kind of collateral attack on the validity of the CEQA document that NFSR would have the Commission engage in on rehearing:

The evident intent of section 21167.3 is to expedite CEQA review where a lawsuit contesting CEQA documentation is pending by designating **one forum** for resolution of claims of unlawful documentation [*i.e.*, a negative declaration or EIR] and by requiring project review to proceed while the claims are resolved. ***That forum is the court.***²⁴

The court of appeal in *City of Redding* recognized the intent of the Legislature to preclude a collateral attack on the validity of CEQA documentation (whether it is a negative declaration or an EIR) in two forums. Thus, the court rejected Redding’s arguments, and affirmed the trial court’s judgment.²⁵ It reasoned that “Redding would have the adequacy of Anderson’s negative declaration determined by both LAFCO [the responsible agency] and the court. Such a dual determination would cause confusion and provoke additional time-consuming litigation.”²⁶

The court also rejected Redding’s argument that the Local Agency Formation Commission (“LAFCO”) should assume the role of lead agency, because LAFCO was ***prohibited by law*** from making the threshold determination that the negative declaration was inadequate for LAFCO’s purposes.²⁷ The court also held that even if LAFCO could determine that the negative declaration was inadequate, which it could not, it could not assume the lead

²⁴ *City of Redding v. Shasta County Local Agency Formation Commission* (1989) 209 Cal.App.3d 1169, 1181 (first emphasis in the original, second emphasis added).

²⁵ *Id.* at p. 1181.

²⁶ *Id.*

²⁷ *Id.* at p. 1180.

agency role because it was not authorized to do so where a CEQA challenge had been timely filed in court.²⁸

Just as section 21167.3 barred Redding from adjudicating the validity of the lead agency's negative declaration and from assuming the role of lead agency to prepare a subsequent or supplemental EIR, it also bars the Commission from re-litigating the validity of the Final EIR or assuming the lead agency role.

Thus, in light of the Legislature's clear mandate in CEQA section 21167.3 and controlling case law, the Commission must assume the Final EIR complies with CEQA.

3. CEQA Prohibits the Commission From Requiring the Preparation of a Supplemental or Subsequent EIR.

The Commission, as a responsible agency, has very limited discretion to require additional CEQA analysis. Once an EIR is certified, CEQA *prohibits* any agency from requiring the preparation of a supplemental or subsequent EIR *unless* the agency finds that the project will have new significant impacts that were not known and could not have known at the time the EIR was prepared.²⁹

NFSR has not filed any testimony. Thus, it has failed to produce any evidence that there are any changes in the project or new information that reveals any new significant impacts or any more severe significant impacts of the Project. NFSR also failed to produce any evidence

²⁸ It is important to note that none of the other prerequisites in Guidelines section 15052 for the Commission to assume the role of lead agency applies here. Under that provision, a responsible agency may assume the role of lead agency only if the time to file a judicial challenge has passed, and one of the following situations arises: (1) the lead agency did not prepare *any* environmental documents for the project, (2) a subsequent EIR is required, and the lead agency has granted final project approval, or (3) the lead agency's environmental document is inadequate, and the lead agency failed to consult with the responsible agency. Guidelines, § 15052, subd. (a)(1)-(3). Here, a Final EIR was prepared, no subsequent or supplemental EIR is required, and Expo Authority consulted with the Commission.

²⁹ Pub. Resources Code, § 21166; Guidelines, § 15096, subd. (e)(3); *id.*, § 15162. *Bowman v. City of Petaluma* (1986) 185 Cal.App.3d 1065, 1081 (holding that CEQA and the Guidelines prohibit agencies from preparing subsequent or supplemental EIRS “*unless* ‘subsequent changes’ necessitating ‘major revisions’ are shown” (emphasis in original)).

during the prior SX-100 proceedings identifying any new significant impact. Instead, in its portions of the Joint PHC Statement and its failed Motion for Stay, NFSR has merely rehashed the same complaint that it made in comments on the Draft EIR and in its losing legal challenge to the adequacy of the Final EIR. Because NFSR has failed to present evidence of a new significant impact, its claim that the Commission should conduct additional CEQA analysis is waived.

4. It Would Be Appropriate for the Commission to Prepare CEQA Findings for Each Significant Impact Within Its Jurisdiction as a Responsible Agency, Accompanied by a Brief Explanation of the Rationale for Each Finding.

CEQA requires public agencies to adopt certain findings at the time of approval of a project.³⁰ “The Responsible Agency shall make the findings required by Section 15091 for each significant effect of the project and shall make the findings in Section 15093 if necessary.” Guidelines section 15091 specifies that each finding with respect to a significant impact should be “accompanied by a brief explanation of the rationale for each finding.”³¹

As explained above, responsible agencies have more limited obligations under CEQA and may consider only those aspects of a project as are within the authority of the responsible agency.³² Thus, Commission review under CEQA here is limited to those aspects of the Expo Rail Project (*i.e.*, the crossings) over which it has discretionary approval authority. Here, the Commission’s approval relates to the safety of the crossings approved in Resolution SX-100.

³⁰ Pub. Resources Code, § 21081; *Resource Defense Fund v. Local Agency Formation Commission* (1987) 191 Cal.App.3d 886, disapproved on other grounds by *Voices of the Wetlands v. State Water Resources Control Bd.* (2011) 52 Cal.4th 499.

³¹ Guidelines, § 15096, subd. (h).

³² Pub. Resources Code, § 21002.1, subd. (d); see also, 2 Kostka & Zischke, Practice Under the California Environmental Quality Act (CEB 2d ed. 2012) § 17.53, p. 848 (admonishing practitioners that the seemingly broad language in Guidelines section 15096, subd. (f) must be interpreted in light of the statutory restriction on a responsible agency’s scope of authority); see also, *San Diego Navy Broadway Complex Coalition v. City of San Diego* (2010) 185 Cal.App.4th 924, 939 (holding that city was not required to prepare a subsequent or supplemental EIR to address global warming impacts where its discretionary approval authority was limited to design aesthetics).

The Commission is required to make findings only for any significant safety impacts related to those crossings.

The Final EIR's analysis of the safety impacts of the at-grade crossings identifies potentially significant safety impacts related to emergency response during construction and once the project becomes operational.³³ It also summarizes that each could be mitigated to a level of less than significance with the adoption of specified mitigation measures.³⁴ Expo Authority found that each significant impact would be reduced to a less than significant level, and adopted the mitigation measures proposed in the Final EIR.³⁵

In Resolution SX-100, the Commission incorporated Expo Authority's relevant findings and Statement of Overriding Considerations by reference.³⁶ The Commission's order granting rehearing indicates that the Commission is considering adopting express findings. While the Commission's findings comply with CEQA, the Commission may choose to adopt its own findings regarding those aspects of the Project as are within the Commission's authority. Expo Authority has attached draft findings that may be used as a resource for the Commission's own express findings.³⁷

³³ Final EIR, vol. I, § 3.15 Safety and Security, pp. 3.15-7 – 3.15-9, 3.15-12 – 3.15-13 (operational impacts on emergency response times); *id.*, § 4 Construction Impacts, pp. 4-57 – 4-58 (construction impacts); see also, *inter alia*, Final EIR, vol. II, Comments and Responses, Subvol. IIB at p. IIB-17 (Master Response 7: School Issues and Concerns), IIB-193-194 (Response R-L331-79 regarding MM SAF-1), IIB-280 (Response R-E-419-1 regarding MM SAF-1); *id.*, Subvol. IIC at p. IIC-514-515 (Response R-F7-2-3 regarding MM SAF-1), p. IIC-590 (Response R-L640-25 regarding MM CON-17 and MM CON-18), IIC-704 (Response R-L475-12 regarding MM SAF-1).

³⁴ *Id.*

³⁵ Exposition Metro Line Construction Authority Board Resolution No. 0010 (Feb. 4, 2010), Attachment A, Findings of Fact for the Final Environmental Impact Report of the Exposition Corridor Transit Project Phase 2 Los Angeles, Culver City, and Santa Monica, California, at pp. 4-16 – 4-17; 4-27 – 4-28; Attachment C, Final Mitigation Monitoring and Reporting Program at p. 12 (MM SAF-1); 19-20 (MM CON-17 and MM CON-18).

³⁶ Resolution SX-100, at pp. 8-9.

³⁷ Attachment A hereto.

B. The Commission Procedure Approving the Phase 2 Grade Crossings Satisfied the Requirements of Due Process.

Parties appearing before an administrative agency are entitled to procedural due process, which generally safeguards the right to notice and opportunity for hearing.³⁸ Due process does not, however, compel the use of any specific set of procedures. Administrative agencies enjoy considerable discretion in determining the nature and extent of process afforded and the Commission, in particular, “is not an ordinary administrative agency” in this respect.³⁹ Instead, the Commission is a “constitutional body with broad legislative and judicial powers,” including the power to establish the rules governing its proceedings.⁴⁰ The United States Supreme Court has said that due process “does not require a trial-type hearing in every conceivable case of government impairment of private interest” and that “the very nature of due process negates any concept of inflexible procedures universally applicable to every imaginable situation”⁴¹

As will be demonstrated in the argument below, the regulatory procedures used to adopt Resolution SX-100 gave NFSR ample opportunity to advocate its interests and the Commission – having followed these procedures – fully satisfied its due process obligations, and the formal evidentiary procedures now being followed render previous due process concerns moot.

³⁸ See, *Ohio Bell Tel. Co. v. Public Util. Com. of Ohio* (1937) 301 U.S. 292, 304.

³⁹ *Wise v. Pacific Gas & Electric Co.* (1999) 77 Cal.App.4th 287, 300.

⁴⁰ *Consumers Lobby Against Monopolies v. Public Utilities Com.* (1979) 25 Cal.3d 891, 905; see also, Cal. Const., art. XII, §§ 2 (which provides that the Commission may establish its own procedures, subject to statute and due process); see also, Pub. Util. Code, § 1701, subd. (a) (which provides that all proceedings shall be governed by rules of practice and procedure adopted by the Commission).

⁴¹ *Cafeteria & Restaurant Workers Union, Local 473, AFL-CIO v. McElroy* (1961) 367 U.S. 886, 895-96; see generally, *Mathews v. Eldridge* (1976) 424 U.S. 319.

1. The RCHAR Process Accorded Due Process to Interested Parties Including NFSR.

As detailed in the factual and procedural background above, GO 164-D sets forth the rules and regulations governing the Commission's safety oversight of rail transit agencies. In addition to imposing requirements for reporting accidents, conducting internal safety and security audits, and other operational and administrative obligations, GO 164-D sets forth the expedited process by which at-grade rail crossings may be designed in conjunction with the Commission's Rail Safety Staff and approved by the Commission. This alternative process requires the development of an RCHAR, the refinement of which advances the design of each proposed at-grade crossing. Refinement of the RCHAR requires that the Commission Rail Safety Staff hold field diagnostic review meetings in order "to assess the safety aspects of the proposed at-grade crossing design(s)."⁴² Once the RCHAR receives the support of the Commission's Rail Safety Staff, a formal resolution is circulated for comment in accordance with Rule 14.5 of the Commission's Rules. Comments submitted by interested parties, stakeholder agencies, or members of the general public are considered in drafting the final resolution, which is then put to a vote during a regular meeting of the Commission. As a result of this purposefully crafted and detailed procedure, interested parties and others are granted substantial opportunities to participate in, and affect the outcome of, this RCHAR process.

Consistent with GO 164-D and contrary to NFSR's claims of insufficient public participation, persons and organizations interested in the design of Phase 2 of the Expo Rail Project, including NFSR, were extended significant opportunities to provide input in design development. Such opportunities included the following:

⁴² GO 164-D, at paragraph 10.5.

- In October 2011, Expo Authority informed stakeholders about CPUC Resolution SX-100 and the hearing date on the Expo Line social media sites, including Facebook (2,900 followers) and Twitter (1,900 followers).⁴³
- Expo Authority conducted outreach to key project stakeholders along the alignment, including local residents and organizations, to solicit feedback and participation during the RCHAR process.⁴⁴
- Outreach conducted by Expo Authority resulted in: (i) over 360 signatures on an online petition supporting approval of Resolution SX-100; (ii) nearly 30 personal letters from area stakeholders supporting approval of Resolution SX-100, including residents immediately adjacent to the grade crossings and organizations such as the Los Angeles Area Chamber of Commerce; and (iii) 11 letters of support from elected officials representing the Expo Rail Project alignment, including the cities of Los Angeles, Culver City and Santa Monica.⁴⁵
- NFSR, among others, was given the opportunity and did, in fact, file comments on draft Resolution SX-100, which were considered prior to its adoption.⁴⁶

The RCHAR process is a valuable and efficient means of maximizing the expertise of the Commission’s Rail Safety Staff to design and construct a public railway system in conjunction with the rail transit agency, affected local agencies, community groups and the public. While procedural due process is meant to facilitate a just and fair result, it is not intended to guarantee that all interested parties will be happy with the eventual outcome. That the Commission’s procedures are aimed to achieve the former proposition and not the latter does not mean that due process itself has been denied.

2. NFSR Had Opportunity to Participate in the Development of the Expo Rail Project Even Prior to the Commencement of the RCHAR Process.

There were extensive opportunities for NFSR, among other organizations and individuals interested in Phase 2 of the Expo Rail Project, to participate in the environmental review process, for which Expo Authority was responsible as lead agency pursuant to CEQA.

⁴³ Prepared Testimony of Richard D. Thorpe, served November 2, 2012 (“Thorpe Testimony”), at p. 11.

⁴⁴ *Id.*

⁴⁵ *Id.* at pp. 10-11.

⁴⁶ *Id.* at p. 11.

As noted in the testimony of Expo Authority witness Monica Born, the public and other stakeholders, including NFSR, had substantial opportunity to participate in the development of the Project since 2007.⁴⁷ Expo Authority conducted a comprehensive public outreach program throughout the environmental planning phase of the project, which took place from February 2007 through December 2009. At the start of the environmental review process, Expo Authority conducted four public meetings to solicit public input on the Project prior to preparing an EIR. After circulating the Draft EIR for comment in January 2009, Expo Authority conducted over 100 meetings, including three formal public hearings, with various cities, public agencies and stakeholders. Expo Authority received and responded to nearly 9,000 comments in response to the Draft EIR, and copies of all public testimony and comments, along with Expo Authority's responses, were included in the Final EIR.⁴⁸ Comments on the environmental document included extensive discussion of the grade crossings, safety, and traffic. The Final EIR was circulated in December 2009 to allow for additional public review and comment, and was the subject of a public hearing attended by about 200 individuals and organizations held in February 2010.⁴⁹

NFSR participated in this process and was represented at a substantial number of these meetings and events.⁵⁰ NFSR's active involvement in the environmental review process included extensive comments regarding the proposed at-grade rail crossings and confirms that the process of developing the at-grade rail crossings encouraged and invited public participation, in accordance with due process.

⁴⁷ Born Testimony, at pp. 5-7.

⁴⁸ *Id.*

⁴⁹ *Id.* at p. 6.

⁵⁰ *Id.* (noting Expo Authority's response to, and analysis of, NFSR's Draft EIR comments).

Furthermore, as noted in the factual and procedural background detailed above, the RCHAR process itself was developed in a formal Commission rulemaking proceeding to revise and update procedures relevant to the safety oversight of the state's rail systems. Although NFSR was an active participant in the CPUC proceedings litigating Phase 1 of the Expo Project in 2007, NFSR made no effort to comment and/or submit alternative recommendations in the GO 164-D rulemaking proceeding occurring during the same time period.

3. Although Not Necessary to Satisfy Due Process, the Commission Has Instituted Supplementary Procedures Facilitating Additional Public Participation and Confirming the Allowance of Due Process to NFSR.

As demonstrated above, ample due process was provided in the consideration and approval of Resolution SX-100. However, the Commission's decision to allow for a rehearing and subsequent procedures have provided additional opportunity for public input and specifically for participation by NFSR, which eliminate any basis for claiming a denial of due process with respect to the subject matter of this proceeding.

ALJ Mason's Ruling of July 27, 2012, requiring Expo Authority and NFSR to meet and confer in order to formulate and file a joint PHC statement facilitated NFSR's participation in the rehearing process, enabling NFSR to submit its positions on the rehearing issues in the context of a document drafted, filed, and served by Expo Authority. The PHC, held October 5, 2012, allowed NFSR to present its procedural concerns to ALJ Mason, who established a schedule providing for Expo Authority to serve the Final Hazard Analysis Report for Expo Phase 2 for the parties' use and consideration and for inclusion in the evidentiary record, to be followed by service of testimony and submission of legal briefs. As memorialized in the Scoping Memo, these events will culminate in evidentiary hearings to be held in mid-December, 2012.

These formal procedures offer NFSR and any other interested party attending to the Commission's business ample procedural opportunities for developing an evidentiary record

addressing issues of concern regarding the at-grade and grade separated crossings authorized by Resolution SX-100, and presenting factual and legal arguments to the Commission in support of their points of view with respect to those authorizations. The evidentiary and analytic record being developed in this rehearing proceeding will provide a sufficient basis for the Commission to affirm or revise the terms of that Resolution SX-100, while according due process to NFSR and to any other interested party that may take timely action to participate in this proceeding.

C. The Commission Properly Considered Cost and Complied With the Standards of Practicability in Approving the Expo Rail Project Phase 2 Rail Crossings.

The Commission has long applied a standard of “practicability” in determining whether to require a grade separated roadway/rail crossing in preference to an at-grade crossing. One of the leading Commission decisions on the subject – *City of San Mateo*, Decision (“D.”) 82-04-033⁵¹ – favored a highly restrictive definition of the word “practicable,” implying that the “practicability” standard requires construction of separated grade crossings in all cases where such separation is feasible to construct, regardless of cost or other considerations. However, *City of San Mateo* is distinguishable on its facts.⁵² *San Mateo* and similar cases involved freight trains passing over mainline railroads at high speeds, or commuter rail lines with long trains moving at high speed – not the circumstances of a light rail transit system such as Expo Rail.

More recently, the meaning of the word “practicable” in the context of the Commission’s consideration of proposed at-grade crossings has evolved to better account for modern light rail transit designed to run in an urban environment accessible to pedestrians. In D.01-08-016,⁵³ the Commission declared an at-grade crossing for the Santa Clara Valley Transportation Authority to be “the most financially and environmentally acceptable choice,”

⁵¹ D.82-04-033, 8 CPU2d 572 (1982).

⁵² See, e.g., *City of Oceanside*, D.92-01-017, 43 CPUC2d 46 (1992).

⁵³ *Application of Santa Clara Valley Transportation Authority*, D.01-08-016, at p. 3.

recognizing the “open access concept of light rail” and the relevance of cost in the consideration of at-grade crossing design.⁵⁴ In D.02-05-047,⁵⁵ the Commission further acknowledged the need to consider cost in “the real world” by abandoning a strict “dictionary approach” to the term “practicable” for purposes of the subject light rail line. Although the Commission declined to restrict *City of San Mateo* to instances involving major heavy rail movements, the Commission defined a set of practicability criteria upon which to base a practicability analysis. More recently, in D.09-02-031,⁵⁶ the Commission restated those criteria as follows:

- A demonstration of public need for the crossing;
- A convincing showing that Expo Authority has eliminated all potential safety hazards;
- The concurrence of local community and emergency authorities;
- The opinions of the general public, and specifically those who may be affected by an at-grade crossing;
- Although less persuasive than safety considerations, the comparative costs of an at-grade crossing with a grade separation;
- A recommendation by Staff that it concurs in the safety of the proposed crossing, including any conditions; and
- Commission precedent in factually similar crossings.⁵⁷

As more fully detailed in the testimony of Expo Authority witness Thorpe, Expo Authority considered these seven practicability criteria as it developed the crossing plans approved by Resolution SX-100.⁵⁸ Expo Authority went through comprehensive CEQA environmental review and GO 164-D safety analysis to develop a set of proposed crossings that:

(a) addressed the compelling need for extended rail transit to serve the people on the west side of

⁵⁴ *Id.*

⁵⁵ *Los Angeles to Pasadena Metro Blue Line Construction Authority*, D.02-05-047, at p. 10.

⁵⁶ *Re Exposition Metro Line Construction Authority*, D.09-02-031, at pp. 17-19.

⁵⁷ *Id.*

⁵⁸ Thorpe Testimony, at pp. 9-16.

Los Angeles County; (b) resolved all potential safety hazards identified in the EIR process and thereafter in the RCHAR process; and (c) garnered the support of members of the general public, area stakeholders and the Commission's Rail Safety Staff. Public need and support for the Expo Rail Project were thoroughly substantiated by the volume of public support during project development. Expo Authority received numerous letters from area stakeholders and members of the general public during the environmental review phase and during the time the Commission considered Resolution SX-100. An online petition urging the Commission to approve Resolution SX-100 received some 360 signatures. Compared to the isolated – and intransigent – opposition mounted by NFSR, there has been substantial public support for the Expo Rail Project.⁵⁹

Expo Authority properly considered cost as a component of its practicability evaluation. Such an analysis was pursued in particular detail with respect to the at-grade crossing designs proposed for Westwood Boulevard and Overland Avenue, with respect to which NFSR called for consideration of grade separations in its comments on the Draft EIR. As described in the testimony of witnesses Thorpe and Born, Expo Authority commissioned its environmental consultant to conduct an in-depth technical, engineering, and cost analysis of constructing an underground trench or an aerial structure at one or both of these crossings. The analysis developed a comparison of estimated costs for an at-grade crossing with grade-separated alternatives, including two variations of an aerial structure (overcrossing at Overland or extended overcrossing with an aerial station) and three variations of an underground trench (shallow trench, open trench or deeper trench).⁶⁰ Of those alternatives that were first deemed feasible

⁵⁹ Thorpe Testimony, at pp. 10-11.

⁶⁰ *Id.* at pp. 11-14; Born Testimony, at pp. 11-13.

from a construction standpoint,⁶¹ none proved to be practicable once cost and other impacts, including construction complexity and aesthetics, were considered.

As detailed in the testimony of witnesses Thorpe and Born, the two aerial rail overcrossing alternatives were complicated by the imposition of a constant visual obstruction and were estimated to exceed the cost of the at-grade crossing approved in Resolution SX-100 by \$31 million to \$66 million, respectively.⁶² An underground trench alternative that was feasible from a construction standpoint – although with significant noise, vibration, aesthetic and traffic impacts – was estimated to exceed the cost of the approved at-grade approach by \$224 million.⁶³

Consistent with the Commission’s standards of practicability, Expo Authority gave cost appropriate, but not undue, weight in the design of the Westwood Boulevard and Overland Ave crossings while working closely with the Department of Transportation of the City of Los Angeles (“LADOT”) and other stakeholders to design the crossings to operate safely.⁶⁴ As a result, Expo Authority’s designs are cost effective – reflecting the financial limitations of the “real world” – *without* compromising the Commission’s primary goal of safe rail crossings.

The only proposed crossings that NFSR specifically addressed in its portion of the Joint PHC Statement addressing the practicability/cost issues were those at Overland Avenue, Westwood Boulevard, Military Avenue, and Sepulveda Boulevard.⁶⁵ The engineering, aesthetic, and cost concerns that make grade separation impracticable have already been addressed above. As noted in the testimony of Expo Authority’s witnesses, the Expo Authority Board adopted a grade separation plan for the Sepulveda Boulevard crossing and the nearby Sepulveda Station,

⁶¹ Thorpe Testimony, at p. 12 (noting that construction of a shallow trench was not considered to be a feasible option because of storm drains running under Overland Avenue and under Roundtree Road at the Expo Rail right of way).

⁶² Born Testimony, at pp. 12-13; Thorpe Testimony, at pp. 13-14.

⁶³ Born Testimony, at pp. 11-12; Thorpe Testimony, at pp. 12-13.

⁶⁴ Born Testimony, at p. 8.

⁶⁵ Joint PHC Statement, filed October 23, 2012, at p. 22.

eliminating safety concerns with respect to that crossing.⁶⁶ Military Avenue is a two-lane, lightly traveled street. As indicated in LADOT’s recommendations to Expo Authority, included as Appendix E to the RCHAR, signaling the Military Avenue crossing will provide appropriate safety features, and considering the “relatively lighter traffic volumes on Military Avenue,” no significant impacts were foreseen.⁶⁷

As demonstrated above, the RCHAR process produced a set of at-grade crossings that meet the practicability criteria set by this Commission and achieve the common goal of a safe and efficient light rail transit project. The Commission should affirm the authorizations granted by Resolution SX-100.

D. Resolution SX-100 Need Not Be Modified To Specifically Consider Two Unchanged Overhead Structures and No Addendum to the Project EIR is Required.

The decision granting rehearing, D.12-06-041, identified an “error” in Resolution SX-100 related to “two overhead structures situated above new crossing locations” – the I-405 freeway and the Palms Park pedestrian bridge. The decision finds fault in the Resolution for not identifying these overhead structures “as part of the existing environmental baseline” for CEQA purposes, and directs the assigned ALJ “to consider whether Resolution SX-100 should be modified or revised to include these two overhead structures, and whether an addendum is required by CEQA.”⁶⁸ The Scoping Memo responds to this direction by defining the issue as “whether Resolution SX-100 should be modified or revised to include two overhead structures.”⁶⁹

In fact, there is no need either to include references or authorizations regarding the two overhead structures in Resolution SX-100 or to create an addendum to the project EIR in this

⁶⁶ Thorpe Testimony, at p. 7; Born Testimony, at pp. 8-9; Final RCHAR, Appendix B, Drawing No. GC-010.

⁶⁷ Final RCHAR, Appendix E, at p. 6; Final RCHAR, Appendix B, Drawing No. GC-007.

⁶⁸ D.12-06-041, at pp. 8-9.

⁶⁹ Scoping Memo, at p. 4.

regard. The Draft and Final EIR properly and adequately took account of these structures, and they were not relevant to the RCHAR process that resulted in Resolution SX-100.

1. The Commission Need Not Prepare an Addendum to the Final EIR Because the Final EIR Disclosed the Existence of the Palms Park Pedestrian Overcrossing and the Relationship of the I-405 to the Expo Rail Project.

A lead or responsible agency is required to prepare an addendum to a certified EIR “if some changes or additions are necessary but none of the conditions described in Section 15162 calling for preparation of a subsequent EIR have occurred.”⁷⁰ An addendum to the Final EIR for Expo Rail Phase 2 is not required because both the Palms Park Pedestrian Overcrossing and the I-405 were disclosed in the Final EIR and no changes to those structures are proposed in connection with the Expo Rail project.

As Mr. Thorpe has testified, Expo Authority stated in the Final EIR: “The existing pedestrian bridge over the Exposition ROW to Palms Park would remain.”⁷¹ Also, in response to a comment asking whether the pedestrian overpass would remain, or if it would need to be rebuilt, Expo Authority explained: “There is sufficient clearance [above the Overhead Contact System] that the Palms Park pedestrian overpass will not need to be rebuilt.”⁷² Mr. Thorpe’s testimony confirms that this remains the case. In addition, the Palms Park pedestrian overpass is located in a trench (the existing ROW), does not cross any street, will not be touched as part of the project, and will remain in place. The top of the rail system will maintain safe clearance from the bottom of the bridge and no mitigation is required because the crossing is unaffected by the Expo Rail Phase 2 project.⁷³

⁷⁰ Guidelines, § 15164, subd. (a).

⁷¹ Thorpe Testimony, at p. 17 and Attachment 2 thereto (Final EIR, vol. I at p. 2-16).

⁷² Thorpe Testimony, at p. 17 and Attachment 3 thereto (Final EIR, vol. II, Subvolume IId at p. IId-678, Response R-E562-11).

⁷³ Thorpe Testimony, at p. 17 and Attachment 4 thereto.

The Final EIR also disclosed the relationship of the I-405 freeway to the grade-separated crossing at Sawtelle Boulevard.⁷⁴ The conceptual engineering drawings for the grade-separated crossing at Sawtelle Boulevard were included in both the Final EIR and the RCHAR. They represented the relationship of the I-405 to the light rail bridge over Sawtelle Boulevard, both from an overhead perspective, and in a side profile. The engineering drawings in Appendix E to the Final EIR represented how Sawtelle Boulevard would be lowered to accommodate the clearance required between the roadway and the light rail bridge.⁷⁵ In addition, the RCHAR included an additional “concept plan” showing the grade-separated Sawtelle Boulevard crossing in relationship to the I-405 with appropriate clearances indicated.⁷⁶

As Mr. Thorpe has testified, the current level of engineering of the Sawtelle crossing adjacent to the I-405 freeway includes no design changes that reveal any new significant environmental impacts. To the contrary, the latest design will not require that Sawtelle be lowered because design criteria will be achieved by using a different light rail bridge design that reduces the space between the bottom of the light rail bridge and the top of the rail system while maintaining adequate clearance between the top of rail and the I-405 soffit. The effect will be a reduction of construction impacts of the grade-separated crossing at Sawtelle Boulevard and the I-405 freeway will not be affected at all.⁷⁷

In short, an addendum to the EIR is not required to address either the Palms Park pedestrian bridge or the I-405 overcrossing, because the Final EIR disclosed both these structures, there have been no significant changes related to those crossings, the Expo Rail

⁷⁴ Thorpe Testimony, at p. 18 and Attachment 5 thereto (Final EIR, vol. I at p. 2-23).

⁷⁵ Thorpe Testimony, at p. 19 and Attachment 6 thereto (Final EIR, Appendix E, attached to Final RCHAR as Appendix D, Drawings Nos. T005, T005A, CP-100, and CP-200).

⁷⁶ Thorpe Testimony, at pp. 19-20 and Attachment 7 thereto (Final RCHAR, Appendix B, Drawing No. GC-009).

⁷⁷ Thorpe Testimony, at p. 19.

Project will not affect these existing crossings, and the Project will have no impact on the safety of either of these grade-separated crossings. These crossings have been evaluated during the environmental planning stage of the Project and were not inadvertently omitted from the CEQA baseline for any impact analyses.

2. Resolution SX-100 Need Not Be Modified to Include the Two Overhead Structures Because They Are Not Relevant to the RCHAR Process.

Pursuant to GO 164-D, an RCHAR must include detailed engineering drawings and certain specific information upon which to base a safety analysis for each at-grade crossing proposed to be constructed by a rail transit agency.⁷⁸ As described by Expo Authority witness Thorpe and noted above, the crossings under the Palms Park pedestrian footbridge and the I-405 freeway are grade-separated and so do not present safety hazards, evaluation of which is the purpose of the RCHAR process.⁷⁹ Both of these existing structures are to remain untouched and unaltered by the light rail construction.⁸⁰ Neither the Palms Park pedestrian overcrossing nor the I-405 freeway was included in the RCHAR finalized in August 2011 because there was simply no need to do so.

The RCHAR process did not impermissibly fail to consider these unchanged overhead structures. There is no evidence or reasonable basis for concern that these structures will affect the proposed grade separated crossings. In any event, the requirements of General Order 164-D, establishing the RCHAR process, are not mandatory for grade separated crossings, but only for “at-grade crossings established after the effective date of this General Order.”⁸¹

⁷⁸ GO 164-D, at paragraph 10.4.

⁷⁹ Thorpe Testimony, at p. 20.

⁸⁰ *Id.*

⁸¹ GO 164-D, at paragraph 10.1.

Therefore, Resolution SX-100 need not be modified to specifically consider either the Palms Park pedestrian footbridge or the I-405 freeway.⁸²

IV.

CONCLUSION

Based on the evidentiary record and principles of law summarized above, Exposition Metro Line Construction Authority respectfully urges the Commission either to affirm Resolution SX-100 or to issue a further decision providing the same authorizations and ordering paragraphs that were provided for in that Resolution, so that Expo Authority may proceed with construction of the 16 at-grade and 11 grade separated Expo Rail Phase 2 Project crossings that were authorized therein.

Respectfully submitted,

NOSSAMAN LLP

Robert D. Thornton
Martin A. Mattes
Robert C. Horton
Mari R. Lane

By /S/ MARTIN A. MATTES
Martin A. Mattes

50 California Street, 34th Floor
San Francisco, CA 94111
Telephone: (415) 398-3600
Facsimile: (415) 398-2438
E-mail: mmattes@nossaman.com

Attorneys for EXPOSITION METRO
LINE CONSTRUCTION AUTHORITY

November 9, 2012

⁸² Although the RCHAR process need not, under the terms of GO 164-D, Part 10, address plans for constructing new grade separated crossings, the RCHAR developed for Expo Rail Phase 2 did address a number of grade separated crossings along with a larger number of at-grade crossings. For the sake of consistency and completeness, the Commission may wish to include reference to and even approval of the grade separated Palms Park and I-405 crossings in a revised Resolution SX-100 or in its further decision in this proceeding, but there is no necessity to do so.

ATTACHMENT A

DRAFT CEQA FINDINGS FOR POTENTIALLY SIGNIFICANT SAFETY IMPACTS RELATED TO THE CONSTRUCTION AND OPERATION OF AT-GRADE CROSSINGS

Background:

With respect to the safety of the Project's at-grade crossings, the Final Environmental Impact Report ("FEIR") notes potentially significant impacts to community safety services during construction and operation of the Project because emergency vehicles traveling on streets that intersect the Project's at-grade crossings may experience some delay. (FEIR, vol. I, § 3.15 Safety and Security, pp. 3.15-12 – 3.15-13 [operational impacts on emergency response times]; *id.*, § 4 Construction Impacts, pp. 4-57 – 4-58 [construction impacts on emergency response times].)

To address these potentially significant impacts, Expo Authority adopted mitigation measure MM SAF-1 to mitigate operational impacts, as well as MM CON-17 and MM CON-18 to mitigate construction impacts. (Exposition Metro Line Construction Authority Board Resolution No. 0010 (Feb. 4, 2010), Attachment A, Findings of Fact for the Final Environmental Impact Report of the Exposition Corridor Transit Project Phase 2 Los Angeles, Culver City, and Santa Monica, California ("Findings") at pp. 4-16 – 4-17; 4-27 – 4-28; Attachment C, Final Mitigation Monitoring and Reporting Program ("MMRP") at p. 12 [MM SAF-1]; 19-20 [MM CON-17 and MM CON-18].)

MM SAF-1 requires the Los Angeles Metropolitan Transportation Agency (Metro) to provide a detailed description of its emergency response procedures to the appropriate community safety providers in the cities of Culver City, Santa Monica, and Los Angeles, and to conduct drills in order to properly implement the procedures. (Findings at p. 12; FEIR, § 3.15 at p. 3.15-12.) Additionally, Metro must encourage the adjacent cities to update their emergency response procedures to address the Project. (FEIR, § 3.15 at p. 3.15-13.) The FEIR notes that the cities of Los Angeles, Pasadena, South Pasadena, and Long Beach have all successfully implemented the procedures identified in MM SAF-1 for other Metro light rail lines. (FEIR, vol. II, Subvol. IIB at p. IIB-17.) In addition, Expo Authority studied response times as indicated by the various police and departments along the proposed alignment, or within proposed station areas, and determined that response times during project operation will remain within the averages for these departments. (FEIR, § 3.15 at p. 3.15-12.)

As adopted by Expo Authority, Mitigation Measure MM SAF-1 provides:

MM SAF-1 Prior to commencement of operation of the project, Metro shall coordinate with the cities of Culver City, Santa Monica, and Los Angeles and inform the appropriate community safety provider of Metro's emergency response procedures as incorporated into Metro's standard operating

procedures. Metro shall provide a detailed description of their emergency response procedures so as to provide other public safety providers with the knowledge of Metro's response plan in order to provide a fast, controlled and coordinated response to the various types of emergencies that may occur on the Metro rail system. Additionally, Metro shall encourage the cities of Culver City, Los Angeles, and Santa Monica to update their emergency response procedures to address implementation of the RPA [Recommended Preferred Alternative].

(MMRP, at p. 12.)

With respect to the potentially significant impacts from the construction of the Project's at-grade crossings on community safety services, Expo Authority analyzed and adopted the following mitigation measures:

MM CON-17 The Expo Authority shall maintain access to all police and fire stations at all times during construction.

MM CON-18 During construction of the RPA, the Expo Authority shall coordinate with the cities of Culver City, Santa Monica, and Los Angeles and inform the appropriate community safety provider of the construction emergency response procedures as incorporated into the Contractor's Systems Safety Program Plan. The Plan will include a detailed description of all emergency response procedures that shall be implemented by the contractor, so as to provide other public safety providers with the knowledge of the contractor's response plan in order to provide a fast, controlled, and coordinated response to the various types of emergencies. Additionally, the Expo Authority shall encourage the cities of Culver City, Santa Monica, and Los Angeles to update their emergency response procedures to address construction of the RPA.

(FEIR, § 4 at pp. 4-57 – 4-58; MMRP, at pp. 19-20.)

The Commission's CEQA Findings:

In Resolution SX-100, the Commission noted Expo Authority's preparation of the FEIR, its adoption of a Notice of Determination ("NOD") in certifying the FEIR, and its adoption of a Statement of Overriding Considerations ("SOC") in approving the Project. (Resolution SX-100, at p. 8.) The Resolution, at page 9, included the following CEQA findings:

The Commission reviewed and considered the lead agency's FEIR and finds, where feasible, Expo Authority adopted mitigations to reduce the impacts to less-than-significant levels, and that remaining significant impacts were lessened to the extent possible through adoption of additional mitigations. The Commission finds the FEIR, NOD, and SOC adequate for our decision-making purposes.

In consideration of the FEIR's findings and mitigation measures addressing safety-related impacts related to the construction and operation of the proposed at-grade crossings, the following additional Findings are proposed for adoption by the Commission:

1. Commission Finding re Potentially Significant Impact of Operation of the Project's At-Grade Crossings on Community Safety Services:

After reviewing the Final EIR, Findings, and MMRP for the Expo Rail Project, and based on the discussion above, the Commission finds that implementation of MM SAF-1 will reduce impacts to the delivery of community safety services to a less-than-significant level by providing a fast, controlled and coordinated response to the various types of emergencies. The Commission also finds that such changes or alterations are within the responsibility and jurisdiction of another public agency and not the Commission. Such changes have been adopted by such other agency or can and should be adopted by such other agency.

2. Commission Finding re Potentially Significant Impacts on Community Safety Services Due to Construction of At-Grade Crossings:

Based on the relevant information regarding construction impacts to community safety services during project construction in the Final EIR, Findings, and MMRP, the text of MM CON-17 and MM CON 18, and the above discussion, the Commission finds that implementation of MM CON-17 and MM CON-18 will reduce impacts to the delivery of community safety services to a less-than-significant level by providing a fast, controlled and coordinated response to the various types of emergencies during construction. The Commission also finds that such changes or alterations are within the responsibility and jurisdiction of another public agency and not the Commission. Such changes have been adopted by such other agency or can and should be adopted by such other agency.