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

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

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

**ASSIGNED COMMISSIONER AND ADMINISTRATIVE LAW JUDGE'S  
SCOPING MEMO AND RULING**

This scoping memo and ruling sets forth the category, need for hearing, issues to be addressed and schedule of the proceeding, and designates the presiding officer pursuant to Rule 7.3 of the Commission's Rules of Practice and Procedure (Rules).

**1. Background**

**1.1. Issuance of Resolution SX-100**

On November 14, 2011, the Commission issued Resolution SX-100 and granted Expo Authority authorization pursuant to Commission General Order 164-D (GO 164-D) to construct 16 new at-grade and 11 grade-separated highway-light rail crossings as part of Phase 2 of the Exposition Corridor Light Rail Transit Project. Expo Authority, on behalf of the Los Angeles County Metropolitan Transportation Authority (LACMTA), is charged with planning and constructing the Exposition Corridor Light Rail Transit Project. The project is a light rail transit extension that, when complete, will provide public transit service between downtown Los Angeles and the City of Santa Monica. Phase 1 of the project, an 8.5 mile segment from downtown Los Angeles to Culver City,

has received Commission approval and is under construction. Phase 2 of the project will extend approximately 6.7 miles from the terminus of Phase 1, at the Venice/Robertson/Washington aerial station in Culver City, to the downtown area of Santa Monica.

**1.2. Neighbors for Smart Rail's (NFSR)  
Rehearing Application**

In its rehearing application, NFSR challenged Resolution SX-100 on the following grounds: (1) at-grade crossings are not cheaper, and Expo cannot claim cost as a factor in eliminating analysis and adoption of grade separations if they did not seek funding for those options; (2) the Commission failed in its duties as a responsible agency under the California Environmental Quality Act (CEQA), and the Commission cannot claim it did not know the requirements of CEQA; (3) the Commission failed to comply with section 13.6 of the Commission's Rules of Practice and Procedure, which states that the substantial rights of the parties must be protected; (4) the Commission has lost objectivity in proceedings with LACMTA and therefore further fails to serve the public interest and need for transparency, due diligence and due process in transit planning in Los Angeles County; (5) the metro grade crossing policy circumvents safety and defers environmental review; (6) NFSR agrees with Commissioner Simon that the public was excluded in the crossing approvals, and the Commission erred in relying on Expo to conduct public outreach; and (7) the ratesetting categorization wrongly disallows intervenor compensation for parties who are members of the public. NFSR also requests oral argument on its rehearing application.

**1.3. The Order Granting Limited Rehearing of Resolution SX-100 and Instructions to the assigned Administrative Law Judge (ALJ)**

On June 25, 2012, the Commission issued an order granting limited rehearing of Resolution SX-100 on the issues involving CEQA and due process. Specifically, the order directed the assigned ALJ to address and resolve the following issues identified in the June 25, 2012 order:

- (1) CEQA compliance;<sup>1</sup>
- (2) due process;<sup>2</sup>
- (3) allegations of error regarding cost issues and compliance with standards of practicability;<sup>3</sup> and
- (4) whether Resolution SX-100 should be modified or revised to include two overhead structures (the I-405 and the Palm Park pedestrian bridge) that are situated above new crossings locations.<sup>4</sup>

The order further directed the assigned ALJ to do all of the following in the course of addressing these issues:

- (1) assemble the administrative record for Resolution SX-100, which shall become part of the administrative record for the rehearing proceeding, and which will be lodged with the Commission's Central Files office, so that the record is available to all parties involved in this rehearing proceeding;
- (2) ask the interested parties to supplement this record, as necessary, by way of prepared testimony and/or additional comments;

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<sup>1</sup> Order, at 4, Section III. A.

<sup>2</sup> *Id.* at 4-5, Section III. B.

<sup>3</sup> *Id.* at 6-7, Section III. C.

<sup>4</sup> *Id.* at 8-9, Section III. F.

- (3) based on the record evidence, make specific findings for each significant effect of the project that is related to the Commission's crossing jurisdiction;
- (4) provide opportunity for interested parties to comment on whether, in light of a fully developed record, the crossings approved in Resolution SX-100 should be revised, modified or re-approved by the Commission on rehearing;
- (5) determine whether the baseline issues addressed in Section III. F of the Order Granting Limited Rehearing require a CEQA addendum, and if so, to prepare such an addendum with the assistance of the Commission's CEQA Staff; and
- (6) determine whether any related, pending Commission proceedings should be consolidated with the issues addressed herein to facilitate coordinated consideration and review.

#### **1.4. The Prehearing Conference**

The Prehearing Conference was held on October 5, 2012, at the California Public Utilities Commission in San Francisco, California. After listening to the arguments of the parties, and after reviewing the Joint Prehearing Conference Statement, the assigned Commissioner and ALJ rule as follows.

#### **2. Scope of the Proceeding**

As set forth, supra, the Order granting rehearing set forth the scope of this rehearing proceeding as follows:

- (1) CEQA compliance;
- (2) due process;
- (3) allegations of error regarding cost issues and compliance with standards of practicability; and
- (4) whether Resolution SX-100 should be modified or revised to include two overhead structures (the I-405 and the Palm Park pedestrian bridge) that are situated above new crossings locations.

In addition, the parties set forth their factual and or legal positions on these four rehearing issues in their Joint Prehearing Conference Statement that was filed on September 28, 2012. These positions are set forth in the excerpt from the Joint Prehearing Conference Statement that is attached as Exhibit A to this Scoping Memo and are incorporated herein by reference.

### **3. Discovery**

Discovery will be conducted according to Article II of the Rules. If the parties have discovery disputes they are unable to resolve by meeting and conferring, they shall raise these disputes under the Commission's Law and Motion procedure. (See Rule 11.3.)

### **4. Filing, Service, and Service List**

Parties should confirm that their information on the service list is correct, and serve notice of any errors on the Commission's Process office, the service list, and the judge. Prior to serving any document, each party must ensure that it is using the most up-to-date service list. The list on the Commission's web site meets that definition.

Electronic service is now the standard under Rule 1.10. All parties to this proceeding shall serve documents and pleadings using electronic mail, whenever possible, transmitted no later than 5:00 p.m., on the date scheduled for service to occur. Parties are reminded that, when serving copies of documents, the document format must be consistent with the requirements set forth in Rule 1.10(a).

Rules 1.9 and 1.10 govern service of documents only and do not change the Rules regarding the tendering of documents for filing. All documents formally filed with the Commission's Docket Office must include the caption approved by the Docket Office and this caption must be accurate.

Other documents, including prepared testimony, are served on the service list but not filed with the Docket Office. We will follow the electronic service protocols adopted by the Commission in Rule 1.10, whether formally filed or just served. This Rule provides for electronic service of documents, in a searchable format, unless the appearance or state service list member did not provide an e-mail address. If no e-mail address was provided, service should be made by United States mail. Additionally, parties shall serve paper copies of all filings on the presiding officer and assigned Commissioner.

## **5. Categorization and Need for Hearings**

This scoping memo confirms the Commission's categorization of this proceeding as ratesetting. This determination is appealable under the provisions of Rule 7.6. This scoping memo also confirms that hearings are necessary and sets forth the hearing schedule as follows:

### **5.1. Schedule for Serving Final Hazard Analysis Report for Expo Phase 2**

October 12, 2012: Exposition Metro Line Construction Authority shall serve the Final Hazard Analysis Report for Expo Phase 2, dated August 2011.

### **5.2. Schedule for Serving Opening and Rebuttal Testimony**

November 2, 2012: Opening testimony addressing the issues identified in § 2 of this Scoping Memo shall be served.

November 30, 2012: Rebuttal testimony shall be served.

If the opening or reply testimony relies on documentary evidence, the documentary evidence shall be appended to the testimony as an exhibit. Exhibits shall be designated and distinguished alphabetically (e.g., Exhibit A, Exhibit B, etc.).

**5.3. Schedule for Serving Opening Legal Briefs**

November 9, 2012: Opening Legal Briefs addressing the issues identified in § 2 of this Scoping Memo shall be served. Upon receipt of the Opening Legal Briefs the parties shall meet and confer and advise the assigned ALJ by November 16, 2012 if they wish to file reply briefs. If so, Reply Legal Briefs shall be served no later than November 30, 2012.

**5.4. Date and Location of Evidentiary Hearings**

December 17 and December 18, 2012: these dates have been reserved for evidentiary hearings which will be held in the hearing room of Junipero Serra State Office Building, at 320 W. 4<sup>th</sup> Street, Suite 500, Los Angeles, California. The hearings will commence at 9:30 a.m. and conclude at 5:00 p.m.

**6. Ex Parte Communications**

As this is a ratesetting proceeding, *ex parte* communications are governed by Rules 8.3 and 8.4 of the Commission's Rules of Practice and Procedure.

**7. Public Advisor**

Any person interested in participating in this proceeding who is unfamiliar with the Commission's procedures or who has questions about the electronic filing procedures should contact the Commission's Public Advisor at (866) 849-8390 or (415) 703-2074, or (866) 836-7825 (TTY-toll free), or send an e-mail to [public.advisor@cpuc.ca.gov](mailto:public.advisor@cpuc.ca.gov).

**8. Presiding Officer**

Pursuant to Pub. Util. Code § 1701.3 and Rule 13.2, ALJ Robert M. Mason III is designated as the presiding officer.

**IT IS RULED** that:

1. The scope of this proceeding is as set forth above in § 2 of this Scoping Memo as follows:

- (1) California Environmental Quality Act compliance;
- (2) due process;
- (3) allegations of error regarding cost issues and compliance with standards of practicability; and
- (4) whether Resolution SX-100 should be modified or revised to include two overhead structures (the I-405 and the Palm Park pedestrian bridge) that are situated above new crossings locations.

In addition, the parties set forth their factual and or legal positions on these four rehearing issues in their Joint Prehearing Conference Statement that was filed on September 28, 2012. These positions are set forth in the excerpt from the Joint Prehearing Conference Statement that is attached as Exhibit A to this Scoping Memo and are incorporated herein by reference.

2. The proceeding is categorized as ratesetting.
3. This Scoping Memo confirms that hearings are necessary.
4. Exposition Metro Line Construction Authority shall serve the Final Hazard Analysis Report for Expo Phase 2, dated August 2011, by October 12, 2012.
5. Evidentiary hearings will be held on December 17, 2012, and December 18, 2012, in the hearing room of Junipero Serra State Office Building, at 320 W. 4<sup>th</sup> Street, Suite 500, Los Angeles, California. The hearings shall commence at 9:30 a.m. and conclude at 5:00 p.m.
6. Opening testimony shall be served by November 2, 2012. The Opening testimony shall address those issues identified in § 2 of this Scoping Memo.
7. Rebuttal testimony shall be served by November 30, 2012.
8. Opening legal briefs shall be served by November 9, 2012. The parties shall address those legal issues identified in § 2 of this Scoping Memo.



9. The parties shall meet and confer and advise the assigned Administrative Law Judge if they wish to file reply legal briefs. If so, reply legal briefs shall be served by November 30, 2012.

10. The prepared testimony in this proceeding shall be electronically served on the entire service list on the dates set forth in the adopted procedural schedule, and hard copies shall be provided to the assigned Commissioner and Administrative Law Judge.

11. Administrative Law Judge (ALJ) Robert M. Mason III is the assigned ALJ and is designated as the presiding hearing officer.

12. Rules 8.3 and 8.4 of the Commission's Rules of Practice and Procedure regarding *ex parte* communications in ratesetting proceedings apply to this proceeding.

Dated October 23, 2012, at San Francisco, California.

/s/ MICHAEL R. PEEVEY

Michael R. Peevey  
Assigned Commissioner

/s/ ROBERT M. MASON III

Robert M. Mason III  
Administrative Law Judge

## Exhibit A

Excerpt of Factual and Legal Issues from the Joint Pre Hearing Conference Statement determining the parties' respective positions as to each issue that the Commission needs to decide in this case.

**a. CEQA Compliance. [ALJ's Ruling, Section 2.3(1)]**

**Expo Authority:** Consistent with the position Expo Authority stated in its Response, filed January 25, 2012, to NFSR's Application for Rehearing in Resolution SX-100, the Commission is neither required nor permitted to second-guess the adequacy of the Final Environmental Impact Report ("FEIR") that was certified by Expo Authority in its role as lead agency for the Exposition Metro Line Light Rail Phase 2 Project (the "Project") pursuant to the California Environmental Quality Act ("CEQA"). The Commission must conclusively presume that the FEIR prepared by Expo Authority complies with CEQA. Because there have been no substantial changes to the Project or to the circumstances under which the project is being undertaken and no new information regarding significant impacts that was not known and could not have been known at the time the FEIR was certified has become available, CEQA prohibits the Commission from requiring the preparation of a subsequent or supplemental EIR.

In its Resolution SX-100, authorizing Expo Authority to construct certain highway-light rail transit crossings, the Commission made appropriate findings in its capacity as a responsible agency under CEQA on page 9 of the Resolution. Expo Authority believes that this presentation of CEQA findings was sufficient to satisfy the Commission's obligations as a responsible agency and that the

Commission has fully complied with CEQA requirements in the course of completing its CEQA review.

**NFSR:**

BASELINE. The Controlling Authorities on the CEQA baseline issue are *Communities for a Better Environment v. South Coast Air Quality Management District* (2010) 48 Cal. 4<sup>th</sup> 310 (“CBE”), *Sunnyvale West Neighborhood Assn. v. City of Sunnyvale* (2010) 190 Cal.App. 4<sup>th</sup> 1351, *Madera Oversight Coalition, Inc. v. County of Madera* (2011) 199 Cal.App 48.

Because Expo compared a future 2030 No-Project baseline against a future 2030 Project’s potential traffic and air quality impacts, the EIR fails to provide relevant and required information under CEQA to the CPUC, the decision makers and the public. See *Kings County*, supra, 221 Cal.App.3d at 712 (“A prejudicial abuse of discretion occurs if the failure to include relevant information precludes informed decisionmaking and informed public participation, thereby thwarting the statutory goals of the EIR process.”).

- The EIR used exclusively a 2030 projection as its sole baseline for evaluating at least traffic and air quality.
- The 2030 projection was based on models which utilize hypothesis in reaching their conclusions.
- *CBE* prohibits use of hypothetical baselines.
- *Madera* prohibits use of hypothetical baselines.
- *Pfeiffer* (*Pfeiffer v. City of Sunnyvale* (2011) 200 Cal.App.4th 1552, 1571-1572) allows for the use of a hypothetical baseline but only because a non-hypothetical existing baseline (consistent with CBE) was also used.
- The Expo Phase 2 2030 hypothetical baseline was based on SCAG projections.

- SCAG projections are increasingly inaccurate over longer periods of time.
- SCAG has admitted that it had to make substantial and material corrections to its projections after the 2010 census data became available.
- The 2010 census data did not support SCAG's projected hypothetical baselines.
- Those same inaccurate SCAG baselines formed the basis of the Expo Phase 2 EIR projected hypothetical baseline.
- The public, the CPUC, the decisionmakers and the Agency have no reliable means to independently verify or validate hypothetical future baselines.
- The Expo hypothetical baseline assumed completion of the Pico/Olympic one-way reconfiguration.
- The Pico/Olympic reconfiguration was not implemented and was rejected by the Los Angeles Superior Court due to improper CEQA study.
- Inclusion of a non-existent major reconfiguration on Pico/Olympic causes the projected future baseline to be fundamentally flawed.
- Expo did not consider the Cumulative impacts of the Casden Project in their EIR.
- Expo had a development agreement with Casden prior to the release of the FEIR.
- Expo acknowledged to the CPUC in a letter that the likelihood that development at the proposed Casden location would impact traffic at Exposition and Sepulveda.
- An EIR must separately discuss the potential cumulative impacts of a project "when the project's incremental effect is cumulatively considerable," which "means that the incremental effects of an individual project are significant when viewed in connection with the effects of past

projects, the effects of other current projects, and the effects of probable future projects.” Guidelines, §§ 15130, subd. (a) and 15065, subd. (a)(3).

DEFERRED MITIGATION. CEQA requires that public agencies, through the preparation of an EIR, identify the adverse environmental effects of the projects they approve and mitigate such adverse effects through the *imposition* of feasible mitigation or alternatives. Accordingly, CEQA mandates that “[e]ach public agency *shall mitigate or avoid the significant effects on the environment* of projects that it carries out or approves whenever it is feasible to do so.” (Emphasis added.) Pub. Resources Code, § 21002.1, subd. (b).

Pursuant to Guidelines section 15370, “‘mitigation’ includes: (a) Avoiding the impact altogether by not taking a certain action or parts of an action; (b) Minimizing impacts by limiting the degree or magnitude of the action and its implementation; (c) Rectifying the impact by repairing, rehabilitating, or restoring the impacted environment; (d) Reducing or eliminating the impact over time by preservation and maintenance operations during the life of the action; [or] (e) Compensating for the impact by replacing or providing substitute resources or environments.”

- Expo’s EIR estimates over 5000 daily boardings at the Westwood station.
- Expo does not provide any public parking at the station.
- Expo has acknowledged significant parking impacts around the station.
- The mitigation offered was to “work with” the City of Los Angeles to implement a solution, including a preferential parking district.
- “Working with” someone or some other entity toward a mitigation is fundamentally different than providing certainty of implementation of a mitigation.

- Implementation of a preferential parking district requires a vote of the people for implementation as it is a property-based fee.
- As Expo cannot guarantee implementation of the mitigation and the City cannot guarantee implementation, the mitigation lacks the required certainty to be CEQA compliant.
- Mitigation measures, which exceed the scope of the lead agency's legal authority and which no agency has a legal obligation to enforce, are inconsistent with the CEQA objective of ensuring the avoidance of environmental harm.

**b. Due Process. [ALJ's Ruling, Section 2.3(2)]**

**Expo Authority:** Procedural due process in an administrative agency context generally safeguards a party's right to notice and opportunity for hearing,<sup>5</sup> but does not necessitate the use of any specific set of procedures. 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 . . . ."<sup>6</sup> As more fully described below, the regulatory procedures employed by the Commission in its adoption of Resolution SX-100 and the Rail Crossing Hazard Analysis Report ("RCHAR") process that led to its adoption were fully consistent with, and accorded NFSR, due process.

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<sup>5</sup> See, *Ohio Bell Tel. Co. v. Public Util. Com. of Ohio* (1937), 301 U.S. 292, 304.

<sup>6</sup> See, *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.

The procedure the Commission followed was compliant with General Order (“GO”) 164-D, which the Commission adopted in a formal rulemaking proceeding in July 2007, after all interested parties had been afforded opportunity to comment and submit alternative recommendations. At that time, NFSR already was an active participant in CPUC proceedings regarding Phase 1 of the Expo Line project, and yet NFSR chose not to participate in the rulemaking proceeding by which the Commission adopted GO 164-D.

There were extensive opportunities for NFSR, among other organizations and individuals interested in the Expo Rail Phase 2 Project, to participate in the environmental review process, for which Expo Authority was responsible as lead agency pursuant to CEQA. In fact, NFSR was actively involved in the environmental review process and made extensive comments regarding the rail crossings during this process. The following events and arrangements gave the public and other stakeholders ample opportunity to participate in the development of the Project, including the planned grade crossings, since 2007.

- A comprehensive public outreach program was conducted throughout the environmental planning phase of the project, which took place from February 2007 through December 2009. During that time, Expo Authority held 17 community meetings, 38 stakeholder meetings, participated in 11 community events and gave almost 40 presentations. NFSR was represented at a substantial number of these meetings and events.
- Expo Authority conducted three (3) formal Public Hearings following the January, 2009 release of the Draft EIR (“DEIR”). Expo Authority received and responded to over 9,000 comments in

response to the DEIR, and copies of all public testimony and comments, along with Expo Authority's responses, were included in the FEIR. Comments on the environmental document included extensive discussion of the grade crossings, safety, and traffic. NFSR participated in this process.

- In October 2009, Expo Authority conducted three (3) community meetings to provide updated project information and to discuss changes to the project in response to comments. Notices of these meetings were sent to the community (including NFSR) via email, US Mail and hand delivered flyers. Over 50,000 notices and flyers were distributed to residents in the project area and to individuals on Expo Authority's database. Notices of the meeting also were published in local papers and a media release was forwarded to local media outlets. Flyers were distributed to eight (8) local schools adjacent to or near the Expo rail alignment and were posted at six (6) public libraries also adjacent to or near the alignment. Approximately 300 people attended these meetings (including representatives of NFSR).
- In addition, Expo Authority provided opportunities for the public to speak at the Board meetings where the DEIR and the FEIR were approved. Several hundred people attended these meetings and over 200 people submitted public comment.



Likewise, there were substantial opportunities for NFSR and other interested parties to participate in the RCHAR process that the Commission followed, pursuant to GO 164-D, to evaluate Expo Authority's grade crossing proposals.

- 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).
- Additional outreach was also conducted to key project stakeholders along the alignment, including local residents and organizations.
- Expo Authority also reached out to popular transportation blogs, and as a result, the item was covered by media outlets including Metro's The Source Blog and Streetsblog Los Angeles.
- The outreach conducted yielded the following results:
  - Over 360 signatures on an online petition supporting approval of Resolution SX-100.
  - 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.
  - 11 letters of support from elected officials representing the project alignment, including the cities of Los Angeles, Culver City and Santa Monica.

The RCHAR process is one option for submitting a rail crossing proposal for Commission approval, but only if the proposing Rail Transit Agency (“RTA”) and the Commission’s rail safety engineering staff agree on the crossing design – otherwise, a formal application is necessary. But even with the safety staff’s support, Commission approval requires a formal resolution, which is submitted for public comment in draft form in accordance with Public Utilities Code §311(g). NFSR could and did file comments on draft Resolution SX-100 and the Commission considered those comments before adopting the Resolution. There was no denial of due process.

If the Commission wishes to create opportunities for increased participation by the public, and by interested parties such as NFSR, in the RCHAR process, there certainly are means readily available to do so, but the Commission should not give up on a valuable and efficient means of making maximum use of the expertise of its rail safety engineering staff based solely on the grumblings of a few antagonistic neighbors. The RCHAR process allows for effective, productive interaction among an RTA seeking to construct a rail system to meet public transportation needs, other local agencies with particular interests and goals to protect and advance, and the Commission’s dedicated rail safety engineering staff. Within this RCHAR process, additional opportunities can be provided for participation by members of the public and community groups but that effort should not be allowed to impair the efficient functioning of a valuable mechanism for designing and implementing needed public services in a timely manner.

Specifically, in the present case, while Expo Authority believes that there was ample due process, if the Commission desires to provide additional avenues

for public input into the RCHAR, the following steps could be implemented:

1) recirculating the Final Hazard Analysis Report for Expo Phase 2, dated August 2011, to NFSR and other interested parties for their review; 2) allowing for submission by NFSR and/or other interested parties of further comments and/or objections; and 3) submission by Expo Authority of a further reply. This procedure will provide a sufficient basis for the Commission to reconsider its Resolution SX-100, as appropriate, and to affirm or revise the terms of that Resolution, and will fully satisfy any further concerns over due process.

**NFSR:**

- The Metro Grade Separation Policy provides a threshold which attempts to guide when grade separation is indicated.
- The Grade Separation Policy filters intersections which are considered for grade separation.
- The Grade Separation Policy, as implemented on Expo Phase 2, was used to eliminate Overland as requiring grade separation.
- The Overland grade separation was evaluated using projected future conditions as opposed to existing conditions.
- The public did not have the opportunity to have hearings on the grade separation policy or how it would be implemented in a CEQA setting.
- General Order 164-D allowed the CPUC to evaluate and approve the safety of the Phase 2 Expo crossings without allowing the benefit of public review and comment.
- The DEIR states that the at-grade crossing designs were determined by application of the Metro Grade Crossing Policy.
- The Grade Crossing Policy undermines the CEQA/NEPA Alternative Analysis criteria and the California Public Utilities Commission (CPUC)

safety criteria by making the initial crossing design decisions outside the evaluative processes of those regulatory bodies.

- In eliminating consideration of grade separations at key intersections through use of the Metro Grade Crossing Policy before circulation of the DEIR, Expo failed to present information to the CPUC which would allow for adequate evaluation of the project's costs in relation to benefits of grade separation, as required by Commission Standards of Practicability.
- CEQA and the CPUC both say that safety and environmental criteria should weigh more heavily than costs.
- CAL. PRC. CODE § 21003.1 states :“(c) Nothing in subdivisions (a) or (b) reduces or otherwise limits public review or comment periods currently prescribed either by statute or in guidelines prepared and adopted pursuant to Section 21083 for environmental documents, including, but not limited to, draft environmental impact reports and negative declarations.”
- General Order 164-D reduced and/or limited public review.
- The Commission Rules of Practice and Procedure require that Agencies bear the burden of proving that grade-separations are not practicable.
- Pub. Util. Code § 1202(c) gives the Commission the exclusive power to require, where in its judgment it would be practicable, a separation of grade at any crossing.
- General Order 164-D eliminated the opportunity for the public to inform the Commission on grade separation.
- Nothing in GO 164-D precludes the necessity of a railroad agency's compliance with Commission Standards of Practicability.

- Expo failed to meet the burden of proving that grade-separations are not practicable.
- "Opinions of the affected public" is one standard for review of the CPUC Practicability Standards.
- GO 164-D precludes, reduces or otherwise limits public review or comment periods.
- NFSR was presented no evidence in the Draft Resolution and not in the Commission's brief deliberation on November 10, 2011, that all potential safety hazards were eliminated pursuant to CPUC precedent (City of San Mateo, D.82-04-033 (1982) 8 Cal.P.U.C.2d 572 at p. 12).
- GO 164-D requires that a substantial number of reports be developed and submitted to the Commission, including: System Safety Program Plan, System Security Plan, Safety Certification Plans.
- System Safety Program Plan, System Security Plan, and Safety Certification Plans reports were not named nor provided to the Parties with the Draft Resolution nor was there any indication that they had been completed or circulated prior to the Commission's vote to approve the crossings.
- CPUC neglected to make and publish findings on each CEQA issue on the Expo crossings they approved under Resolution SX-100.

**c. Allegations of error regarding cost issues, compliance with standards of practicability, and the Commission's objectivity. [ALJ's Ruling, Section 2.3(3)]**

Expo Authority and NFSR agree that the Commission directed the assigned ALJ to consider whether NFSR's claims about cost as a factor in

choosing grade-separated vs. at-grade crossings and compliance with the Commission's standards of practicability have merit, but expressly denied rehearing as to NFSR's claim that the Commission had "lost our objectivity." Therefore, the parties agree that there should be no further consideration of "the Commission's objectivity."

**Expo Authority:** Regarding considerations of cost and practicability, the Commission should take into account the detailed review process that already has been conducted with respect to the grade crossings proposed for the Expo Rail Phase 2 Project. That process has included the following steps:

- Expo Authority met regularly with the City of Los Angeles Department of Transportation ("LADOT"), the City of Santa Monica, Los Angeles County Metropolitan Transportation Authority ("Metro"), and the Commission's rail safety staff, all of which have agreed that the grade crossings as environmentally cleared in the FEIR will operate safely.
- Expo Authority, in conjunction with the other entities, evaluated the safety of each crossing through the RCHAR process that was started in the summer of 2009 and completed in the summer of 2011.
- A Diagnostic Team was formed as part of this process and included LADOT, City of Santa Monica, Metro and CPUC staff. The team reviewed the proposed grade crossings, identified potential hazards, and provided suggestions to help manage and control the crossings. The team also conducted a field

investigation for each of the crossings to further evaluate the conditions and provide additional recommendations. All team members' recommendations were considered and implemented as long as there was consensus among the team.

- Following completion of the Hazard Analysis, Expo Authority modified the proposed grade crossings to reflect the Diagnostic Team's inspection and evaluation, such as:
  - CPUC staff requested that "No Right Turn on Red" signs be placed on the nearside poles at crossings, which the team agreed would be helpful to motorists.
  - CPUC staff suggested adding additional railroad flashers directed to the parallel streets to provide more warning to motorists, which was also implemented for better control at the crossings.

As prescribed by *Re Exposition Metro Line Construction Authority*, D.09-02-031,<sup>7</sup> there are seven criteria used for judging practicability. These seven practicability criteria were considered in the development of the crossing plans approved by Resolution SX-100. If the Commission considers it appropriate to address these criteria specifically, the following considerations are relevant:

1. A demonstration of public need for the crossing.

In November 2008, over two-thirds of the voters in Los Angeles County voted to approve Measure R, which levied a half-percent sales tax over 30 years dedicated to transportation improvements. Phase 2 of the Expo Line was listed

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<sup>7</sup> *Re Exposition Metro Line Construction Authority*, D.09-02-031, at 17-19.

as a high priority project on the Measure R project list and expenditure plan, which indicated that \$925 million in Measure R funds would be allocated to this project.

The proposed Los Angeles County Board of Supervisors Ordinance # 08-01, which was adopted by voter approval of Measure R, included in its preamble the following language regarding public need: "Mobility in Los Angeles County is a necessity and requires an aggressive, responsible and accountable plan to meet the transportation needs of its more than 10 million residents."

2. A convincing showing that Expo Authority has eliminated all potential safety hazards.

The requisite showing was made by the RCHAR process and resulting report.

3. The concurrence of local community and emergency authorities.

As part of the RCHAR process, Expo Authority worked in consultation with the City of Los Angeles and the City of Santa Monica, including their respective emergency authorities.

4. The opinions of the general public, and specifically those who may be affected by an at-grade crossing.

Expo Authority conducted significant outreach efforts and considered the opinions of the general public, including those who may be affected by an at-grade crossing, in the development of the crossing plans. In addition to numerous letters of support for the project that Expo Authority received during the environmental review process, (i) over 360 members of the general public signed an online petition urging the Commission to approve Resolution SX-100; and (ii) nearly 30 area stakeholders, including residents immediately adjacent to



the grade crossings and eleven elected officials representing districts including all or portions of the project alignment, sent letters of support to the Commission at the time of the Commission's consideration of Resolution SX-100.

5. Although less persuasive than safety considerations, the comparative costs of an at-grade crossing with a grade separation.

The issue of grade separation versus at-grade construction was presented with respect to the design of crossings at Overland Avenue and Westwood Boulevard. The design of these crossings included the following considerations:

- In the DEIR, both Overland Avenue and Westwood Boulevard were recommended to be at-grade based on application of the Metro Grade Crossing policy, traffic analysis, and environmental impact analysis.
- In developing the FEIR in response to comments on the DEIR, Expo Authority conducted additional analysis of these crossings in coordination with LADOT. The additional analysis confirmed the conclusion of the DEIR that the Overland Avenue and Westwood Boulevard crossings would operate safely at grade, with effects mitigated to a less-than-significant level.
- Expo Authority staff also commissioned the environmental consultant to conduct an in-depth technical, engineering and cost analysis of constructing an underground trench at Overland Avenue and Westwood Boulevard as well as an aerial structure at both of these crossings. An important element of this analysis was a recognition that this area has been designated by the Federal Emergency Management Agency ("FEMA") as a Special Flood Hazard Zone ("SFHZ"), subject to shallow flooding in a 100-year storm.

- **SHALLOW TRENCH ALTERNATIVE:** The analysis concluded that, because of a large gravity fed storm drain that runs under Overland Avenue, and a second storm drain under Rountree Road at the Expo Rail right of way, construction of a shallow trench would not be feasible. Because this area is in an SFHZ, the trench would have to be covered between Westwood and Overland to prevent trackway flooding in the event of a major storm.
- **OPEN TRENCH ALTERNATIVE:** A shorter open trench was studied but would be subject to full inundation that would force suspension of service during these storm events and until the trench was emptied of water, cleaned, and inspected prior to restoration of service. Suspension of service under such circumstances for a key transportation facility is not considered acceptable and would violate both Metro Design Criteria and Federal Transit Administration requirements. It also was determined that a pump station of sufficient size to prevent such inundation would require a capacity of approximately 3,600 cubic feet per second (cfs). Additionally, land acquisition would be required for a water storage area needed to supply the pumps. For these reasons, an open trench was considered infeasible.
- **DEEPER TRENCH ALTERNATIVE:** A deeper light rail trench also was evaluated (approximately 45 to 50 feet at bottom), which would permit leaving the existing gravity fed storm drains in place. A trench solution would have to extend beyond the limits of the SFHZ, with portals east of Overland and west of Westwood, and would have to be covered within those limits in order to address the flooding problem. With a covered

trench, construction of the station at Westwood would require that station access points, stairs, elevators, and vent shafts be raised above the flood zone, 2 to 3 feet above the existing ground level, to prevent water intrusion in the event of a major storm. This would create engineering and environmental challenges, as well as additional construction impacts.

- **IMPACTS FROM TRENCH CONSTRUCTION:** When compared to the at-grade approach in the Recommended Preferred Alternative (“RPA), the construction of a trench would result in greater noise and vibration impacts as well as aesthetic impacts during construction due to the footprint of the construction zone and the necessary equipment. These impacts would stem from an extended period of pile installation for trench wall construction, construction of bridges to carry both Overland and Westwood over the new trench, and extended periods of crane and truck activity associated with the installation of rebar and placement of concrete. In addition, the amount of excavated material would increase haul loads and routes through the neighborhood as well as causing an increase in dust emissions. The construction of a trench would require greater traffic detours and lane closures for a more extended period of time.
- **COST OF TRENCH CONSTRUCTION:** The cost of any of the trench alternatives would be significantly higher than an at-grade alignment and station. The underground trench from east of Overland to west of Westwood is estimated to cost \$224 million (YOES) more than the at-grade approach proposed in the RPA.

- **AERIAL STRUCTURE ALTERNATIVE:** The environmental consultant also analyzed an aerial structure and station which would require that the track be elevated approximately 30 feet above existing ground level and extend approximately 3,000 feet in length if over both Westwood and Overland (1,500 feet if only over Overland). Station canopies, sound walls, and fencing would further increase this height. This would create a large and imposing physical barrier in this single-family residential neighborhood. The aerial structure would be a constant and dominant visual element and thus, the visual impacts would be greater than those of an at-grade approach. The construction impacts of an aerial structure also would be greater than those of an at-grade crossing, with longer construction duration and larger staging areas. The amount of fill material that would be required to build an aerial structure would increase haul loads and routes through the neighborhoods. The noise and vibration during construction would be more significant than for construction of an at-grade crossing.
- **COSTS OF AERIAL STRUCTURE:** The costs of an aerial structure over Overland would be \$31 million (YOES) more than for the at-grade approach proposed in the RPA. The cost of a longer aerial structure over both Overland and Westwood, including an aerial station, would be \$66 million (YOES) more than for the at-grade approach proposed in the RPA.

In addition to these environmental impacts and cost comparisons that were considered in the FEIR process, the Commission must also recognize that

Expo Authority already has acted on the authority the Commission granted by that Resolution, and has expended public funds toward construction of the authorized crossings. Any consideration the Commission may now give to “cost as a factor in choosing grade-separated vs. at-grade crossings” must consider the cost impacts, *today*, of any reversal of the authority granted by Resolution SX-100.

6. A recommendation by Staff that it concurs in the safety of the proposed crossing, including any conditions.

Resolution SX-100 was prepared by the Rail Crossings Engineering Section of the Rail Transit and Crossings Branch of the Commission’s Consumer Protection and Safety Division. Thus, the recommendations presented in Resolution SX-100 were those of the Commission’s rail safety Staff. Thus, presentation of Resolution SX-100 for Commission approval demonstrates Staff concurrence in the safety of the proposed crossings approved therein. Those recommendations were based on the comprehensive RCHAR, which was developed in consultation with the Commission’s rail safety Staff.

7. Commission precedent in factually similar crossings.

Over the past decade, the Commission has approved numerous at-grade crossings comparable to those approved in Resolution SX-100 in reviewing plans for construction of the Los Angeles to Pasadena Gold Line, the East-Side Extension serving East Los Angeles, the San Diego Trolley, San Francisco Municipal Railway’s T Line, and the Sacramento Regional Transit System, among other major projects. In all these cases, the Commission has recognized that at-grade crossings are necessary in the design of modern light rail systems.

In summary, the RCHAR effectively evaluates practicability with primary attention to safety considerations but with appropriate evaluation of relevant

environmental and cost factors as well as the other considerations noted above. The RCHAR provided analysis and recommended results, and is consistent with the practicability criteria listed in D.09-02-031.

**NFSR:**

The Commission has made no finding or ruling that supports Expo's contention that, as claimed above, "the Commission has recognized that at-grade crossings are necessary in the design of modern light rail systems." In fact, the stated goal of the Commission is to reduce the number of at-grade crossings in California. Each crossing must be evaluated individually, in its existing setting to determine the safety and environmental impacts of the changes resulting from implementing *any and all* at-grade rail crossings. The RTA-centric view supported by the Metro Grade Crossing Policy, which seeks to put all crossings at grade and then proceeds with gluing on prophylactic safety measures after the fact, should not infect the mandate of the Commission which requires that RTAs bear the burden of proving grade separation is impracticable.

The fact that the Commission approved over 100 at-grade crossings on the Blue Line which has experienced more than 105 fatalities and nearly 900 accidents, does not mean that that poor standard should be repeated. In 2012 alone so far there have been more than 20 serious Blue Line accidents and 6 fatalities. Even if the Commission has approved many at-grade crossings in the past, there is no legislative obligation or intent expressed in the Public Utilities Code or the Rules of Practice and Procedure that give weight to Expo's implication that the Commission recognizes any inherent necessity to approve **any** at-grade crossings. A crossing is either safe or it is not. Grade separated crossings provide absolute safety from interactions between trains and pedestrians, automobiles and bicycles. The burden of the RTA is to prove that it

is impracticable to grade separate a crossing – not that it is cheaper or easier to build or that it has been done before. While an RTA may use actuarial tables to determine the level of acceptable risk to which they are willing to expose the public, the Commission, as the State’s independent rail oversight authority, has a higher obligation to protect the safety of California citizens.

- Expo determined in their DEIR that a grade separation at Sepulveda Boulevard would not be required based on determinations using the Metro Grade Crossing Policy.
- The study of grade separation at Sepulveda was never submitted to the public and decisionmakers for review and comment.
- The CPUC gave preliminary approval to an at-grade crossing at Sepulveda Boulevard.
- NFSR submitted an engineering study which determined that the cost for a grade-separated depressed profile alignment between Overland Avenue and Sepulveda Boulevard would be \$35 million.
- After project approval, Expo determined that the cost of a grade separation at Sepulveda Boulevard would only be an additional \$5 million above the cost of an at-grade crossing.
- Expo’s DEIR made no determination as to cost and feasibility of grade separations at individual crossings at Overland, Military, Westwood and Sepulveda. Expo said that according to the Metro Grade Crossing Policy no separation was justified.
- Expo declined to study a grade separation at Overland Avenue.
- The Overland crossing is immediately adjacent to Overland Avenue Elementary School – a key safety and noise concern.

- Every light rail accident costs Los Angeles County Metropolitan Transit Authority an average of \$500,000.
- It is the policy of the CPUC to reduce the number of at-grade rail crossings in California.

**d. Whether Resolution SX-100 should be modified or revised to include two overhead structures. [ALJ Ruling Section 2.3(4)]**

**Expo Authority:** There is no need to modify Resolution SX-100 on account of the two existing overhead structures (Interstate Highway 405 and the Palm Park pedestrian bridge) that are situated above crossing locations that were not expressly identified in the FEIR. The identified structures are both pre-existing grade-separated crossings that have not undergone any changes since the EIR was drafted, submitted for public comment, and certified as a Final EIR. Neither of these structures will be modified in connection with the Project. The Project has no impact on either of these crossings.

CEQA prohibits the CPUC from reopening the environmental review process to consider these unchanged structures at this time, nor would any public interest be served by doing so.<sup>8</sup> There is no evidence or reason for concern that these structures will affect the proposed crossings or be affected by them. This issue should be of no concern.

**NFSR:**

I-405 OVERCROSSING. The I-405 overcrossing at Sawtelle Boulevard in West Los Angeles should be subject to a supplemental

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<sup>8</sup> See, Pub. Resources Code, § 21166.



environmental review including a proper description of its existing environmental setting in proximity to the Expo Phase 2 Project. The existing baseline of the structure and its environment, including physical location, traffic circulation of on and off ramps and earthquake behavior should be evaluated for impacts from the Project.

Plans for the light rail are to cross on an elevated bridge over Sawtelle Boulevard while remaining under the I-405 with minimal clearance. To accomplish that minimal clearance the streets (Pico Boulevard and Sawtelle Boulevard) must be excavated and lowered. The environmental setting of the I-405 should be evaluated to determine if the addition of the light rail bridge positioned closely underneath allows all necessary separation for maximum safety. If excavation is done at the base of the multilayered freeway crossings to install the massive footings and structure for an extended light rail bridge, good sense would dictate that the bridge be included in the environmental study. Expo erred in not including description and evaluation of the I-405 overcrossing in its plans for the Sawtelle Blvd. elevated overcrossing especially as it connects to the station and elevated crossing at Sepulveda Boulevard only one block away. As this project is "Design-Build", the FEIR was certified when the project was developed to less than a 10% level. As final design is nearly complete, the I-405 evaluation can be accomplished with the benefit of Expo's more fully developed engineering plans providing greater assurance that Commission obligations as a Responsible Agent of CEQA are fulfilled.

**PALMS PARK PEDESTRIAN BRIDGE.** Expo has committed to preserving the pedestrian bridge crossing the Expo ROW at Dunleer Drive connecting Cheviot Hills to the Palms Park Library and Recreation Center. No impacts to the bridge were identified in the DEIR during construction or revenue

operation. If that is in fact the case then no additional environmental evaluation need be done. If any new changes to the bridge are anticipated that were not previously known and circulated, then a supplemental EIR may be necessary for this important neighborhood infrastructure.

**(End of Exhibit A)**