



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

FILED
11-30-12
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)

**REPLY 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 30, 2012

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In accordance with Rule 13.11 of the Rules of Practice and Procedure (“Rules”) of the California Public Utilities Commission (“Commission”) and the schedule established by the Assigned Commissioner and Administrative Law Judge’s Scoping Memo and Ruling issued October 23, 2012, and Administrative Law Judge (“ALJ”) Mason’s e-mail ruling of November 15, 2012, Exposition Metro Line Construction Authority (“Expo Authority”) hereby respectfully submits its Reply Brief regarding the issues set forth in the Commission’s Decision (“D.”) 12-06-041.

I.

**NFSR SPENDS MUCH OF ITS OPENING STATEMENT
ATTACKING THE ADEQUACY OF THE PROJECT EIR
BUT FAILS TO SHOW THAT THE COMMISSION HAS NOT
DONE ITS DUTY AS A RESPONSIBLE AGENCY UNDER CEQA.**

The “Opening Statement,” filed November 9, 2012, by Neighbors for Smart Rail (“NFSR”) focuses on NFSR’s claims of deficiencies in the environmental impact review (“EIR”) process conducted by Expo Authority with respect to Phase 2 of the Exposition Corridor Light Rail Transit Project (“Expo Phase 2” or “Phase 2 Project”). NFSR’s

arguments are fatally flawed. NFSR is attempting to re-litigate issues that it lost before the Superior Court and the Court of Appeal. The fact that NFSR's CEQA case is pending in the California Supreme Court is irrelevant because CEQA *requires* the CPUC to presume that the Expo Authority's Final EIR is legally adequate.

NFSR's argument is centered on its critique of the Final EIR that was completed and certified by Expo Authority and that is presently pending review in the California Supreme Court. As Expo Authority demonstrated in its Opening Legal Brief, the Commission must reject NFSR's attempt to mount a collateral attack on the legal adequacy of the Final EIR. Indeed, 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. As Expo Authority has shown, CEQA requires the Commission to presume that the Final EIR complies with CEQA and also prohibits the Commission from requiring preparation of a supplemental or subsequent EIR in this case.¹

NFSR conflates Expo Authority's duties as a lead agency with the Commission's duties as a responsible agency under CEQA. NFSR cites cases regarding the environmental "baseline" for traffic and air quality used in an EIR, quotes the general duties of all governmental agencies under CEQA, and notes the "fundamental purpose" of CEQA and of the EIR process. NFSR then concludes that the Commission abused its discretion by not making findings regarding grade-separated alternatives to two of the proposed crossings.²

¹ Expo Authority Opening Legal Brief, at 2, 12-15.

² NFSR Opening Statement, at 4-7.

NFSR's mishmash of authorities fails to support its allegation that the Commission abused its discretion in its role as a responsible agency under CEQA.

NFSR attacks the Commission's CEQA findings in Resolution SX-100 as not meeting CEQA's requirement that a "Responsible Agent" [*sic*] make findings on the infeasibility of alternatives or alternative mitigation that would lessen or eliminate significant impacts.³ Specifically, NFSR claims the Commission should have "discussed in detail" the potential for grade separation at Overland Avenue and Westwood Boulevard. NFSR goes on to criticize the Commission for not analyzing the traffic and air quality impacts of these proposed at-grade crossings and grade-separated alternatives.⁴ But NFSR cites cases regarding the duties of a *lead* agency rather than those of a responsible agency such as the Commission in the present case.⁵ Indeed, these are the very arguments NFSR made in the Superior Court and the Court of Appeal, and which both courts rejected. As Expo Authority has demonstrated, the Commission does not have the discretion under CEQA to re-litigate those claims in this proceeding.⁶

NFSR also faults the Commission for not discussing in detail the possibility of not constructing a station at Westwood Boulevard in order to avoid "significant impacts on visual aesthetics and spillover parking in the residential neighborhood." Indeed, NFSR spends full sections of its Opening Statement complaining of the Commission's "failure" to make findings about spillover parking effects of the planned location of stations at Westwood and Sepulveda Boulevards, challenging the Court of Appeal's decision affirming the adequacy of the Final EIR, and criticizing the Final EIR's use of a "hypothetical future

³ NFSR Opening Statement, at 7-8.

⁴ *Id.* at 8-10.

⁵ *Id.*

⁶ Expo Authority Opening Legal Brief, at 1-2, 12-14.

baseline” to project traffic and air quality impacts.⁷ As Expo Authority demonstrated in its Opening Legal Brief, the Commission is neither authorized nor required to make findings regarding near-station spillover parking, traffic level of service, or air quality.⁸ In any event, these constitute still more attacks on the legal adequacy of the Final EIR, not Resolution SX-100 or the Commission’s procedures. Thus, they are as irrelevant as they are substantively unavailing.

Contrary to NFSR’s strident attacks, the Commission met its obligations as a responsible agency under CEQA and adopted adequate CEQA findings in Resolution SX-100. As Expo Authority explained in its Opening Legal Brief, the Commission’s role as a responsible agency under CEQA is limited to “considering only the effects of those activities involved in a project which it is required by law to carry out or approve,” and the Commission fulfilled that role by commenting on the Draft EIR and by reviewing and making findings regarding the Final EIR in the course of approving Resolution SX-100.⁹ If the Commission wishes to expand on its initial CEQA findings with a more detailed set of such findings, the Commission may adopt express CEQA findings for each significant impact that was identified in the Final EIR that is related to the authorizations the Commission granted by Resolution SX-100, *i.e.*, any findings related to the safety of the crossings approved in Resolution SX-100. To facilitate this result, Expo Authority provided a draft of such findings as an attachment to its Opening Legal Brief, accompanied by a brief explanation of the background and rationale for each finding.¹⁰ Considering and adopting

⁷ NFSR Opening Statement, at 10-15.

⁸ Expo Authority Opening Legal Brief, at 10-11, 15-16.

⁹ Expo Authority Opening Legal Brief, at 10-12, *quoting*, Pub. Res. Code, §21002.1(d).

¹⁰ Expo Authority Opening Legal Brief, at 15-16 and Attachment A.

such detailed findings would more than satisfy any procedural obligation incumbent on the Commission as a responsible agency under CEQA.

II.

NFSR HAS NOT DEMONSTRATED ANY DENIAL OF DUE PROCESS.

In addressing the Due Process issue, NFSR continues to confuse the EIR process, which was conducted by Expo Authority as CEQA Lead Agency, with the Commission's process for review of grade crossing proposals pursuant to General Order 164-D. NFSR refers to a petition with 2,000 signatures that was submitted to Expo Authority during the EIR process, notes support for below-grade crossings in that context, and quotes CEQA's requirement of public participation.¹¹ But NFSR makes no suggestion that public participation in the EIR process was deficient in any way. In fact, as Expo Authority's Project Director has testified and Expo Authority noted in its Opening Legal Brief, there was very extensive public participation in the process by which Expo Authority, as lead agency, developed the Final EIR – a process in which the Commission participated appropriately in its role as a responsible agency.¹²

Regarding the public comments on draft Resolution SX-100, NFSR takes issue with the testimony of Expo Authority CEO Richard D. Thorpe, who noted the Commission's own record demonstrating public support of Resolution SX-100. NFSR complains that it did not receive service of such public comments and on that basis contends that public comments should be disregarded.¹³ It is ironic that NFSR insists on all manner

¹¹ NFSR Opening Statement, at 16-18.

¹² Prepared Testimony of Monica Born, at 5-7; Expo Authority Opening Legal Brief, at 5-6.

¹³ NFSR Opening Statement, at 16-17.

of procedural rights for itself but would deny consideration to the views expressed by other members of the public.

More to the point, NFSR fails to identify any violation of Due Process in the Commission's procedures either leading up to the adoption of Resolution SX-100 or thereafter.¹⁴ In fact, as Expo Authority explained in its Opening Legal Brief, the requirements of Due Process were fully satisfied through the course of the Rail Crossing Hazard Analysis ("RCHAR") process, by which Expo Authority cooperated with the Commission's rail safety staff to analyze proposals for roadway/rail crossings along the route of the Expo Rail Project, culminating in the circulation for public comment of draft Resolution SX-100, the Commission's review of comments submitted, and the Commission's adoption of a revised Resolution SX-100.¹⁵

Further, subsequent events have rendered any prior contentions of a denial of Due Process moot, as the Commission granted rehearing of Resolution SX-100 and ALJ Mason made certain that the allowed rehearing would provide interested parties, including and especially NFSR, ample opportunity to conduct discovery, serve testimony, submit legal briefs, and proceed to evidentiary hearing. If there ever were grounds for concern about a denial of Due Process regarding the subject matter of Resolution SX-100, there is no longer any basis for such concern.

¹⁴ NFSR's only reference to a "failure of Due Process" comes in the conclusion of its brief, where, rather than demonstrating the point, NFSR merely purports to "incorporate by this reference" its previously filed application for rehearing. NFSR Opening Statement, at 23. The Commission's allowance of rehearing renders any Due Process contentions in that document moot.

¹⁵ Expo Authority Opening Legal Brief, at 17-21.

III.

NFSR FALSELY ASSERTS THAT EXPO AUTHORITY HAS NOT CONDUCTED A STUDY OF SAFETY HAZARDS.

Reverting to its concern about CEQA compliance, NFSR claims that Expo Authority did not study project impacts to existing conditions for operational impacts on traffic and air quality. On that basis, NFSR contends that it cannot be shown that all potential safety hazards have been eliminated.¹⁶ Beyond the fact that NFSR is again attacking the validity of a Final EIR that is presently under appellate review and that the Commission must conclusively presume the Final EIR to be in compliance with CEQA,¹⁷ NFSR is simply wrong. The specific purpose of the RCHAR process is to evaluate and to eliminate all potential *safety* hazards and that is what the RCHAR has done.

IV.

NFSR CONFUSES THE COMMISSION'S PRACTICABILITY STANDARDS WITH EXPO AUTHORITY'S AND THE COMMISSION'S DUTIES UNDER CEQA.

NFSR claims Expo Authority has not shown that grade separations are impracticable at Overland Avenue, Westwood Boulevard and Sepulveda Boulevard, and contends that Expo Authority should have incorporated the Commission's practicability standards in its CEQA review as a lead agency. Again, this argument is an impermissible collateral attack on the adequacy of the Final EIR, and it is irrelevant to the Commission's duties as a responsible agency under CEQA, under the Public Utilities Code, and under GO 164-D.

¹⁶ NFSR Opening Statement, at 18.

¹⁷ Expo Authority Opening Legal Brief, at 12-14, *quoting*, Pub. Res. Code, §21167.3.

NFSR cites *City of San Mateo* and other heavy rail grade crossing decisions to support its claim that at-grade crossings should be avoided.¹⁸ However, as explained in Expo Authority's Opening Legal Brief, the Commission's practicability standards have evolved since the *City of San Mateo* decision to better account for the needs and advantages of modern light rail transit, and the testimony of Richard D. Thorpe demonstrates that the standards have been met in the case of Expo Phase 2.¹⁹ Despite the overwrought arguments of its Opening Statement, NFSR has presented no evidence proving its contentions to the contrary.

Most importantly, NFSR offers no specific evidence that any of the proposed crossings – including the 16 proposed at-grade crossings – along Phase 2 of the Expo Rail alignment are unsafe as designed or as they will be constructed. All that NFSR offers is a series of vaguely analogous or completely unrelated allegations about other light rail lines (the Long Beach Blue Line, Phase 1 of Expo Rail, and the Pasadena Gold Line) with no foundation beyond a few quotations from newspaper articles and a report on the status of a grade crossing improvement in the City of South Pasadena.²⁰

V.

CONCLUSION

NFSR concludes its Opening Statement by restating its flawed contention that the Commission should second-guess the validity of the Final EIR previously certified by Expo Authority for the Phase 2 Project and now under appeal by NFSR in the California Supreme

¹⁸ *Re City of San Mateo*, D.82-04-033, 8 CPUC 2d 572 (1982); NFSR Opening Statement, at 18-20.

¹⁹ Expo Authority Opening Legal Brief, at 22-24; Testimony of Richard D. Thorpe (Expo Authority), at 9-16.

²⁰ NFSR Opening Statement, at 20-22.

Court.²¹ As Expo Authority has shown in its Opening Legal Brief and in this Reply Brief, NFSR's position is legally incorrect; CEQA requires the Commission to treat the Final EIR as valid. Based on the evidentiary record and the principles of law summarized above and in Expo Authority's Opening Legal Brief, the Commission should either affirm Resolution SX-100 or issue a further decision providing the same authorizations as that Resolution provided, so that Expo Authority may proceed with completion of its Phase 2 Project.

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

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²¹ *Id.* at 22-23.