

PROPOSED DECISION

Decision PROPOSED DECISION OF ALJ MASON (Mailing 7/12/2013)

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)

**DECISION FOLLOWING REHEARING AFFIRMING RESOLUTION SX-100
AND GRANTING AUTHORIZATION TO EXPO AUTHORITY TO CONSTRUCT
16 AT-GRADE AND 11 GRADE-SEPARATED HIGHWAY LIGHT RAIL
CROSSINGS AS PART OF PHASE 2 OF THE EXPOSITION CORRIDOR
LIGHT RAIL TRANSIT PROJECT**

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A.11-12-010

LIST OF ACRONYMS AND ABBREVIATIONS

Acronyms and Abbreviations	Definition
CEQA	California Environmental Quality Act
CPSD	Consumer Protection and Safety Division
CSM	City of Santa Monica
DEIR	Draft Environmental Impact Report
Expo or Expo Authority	The Exposition Metro Line Construction Authority
FEIR	Exposition Corridor Transit Project Phase 2 Final Environmental Impact Report
Guidelines	CEQA Guidelines, California Code Regulations
LACMTA	Los Angeles County Metropolitan Transportation Authority
LADOT	City of Los Angeles Department of Transportation
LRT	Light Rail Transit Alternative
LRT 2	Alternative Light Rail Transit 2
Metro	Los Angeles County Metropolitan Transportation Authority
MMRP	Mitigation Monitoring and Reporting Program
MMTR	Mitigation Measure Transportation/Traffic
NFSR	Neighbors for Smart Rail
Project	The Exposition Corridor Light Rail Transit Project
RCES	California Public Utilities Commission's Rail Crossings Engineering Section
RCHAR	Rail Crossings Hazard Analysis Report or Final Draft Rail Crossing Hazard Analysis Report
RTSS	California Public Utilities

	Commission's Rail Transit Safety Section
SCAG	Southern California Association of Governments
SED	Safety Enforcement Division (formerly known as CPSD)

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1. Summary

Following the order granting rehearing, and pursuant to General Order 164-D, this decision affirms Resolution SX-100 and authorizes Exposition Metro Line Construction Authority to construct 16 at-grade and 11 grade-separated highway-light rail crossings as part of Phase 2 of the Exposition Corridor Light Rail Transit Project.

This proceeding is closed.

2. Background

2.1. Issuance of Resolution SX-100

As set forth in the following Table 1, on November 14, 2011, the Commission issued Resolution SX-100 and granted Exposition Metro Line Construction Authority (Expo or Expo Authority) authorization pursuant to Commission General Order (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.

Table 1 below contains a summary of the proposed crossings with relevant information for each.

Table 1: Phase 2 of the Exposition Corridor Light Rail Transit Project

	Street/Crossing	City	Proposed CPUC Crossing No.	Orientation	Warning Devices **
1	Venice/Robertson	Los Angeles	84S-107.50-B	Grade-Separated	
2	Bagely Ave	Los Angeles	84S-107.90	At-Grade	9, 9E, Ped Gates
3	National/Palms	Los Angeles	84S-108.30-B	Grade-Separate	

	Street/Crossing	City	Proposed CPUC Crossing No.	Orientation	Warning Devices **
				d	
4	Motor Ave	Los Angeles	84S-108.70-B	Grade-Separate d	
5	I-10 Freeway	Los Angeles	84S-108.90-A	Grade-Separate d	
6	Overland Ave	Los Angeles	84S-109.50	At-Grade	9, 9E, Ped Gates
7	Westwood Blvd	Los Angeles	84S-109.80	At-Grade	9, 9E, Ped Gates
8	Military Ave	Los Angeles	84S-110.10	At-Grade	9, 9E, Ped Gates
9	Sepulveda Blvd	Los Angeles	84S-110.30-B	Grade-Separate d	
10	Sawtelle Blvd	Los Angeles	84S-110.50-B	Grade-Separate d	
11	Pico Blvd	Los Angeles	84S-110.70-B	Grade-Separate d	
12	Barrington Ave	Los Angeles	84S-111.10	At-Grade	9, 9E, Ped Gates
13	Bundy Dr	Los Angeles	84S-111.40-B	Grade-Separate d	
14	Centinela Ave	Santa Monica	84S-111.60-B	Grade-Separate d	
15	Stewart St	Santa Monica	84S-112.10	At-grade	9, 9E, Ped Gates
16	26th St	Santa Monica	84S-112.40	At-grade	9, 9E, Ped Gates
17	Cloverfield Blvd	Santa Monica	84S-112.50-B	Grade-Separate d	
18	Olympic Blvd	Santa Monica	84S-112.60-B	Grade-Separate d	
19	20th St	Santa Monica	84S-112.80	At-Grade	9, 9E, Ped Gates
20	19th St	Santa Monica	84S-112.90	At-Grade	9, 9E, Ped Gates
21	17th St/Colorado	Santa Monica	84S-113.00	At-Grade	Traffic Signals
22	14th St/Colorado	Santa Monica	84S-113.20	At-Grade	Traffic Signals
23	11th St/Colorado	Santa Monica	84S-113.50	At-Grade	Traffic Signals
24	Lincoln/Colorado	Santa Monica	84S-113.70	At-Grade	Traffic Signals
25	7th St/Colorado	Santa Monica	84S-113.80	At-Grade	Traffic Signals
26	6th St/Colorado	Santa Monica	84S-113.85	At-Grade	Traffic Signals
27	5th St/Colorado	Santa Monica	84S-113.90	At-Grade	Traffic Signals

** 9 = Commission Standard 9 (flashing light signal assembly with automatic gate arm); 9E = Commission Standard 9 used as an exit gate; Ped Gate = Commission Standard 9 with shortened gate arm for Pedestrians on sidewalks; Traffic Signals = Used at intersections on street-running segment.

Expo Authority, on behalf of the Los Angeles County Metropolitan Transportation Authority (LACMTA or Metro), is charged with planning and constructing the Exposition Corridor Light Rail Transit Project (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 (CSM). Phase 1 of the Exposition Corridor Light Rail Transit 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.

By Letter of Transmittal dated March 11, 2011, the Expo Authority provided finalized conceptual engineering plans and a hazard analysis report requesting Commission authorization to construct 27 highway light-rail transit crossings (crossings) as part of the Project.

The Project will extend westward to the City of Santa Monica from the Culver City Station (Phase 1) and run along the old Pacific Electric Railway Exposition right-of-way until it reaches the intersection of Colorado Avenue and 17th Street, where it will transition into a street-running alignment. The street-running alignment will continue down the center of Colorado Avenue to the terminus just west of the 4th Street and Colorado Avenue intersection in downtown Santa Monica.

The Project will operate light rail vehicles at a maximum frequency of 2.5-minute intervals during morning and evening peak hours with train operations commencing at approximately 4 a.m. and continuing until approximately 2 a.m. seven days a week, consistent with LACMTA light rail system hours of operation.

The Project requires construction of 27 new crossings of which 11 are grade separated, while the remaining 16 are proposed at-grade. Nine of the

at-grade crossings are located on exclusive right-of-way and will cross existing roadways. These crossings will be equipped with the following warning devices:

- Commission Standard 9 (flashing light signal assembly with automatic gate arm) installed in advance of the crossing;
- Commission Standard 9E (Standard 9 used as an exit gate) installed on the departure side of the crossing;
- Pedestrian gate (Standard 9 with shortened automatic gate arm) installed on all sidewalk approaches to the crossings; and
- Swing gates and fencing to channelize pedestrians to the crossing locations.

The remaining seven at-grade crossings are located on semi-exclusive rights-of-way. They are oriented in a street-running alignment down the center of Colorado Avenue in downtown Santa Monica. Each of these crossings is an existing street intersection through which the light rail system will pass. These crossings will be equipped with the following warning devices:

- Traffic signals at each intersection to control vehicular and pedestrian traffic;
- Dedicated train signals at each intersection to control the light rail train movements;
- Active “TRAIN” Light Emitting Diode warning signs to warn of approaching light rail trains.

2.2. Neighbors for Smart Rail’s (NFSR) Application for Rehearing

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 it 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); (3) the Commission

failed to comply with § 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 requested oral argument on its rehearing application.

2.3. 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. Specifically, the order directed the assigned ALJ to address and resolve the following issues identified in the June 25, 2012 order:

- (1) CEQA compliance;¹
- (2) due process;²
- (3) allegations of error regarding cost issues and compliance with standards of practicability;³ 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.⁴

¹ Order at 4, Section III. A.

² *Id.* at 4-5, Section III. B.

³ *Id.* at 6-7, Section III. C.

⁴ *Id.* at 8-9, Section III. F.

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;
- (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.

2.4. Prehearing Conference

A Prehearing Conference (PHC) was held on October 5, 2012, at the California Public Utilities Commission (Commission) in San Francisco, California.

The parties set forth their factual and or legal positions on the four rehearing issues in their Joint Prehearing Conference Statement that was filed on September 28, 2012. These positions are set forth and discussed, *infra*.

3. Discovery

The Scoping Memo and Ruling instructed the parties to conduct discovery in accordance with the Commission's Rules of Practice and Procedure. Tellingly, even though it had ample opportunity to do so, NFSR did not engage in any discovery with Expo. (RT, 17:7-12 [PHC Transcript]) This is so even after Expo served NFSR with the Final Hazard Analysis Report (Rail Crossings Hazard Analysis Report or RCHAR) on October 12, 2012.

4. Evidentiary Record Developed

4.1. Documents and Testimony Admitted into Evidence at the December 17, 2012 Evidentiary Hearing

- Exhibit 1: FINAL HAZARD ANALYSIS REPORT for Exposition Corridor Transit Project Phase 2 dated August 2011 Prepared for Exposition Metro Line Construction Authority By AECOM.
- Exhibit 2: Prepared Testimony of Richard D. Thorpe, Chief Executive Office of Exposition Metro Line Construction Authority.
- Exhibit 3: Prepared Testimony of Monica Born, Project Director for the Exposition Metro Line Construction Authority.
- Exhibit 4: Prepared Testimony of John Van Hoff, Traffic Engineer for AECOM.
- Exhibit 5: Motion by Supervisor Mark Ridley-Thomas Dated September 23, 2010 and entitled Grade Crossing Safety Policy.
- Exhibit 6: Minutes Regular Board Meeting Board of Directors of Los Angeles County Metropolitan Transportation Authority dated October 28, 2010.

- 4.2. **Documents Not Admitted into Evidence at the December 17, 2012 Evidentiary Hearing**
- 285 pages of letters with a cover letter from Craig Silvers dated October 5, 2009.
 - Power Point Report entitled Ultrafine Particles on and near Roadways: Exposure Assessment and Mechanism Understanding by Yifang Zhu.
- 4.3. **Documents Requested by the Assigned ALJ from Resolution SX-100 and Served by the parties (RT, 189:9-14)**
- Exhibit 7: Excerpts from Exposition Corridor Transit Project Phase II Final Environmental Impact Report (FEIR) – December 2009 Part 1 served by NFSR on December 31, 2012.
 - Exhibit 8: Excerpts from Exposition Corridor Transit Project Phase II FEIR --December 2009 Part 2 served by NFSR on December 31, 2012.
 - Exhibit 9: Compact Disc entitled NFSR FEIR Reference Doc dated December 31, 2012.
 - Exhibit 10: Excerpts from Exposition Corridor Transit Project Phase 2 FEIR December 2009 served by Exposition Metro Line Construction Authority on December 27, 2012.
- 4.4. **Documents [of](#) which the Commission takes Official Notice**
- Resolution SX-100 dated November 10, 2011
- 4.5. **ALJ’s Ruling Reopening the Record for Supplemental Briefing on the California Environmental Quality Act Issue**

In analyzing the FEIR, the assigned ALJ reviewed Table 8, which is entitled “Summary of Significant Environment Impacts and Proposed Mitigation, and Significant Unavoidable Impacts for LRT Alternatives”. As a result, on March 22,

2013, the assigned ALJ issued a ruling reopening the record and instructing the parties to address the following:

1. Which of the significant environmental impacts identified in Table 8 are or are not within the scope of the Commission's crossing jurisdiction? The answer to this question should include citations to applicable case law, administrative decisions, orders, and statutory authorities.
2. Which of the proposed mitigation measures identified in Table 8 should the Commission find are or are not feasible? The answer to this question should include citations to applicable case law, administrative decisions, orders, statutory authorities, prepared testimony, and any other portions of the FEIR.

By this decision, Table 8 is marked and admitted into evidence as Exhibit 11.

4.6. Expo Authority's Supplemental Briefing on the CEQA Issue

On April 5, 2013, Expo Authority, lead agency for the Project, filed its supplemental brief on CEQA and argued, in part, that the FEIR identified significant impacts relevant to rail crossing safety in its analysis of noise and safety impacts of the Project. Expo Authority cited to FEIR, Vol. I, § 3.15, Safety and Security, pp. 3.15-7 to 3.15-9, 3.15-12 to 3.15-13 (operational impacts on emergency response times); § 4 Construction Impacts, pp. 4-57 to 4-58 (construction impacts).⁵ Expo Authority further argued that the FEIR's analysis of noise impacts of project operations proposed a reduction in the sound volume of bells on the at-grade crossing gates to within 5 dba "of the bottom of the range allowed by the Commission-approved range," and that Expo Authority believed that "the proposed mitigation measures would reduce each of these significant

⁵ Expo Authority Supplemental Brief 4 fn. 11.

impacts to a less than significant level, and adopted the mitigation measures proposed in the FEIR.”⁶

Expo Authority notes that Table 8 “addressed all four of the light rail alternatives for the Project, designated as LRT 1, LRT 2, LRT 3, and LRT 4 that were evaluated in the FEIR.”⁷ As Expo Authority adopted Alternative Light Rail Transit 2 (LRT 2) , which is the 6.6 mile LRT extension of the Expo Phase 1 Project, Expo Authority asserts that only those impacts of Alternative LRT 2 listed in Table 8, and mitigation measures relevant to LRT 2, should be considered by the Commission.

Table 8 lists the following Alternative LRT 2 impacts as significant before mitigation:

- Transportation/Traffic;⁸
- Aesthetics;⁹
- Cultural Resources;¹⁰
- Hydrology/Water Quality;¹¹

Noise and Vibration;¹²

- Paleontological Resources;¹³
- Parks and Community Facilities;¹⁴

Safety and Security;¹⁵

- Construction – Transportation/Traffic; Aesthetics; Air Quality; Biological Resources; Land Use Planning; Noise

⁶ *Id.* 5.

⁷ *Id.* 6.

⁸ Table 8 1-3.

⁹ *Id.* 7-8.

¹⁰ *Id.* 8-11.

¹¹ *Id.* 14-15.

¹² *Id.* 17-20.

¹³ *Id.* 21.

¹⁴ *Id.* 22.

¹⁵ *Id.*

- and Vibration; Parks and Community Facilities;
Socioeconomics;¹⁶ and
- Construction – Safety and Security.¹⁷

Of these significant environmental impacts, Expo Authority asserts, without citing any supporting authority, that the significant impacts in the areas of Noise and Vibration, and Safety and Security are within the scope of the Commission's jurisdiction.¹⁸ Expo Authority further asserts that:

Significant environmental impacts of LRT operation that Table 8 identifies with respect to Noise and Vibration as well as Safety and Security, and the significant environmental impacts of the construction phase identified with respect to Safety and Security, are within the scope of the Commission's jurisdiction over the safety of rail crossings, and all of the proposed mitigation measures identified in Table 8 (and which were adopted by the Expo Authority) with respect to those environmental impacts are feasible.¹⁹

The FEIR's adopted Findings of Fact explain the planned mitigation measures in detail and, according to Expo Authority, the Findings of Fact are consistent with the summary descriptions in Table 8.

Expo Authority asserts only two impacts of LRT 2 remained significant after application of the FEIR's described mitigation measures – impacts to the visual character of the area of the Westwood Station; and emission of oxides of nitrogen from construction equipment in excess of the South Coast Quality Management District's daily construction threshold during construction of LRT 2. Expo Authority adopted findings regarding these effects and a Statement of Overriding Considerations.

¹⁶ *Id.* 23-32.

¹⁷ *Id.* 31-32.

¹⁸ Expo Authority's Supplement Brief, 8 and 11.

¹⁹ *Id.* 11.

Expo Authority's Supplemental Brief contains the following Appendices which are marked and included as part of the evidentiary record as follows:

Exhibit 12: Resolution No. 0010: A Resolution Of The Board Of The Exposition Metro Line Construction Authority Regarding The Exposition Corridor Transit Project Phase 2 Pursuant To The California Environmental Quality Act, dated February 4, 2010.

Exhibit 13: 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, dated February 2010.

Exhibit 14: Exposition Metro Line Construction Authority Exposition Corridor Transit Project Phase 2 Final Environmental Impact Report Statement of Overriding Considerations, dated February 2010.

Exhibit 15: Exposition Metro Line Construction Authority Exposition Corridor Transit Project Phase 2 Final Environmental Impact Report FINAL Mitigation Monitoring and Reporting Program, dated February 2010.

4.7. NFSR's Supplemental Briefing on the CEQA Issue, Request for Judicial Notice, Expo Authority's Opposition to the Request for Judicial Notice, and Expo Authority's Motion to Strike Portions of NFSR's Supplemental Brief

On April 5, 2013, NFSR filed its Supplemental Brief purportedly on the CEQA issues identified in the assigned ALJ's March 22, 2013 ruling. But a significant portion of NFSR's Brief attempts to introduce the following new evidence into the record by way of a Request for Judicial Notice pursuant to Evidence Code § 452 (c):

- City of Los Angeles Department of City Planning, Final Environmental Impact Report, Casden Sepulveda Project; ENV-2008-3989-EIR; State Clearinghouse Number: 2009061041;

- The City of Los Angeles 2010 Bicycle Plan first year of the First Five-Year Implementation Strategy & Figueroa Streetscape Project Draft EIR; ENV-2012-1470-EIR;
- Notice of Availability of the Draft Environmental Report of the City of Los Angeles 2010 Bicycle Plan First Year of the First Five-Year Implementation Strategy & Figueroa Streetscape Project Draft EIR; ENV-2012-1470-EIR; and
- Notice of Public Hearing for the Casden Sepulveda Project Final Environmental Impact Report; ENV-2008-3989-EIR; State Clearinghouse Number 2009061041.²⁰

NFSR then attempts to weave together its CEQA arguments with alleged findings made in these four documents.

On April 29, 2013, Expo Authority filed a Motion to Strike Portions of NFSR's Supplemental Brief, seeking to strike all references and arguments based on the four documents which NFSR asked the Commission to judicially notice. Simultaneously, Expo Authority filed a Response in Opposition to NFSR's Request for Judicial Notice, and again objected to any consideration of the four above-referenced documents.

On May 6, 2013, NFSR filed its Replies.

We deny NFSR's Request for Judicial Notice for several reasons. First, NFSR has attempted to introduce new evidence which is beyond the scope of the March 22, 2013 Ruling Reopening the Record. The parties were instructed to address two questions regarding Table 8 from the FEIR, not introduce evidence from other proceedings. This fact makes NFSR's reliance on *Associated Builders & Contractors, Inc. v. San Francisco Airports Commission* (1999) 21 Cal. 4th 352, 374, fn. 4 unavailing because there the judicial notice requests were for the Commission's hearing records on the very matter in dispute on appeal

²⁰ Evidence Code § 542 (c) provides that judicial notice may be taken of "official acts of the legislative, executive, and judicial department of the United States and of any state of the United States."

("By request filed on April 20, 1998, the Commission asks this court to take judicial notice of the transcripts of the two public hearings it conducted before adopting the PSA bid specification.").

Second, NFSR fails to establish that these four documents are an appropriate subject for a judicial-notice request pursuant to Evidence Code § 450, *et. seq.* While at first blush they appear to fit within the scope of Evidence Code § 452 (c), accepting these four unauthenticated documents would require the Commission to accept the truth of the matters asserted therein, which would be, in effect, an end run around the hearsay rule.²¹ Although it is true that the Commission is not bound to follow the technical rules of evidence,²² and that the Commission has considered hearsay evidence in other proceedings,²³ the hearsay evidence is usually supported by some other corroborative evidence.²⁴ NFSR fails to meet the Commission's relaxed standard for admissible evidence.

While we do not strike the references as Expo Authority requests, we do not give any consideration to these four documents and disregard the arguments NFSR has made in its Supplemental Brief that reference the four documents.

²¹ See *e.g. North Beverly Park Homeowners Association v. Bisano* (2007) 147 Cal.App.4th 762, 778 ("[t]he hearsay rule applies to the statements contained in judicially noticed documents, and precludes the consideration of those statements for their truth unless an independent hearsay exception exists."); *Re Pacific Gas and Electric Co.*, 2010 Cal. PU C LEXIS at *227; and *County of San Diego v. Grossmont-Cuyamaca Community College Dist.* (2006) 141 Cal.App.4th 86.

²² Rule 13.6(a) of the Commission's Rules of Practice and Procedure provides: "Although technical rules of evidence ordinarily need not be applied in hearings before the Commission, substantial rights of the parties shall be preserved." Accord, Pub. Util. Code § 1701(a).

²³ See *e.g. Investigation re North Shuttle Service, Inc.*, D.98-05-019, 80 CPUC 2d 223, 230; and *Re Investigation into Possible Overassessment by the State Board of Equalization of Property Owned by Commission-regulated Utilities* D.98-06-084, 80 CPUC 2d 685, 688-689.

²⁴ *Re Landmark Communications, Inc.* D.99-01-029, 84 CPUC 2d 698, 700-701; and *North Shuttle Service, supra* ("Hearsay is admissible in an administrative [hearing](#) and may be relied upon if supported by other credible evidence.")

4.8. NFSR's Motion for Stay of all Further Proceedings

On October 23, 2012, NFSR filed a motion for, *inter alia*, a stay of all further proceedings in light of the California Supreme Court's grant of the Petition for Review of Decision B232655 from the Court of Appeal of the State of California, Second Appellate District, Division Eight. NFSR argued that since the CEQA issues of (1) the appropriate baseline for evaluating traffic patterns and air quality; and (2) mitigation measures to offset adverse environmental impacts are before both the California Supreme Court and the Commission, that the Commission should defer its decision on rehearing pending the California Supreme Court's decision. The assigned ALJ, via e-mail, denied NFSR's motion. As time was of the essence, the e-mail ruling did not go into the details behind the denial but promised a fuller rationale at a later date, which this decision now provides.

While NFSR's motion failed to cite any authority for the Commission to grant its motion, we have reviewed the relevant authorities and discuss them herein. Pursuant to Pub. Util. Code § 1735, our authority to grant a stay is discretionary.²⁵ In exercising that discretion, we normally consider the following factors: (1) whether the moving party will suffer serious or irreparable harm if the stay is not granted; (2) whether the moving party is likely to prevail on the merits of the application for rehearing; (3) a balance of the harm to the moving party (or the public interest) if the stay is not granted and the decision is later reversed, against the harm to the other parties (or the public interest) if the stay is granted and the decision is later affirmed; and (4) other factors relevant to the

²⁵ See Order Granting Stay of D.08-01-031 [D.08-04-044]; Order Instituting Investigation Into The Proposal of Sound Energy Solutions to Construct And Operate A Liquified Natural Gas Terminal At The Port Of Long Beach (SES OII) [D.04-07-040] (2004) __ Cal.P.U.C.3d __, 2004 Cal. PUC LEXIS 352, *2.

particular case.²⁶

NFSR fails to satisfy the above criteria. First, there is no demonstration that NFSR will suffer any serious or irreparable harm if the stay is not granted. Second, there are more issues beyond CEQA that are the subject of this rehearing. Specifically, issues of due process, cost and practicability, and whether or not Resolution SX-100 should be modified to reflect two overhead crossings are being resolved herein and are not before the California Supreme Court. Third, in balancing the harm to the moving and responding parties, granting of a stay now would prejudice Expo as it would be prevented from proceeding with the Project. Mr. Thorpe testified about potential considerable cost increases and job losses if the Project were delayed. (*Ex. 2*, Prepared Testimony of Richard D. Thorpe, 21.) In conclusion, it would be inefficient and prejudicial to the Applicant to stay the rehearing of Resolution SX-100.

5. Discussion of Rehearing Issues

5.1. CEQA Compliance Issue

5.1.1. Expo Authority's Position

Expo Authority contends that the Commission is neither required nor permitted to second-guess the adequacy of the FEIR that was certified by Expo Authority in its role as lead agency for the Project pursuant to the CEQA. Instead, the Commission must conclusively presume that the FEIR prepared by

²⁶ *SES OII, supra*, 2004 Cal. PUC LEXIS 352, at *2 citing to *Pacific Gas and Electric Company* [D.99-09-035] (1999) 2 Cal.P.U.C.2d 329, 1999 Cal. PUC LEXIS 602; *Re Southern California Edison Company* [D.90-12-101] (1990) 39 Cal.P.U.C.2d 14, 1990 Cal. PUC LEXIS 1316; *Re Line Extension Rules of Electric and Gas Utilities* [D.99-09-034] (1999) 2 Cal.P.U.C.2d 227, 1999 Cal. PUC LEXIS 601; and *Airtouch Communications v. Pacific Bell* [D.95-09-122] (1995) 61 Cal.P.U.C.2d 606, 1995 Cal. PUC LEXIS 774.

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, Expo Authority asserts that CEQA prohibits the Commission from requiring the preparation of a subsequent or supplemental Environmental Impact Report (EIR).

5.1.2. NFSR's Position

NFSR contends that the FEIR was inadequately prepared and presents two main arguments to support its position. First, NFSR asserts that 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 Commission, the decision makers, and the public. For legal support, NFSR cites *Communities for a Better Environment v. South Coast Air Quality Management District* (2010) 48 Cal. 4th 310 (CBE), *Sunnyvale West Neighborhood Assn. v. City of Sunnyvale* (2010) 190 Cal.App. 4th 1351, *Madera Oversight Coalition, Inc. v. County of Madera* (2011) 199 Cal.App. 48; and *Kings County Farm Bureau v. City of Hanford* (1990) 221 Cal.App. 3d 692, 712 ("A prejudicial abuse of discretion occurs if the failure to include relevant information precludes informed decision making and informed public participation, thereby thwarting the statutory goals of the EIR process.").

NFSR's second argument is that the FEIR failed to identify the adverse environmental effects of the Project and the proposed mitigation measures that would counteract each effect. NFSR contends that 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."

(Pub. Resources Code, § 21002.1, subd. (b).) Pursuant to CEQA Guidelines §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.”

5.1.3. Resolution of CEQA Issues

As a “responsible agency” under the CEQA Guidelines (Guidelines), the Commission’s obligations and responsibilities are more limited than those of Expo, which is the “lead agency” for the Project. (*See* Cal. Code Regs., Tit. 14, Div. 6, Ch. 3 (Guidelines), §§ 15050, 15051, 15096.) However, the Guidelines do lay out in specific detail what is required of a responsible agency in terms of CEQA compliance. Guidelines § 15096, entitled “Process for a Responsible Agency,” states: “A Responsible Agency complies with CEQA by considering the EIR or Negative Declaration prepared by the Lead Agency and by reaching its own conclusions on whether and how to approve the project involved.” (Guidelines, § 15096(a).) Section 15096 describes the “special duties a public agency will have when acting as a Responsible Agency” under CEQA. (Guidelines, § 15096(a).) Section 15096(h) states: “The Responsible Agency shall make the findings required by § 15091 for each significant effect of the project and shall make the findings in Section 15093 if necessary.” (Guidelines, § 15096(h).) Section 15091, entitled “Findings,” states:

No public agency shall approve or carry out a project for which an EIR has been certified which identifies one or more significant environmental effects of the project unless the

public agency makes one or more written findings for each of those significant effects, accompanied by a brief explanation of the rationale for each finding.

(Guidelines, § 15091(a).) Section 15091(b) further provides that all findings be supported by “substantial evidence in the record.” (Guidelines, § 15091(b).) “Substantial evidence” is defined by the Guidelines as “enough relevant information and reasonable inferences from this information that a fair argument can be made to support a conclusion, even though other conclusions might also be reached.” (Guidelines, § 15384(a).) Section 15384(b) further provides that “substantial evidence shall include facts, reasonable assumptions predicated upon facts, and expert opinion supported by facts.” (Guidelines, § 15384(b).)

As noted above, § 15096(h) also requires findings to be made pursuant to § 15093 “if necessary.” (Guidelines, § 15096(h).) Section 15093 dictates the findings that are required when a “Statement of Overriding Considerations” has been adopted by a decision-making agency. Expo did, in fact, adopt a Statement of Overriding Considerations as part of the certification of its FEIR. Section 15093(b) states that, when a project has been approved for which the significant environmental effects cannot be avoided or substantially lessened, but for which the benefits outweigh these effects, “the agency shall state in writing the specific reasons to support its action based on the final EIR and/or other information in the record.” (Guidelines, § 15093(b).) Section 15093(b) further states that the findings “shall be supported by substantial evidence in the record.” (Guidelines, § 15093(b).) Section 15096(h) makes the requirements of § 15093 applicable to responsible agencies (like the Commission, in this instance) when a Statement of Overriding Considerations has been adopted on the project.

In discussing the findings required under §§ 15091, 15093 and 15096, a noted CEQA treatise states that, “[l]ike lead agencies, responsible agencies must

adopt their own findings. Thus, in granting subsequent approvals for projects initially studied in an EIR certified by a lead agency, *a responsible agency cannot rely on the lead agency's findings, but must make its own.*" (Remy, et al. *Guide to CEQA* (11th ed. 2006), 387 (citations omitted); see also *Resource Defense Fund v. Local Agency Formation Commission of Santa Cruz County* (1987) 191 Cal.App.3d 886, 896 ("although the lead agency prepares the EIR, the responsible agency must independently make its own findings and conclusions").) The *Guide to CEQA, supra*, elaborates on findings required by responsible agencies as follows:

The responsible agency relies on the lead agency's environmental document in acting on whatever aspect of the project requires its approval. The responsible agency must, however, issue its own findings regarding the feasibility of relevant mitigation measures or project alternatives that can substantially lessen or avoid significant environmental effects. Furthermore, where necessary, a responsible agency must issue its own statement of overriding considerations.

(Remy, et al. *Guide to CEQA* (11th ed. 2006), p. 53, citing *Resource Defense Fund, supra*, 191 Cal.App.3d, 895 and Guidelines § 15096 (f)-(h).)

It should be emphasized that the Commission, as a responsible agency and not lead agency on the Project, is required to consider the possible significant environmental effects of, and make specific findings with record support related to, only that portion of the overall project that is within the Commission's jurisdiction and expertise, *i.e.*, the crossing approvals. "A responsible agency . . . considers significant impacts, mitigation measures, and alternatives pertaining only to activities that it is responsible for approving or carrying out." (Kostka et al., *Practice Under the California Environmental Quality Act* (2nd ed., January 2011 update), vol. 1, 849 (citations omitted).) The treatise further provides:

It necessarily follows that a responsible agency should be required to make findings and adopt overriding considerations for significant environmental impacts that will result from only the parts of the project the responsible agency approves and that are subject to its jurisdiction.

(*Ibid.*) In other words, the Commission is not in any way required to address all of the possible impacts of the entire Project. The Commission is, however, required to address those impacts that relate to its jurisdiction over the crossings.

In summary, the Commission is required under CEQA to support its approval of the 16 at-grade and 11 grade-separated crossings with specific findings related to significant environmental impacts of the crossings, and these findings must be supported by substantial record evidence. (Guidelines, §§ 15091, 15093, 15096.)

5.1.3.1. There is Substantial Evidence that Expo has Proposed Adequate Mitigation Measures Regarding Rail Safety Issues

In its supplemental filing following the evidentiary hearing, Expo provided the assigned ALJ with what it contended were the pertinent pages from the FEIR that contained areas of significant environmental impact and the proposed mitigation measures for rail safety issues. We summarize those pages below:

Environmental/Safety Criterion	Significant Environmental Impacts	Proposed Mitigation Measures
Would the project cause or create the potential for substantial adverse safety conditions, including station accidents, boarding and disembarking accidents, right-of-way accidents, collisions, fires, and major structural	Accidents at LRT stations with passengers boarding or alighting	To minimize the potential for overcrowding safety concerns, the size of the platform at the proposed LRT stations would be sized to maintain 4 square feet per person on the platform in conformity with Metro's Fire/Life

Environmental/Safety Criterion	Significant Environmental Impacts	Proposed Mitigation Measures
failures?		Safety Design Criteria. (FEIR Section 3.15 [Safety and Security], at 3.15-7). Additional safety measures such as a public address system and automated sprinkler systems with any enclosed space at an LRT station would be implemented in accordance with National Fire Protection Association (NFPA), CPUC, California Code of Regulations, and Metro Requirements. (<i>Id.</i>)
	Right of Way Accidents	A barrier, such as fencing or a wall, would be installed along the outside of the entire alignment except at the at-grade crossings, portions of the street running sections and portions of the aerial structures, Pedestrian gates and other security features such as photo enforcement systems to automatically enforce violations of traffic laws and reduce the potential for collisions would be developed along at-grade crossings. (FEIR Section 3.15 [Safety and Security], at 3.15-7). Photo enforcement systems to automatically enforce violations of traffic laws and reduce potential for collisions. (<i>Id. at 3.15-8</i>).
	Right of Way Accidents	Automated crossing

Environmental/Safety Criterion	Significant Environmental Impacts	Proposed Mitigation Measures
		<p>controls and features including audible sounds to inform pedestrians and vehicles of approaching LRVs and the need to leave the fenced track area; flashing lights to inform pedestrians and vehicles of approaching LRV and the need to leave the track area; vehicle approach gates; vehicle departure gates to prevent vehicles from going around approach gates; pedestrian approach gates; pedestrian emergency exit swing gates; emergency battery back-up power; activated electronic “No Turn” symbol signs at selected locations, which would be determined on a crossing by crossing basis; Activated electronic “No Turn” symbol signs to prohibit attempted turns onto parallel streets and/or U turns; pedestrian countdown signals to inform pedestrians of the time remaining to safely exit the fenced track area; ADA-compliant features for pedestrians; Queue-cutter and/or sign features to prevent vehicles from stopping on tracks. (FEIR Section 3.15 [Safety and Security], at 3.15-8).</p>

Environmental/Safety Criterion	Significant Environmental Impacts	Proposed Mitigation Measures
	Fires	<p>As required by the Metro’s Fire/Life Safety Design Guidelines, evacuation routes would be provided along the entire length of the LRT Alternatives to allow passengers to exit the train and safely leave the alignment at any location. This would be done through the construction of emergency walkways, that would be designed consistent with GO 143-B Classifications 9.04a, 9.04b(1), and 9.04b(2), such that the walkway would be at least 30 inches wide, along portions of the alignment that would operate within a separate ROW (Right Of Way), such as all along Segment 1, Segment 2, aerial structures, and station platforms. (FEIR Section 3.15 [Safety and Security], at 3.15-10). In addition, stations would be constructed using certain types of materials (UBC, CCR Title 24 and Title 8 – Elevator Safety Orders) and finishes (UBC Chapter 42 Classes I through III, depending on the location) to minimize the potential, should a fire occur. (<i>Id.</i> at 3.15-11).</p>
Would the project		Prior to the commencement

Environmental/Safety Criterion	Significant Environmental Impacts	Proposed Mitigation Measures
<p>substantially limit the delivery of community safety services, such as police, fire, or emergency services?</p>		<p>of operation of the LRT Alternatives, Metro shall coordinate with the Cities of Culver, 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 to the various types of emergencies that may occur on the Metro rail system. Additionally, Metro shall encourage the cities of Culver, Los Angeles, and Santa Monica to update their emergency response procedures to address implementation of an LRT Alternative. (MM SAF-1) (<i>Id. at 3.15-13</i>).</p>
<p>Would the project substantially limit the delivery of community safety services, such as police, fire, or emergency services?</p>		<p>The Expo authority shall maintain access to all police and fire stations at all times during construction. (MM CON-17). During the construction of the LRT Alternatives, the Expo Authority shall coordinate with the cities of</p>

Environmental/Safety Criterion	Significant Environmental Impacts	Proposed Mitigation Measures
		<p>Culver, 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, Santa Monica, and Los Angeles to update their emergency response procedures to address construction of the LRT Alternatives. (MM CON-18). (FEIR at 4-57 and 4-58).</p>

As to each of the potentially significant or significant impacts identified in the FEIR within the scope of the Commission’s permitting authority and discussed above, the Commission finds substantial evidence that the lead agency

adopted feasible mitigation measures to either eliminate or substantially lessen the impacts to less-than-significant levels.

5.1.3.2. There is Substantial Evidence that Expo Authority has Proposed Adequate Mitigation Measures Regarding Spillover Parking and the Loss of Parking.

5.1.3.2.1. Spillover Parking

There is a difference of opinion between the parties whether the Commission, as a responsible agency, must determine if the Project will result in significant environmental impacts regarding parking issues, and if adequate mitigation measures have been proposed.²⁷ In accordance with Guidelines § 15096 (a) and (h), we find that it is the responsibility of the Commission to evaluate all potential environmental impacts of the Project that are within the scope of our jurisdiction, and not limit our review to the areas of noise, vibration, safety, and security as Expo Authority suggests.²⁸

NFSR claims that the Commission failed to make findings on the significant impact of spillover parking which Expo has identified in neighborhoods and commercial areas within ¼ mile of the Project's train stations.²⁹ However, the FEIR did address this spillover issue and Expo Authority adopted mitigation measure MM TR-4 which states:

²⁷ See Expo Authority's Supplemental Brief, 8 and 11; and NFSR's Opening Brief, 10-15.

²⁸ Our conclusion is also consistent with the broad grant of authority given to the Commission over railroad crossings pursuant to Pub. Util. Code § 1202 (Chapter 6: Railroad Crossings). Judicial decisions have established that rail crossing safety is a matter of statewide concern within the Commission's jurisdiction. (See *City of San Mateo v. Railroad Commission of California* (1937) 9 Cal.2d 1, 9-10; *City of San Bernardino v. Railroad Commission of California* (1923) 190 Cal. 562; *City of San Jose v. Railroad Commission of California* (1917) 175 Cal. 284; and *City of Union City v. Southern Pacific Company* (1968) 261 Cal.App.2d 277.)

²⁹ NFSR's Opening Legal Brief, 10-12.

In the quarter mile area surrounding each station where spillover parking is anticipated, a program shall be established to monitor the on-street parking activity in the area prior to the opening of service and shall monitor the availability of parking monthly for six months following the opening of service. If a parking shortage is determined to have occurred (i.e., existing parking space utilization increases to 100 percent) due to the parking activity of the LRT patrons, Metro shall work with the appropriate local jurisdiction and affected communities to assess the need for and specific elements of a permit parking program for the impacted neighborhoods. The guidelines established by each local jurisdiction for the assessment of permit parking programs and the development of community consensus on the details of the permit program shall be followed. Metro shall reimburse the local jurisdictions for the costs associated with developing the local permit parking programs within one-quarter mile of the stations and for the costs of the signs posted in the neighborhoods. Metro will not be responsible for the costs of permits for residents desiring to park on the streets in the permit districts. For those locations where station spillover parking cannot be addressed through implementation of a permit program, alternative mitigation options include time-restricted, metered, or shared parking arrangements. Metro will work with the local jurisdictions to determine which option(s) to implement.

The FEIR concluded that this mitigation measure would reduce the station spillover impacts to a less than significant level.

Yet NFSR challenges this mitigation measure on the grounds that (1) the Commission failed to evaluate the efficacy and legality of MM TR-4 as a mitigation measure; (2) Expo Authority provided no measurable, enforceable mitigation for the no-parking alternative at Westwood; and (3) the Commission failed to make findings as to the infeasibility of alternative mitigation measures for the Project.³⁰

³⁰ NFSR's Supplemental Brief, 12.

We reject NFSR's arguments. First, MM TR-4 sets a clear performance standard *i.e.* monitoring parking activity to determine if LRT increases parking space utilization to 100%. If that percentage occurs, Expo Authority proposes to work with local jurisdictions to following their permit parking program guidelines. Second, Expo Authority's deferral approach is consistent with the approach approved in *Defend the Bay v. City of Irvine* (2004) 119 Cal.App 4th 1261, 1275, wherein the Court reasoned that the "deferral of the specifics of mitigation is permissible where the local entity commits itself to mitigation and lists the alternatives to be considered, analyzed and possibly incorporated in the mitigation plan." The approval of a similar deferral approach was made in *Sacramento Old City Association v. City Council* (1991) 229 Cal.App. 3d 1011, 1028-1029, wherein the Court opined:

For [the] kinds of impacts for which mitigation is known to be feasible, but where practical considerations prohibit devising such measures early in the planning process (*e.g.* at the general plan amendment or rezone stage), the agency can commit itself to eventually devising measures that will satisfy specific performance criteria articulated at the time of project approval. Where future action to carry a project forward is contingent on devising means to satisfy such criteria, the agency should be able to rely on its commitment as evidence that significant impacts will be mitigated.³¹

The Commission has analyzed MM TR-4 and finds it to be a reasonable, practicable, and legal approach for dealing with the traffic-spillover issue. Thus, we find it unnecessary to consider and make findings as to the infeasibility of

³¹ See also *Laurel Heights Improvement Association v. Regents of University of California* (1988) 47 Cal.3d 376, 418 (upholds mitigation measure by which project noise levels will be kept within performance standards); and *Schaeffer Land Trust v. San Jose City Council* (1989) 215 Cal.App. 3d 612, 632 (upholds approval of general plan amendment based on a negative declaration because actual physical development will be contingent on devising a plan to ensure compliance with city standards for traffic levels of service).

alternative mitigation measures to the Project as NFSR would have this Commission do.

5.1.3.2.2. **Loss of Parking**

We also note that the FEIR has proposed mitigation measures for the removal of street parking. One area is on the south side of Colorado Avenue between 14th Street, and Lincoln Boulevard on either the north or south side of the street between Lincoln Boulevard and 4th Street. In addition, 56 parking spaces will be eliminated on the south side of Colorado Avenue between 14th and 4th Streets. The FEIR proposed the following mitigation measures:

MM TR-9 Colorado Avenue. Replacement parking would be required along impacted portions of Colorado Avenue. The potential replacement parking lots are listed below. Additional replacement options could include implementation of diagonal parking on adjacent streets (after extensive neighborhood outreach), or the implementation of design options, which would reduce the extent of parking impacts[.]

MM TR-9(a) South side of Colorado Avenue, between 14th Street and 11th Street. Property would have to be acquired to provide replacement parking. Potential parcels on the south side of Colorado Avenue between 18th Street and 16th Street have been identified.

MM TR-9(b) South side of Colorado Avenue, between 11th Street and 4th Street. Property would have to be acquired to provide replacement parking. A potential parcel at the northwest corner of 6th Street and Colorado Avenue has been identified.

The EIR concluded that implementation of these mitigation measures would reduce the impact of displaced parking spaces to a less than significant level. We have reviewed these mitigation measures and find them to be reasonable.

5.1.3.3. Commission's Independent Review of the FEIR's Remaining Significant Environmental Impacts and Proposed Mitigation Measures

As part of this rehearing, and in compliance with the CEQA guidelines for a responsible agency, we must also conduct our own independent review of the FEIR in order to make our own findings as the Project's significant environmental impacts and whether the proposed mitigation measures are sufficient to either eliminate or substantially lessen the impacts to less-than-significant levels. In so doing, we mark and admit into evidence the entirety of the FEIR as Exhibit 16. In reviewing the FEIR, we note that Expo has identified CEQA significant thresholds in the following areas of concern: Transportation/Traffic; Aesthetics; Air Quality; Cultural Resources; Geology, Soils, and Seismicity; Hazards and Hazardous Materials; Hydrology/Water Quality; Land Use/Planning; Noise and Vibration; Paleontological Resources; Parks and Community Facilities; Safety and Security; and Construction. (FEIR, at 3.1-5 through 3.1-12.).

After reviewing the FEIR, as well as the supplemental briefing provided by the parties on the CEQA issues raised by Table 8, we concur in and adopt these findings within the Commission's jurisdiction regarding the significant environmental impacts and the proposed mitigation measures, as well as the significant unavoidable impacts, as they relate to the Project. We have also reviewed Volume 1 of the FEIR which discusses the content of Table 8 in detail. We concur in and adopt those findings regarding the significant environment impacts and the proposed mitigation measures, as well as the significant unavoidable impacts, as they relate to the Project.

5.1.3.4. NFSR's Argument that Expo used an Improper Baseline in the FEIR, for Traffic and Emergency Response Issues, is Legally and Factually Flawed

NFSR faults the FEIR for using a hypothetical future baseline to evaluate real world impacts to the traffic operations and emergency-vehicle responses at the Overland Avenue and Westwood Boulevard crossings. Instead, NFSR asserts that the FEIR should have identified what those impacts would be at the Project's at-grade crossings in 2015, rather than in 2030.³² Yet NFSR also acknowledges that while it lost on this issue in Court of Appeal,³³ that appellate decision is now before the California Supreme Court.³⁴ Curiously, while NFSR asserts that the decision by the Court of Appeal is no longer controlling authority on the question of what is the proper baseline for a CEQA evaluation, yet NFSR continues to assert the very arguments upon which it lost. While we await the decision by the California Supreme Court regarding the FEIR's baseline analysis, there is nothing preventing this Commission, in its capacity as responsible agency, from conducting its own analysis of the baseline question in compliance with the applicable law.

Admittedly case law is split on this question.³⁵ One case that does permit the use of future baselines is *Pfeiffer v. City of Sunnyvale* (2001) 200 Cal.App.4th

³² NFSR's Opening Brief, 14.

³³ *Neighbors for Smart Rail v. Exposition Metro Line Construction Authority*, Los Angeles County Superior Court No. BS 125233; Court of Appeal No. B232655; California Supreme Court No. S202828.

³⁴ NFSR's Opening Brief, 13-14.

³⁵ For cases rejecting the use of future baselines to evaluate the environmental impacts of projects subject to CEQA, see *Communities for a Better Environment v. South Coast Air Quality Management District* (2010) 48 Cal. 4th 310, 320-321; *Sunnyvale West Neighborhood Association v. City of Sunnyvale City Council* (2010) 190 Cal.App. 4th 1351, 1382-1382; and *Madera Oversight Coalition, Inc. v. County of Madera* (2011) 199 Cal.App. 4th 48, 90.

1552, 1572, wherein the court approved the EIR's use of multiple traffic baselines, including predicted conditions, to analyze traffic impacts:

[A]ppellants' contention that a traffic baseline is limited to existing conditions lacks merit because . . . the California Supreme Court has instructed that predicted conditions may serve as an adequate baseline where environmental conditions vary. . . . ([CBE], *supra*, 48 Cal.4th at pp. 327-328.) Here, there was substantial evidence, undisputed by appellants, that traffic conditions in the vicinity of the . . . project could vary from existing conditions due to a forecast for traffic growth and the construction of already-approved developments. Moreover, appellants overlook the fact that the EIR included existing conditions, based on actual traffic counts, in its analysis of traffic impacts.

In reaching its decision that it was appropriate to use a future baseline, *Pfeiffer* relied on *Communities for a Better Environment v. South Coast Air Quality Management District* (2010) 48 Cal.4th 310 and *Save Our Peninsula Committee v. Monterey County Board of Supervisors* (2001) 87 Cal.App.4th 99, both of which recognized that selecting a baseline is a factual determination that agencies have the discretion to make. (200 Cal.App.4th, 1571-1572.) *Pfeiffer's* discussion regarding the use of future baselines is instructive:

[A]ppellants' contention that a traffic baseline is limited to existing conditions lacks merit because, as we have discussed, the California Supreme Court has instructed that predicted conditions may serve as an adequate baseline where environmental conditions vary. "[T]he date for establishing baseline cannot be a rigid one. Environmental conditions may vary from year to year and in some cases it is necessary to consider conditions over a range of time periods." [Citation.]" (*Communities for a Better Environment, supra*, 48 Cal.4th at pp. 327-328.) Here, there was substantial evidence, undisputed by appellants, that traffic conditions in the vicinity of the PAMF project could vary from existing conditions due to a forecast

for traffic growth and the construction of already-approved developments.³⁶

What the law in this area makes clear is that neither the California Supreme Court nor the CEQA Guidelines mandate a “uniform, inflexible rule for determination of the existing conditions baseline.” (200 Cal.App.4th, 1570.)

We find the use of a future baseline appropriate for the consideration of traffic impacts on the environment. Expo Authority found that “existing physical environmental conditions (current population and traffic levels) do not provide a reasonable baseline for the purpose of determining whether traffic and air quality impacts of the Project are significant.”³⁷ As such, Expo Authority defined a “No-Build” alternative as consisting of existing transit services and improvements explicitly committed to be constructed by the year 2030 in accordance with the 2008 Southern California Association of Governments’ (SCAG) Regional Transportation Plan, as well as general plans for the relevant municipalities. SCAG is the federally designated Metropolitan Planning Organization pursuant to 23 U.S.C. § 134(a) and (g) for Imperial, Los Angeles, Orange, Riverside, San Bernardino, and Ventura Counties, and, as such, is responsible for the preparation, adoption, and revision of the Regional Transportation Plan and the Regional Transportation Improvement Program pursuant to 23 U.S.C. § 134(g), 49 U.S.C. § 5303(f), and 23 C.F.R. § 450.312. The Final 2004 Regional Transportation Plan Amendment # 3 (June 7, 2007) states that the Regional Transportation Plan “is a long-range plan that identifies multi-modal regional transportations needs and investments out to the plan horizon year of 2030.” Thus, it was reasonable for Expo Authority to utilize the

³⁶ 200 Cal.App.4th, 1572.

³⁷ FEIR.

2030 baseline as that future date is being used as the benchmark for determining future regional transportation needs.

The FEIR's approach is also consistent with CEQA Guidelines § 15130's directive that cumulative impacts "shall reflect the severity of the impacts and their likelihood of occurrence, but the discussion need not provide as great detail as is provided for the effects attributable to the project alone. The discussion should be guided by the standards of practicability and reasonableness[.]" Similarly, CEQA Guidelines § 15125(a) provides that the baseline will "normally" consist of conditions existing as of the time the Notice of Preparation for an EIR: "This environmental setting will normally constitute the baseline physical conditions by which the lead agency determines whether an impact is significant." In *Communities for a Better Environment, supra*, 48 Cal.4th 310, the California Supreme Court noted that the word "normally" means that the agencies have flexibility in setting the baseline, noting:

Where environmental conditions are expected to change quickly during the period of environmental review for reasons other than the proposed project, project effects might reasonably be compared to predicted conditions at the expected date of approval, rather than to conditions at the time analysis is begun.³⁸

Accordingly, we find the FEIR's use of future-baseline data to be reasonable, and that the FEIR's methodology is therefore distinguishable from the case of *Kings County Farm Bureau v. City of Hanford* (1990) 221 Cal.App. 3d 692 where the FEIR avoided analyzing the severity of the problem and allowed the approval of a project with problems that, collectively, were startling.

³⁸ 48 Cal.4th, 328. Other decisions have also acknowledged that the word "normally" gives the lead agency flexibility in determining an appropriate baseline (*See Cherry Valley Pass Acres & Neighbors v. City of Beaumont* (2010) 190 Cal.App.4th 316, 336-337; and *Fat v. County of Sacramento* (2002) 97 Cal.App.4th 1270, 1277-1278.)¹

5.1.3.5. NFSR's Claim that it was Improper to use a Future Baseline to Evaluate the Significant Impacts of the Project to Traffic and Air Quality on the Existent Environment is Factually and Legally Flawed

NFSR also faults the FEIR for using a baseline of hypothetical projected conditions 20 years after the commencement of their environmental impact review to determine the significance of the Project on the environment.

Specifically, NFSR reference section 3.1.5 of the FEIR which states:

Implementation of the RPA would not degrade study area intersections projected to operate above level of service (LOS) E, or further degrade the study area intersections that are already projected to operate at LOS E or F under year 2030 No-Build conditions. As such, the RPA would not result in significant delay impacts to any of the study intersections relative to the No-Build Alternative, resulting in less-than-significant impact.³⁹

NFSR concludes that because Expo Authority used this hypothetical baseline, the Commission cannot verify the safety of the Project's crossings.

We reject NFSR's arguments as they are factually and legally unsound. Expo Authority explained in its FEIR regarding the need to in rely on future projections to evaluate the Project's environmental impacts:

Past experience with the adopted demographic projections indicate[s] that it is reasonable to assume that the population of the project area and the region will continue to increase over the life of the project. The projected population increases will, in turn, result in increased traffic congestion and increased air emissions from mobile sources in the project area and in the region.

A future baseline would permit the public and decision makers to "understand the future impacts on traffic and air quality of approving and not approving the

³⁹ Findings of Fact 3-2 (Exhibit 13).

Project.” In contrast, determining the impact of the Project on presently existing traffic and air quality conditions would not generate the beneficial information needed to determine the future impact of the Project which is not scheduled to operate until 2015.

Our analysis of the relevant case law and CEQA Guidelines do not reveal any impediment to the use of a future baseline. We do not see that the *Sunnyvale*, *Madera*, and *Communities for a Better Environment* decisions conclusively prohibited, in all circumstances, the use of a future baseline to evaluate a project’s environmental impact on traffic and air quality. Similarly, CEQA Guidelines § 15125 (a) states that the beginning of the environmental analysis “will normally constitute the baseline physical conditions by which a lead agency determines whether an impact is significant.” As we discussed, *supra*, it is telling that the Guidelines used the word “normally” rather than “exclusively,” which indicates that Expo Authority, or any other Lead Agency, can under the appropriate circumstances consider a future date in order to evaluate a project’s environmental impacts.

In sum, we conclude that there is substantial evidence in the record to support the FEIR’s findings regarding the Project’s significant impacts, proposed mitigation measures, and unavoidable consequences.

5.2. Due Process Issue

5.2.1. Expo Authority’s Position

Expo Authority contends that procedural due process in an administrative agency context generally safeguards a party’s right to notice and opportunity for hearing,⁴⁰ 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

⁴⁰ *Ohio Bell Tel. Co. v. Public Util. Com. of Ohio* (1937) 301 U.S. 292, 304.

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 Expo Authority concludes that 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, as well as the rest of the public, the requisite due process.

5.2.2. NFSR’s Position

NFSR asserts that due process was denied as Expo Authority’s public participation and outreach efforts were insufficient. NFSR also faults the Commission for not presenting NFSR with any evidence that all potential safety hazards were eliminated as allegedly required by D.82-04-033.⁴²

5.2.3. Resolution of Due Process

The concept of due process is found in the 5th and 14th Amendments to the United States Constitution. In the administrative-law context, due process requires, at a minimum, notice and opportunity to be heard. (*Ohio Bell Tel. Co. v. Public Util. Com. of Ohio* (1937) 301 U.S. 292, 304; *Bi-Metallic v. State Board of Equalization* (1915) 239 U.S. 441; *Londoner v. Denver* (1908) 210 U.S. 323; *Wood v. Public Utilities Com.* (1971) 4 Cal.3d 289, 293; and *Cal. Assn. of Nursing Homes, Inc.*

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

⁴² *City of San Mateo* (1982) 8 CPUC 2d 572. NFSR references the number 12 and it is unclear if NFSR is referring to Findings of Fact No. 12 which states “Any at-grade crossing in this vicinity would impose potential operating hazards and delays on S.P.” We are not certain how this portion of the decision supports NFSR. We do note, however, that *City of San Mateo* does require a showing that a grade-separated crossing is not practicable. (*Id.*, 581). We will, therefore, discuss the practicability standard, *infra*.

v. Williams (1970) 4 Cal.App.3d 800, 811.) In analyzing whether an agency has afforded interested parties sufficient due process, many courts rely more on instinct, for example by applying a smell test to agency conduct rather than precise legal rules. (*Rosenblit v. Superior Court* (1991) 231 Cal.App.3d 1434, 1445.) While there are no hard and fast rules for determining what is due process since the type of process that should be accorded may be elusive or ever changing,⁴³ we can glean from the case law the following examples of due process that should be accorded the parties:

- Circulating materials to the interested parties before relying on that information to make findings. (*Louisiana Ass'n of Indep. Producers & Royalty Owners v. FERC* (D.C. Cir. 1992) 958 F.2d 1101, 1113.)
- Adequate notice for the basis of action. (*Brock v. Roadway Express* (1987) 481 U.S. 252.)
- Meaningful opportunity to be heard. (*Armstrong v. Manzo* (1965) 380 U.S. 545.)
- Opportunity to present evidence and argument. (*Rosa v. Bowen* (1988) 677 F. Supp. 782.)

We believe that there is substantial evidence in the record that NFSR was afforded due process before Resolution SX-100 was issued and after its Rehearing Application was granted.

5.2.3.1. Public Participation prior to the commencement of the RCHAR

The public had the opportunity participate and provide input on the Expo Rail Project environmental review process prior to the commencement of the RCHAR. Starting on February 19, 2007, Expo issued the notice of preparation of an EIR for the Project. Expo conducted four public meetings that over 700 people

⁴³ (*Hannah v. Larache* (1960) 363 U.S. 420, 442; *Roth v. Los Angeles* (1975) 53 Cal.App.3d 679, 692.)

attended to solicit public opinion prior to the EIR's preparation. (*Ex 3*, Prepared Testimony of Monica Born, 5.) Expo received and evaluated 1,800 written comments on proposed alternatives. (*Id.*)

5.2.3.2. The Public had the Opportunity to Comment on the Draft EIR (DEIR)

On January 28, 2009, Expo circulated the DEIR for the Project, which evaluated six alternatives, including the "No-Build" alternative, a transportation system management alternative, and four different LRT alignments. (*Ex 3*, Prepared Testimony of Monica Born, 5.) After the DEIR was circulated for comment, Expo "conducted over 100 meetings with various cities, public agencies and stakeholders, including three formal public hearings, business outreach meetings, and group presentations." (*Id.*) Agencies, individuals, and interest groups submitted "at least 8,979 oral and written comments on the draft EIR." (*Id.*) Expo also responded to NFSR's comments by conducting additional environmental analysis by analyzing "two grade-separated design options for Overland Avenue and Westwood Boulevard." (*Id.*, 6.)

5.2.3.3. The Public had the Opportunity to Comment on the FEIR

The public had the opportunity to review and comment on the FEIR. On December 21, 2009, Expo made the FEIR available for public review and comment, and held a public hearing on February 4, 2010, to consider certifying the FEIR and approving the Expo Rail Phase 2 project. (*Ex. 3*, Prepared Testimony of Monica Born, 6.) A number of individuals and organizations submitted written comments and testified at the hearing. (*Id.*)

5.2.3.4. Expo Authority Solicited and Received input from Local Communities and Emergency Authorities from the City of Los Angeles

As part of the RCHAR process, Expo Authority worked with the City of Los Angeles, including its emergency authorities. . (Ex. 1, Prepared Testimony of Richard D. Thorpe, 10.) Additionally, numerous local officials submitted letters or other communications in support of Resolution SX-100. (*Id.*) Monica Born testified that in January 2008, Expo Authority:

Held a series of regular meetings with Los Angeles Department of Transportation (LADOT) to discuss the grade crossings within the City of Los Angeles. These meetings, totaling over 15, were usually held monthly and involved LADOT traffic engineers, planners and even the General Manager in some cases. At these meetings, projected traffic flows, queuing near the crossings, spillback into intersections, traffic growth, level of service, and other safety and traffic issues were discussed for each crossing. From the beginning, LADOT agreed with the proposals for grade separated crossings at the following locations: Venice/Robertson, National/Palms, Motor, Sawtelle, Pico/Gateway, and Bundy. There was even some discussion of considering Sawtelle at-grade as opposed to grade separated due to the low traffic volumes. However, it was not technically feasible to construct the Sawtelle crossing at-grade. Also, LADOT was supportive of the at-grade crossings proposed to be signalized and gated at Bagley Avenue and Military Avenue. (Ex. 3, Prepared Testimony of Monica Born, 7.)

Following input from LADOT, Expo conducted additional studies of the at-grade crossings by analyzing the traffic operations of the Light Rail Transportation crossing and the adjacent intersections along the specified corridor at Overland, Centinela, Westwood, Sepulveda, and Barrington. (Ex. 3, Prepared Testimony of Monica Born, 7.) For Overland Avenue and Centinela

Avenue, Ms. Born testified that the agreed-upon method was to use Synchro software, which analyzes traffic operations in a more comprehensive manner by taking into account the LRT crossing and the adjacent intersections along a specified corridor:

- For Overland, the Synchro analysis included the proposed addition of one through lane in each direction between Cushdon and Coventry and resulted in no significant impacts. Also a traffic signal was added at the tracks and this was interconnected to the existing Ashby signal in order to prevent spillback along with pre-empting the Ashby signal.
- For Centinela, the Synchro analysis results led to the change from an at-grade to a grade separated crossing, which was included in the EIR and adopted by the Expo Authority Board as part of the Project. (Ex. 3, Prepared Testimony of Monica Born, 7.)

Ms. Born also provided the following testimony regarding the additional studies Expo Authority conducted for the Westwooe, Sepulveda, and Barrington crossings:

- For Westwood Boulevard, several alternatives were explored, trying to balance traffic volumes with parking and tree removals. Many options were considered, even eliminating the center left turn lane in order to minimize the parking and tree removals, but ultimately LADOT and Expo Authority agreed on a configuration that widened the street to accommodate a second northbound through lane that could accommodate a bus and through traffic. Also, the plan provided for the crossing to be signalized along with adjacent intersections, and LADOT agreed that portions of North and South Exposition would be closed or restricted to one-way due to the complexity of the crossing. The at-grade configuration was included in the Final EIR and adopted as part of the project.
- For Sepulveda Boulevard, LADOT agreed that the analysis showed that a grade separation was not necessary per the

results of the traffic analysis but requested a grade separation option be addressed in the FEIR in case ~~funding became~~ [funding became](#) available. This grade separation was added to the project by action taken at the March 18, 2011 Expo Authority Board meeting.

- For Barrington Avenue, four alternatives were explored, including couplet pairing with Centinela and Bundy. The results concluded that three of the four alternatives were not feasible and the last could result in significant impact. However, improvements were made to Barrington which included lengthening the left turn pockets and adding dedicated right turn lanes from Barrington to Olympic and Barrington to Pico. LADOT was supportive of the at-grade crossing as proposed in the EIR. (*Ex. 3, Prepared Testimony of Monica Born, 7-9.*)

The results of LADOT meetings, studies, and findings were shared with the community at the October 6, and 11, 2009 meetings with the West of Westwood Home Owners Association and the Westwood Gardens Civic Association. The memo summarizing the studies and findings was included in the Transportation Traffic Technical Background Report that was included in the Final EIR. The input data and results for these Synchro studies were discussed with LADOT and other City stakeholders. (*Ex. 3, Prepared Testimony of Monica Born, 9.*)

5.2.3.5. Expo Authority held Meetings with and Received Input from the CSM

Expo “Authority presented testimony that starting in January 2008, and continuing through the end of 2009, “Expo Authority met with CSM on at least eight occasions to discuss the grade crossings. Just as with the grade crossings in Los Angeles, Expo Authority completed a study of each grade crossing applying the Metro Grade Crossing Policy. The analysis and results were shared with CSM for comment and concurrence. The CSM agreed with Cloverfield and

Olympic Boulevards being grade separated along with crossings at Stewart, 26th, 20th, and 19th Streets being at grade with gates.” (Ex. 3, Prepared Testimony of Monica Born, 9 and 10.)

In addition, before Expo Authority began the Metro Grade Crossing Policy study for each grade crossing, Expo Authority analyzed alternatives to the Olympic segment due to the CSM’s concern over the loss of trees:

The alternative segment that was studied began at Cloverfield and continued west to 17th within the Expo right-of-way, then veered into Colorado at 17th and ended east of 4th with the terminus station. The portion within Colorado would not have gates and the train would be controlled by traffic signals. Also, one lane of traffic would be removed, left turns from Colorado onto streets in the north/south direction, except at 17th and 4th, would be prohibited, and T-intersections along Colorado would prohibit vehicles from crossing the tracks. There was some discussion of incorporating left turn pockets at selected streets other than 17th and 4th, but this option was dropped since parking removal and property acquisitions would have been required. Also implemented, at Metro’s request, was photo enforcement at 17th due to the left turns from Colorado to 17th that would require crossing of the tracks. Overall, CSM supported the design of Colorado and requested that the alternative be added to the EIR. The Board agreed and ultimately the segment was selected as the preferred alternative with CSM’s support. (Ex. 3, Prepared Testimony of Monica Born, 10.)

5.2.3.6. Expo Authority Conducted Additional Public Outreach Efforts Regarding Resolution SX-100 and the Environmental Process

Expo conducted additional public outreach efforts in October 2011 by providing information about Resolution SX-100 on Expo Rail’s social-media sites including Facebook (2,900 followers) and Twitter (1,900) followers. (Ex. 2,

Prepared Testimony of Richard Thorpe, 11.) During the environmental review process, Expo received a petition signed by more than 360 members of the public urging approval of Resolution SX-100. Moreover, “nearly 30 area stakeholders, including residents immediately adjacent to the grade crossings, and eleven elected official representing the Cities of Santa Monica, Culver City, and Los Angeles sent letters in support of Resolution SX-100. “ (*Id.*)

5.2.3.7. Additional Due Process was Accorded to NFSR After the Commission Granted Rehearing

NFSR was able to present all of its positions in the Joint PHC Statement. The assigned ALJ instructed the parties to meet and confer in order to identify the issues for Resolution as to the four issues upon which the Commission granted rehearing. (ALJ Mason Ruling dated July 27, 2012.) In response, the parties filed a detailed Joint Prehearing Conference Statement which set forth their respective positions on the four issues identified for rehearing.

NFSR had the opportunity to but did not propound discovery to Expo. NFSR received a copy of the RCHAR on October 12, 2012 yet elected not to conduct any discovery. NFSR’s claim that it was trying to hire an attorney is no excuse for not exercising its right to conduct discovery, especially after it claimed that it needed this rehearing because of a claimed denial of due process. Moreover, when pressed, it appeared that NFSR was pursuing its case against Expo in the appellate courts with the California Supreme Court having granted NFSR’s Petition for Review. While we have no quarrel with how NFSR chooses to launch its calculated strategic two-pronged attack, the fact that NFSR has chosen to pursue its remedies in the ~~appellate~~[appellate](#) courts is no excuse for not exercising its rights to discovery during this rehearing process.

NFSR also failed to present any prepared testimony in accordance with the Scoping Memo and Ruling. The parties were required to serve opening testimony addressing the issues identified in of the Scoping Memo and Ruling by November 2, 2012, and rebuttal testimony by November 30, 2012. While Expo Authority served the testimony of three witnesses, NFSR presented no prepared testimony. Instead, NFSR served its legal briefs that, like its positions in the Joint PHC Statement, presented many arguments but no supporting prepared testimony.

Finally, NFSR was able to cross examine Expo's witnesses at the Evidentiary Hearing. At the December 17, 2012 Evidentiary Hearing, NFSR was given ample opportunity to cross examine Expo's witnesses. (RT, 15-16 [Monica Born]; 19-20 [John Van Hoff]; and 23-168 [Richard Thorpe].)

In sum, based on the collective findings set forth above, we find that the public in general and NFSR in particular have been afforded due process during the course of the Project, prior to the adoption of Resolution SX-100, and during this rehearing process, in accordance with the applicable legal standards.

5.3. Allegations of Error Regarding Cost Issues, and Compliance with Standards of Practicability

5.3.1. Expo Authority's Position

Expo Authority asserts that 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 Project. Expo Authority further asserts that as prescribed by *Re Exposition Metro Line Construction Authority*, D.09-02-031,⁴⁴ there are seven criteria used for judging practicability. Expo Authority maintains that these seven

⁴⁴ *Re Exposition Metro Line Construction Authority*, D.09-02-031 at 17-19.

practicability criteria were considered in the development of the crossing plans approved by Resolution SX-100.

5.3.2. NFSR's Position

NFSR asserts the Commission has made no finding or ruling that supports Expo's contention that, "the Commission has recognized that at-grade crossings are necessary in the design of modern light rail systems." Instead, 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.

5.3.3. Resolution of Error Regarding Cost Issues and Compliance with Standards of Practicability Issue.

5.3.3.1. Standards of Practicability

In evaluating applications for at-grade crossings, the Commission has the discretion to approve the request, order a separation of grade, or deny the application. Additionally, pursuant to Rules 3.11 and 3.7(c), applications for an at-grade crossing of a light-rail crossing shall include a showing why a separation of grade is not practicable. Pub. Util. Code § 1202(c) further gives the Commission the exclusive power to require, where in its judgment it would be practicable, a separation of grade at any crossing.

The Commission has addressed the issue of practicability many times. (*See e.g.* D.82-04-033 (City of San Mateo), D.92-01-017 (City of Oceanside), D.98-09-059 (City of San Diego), D.03-12-018 (City of San Diego), and D.02-05-047 (Pasadena Blue Line).) To assist it in its determination, the Commission uses the following seven criteria for judging practicability in all at-grade crossing cases (light-rail transit, passenger railroad, and freight railroad):

1. A demonstration of public need for the crossing;

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

Previously, in D.04-08-013, the Commission approved the City of Bakersfield's request to construct four at-grade crossings over a freight railroad, in D.07-03-027 approved the City of Glendale's request to construct an at-grade crossing over a combined passenger/freight railroad line, and in D.01-08-016, the Commission declared an at-grade crossing for the Santa Clara. We now apply these criteria to the instant matter.

5.3.3.1.1. A Demonstration of Public Need for the Crossing

The following evidence in the record demonstrates a public need for the project. First, over two-thirds of the voters in Los Angeles County voted to approve Measure R in November of 2008, "which levied a half-percent sales tax over 30 years dedicated to transportation improvements. The project was listed 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." (Ex. 2, Prepared Testimony of Richard Thorpe, 9.)

Second, “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. (Ex. 2, Prepared Testimony of Richard Thorpe, 9.)

5.3.3.1.2. A Convincing Showing that Expo Authority has Eliminated All Potential Safety Hazards

In addition to the evidence provided regarding the safety analysis in the RCHAR process, Expo presented testimony that it used various safety designs in the project to eliminate all potential safety hazards. John Van Hoff, the traffic engineer for AECOM, the company that provided supplemental technical staff to complete the EIR, testified that AECOM “developed and presented the draft concept plans and hazard matrices for each proposed at-grade crossing to the Diagnostic Team at various Diagnostic Team meeting.” (Ex. 4, Prepared Testimony of John Van Hoff, 4.) As set forth in the RCHAR, the following nine potential hazards for each proposed grade crossing were analyzed:

- Train and roadway speed;
- Skewed grade crossing;
- Restricted pedestrian and/or vehicle sight distance;
- Unsafe right or left turn from intersection/ driveway onto or across a grade crossing;
- Automobile traffic queue from nearby controlled intersection backs up across at-grade crossing or from the at-grade crossing back to a nearby controlled intersection;
- Vehicle driven around downed crossing gates;
- Parallel roadways and driveways to tracks;

- Pedestrian crosses tracks with train approaching; and
- Potential pedestrian surges.

(Ex. 1, 6.) As the RCHAR notes, “the potential hazard areas were developed from past design and operation experiences from other similar LTR projects; specific site inspections of the potential crossings; and, input from the CPUC, Metro, Cities of Los Angeles and Santa Monica.” (*Id.*) For each proposed grade crossing, the RCHAR identified Proposed Mitigations to deal with the potential hazards. (*Id.*, Appendix A: Grade Crossing Hazard Analysis Matrices.) The timeline of meetings and events from Mr. Van Hoff’s testimony demonstrates twenty-nine milestones that reflect the efforts undertaken by Expo to eliminate the potential hazards. (Ex. 4, Prepared Testimony of John Van Hoff, 5-8.) We conclude that the requisite showing was made by the RCHAR process and resulting report.

5.3.3.1.3. The Concurrence of Local Community and Emergency Authorities

As part of the RCHAR process and as set forth, *supra*, Expo Authority worked in consultation with the City and the CSM, including their respective emergency authorities. (Ex. 3, Prepared Testimony of Monica Born, 7-9 [LADOT and 9-10 [CSM].])

5.3.3.1.4. The Opinions of The General Public, and Specifically those Who may be Affected by an At-Grade Crossing

Expo Authority solicited and obtained [opinions from](#) various [members of the public](#) ~~opinions~~ who may be affected by an at-grade crossing. Specifically, over 360 members of the general public signed an online petition urging the Commission to approve Resolution SX-100; 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, including the cities of Los Angeles, Culver City, and CSM sent letters regarding the Project, NFSR and other members of the public filed comments on the draft Resolution SX-100; Expo Authority conducted four public meetings that were attended by over 700 people for input prior to the preparation of the EIR, Expo Authority received and evaluated 1,800 written comments on proposed alternatives, after the Draft EIR was circulated, Expo Authority held over 100 meetings with various cities, public agencies, and stakeholders; and (vii) Expo Authority received at least 8,979 oral and written comments on the Draft EIR. (*Ex. 2, Prepared Testimony of Richard Thorpe, 10-11; Ex. 3, Prepared Testimony of Monica Born, 5.*)

5.3.3.1.5. The Comparative Costs of an At-Grade Crossing with a Grade Separation

During the environmental-review process, the evidence shows that the issue of grade-separation versus at-grade construction was presented with respect to the design of crossings at Overland Avenue and Westwood Boulevard. Mr. Thorpe testified that Expo considered the following alternatives: Shallow Trench, Open Trench, Deeper Trench, and Aerial Structure, as well as their related costs:

- **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 was considered not to be a feasible option.
- **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 acceptable and would violate both Metro Design Criteria and FTA 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 not considered to be a viable option.
- **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. Again, because of these issues this alternative was determined not to be a viable option.
 - **IMPACTS FROM TRENCH CONSTRUCTION:** When compared to the at-grade approach, the construction of a deep 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 and cause 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, the deep trench, would be significantly higher than an at-grade alignment and station as discussed in more detail in Ms. Born's testimony, the reports I have reviewed indicate that the cost for constructing an underground trench from east of Overland to west of Westwood would be approximately \$224 million more than the at-grade approach approved in Resolution SX-100.
- **AERIAL STRUCTURE ALTERNATIVE:** At Expo Authority's request, 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:** As Ms. Born testifies, the reports indicate that the cost for an aerial structure over Overland would be approximately \$31 million more than for the at-grade approach approved in Resolution SX-100, and that the cost of a longer aerial structure over both Overland and Westwood, including an aerial station, would be approximately \$66 million more than for the at-grade approach. (Ex. 2, Prepared Testimony of Richard Thorpe, 12-14)

Ms. Born also testified that the costs for three of the four grade-separated alternatives were above the costs of the recommended at-grade alternatives. (Ex. 3, Prepared Testimony of Monica Born, 11-12.) In addition, these numbers do not take into account funds that the Expo Authority has already expended when it acted on the Commission's ~~passing~~ [passing](#) of Resolution SX-100.

Collectively, the evidence establishes that the grade-separated alternatives would be more costly.

5.3.3.1.6. A Recommendation by Staff that it Concurs in the Safety of the Proposed Crossing, Including Any Conditions

Resolution SX-100 was prepared by the Commission's Rail Transit and Branch of the Rail Crossings Engineering Section (RCES). As the timeline of events will demonstrate, RCES worked closely with Expo Authority to review the locations of the proposed crossings and any safety concerns relating to at-grade crossing designs:

- 09/13/2007: Project Briefing Meeting - Expo Authority presented RCES & Rail Transit Safety Section (RTSS) staff with a Project overview and alternative alignments under consideration in its DEIR.
- 07/14/2008: Technical Advisory Committee Meeting - RCES & RTSS staff attended meeting with other stakeholder

agencies where Expo Authority briefed attendees on status of its DEIR preparation.

- 01/27/2009: Expo Authority's DEIR for the Project was circulated for public comment.
- 03/27/2009: RCES staff submitted comments to Expo Authority's DEIR noting safety concerns related to at-grade crossings.
- 07/02/2009: RCHAR Scoping Meeting - RCES & RTSS staff met with Expo Authority and its consultants to discuss: (1) RCES staff safety concerns in its comments to DEIR; (2) Expo Authority's desire to comply with the RCHAR option in GO 164-D to obtain Commission approval for crossings in the Project; and (3) Discuss development of the RCHAR to address potential hazards and possible mitigations.
- 09/30/2009: Office Meeting/Workshop #1 - RCES staff, Expo Authority, LACMTA, and LADOT met to review initial draft of RCHAR and assist in identifying additional potential hazards and possible mitigation measures. Preliminary engineering crossing designs were also reviewed and RCES staff provided comments on potential design changes.
- 11/16/2009: Expo Authority provided written response to RCES staff comments to the Expo Phase 2 Draft EIR. Comments consisted of a briefing on project changes and status of ongoing hazards analysis. Expo Authority requested continued RCES participation and guidance in development of RCHAR and preliminary engineering designs.
- 12/02/2009: RCES staff responded to Expo Authority's letter dated 11/16/2009, affirming its commitment to continued consultation as part of its regulatory safety oversight responsibilities, and assisting in the analysis of identifying potential hazards and possible mitigations.
- 12/10/2009: Office Meeting/Workshop #2 - RCES staff, Expo Authority, LACMTA, and LADOT met to review

- draft RCHAR and engineering designs for crossings in City of Los Angeles.
- 12/11/2009: Office Meeting/Workshop #3 – RCES staff, Expo Authority, LACMTA and CSM met to review draft RCHAR and engineering designs for crossings in CSM.
- 02/05/2010: Expo Authority adopted a Notice Of Determination in certifying its FEIR, including a Statement of Overriding Considerations.
- 06/09/2010: Expo Authority submitted the Draft RCHAR to RCES staff for review and preparation of field diagnostic meetings.
- 07/27/2010: Pre-Diagnostic Meeting #1, RCES staff, Expo Authority, and LADOT met to review the designs for proposed grade crossings in City of Los Angeles.
- 07/29/2010: Pre-Diagnostic Meeting #2, RCES staff, Expo Authority and CSM met to review the designs for proposed grade crossings in CSM.
- 08/02/2010: Field Diagnostic Meeting #1, RCES staff, Expo Authority, and LADOT conducted a field evaluation of each proposed crossing in City of Los Angeles.
- 08/04/2010: Field Diagnostic Meeting #2, RCES staff, Expo Authority and CSM conducted a field evaluation of each proposed crossing in CSM.
- 11/12/2010: RCES staff provided Preliminary Recommendations, in accordance with the requirements of GO 164-D, to Expo Authority's RCHAR and engineering designs. RCES did not object to ten proposed grade-separated, and 14 proposed at-grade crossings. RCES did ask that three proposed at-grade crossings be evaluated further for either closure or grade-separation.
- 01/07/2011: Expo Authority responded to RCES staff accepting the Preliminary Recommendations on the ten grade-separated and 14 at-grade crossings. Expo Authority agreed to investigate the three crossings identified by RCES staff for closure or

grade-separation by following up with the respective Cities.

- 03/11/2011: Expo Authority submitted Final Draft RCHAR incorporating changes to the three at-grade crossings that satisfactorily address RCES staff's safety concerns.
- 04/01/2011: Expo Authority submitted revisions to its Final Draft RCHAR indicating a change to grade-separate the Sepulveda Blvd. crossing in City of Los Angeles.
- 04/22/2011: RCES staff and Expo Authority discussed I-10 Freeway crossing preliminary engineering design and failure to meet GO 143-B clearance requirements. Expo Authority requested removal of crossing from consideration for approval. RCES staff informed Expo Authority that approval for the I-10 Freeway crossing could be made by formal application once the design complied with applicable Commission General Orders.
- 05/06/2011: Consumer Protection and Safety Division, (now Safety Enforcement Division [SED]) sent a letter summarizing RCES staff teleconference of April 22, 2011 with Expo Authority regarding the I-10 Freeway crossing preliminary engineering design not meeting GO 143-B clearance requirements which was discovered as part of Commission's RTSS staff's review of the Expo Phase 2 System Safety Certification. RTSS staff reviewed the current configurations of the I-10 Box Structure and the proposed design drawings, given to LACMTA by Expo Authority and confirmed the current I-10 Box Structure cannot accommodate dual tracks and meet the GO 143-B clearance requirements. All designs included in the RCHAR must conform to engineering designs included and comply with all applicable Commission General Orders.
- 05/20/2011: Expo Authority responded to the SED letter regarding the I-10 Box Structure not meeting the GO

143-B clearance requirements, since the Expo Authority is still working out the detailed design of the structure and will request, pursuant to GO 164-D, Section 10.9 to file a formal application for this one crossing. Expo Authority intends to work closed with LACMTA, and RCES staff in developing a design that meets all necessary clearance requirements for the I-10 Box Structure.

08/17/2011: Expo Authority submits revised I-10 Freeway crossing preliminary engineering design that complies with GO 143-B clearance requirements and all other applicable Commission General Orders. Expo Authority requested that the I-10 Freeway crossing be once again included for authorization.

(See Resolution SX-100, 5-8 and Ex. 4, Prepared Testimony of John Van Hoff, 5-8.)

And in Resolution SX-100, RCES states that “staff has reviewed the Final Draft Rail Crossing Hazard Analysis Report and preliminary final engineering designs for the crossings submitted by Expo Authority. RCES staff recommends the Commission approve the project crossings, including 16 at-grade and 11 grade-separated crossings.” (*Id.* 11, Findings # 4.)

5.3.3.1.7. Commission Precedent in Factually Similar Crossings

As set forth, *supra*, the Commission has approved numerous at-grade crossings comparable to those approved in Resolution SX-100. The Commission has recognized that at-grade crossings are necessary in the design of modern-light-rail systems and when substantiated by the developed evidentiary record.

In summary, we find no error in evaluating and applying the seven standards of practicability to the Project.

5.3.3.2. Costs

For the reasons set forth, *supra*, we find no error with respect to determining and evaluating the respective costs of the at-grade versus grade-separated options at the rail crossings for the Project.

In conclusion, we find that the RCHAR effectively evaluates practicability, safety, and cost factors as well as the other considerations set forth above in accordance with the criteria in D.09-02-031.

5.4. Whether Resolution SX-100 should be Modified or Revised to Include Two Overhead Structures (Interstate Highway 405 and the Palm Park Pedestrian Bridge)

5.4.1. Expo Authority's Position

Expo Authority contends 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 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 FEIR. Since neither of these structures will be modified in connection with the Project, the Project has no impact on either of these crossings. Expo Authority further asserts that CEQA prohibits the Commission from reopening the environmental review process to consider these unchanged structures at this time, nor would any public interest be served by doing so.⁴⁵

5.4.2. NFSR's Position

First, NFSR contends that the Interstate 405 Highway overcrossing at Sawtelle Boulevard in West Los Angeles should be subject to a supplemental

⁴⁵ See, Pub. Resources Code, § 21166.

environmental review, including a proper description and evaluation of its existing environmental setting in proximity to the Project.

Second, NFSR contends that Expo Authority has committed to preserving the Palms Park Pedestrian Bridge. No impacts to the Palms Park Pedestrian Bridge were identified in the DEIR during construction or revenue operation. If that is in fact the case, then NFSR believes that no additional environmental evaluation need be done.

5.4.3. Resolution of Whether a Subsequent EIR or Negative Declaration must be prepared, or Whether Resolution SX-100 Should be Modified

5.4.3.1. Standards for Subsequent EIR or Negative Declaration

In determining if an addendum to a FEIR should be required, we are guided by the CEQA Guidelines beginning at § 15162 – Subsequent EIR and Negative Declaration:

- (a) When an EIR has been certified or a Negative Declaration adopted, no subsequent EIR shall be prepared for that project unless the lead agency determines, on the basis of substantial evidence in light of the whole record, one or more of the following:
 - (1) Substantial changes are proposed in the project which will require major revisions of the EIR or Negative Declaration due to the involvement of new significant environmental effects or a substantial increase in severity of previously identified significant effects;
 - (2) Substantial changes occur with respect to the circumstances under which the project is being undertaken which will require major revisions of the EIR or Negative Declaration due to involvement of new significant environmental effects or a substantial

increase in severity of previously identified significant effects; or

(3) New information of substantial importance which was not known could not have been known with the exercise of reasonable diligence at the time the previous EIR was certified or the Negative Declaration was adopted, shows the following:

- (A) The project will have one or more significant effects not discussed in the previous EIR or Negative Declaration.
- (B) Significant effects previously examined will be substantially more severe than previously shown in the previous EIR.
- (C) Mitigation measures or alternatives previously found not to be feasible would in fact be feasible, and would substantially reduce one or more significant effects of the project, but the project proponents decline to adopt the mitigation measure or alternative; or
- (D) Mitigation measures or alternatives which are considerably different from those analyzed in the previous EIR would substantially reduce one or more significant effects on the environment, but the project proponent decline to adopt the mitigation measure or alternative.

(b) If changes to a project or its circumstances occur or new information becomes available after adoption of a negative declaration, the lead agency shall prepare a subsequent EIR if required under subsection (a). Otherwise the lead agency shall determine whether to prepare a subsequent negative declaration, an addendum, or no further documentation.

(c) If a project was approved prior to the occurrence of the conditions described in the subsection (a), the subsequent EIR or Negative Declaration shall be prepared by the Public Agency which grants the next discretionary approval for the project. In this situation no other Responsible Agency shall grant an approval for the project until the subsequent EIR has been certified or subsequent Negative Declaration adopted.

(d) A subsequent EIR or subsequent Negative Declaration shall be given the same notice and public review as required under Section 15087 or Section 15072. A subsequent EIR or Negative Declaration shall state where the previous document is available and can be reviewed.

While § 15162 is lengthy, essentially it requires proof of one of three things: first, the existence of proposed substantial changes that will require major revisions to the EIR or FEIR; second, substantial changes occur with respect to the circumstances by which the project is being undertaken that will require major revisions to the EIR; or three, that new information of substantial importance has come to light that could not have been known previously through the exercise of reasonable diligence.

In *Laurel Heights Improvement Association v. Regents of University of California* (1988) 47 Cal.3d 376, 391, fn.2, the California Supreme Court stated that “courts should afford great weight to the Guidelines except when a provision is clearly unauthorized or erroneous under CEQA.” Moreover, in *Melom v. City of Madera* (2010) 183 Cal.App.4th 41, the Court explained that CCR § 15162 was intended to “clarify” Public Resource Code § 21166 which contains the same three criteria for supplementing an EIR or Negative Declaration. The Court explained that the purpose behind § 21166, and by extension § 15162, was to promote finality and certainty in the environmental review process unless specific criteria were met. (*Id.* 49, citing to *Laurel Heights Improvement Association v. Regents of University of California* (1994) 6 Cal.4th 1112, 1130 and *Friends of Davis v. City of Davis* (2000) 83 Cal.App.4th 1004, 1017-1018.) “The interests of finality are favored over the policy of favoring public comment, and the rule applies even if the initial review is discovered to have been inaccurate and misleading in the description of a significant effect or the severity of its consequences.” (*Id.*)

For the reasons that follow, not one of the § 15162 criteria ~~have~~has been triggered to warrant a subsequent EIR.

5.4.3.2. No Substantial Changes have been Proposed or have Occurred, nor is there New Information of Substantial Importance to Require a Subsequent EIR as Both the Palms Park Pedestrian Bridge and the Interstate Highway 405 were Disclosed and Discussed in the FEIR

5.4.3.2.1. Interstate Highway 405.

The FEIR, 2.4.3, is entitled “Segment 2 (Sepulveda to Cloverfield--Exposition ROW from Sepulveda Boulevard to Olympic Boulevard (All LRT Alternatives)” and explained how the structure would cross under the elevated Interstate Highway 405:

The alignment would transition to an aerial structure 600 feet west of Sepulveda, west of the proposed Expo/Sepulveda Station, and would cross under the elevated 1-405 Freeway and over Sawtelle Boulevard in an aerial configuration (Drawing T-005). Alternately, if the LRT trackway is grade separated at Sepulveda Boulevard, the station would be aerial and the LRT trackway would continue on an aerial structure, underneath the I-405 Freeway. Refer to Appendix E (Plans and Profiles), Drawing No. T-005A.

Sawtelle Boulevard would be reconstructed from approximately 400 feet south of Exposition Boulevard to approximately 200 feet north of Pico Boulevard (Appendix E, Drawing No. CP-100). At the LRT crossing, the reconstructed street would be at a lower elevation than the existing street to maintain sufficient vertical clearance under the trackway structure for vehicles traveling along Sawtelle Boulevard. To match the proposed elevations of Sawtelle Boulevard, portions of Exposition Boulevard would be

reconstructed at a lower elevation than the existing pavement. These transition zones would be approximately 400 feet west and 300 feet east of Sawtelle Boulevard.⁶

(*Ex.2*, Prepared Testimony of Richard D. Thorpe, 18, quoting from FEIR, Vol 1, 2-23, which is Attachment 5 to the Thorpe testimony.) In addition, the conceptual engineering drawings for the grade-separated crossing at Sawtelle Boulevard were contained in Appendix E to the FEIR and were appended to the RCHSR as Appendix D (Drawings Nos. T005 [without grade-separated crossing at Sepulveda Boulevard], T005A [grade-separated crossing at Sepulveda Boulevard], CP-100 [representing present grade of Sawtelle Boulevard and finished grade, CP-200 [street plan for Pico/Gateway Boulevard, also showing I-405 above LRT at Sawtelle Boulevard crossing].)

Mr. Thorpe further testified that instead of lowering Sawtelle Boulevard, “the clearance required by the LACTMA’s design criteria will be achieved by using a different light rail design that reduces the space between the bottom of the light rail bridge and top of the rail system, and by elevating the top of the rail while still maintaining adequate clearance between the top of rail and the I-405 soffit.” (*Ex. 2*, Prepared Testimony of Richard D. Thorpe, 19.)

5.4.3.2.2. Palms Park Pedestrian Bridge

The FEIR explained that “the existing pedestrian bridge over the Exposition ROW to Palms Park would remain.” (*Ex. 2*, Prepared Testimony of Richard D. Thorpe, 17, quoting from the FEIR, Attachment 2, FEIR, Volume I, p. 2-16.) Further, in the Comments and Responses on the DEIR, it states:

How tall are the Overhead Contact Systems (OCS)? If the EXPO ROW is used, will these interfere with the Palms Park overpass? If so, will the MTA rebuild the bridge to maintain access to the park from Cheviot Hills? If not, why not? What

would be the cost to demolish and rebuild an appropriately sized overpass, if required?

Response R-E562-11 :

Refer to DEIR Section 2.4.6 (Other Related Facilities) for a description of the Overhead Contact System. As noted in the DEIR, the poles that support the OCS would project approximately 23 feet to 32 feet above the track. There is sufficient clearance that the Palms Park pedestrian overpass will not need to be rebuilt.

(*Ex. 2*, Prepared Testimony of Richard D. Thorpe, Attachment 3 FEIR, Volume II Subvolume IId at IId-678, Response R-E562-11.) Finally, Mr. Thorpe testified that the “top of the rail system will maintain a minimum clearance of more than 16 feet from the bottom of the bridge. No mitigation is required because the crossing is grade separated and unaffected by the Expo Rail Phase 2 project.” (*Id.*, 17.)

In sum, both the Interstate Highway-405 and the Palms Park Pedestrian Bridge already exist and do not need to be modified to accommodate the light rail under crossings. (*Ex. 2*, Prepared Testimony of Richard D. Thorpe, 20.) As there are no changes in the Project with respect to the Interstate Highway 405 and the Palms Park Pedestrian Bridge, and we are not aware of any new information, § 15162 has not been triggered.

5.4.3.2.3. Resolution SX-100 Need Not Be Modified to Include the Interstate Highway 405 and Palms Park Pedestrian Bridge

Paragraph 10.4 of GO 164-D requires the submission to Staff of a RCHAR “listing every at-grade rail crossing.” But since the two crossings at the Palms Park Pedestrian Bridge and the Interstate Highway 405 freeway are grade-separated crossings, it was not necessary to include them in the RCHAR. Further, as Mr. Thorpe testified, “[b]oth of these existing structures are to remain

untouched and unaltered by the light rail construction.” (Ex. 2, Prepared Testimony of Richard D. Thorpe, 20.) By extension, it was not necessary to include these two crossings in Resolution SX-100.

5.4.4. Assemblage of the Administrative Record for Resolution Sx-100, which shall Become Part of the Administrative Record for this Rehearing Proceeding

Pursuant to the June 25, 2012 order granting rehearing, the assigned ALJ was instructed to assemble the administrative record for Resolution SX-100, which will become part of the administrative record for the rehearing proceeding. The following documents shall constitute the administrative record:

1. Exhibit 1: FINAL HAZARD ANALYSIS REPORT for Exposition Corridor Transit Project Phase 2 dated August 2011 Prepared for Exposition Metro Line Construction Authority By AECOM.
2. Exhibit 2: Prepared Testimony of Richard D. Thorpe, Chief Executive Office of Exposition Metro Line Construction Authority.
3. Exhibit 3: Prepared Testimony of Monica Born, Project Director for the Exposition Metro Line Construction Authority.
4. Exhibit 4: Prepared Testimony of John Van Hoff, Traffic Engineer for AECOM.
5. Exhibit 5: Motion by Supervisor Mark Ridley-Thomas Dated September 23, 2010 and entitled Grade Crossing Safety Policy.
6. Exhibit 6: Minutes Regular Board Meeting Board of Directors of Los Angeles County Metropolitan Transportation Authority dated October 28, 2010.
7. Exhibit 7: excerpts from Exposition Corridor Transit Project Phase II Final Environmental Impact Report – December 2009 Part 1 served by NFSR on December 31, 2012.

8. Exhibit 8: Excerpts from Exposition Corridor Transit Project Phase II Final Environmental Impact Report – December 2009 Part 2 served by NFSR on December 31, 2012.
9. Exhibit 9: CD entitled NFSR FEIR Reference Doc dated December 31, 2012.
10. Exhibit 10: Excerpts from Exposition Corridor Transit Project Phase 2 Final Environmental Impact Report December 2009 served by Exposition Metro Line Construction Authority on December 27, 2012
11. Exhibit 11: Table 8 of the FEIR entitled Summary of Significant Environmental Impacts and Proposed Mitigation, and Significant Unavoidable Impacts for LRT Alternatives. (FEIR, at ES-20 through ES-51.)
12. Exhibit 12: Resolution No. 0010: A RESOLUTION OF THE BOARD OF THE EXPOSITION METRO LINE CONSTRUCTION AUTHORITY REGARDING THE EXPOSITION CORRIDOR TRANSIT PROJECT PHASE 2 PURSUANT TO THE CALIFORNIA ENVIRONMENTAL QUALITY ACT dated February 4, 2010.
13. Exhibit 13: 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, dated February 2010.
14. Exhibit 14: Exposition Metro Line Construction Authority Exposition Corridor Transit Project Phase 2 Final Environmental Impact Report Statement of Overriding Considerations, dated February 2010.
15. Exhibit 15: Exposition Metro Line Construction Authority Exposition Corridor Transit Project Phase 2 Final Environmental Impact Report FINAL Mitigation Monitoring and Reporting Program, dated February 2010.
16. Exhibit 16: Final Environmental Impact Report of the Exposition Corridor Transit Project Phase 2 Los Angeles, Culver City, and Santa Monica, California, dated February 2010.

This record will be lodged with the Commission's Central Files so that the record is available to all parties involved in this rehearing proceeding.

6. Assignment of Proceeding

Michael R. Peevey is the assigned Commissioner and Robert M. Mason III is the assigned ALJ in this proceeding.

7. Comments on Proposed Decision

The proposed decision of the ALJ Mason was mailed to the parties in accordance with Section 311 of the Public Utilities Code and comments were allowed under Rule 14.3 of the Commission's Rules of Practice and Procedure.

~~Comments were filed on _____, and reply comments were filed on _____ by _____.~~

7.1. Expo Authority's Comments

Expo Authority filed comments in support of the decision on August 1, 2013. Expo Authority proposed four grammatical corrections which we make to this revised decision. Expo Authority filed reply comments on August 6, 2013.

7.2. NFSR's Comments

On July 30, 2013, NFSR served and submitted for filing its Comments to the Proposed Decision (Comments). On August 1, 2013, NFSR served and submitted for filing its Amendment of Comments to the Proposed Decision (Amendment). While the Amendment attempted to correct formatting errors in the Comments, both documents make the same substantive arguments: (1) the opinions of the general public, and specifically those who may be affected by an at-grade crossing, have yet to be considered; (2) the Commission erred in concluding that Expo Authority made a convincing showing that all potential safety hazards have been eliminated; (3) parking mitigation measure MM TR-4 is legally inadequate; (4) the Commission failed to approve feasible mitigation

measures or alternatives; (5) the use of *Pfeiffer* to support the use of a future baseline is improper as the facts in *Pfeiffer* are distinguishable from the instant proceeding; and (6) NFSR asks that the following four categories of documents be added to the administrative record:

Category one: NFSR's Application for Rehearing of SX-100 and all of the attached exhibits to the administrative record of these proceedings;

Category two: the complete document or CD containing 2500 signatures of Expo Phase II stakeholders supporting underground crossings at Overland Avenue and Westwood Boulevard;

Category three: complete and true copies of all petition signatures, letters, emails or and any/all other types of recorded support and opposition to Draft Resolution SX-100; and

Category four: all exhibits attached to all filings in this proceeding.

As to NFSR's parking mitigation and baseline challenges, both arguments were recently addressed by the California Supreme Court in *Neighbors for Smart Rail v. Exposition Metro Line Construction Authority* (August 5, 2013)

_____ Cal4th _____ (Cal. S. Ct. S202828), slip opinion available at <http://www.courts.ca.gov/opinions/documents/S202828.PDF>. The California Supreme Court held that an agency preparing an EIR does have the discretion to determine a project's significant impacts by utilizing a baseline consisting of environmental conditions projected to exist in the future.⁴⁶ To do so, however, the administrative record must offer substantial evidence to support the agency's decision.⁴⁷ While in this instance the California Supreme Court found that the administrative record did not meet the substantial-evidence test, the error was

⁴⁶ Slip opinion, 19.

⁴⁷ *Id.*, 27.

not prejudicial since it did not deprive the public and decision makers of substantial relevant information about the Project's likely adverse impacts.⁴⁸ As a result, the California Supreme Court affirmed the judgment of the Court of Appeal, which affirmed the superior court's denial of NFSR's petition for writ of mandate.⁴⁹

With respect to NFSR's challenge to parking mitigation measure MM TR-4, the California Supreme Court ruled that this measure satisfied CEQA Guideline § 210081(a) as binding mitigation measures have been incorporated into the Project, and the "planned changes or alterations are within the responsibility and jurisdiction of another public agency and have been, or can and should be, adopted by that other agency."⁵⁰ The California Supreme Court further found that "both findings are supported by substantial evidence."⁵¹

NFSR also errs in its claim that due process has not been afforded to the public, especially those who may be affected by an at-grade crossing. As we documented, *supra*, at § 5.2, the public had ample opportunities to participate in and to provide input to Expo Authority regarding the Project. Yet NFSR would add the additional requirement that the Commission certify the signatures on the petition in support of the Project, and to identify the names of the elected officials who sent letters of support. NFSR cites no authority that the Commission must undertake this level of scrutiny regarding the Project's public support. Further, if NFSR had issues with the veracity of the petition or with the Project's political support, it could have presented witnesses to that effect at the December 17, 2012

⁴⁸ *Id.*, 27-30.

⁴⁹ *Id.*, 3.

⁵⁰ *Id.*, 31, quoting § 21081.

⁵¹ *Id.*, 31.

evidentiary hearing but chose not to do so. NFSR may not now raise their complaints.⁵²

NFSR's argument, that the Commission erred in concluding that Expo Authority made a convincing showing that all potential safety hazards have been eliminated, is also flawed. In support of its claim, NFSR again questions the Commission's decision not to admit into evidence a petition of more than 2500 signatures opposed to the Project that NFSR alleges it collected, as well as NFSR's updated fire and life safety data. This is a rehash of the argument that occurred at the evidentiary hearing wherein NFSR was told that the information would not be admitted because no one was present at the hearing to authenticate the evidence. NFSR's comments do not contain any authority that an unauthenticated petition and other uncorroborated data can or should be admitted into evidence. Again, NFSR had the opportunity to call witnesses on these issues but chose not to do so.

Finally, NFSR's request to add items to the administrative record is granted as to category one. We will include NFSR's Application for Rehearing of Resolution SX-100 and all of the exhibits attached thereto, as well as all exhibits considered by the Commission in granting NFSR's Application. NFSR's request to add document categories two, three, and four are denied as NFSR has failed to cite any authority why these categories of documents should be made part of the administrative record.

⁵² Curiously, NFSR cites to the Commission's Rule 14.5 (Comment on Draft or Alternate Resolution) and claims that this rule mandated the Commission to provide NFSR with copies of letters in opposition to the Project. NFSR misread Rule 14.5. It discusses the rights of persons to file comments and who those comments must be served on. It does not impose an obligation on the Commission to act as a service conduit for comments received.

Findings of Fact

1. On September 13, 2007, there was a Project Briefing Meeting where Exposition Metro Line Construction Authority (Expo or Expo Authority) presented the Commission's Rail Crossings Engineering Section (RCES) and Rail Transit Safety Staff (RTSS) with the Exposition Corridor Light Rail Transit Project (Project) overview and alternative alignments under consideration in its Draft Environmental Impact Report (DEIR).
2. On July 14, 2008, there was a Technical Advisory Committee Meeting. RCES & RTSS staff attended the meeting with other stakeholder agencies where Expo Authority briefed attendees on status of its DEIR preparation.
3. On January 27, 2009, Expo Authority's DEIR for the Project was circulated for public comment.
4. On March 27, 2009, RCES staff submitted comments to Expo Authority's DEIR noting safety concerns related to at-grade crossings.
5. On July 2, 2009, the Hazard Analysis Report for the Exposition Corridor Transit Project (RCHAR) Scoping Meeting was held. RCES & RTSS staff met with Expo Authority and its consultants to discuss: (a) RCES staff safety concerns in its comments to DEIR; (b) Expo Authority's desire to comply with the RCHAR option in General Order (GO) 164-D to obtain Commission approval for crossings in the Expo Phase 2 project; and (c) Discuss development of the RCHAR to address potential hazards and possible mitigations.
6. On September 30, 2009, there was an Office Meeting/Workshop #1. RCES staff, Expo Authority, Los Angeles County Metropolitan Transportation authority (LACMTA), and City of Los Angeles Department of Transportation (LADOT) met to review initial draft of RCHAR and assist in identifying additional potential hazards and possible mitigation measures. Preliminary

engineering crossing designs were also reviewed and RCES staff provided comments on potential design changes.

7. On November 16, 2009, Expo Authority provided written response to RCES staff comments to the DEIR. Comments consisted of a briefing on project changes and status of ongoing hazards analysis. Expo Authority requested continued RCES participation and guidance in development of RCHAR and preliminary engineering designs.

8. On December 2, 2009, RCES staff responded to Expo Authority's letter dated November 16, 2009, affirming its commitment to continued consultation as part of our regulatory safety oversight responsibilities, and assisting in the analysis of identifying potential hazards and possible mitigations.

9. On December 10, 2009, the Office Meeting/Workshop #2 was held. RCES staff, Expo Authority, LACMTA, and LADOT met to review the draft RCHAR and engineering designs for crossings in City of Los Angeles.

10. On December 11, 2009, the Office Meeting/Workshop #3 was held. RCES staff, Expo Authority, LACMTA and City of Santa Monica (CSM) met to review draft RCHAR and engineering designs for crossings in CSM.

11. On February 5, 2010, Expo Authority adopted a Notice Of Determination in certifying its FEIR, including a Statement of Overriding Considerations.

12. On June 9, 2010, Expo Authority submitted Draft RCHAR to RCES staff for review and preparation of field diagnostic meetings.

13. On July 27, 2010, the Pre-Diagnostic Meeting #1 was held. RCES staff, Expo Authority and LADOT met to review the designs for proposed grade crossings in City of Los Angeles.

14. On July 29, 2010, the Pre-Diagnostic Meeting #2 was held. RCES staff, Expo Authority and CSM met to review the designs for proposed grade crossings in CSM.

15. On August 2, 2010, the Field Diagnostic Meeting #1 was held. RCES staff, Expo Authority, and LADOT conducted a field evaluation of each proposed crossing in City of Los Angeles.

16. On August 4, 2010, the Field Diagnostic Meeting #2 was held. RCES staff, Expo Authority, and CSM conducted a field evaluation of each proposed crossing in CSM.

17. On November 12, 2010, RCES staff provided Preliminary Recommendations to Expo Authority's RCHAR and engineering designs. RCES did not object to ten proposed grade-separated, and 14 proposed at-grade crossings. RCES did ask that three proposed at-grade crossings be evaluated further for either closure or grade-separation.

18. On January 7, 2011, Expo Authority responded to RCES staff accepting the Preliminary Recommendations on the ten grade-separated and 14 at-grade crossings. Expo Authority agreed to investigate the three crossings identified by RCES staff for closure or grade-separation by following up with the respective Cities.

19. On March 11, 2011, Expo Authority submitted the Final Draft RCHAR incorporating changes to the three at-grade crossings that satisfactorily addressed RCES staff's safety concerns.

20. On April 1, 2011, Expo Authority submitted revisions to its Final Draft RCHAR indicating a change to grade-separate the Sepulveda Blvd. crossing in City of Los Angeles.

21. On April 22, 2011, RCES staff & Expo Authority discussed I-10 Freeway crossing preliminary engineering design and failure to meet GO 143-B clearance requirements. Expo Authority requested removal of crossing from consideration for approval. RCES staff informed Expo Authority that approval for the I-10 Freeway crossing can be made by formal application once the design complies with applicable Commission General Orders.

22. On May 6, 2011, Consumer Protection and Safety Division sent a letter summarizing RCES staff teleconference of April 22, 2011 with Expo Authority regarding the I-10 Freeway crossing preliminary engineering design not meeting GO 143-B clearance requirements which was discovered as part of Commission's RTSS staff's review of the Project's System-Safety Certification.

23. On May 20, 2011, Expo Authority responded to the Consumer Protection and Safety Division letter regarding the I-10 Box Structure not meeting the GO 143-B clearance requirements. Expo Authority stated it was still working out the detailed design of the structure and would request, pursuant to GO 164-D, Section 10.9 to file a formal application for this one crossings. Expo Authority stated it intended to work closed with LACMTA and RCES staff in developing a design that meets all necessary clearance requirements for the I-10 Box Structure.

24. On August 17, 2011, Expo Authority submitted a revised I-10 Freeway crossing preliminary engineering design. Expo Authority requested that the I-10 Freeway crossing be once again included for authorization.

25. By letter dated March 11, 2011, Expo Authority requested authorization, pursuant to GO 164-D, to construct 17 at-grade and ten grade-separated highway-light rail transit crossings as part of its Project.

26. By letter dated April 1, 2011, Expo Authority revised its requested authorization, pursuant to GO 164-D, to grade-separate an additional crossing

resulting in a request to construct 16 at-grade and 11 grade-separated highway-light rail transit crossings as part of its Project.

27. RCES staff reviewed the Final Draft RCHAR and preliminary final engineering designs for the crossings submitted by Expo Authority. RCES staff recommended the Commission approve the Project crossings, including 16 at-grade and 11 grade-separated crossings.

28. RCES staff recommended that this Resolution be adopted via Resolution SX-100 as authorized by GO 164-D.

29. Neighbors for Smart Rail (NFSR) was given the opportunity to present all of its positions after the Commission granted the rehearing on Resolution SX-100.

30. NFSR did not propound any discovery to Expo Authority after the Commission granted the rehearing on Resolution SX-100.

31. NFSR did not call any witnesses at the December 17, 2012 evidentiary hearing on the rehearing of Resolution SX-100.

32. At the December 17, 2012 evidentiary hearing on the rehearing of Resolution SX-100, NFSR was given the opportunity to cross-examine each of Expo Authority's witnesses.

33. Expo Authority has demonstrated the public need for the proposed Project.

34. Expo Authority has made a convincing showing that it has eliminated all potential safety hazards regarding the Project.

35. Expo Authority has obtained the concurrence of local community and emergency authorities regarding the Project.

36. Expo Authority has solicited the opinions of the general public and those who may be affected by the at-grade crossings that are part of the Project.

37. Expo Authority has conducted a sufficient comparative study of the costs of at-grade crossings with grade-separated crossings for the Project.

38. The portions of the Interstate Highway 405 that are overhead the crossing locations will not be altered by the Project.

39. The Palm Park Pedestrian Bridge will not be altered by the Project.

Conclusions of Law

1. Section 10 of GO 164-D provides rules for authorizing at-grade crossings of fixed ~~guideway~~[guide way](#) systems, such as the Project.

2. The Commission has fulfilled its responsibilities as a responsible agency under the California Environmental Quality Act (CEQA) in making findings as to the significant environmental impacts caused by the 27 subject crossings.

3. The Commission has fulfilled its responsibilities as a responsible agency under CEQA in making findings as to the proposed mitigation measures for the significant environmental impacts caused by the 27 subject crossings.

4. The Commission has fulfilled its responsibilities as a responsible agency under CEQA in making findings as to the significant unavoidable impacts caused by the 27 subject crossings.

5. The Commission finds substantial evidence that Expo Authority has adopted feasible mitigation measures to either eliminate or substantially lessen the Project's environmental impacts to less-than-significant levels.

6. The public has been given the requisite due process during the Project.

7. The public has been given the requisite due process before the adoption of Resolution SX-100 authorizing the Project.

8. The public has been given the requisite due process following the Commission's June 25 2012 order granting rehearing of the adoption of Resolution SX-100 authorizing the Project.

9. There are no errors regarding the cost issues and compliance with the Commission's standards of practicability in the Project. The seven practicability criteria were correctly considered and applied in the development of the crossing plans approved by Resolution SX-100.

10. Resolution SX-100 need not be modified or revised to include two overhead structures (the Interstate Highway 405 and the Palm Park Pedestrian Bridge) situated above new crossing locations because the two overhead structures do not need to be modified to accommodate the light rail under crossings.

O R D E R

IT IS ORDERED that:

1. Pursuant to General Order 164-D, Section 10.6, the Exposition Metro Line Construction Authority is authorized in accordance with Resolution SX-100 to construct the 11 grade-separated and 16 at-grade crossings, as identified in Table 1 of this decision.
2. We adopt and incorporate by reference the significant environmental impacts and proposed mitigations set forth in the Final Environmental Impact Report regarding the Exposition Corridor Light Rail Transit Project.
3. We adopt and incorporate by reference the significant unavoidable impacts set forth in the Final Environmental Impact Report regarding Light Rail Transit Alternative 2.
4. We adopt and incorporate by reference the Findings of Fact in the Final Environmental Impact Report of the Project regarding Light Rail Transit Alternative 2.

5. We adopt and incorporate by reference, Exposition Metro Line Construction Authority's findings contained in the FINAL Mitigation Monitoring and Reporting Program dated February 2010.

6. The traffic control devices at the nine at-grade crossings located on exclusive right-of-way shall be Commission Standard 9 warning devices (flashing light signal assembly with automatic gate arm), pedestrian gates with swing gates, and fencing to channelize pedestrians, are approved.

7. The traffic control devices at the seven at-grade crossings located on the semi-exclusive right-of-way (street-running) at existing street intersections shall be traffic signals, dedicated train signals, and active "TRAIN" Light Emitting Diodes warning signs, are approved.

8. The designs and further treatments at the crossings and along the exclusive and semi-exclusive rights-of-way shall be in accordance with the Final Draft Rail Crossing Hazard Analysis Report, submitted March 11, 2011, and supplemented on April 1, 2011.

9. The Exposition Metro Line Construction Authority shall provide the Commission's Rail Transit and Crossing Branch, Rail Crossings Engineering Section, of the Safety Enforcement Division finalized engineering crossing designs prior to commencement of construction activities. The Commission's Rail Transit and Crossing Branch, Rail Crossings Engineering Section will evaluate their conformance with the crossing designs approved by this decision.

10. The Exposition Metro Line Construction Authority shall comply with all applicable rules, including Commission General Orders and the California Manual on Uniform Traffic Control Devices.

11. The Exposition Metro Line Construction Authority shall notify the Commission's Rail Transit and Crossing Branch, Rail Crossings Engineering

Section of the Safety Enforcement Division, at least 30 days prior to opening the crossings. Notification should be made to rces@cpuc.ca.gov.

12. Within 30 days after completion of the work authorized by this decision, the Exposition Metro Line Construction Authority shall notify the Commission's Rail Transit and Crossing Branch, Rail Crossings Engineering Section of the Safety Enforcement Division, in writing, by submitting a completed Commission Standard Form G (Report of Changes at Highway Grade Crossings and Separations), of the completion of the authorized work. Form G requirements and forms can be obtained at the California Public Utilities Commission web site Form G at <http://www.cpuc.ca.gov/formg>: This report may be submitted electronically to rces@cpuc.ca.gov as outlined on the web page.

13. This authorization shall expire if not exercised within three years unless time is extended or if the above conditions are not satisfied. Authorization may be revoked or modified if public convenience, necessity, or safety so require.

14. A request for extension of the three-year authorization must be submitted to the Rail Crossings Engineering Section of the Commission's Safety Enforcement Division at least 30 days before the expiration of that period.

15. Application 11-12-010 is closed.

This order is effective today.

Dated _____, at ~~San Francisco~~ [Carmel-by-the-Sea](#), California.

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