

**BEFORE THE SURFACE TRANSPORTATION BOARD**

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STB Finance Docket No. 35724  
(Sub-No. 1)  
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**CALIFORNIA HIGH SPEED RAIL AUTHORITY  
CONSTRUCTION EXEMPTION  
IN FRESNO, KINGS, TULARE AND KERN COUNTIES, CA**

**ENTERED  
Office of Proceedings  
March 7, 2014  
Part of  
Public Record**

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**CC-HSR OPPOSITION TO CHSRA'S SECOND PETITION FOR EXEMPTION**

The *Community Coalition on High Speed Rail* ("CC-HSR"), a nonprofit grass-roots organization, hereby opposes the Petition for Exemption of Fresno to Bakersfield HST Section ("Second Exemption Petition") filed by the California High-Speed Rail Authority ("Authority") on September 27, 2013 (STB Finance Docket No. 35724 (Sub-No. 1)).

**ISSUES PRESENTED**

1. Whether the dramatic change in circumstances since the Board's June 13, 2013 decision to grant the Authority an exemption for construction of its Merced to Fresno section warrants a different result for the Authority's Second Exemption Petition for construction of its Fresno to Bakersfield section.
2. Whether the Authority should be granted an exemption to construct its Fresno to Bakersfield section in the face of mounting evidence that the Authority would likely fail the Board's three-part test for such construction.

## I. Dramatic Changes In Circumstances Since The Board Granted An Exemption For The Merced-Fresno Section Warrant A Different Result In This Case

When the Board granted the Authority's first petition for an exemption on June 13, 2013 the federal and state funding required for construction of the Merced to Fresno section was assumed.<sup>1</sup> That is not the case for the pending Second Exemption Petition. As will be shown, the Authority's financial viability currently hangs in the balance, depending on the outcome of judicial proceedings now pending in the California Court of Appeals. If we take the Authority at its word, two critical judicial decisions "imperil the [high-speed rail] project . . . and threaten state and federal funding for the project."<sup>2</sup>

On November 25, 2013 the Sacramento Superior Court issued rulings in two separate cases concerning the Authority's use of state bonds for the high-speed rail project. (These rulings can be found on the website of the Sacramento Superior Court.<sup>3</sup>)

In the *Validation* case (an *in rem* proceeding) the Authority requested that the court validate the issuance and sale of \$8 billion of general obligation bonds, but the Superior Court denied this request on November 25, 2013 on the ground that there was no evidence in the record to support the statutory finance committee's determination that issuance of the bonds was, as required, necessary and desirable.

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1 The Board's June 13, 2013 decision acknowledged that there was an ongoing controversy about implementation of the state's bonding process. p. 20, footnote 104. Nothing more.

2 Authority's Petition For Extraordinary Writ of Mandate, Application For Temporary Stay, and Memorandum Of Points And Authorities filed with the California Supreme Court on January 24, 2014 (p.1), subsequently transferred by the California Supreme Court to the Court of Appeal.

3 <https://services.saccourt.ca.gov/publicdms/Search.aspx> Case Nos. 34-2011-00113919 (*Tos* case) and 34-2013-99140689 (*Validation* case).

In the other case (the *Tos* case), on November 25, 2013 the Superior Court ruled that a writ of mandate should issue requiring the Authority to rescind its Funding Plan for its designated “usable segment.” This ruling was based on the court's August 16, 2013 decision that the Authority had abused its discretion in approving the Funding Plan because it did not comply with the provisions of the Bond Act that required that the Funding Plan (a) identify the “sources of all funds to be invested in the corridor, or usable segment thereof, and the anticipated time of receipt of those funds based on expected commitments, authorizations, agreements, allocations, or other means,” and (b) certify that the “Authority has completed all necessary project-level environmental clearances necessary to proceed to construction.” Cal. Streets & Highways Code section 2704.08(c)(2)(D), (K).

Regarding the requirement that the sources of all funds needed for construction of the designated “usable segment” be identified, the Superior Court ruled:

“Subsection (D) [of section 2704.08(c)(2)], on its face, required the Authority to address funding for the entire [‘usable segment’] IOS. Moreover, it required the Authority to identify sources of funds that were more than merely theoretically possible, but instead were reasonably expected to be actually available when needed. This is clear from the language of the statute requiring the Authority to describe the “anticipated time of receipt of those funds based on expected commitments, authorizations, agreements, allocations, or other means.” [emphasis supplied by court.] Such language, especially the use of the highlighted terms ‘anticipated’ and ‘expected’, indicates that the identification of funds must be based on a reasonable present expectation of receipt on a projected date, and not merely a hope or possibility that such funds may become available.”

Regarding the Funding Plan's environmental-clearances requirement, the Superior Court ruled:

“Subsection (K) [of section 2704.08(c)(2)], on its face, requires the Authority to certify that it has completed all necessary project level environmental clearances necessary to proceed to construction. As the language from the funding plan quoted above demonstrates, the plan does not address project level environmental clearances for the entire [‘usable segment’] IOS at all, but only addresses the ICS. Moreover, the funding plan explicitly states that project level environmental clearances have not yet been completed even for the ICS. It is therefore manifest that the funding plan does not comply with the plain language of the statute.”

Accordingly, on November 25, 2013 the court ordered the Authority to rescind its Funding Plan, thereby restricting the Authority's access to Proposition 1-A bond funds unless and until a new or revised Funding Plan is approved that complies with the court's ruling.<sup>4</sup>

An important part of the court's November 25<sup>th</sup> ruling focused on the relationship between the Authority's non-compliant Funding Plan required by subdivision (c) of section 2704.08 and the yet-to-be-written Second Funding Plan required by subdivision (d) of section 2704.08.

“The primary issue of concern to the Court in relation to remedies was whether issuance of a writ of mandate directing the Authority to rescind its approval of the November 3, 2011 funding plan would have any real and practical effect. Based on the briefing and evidence the parties have submitted, the Court is satisfied that issuance of the writ would have a real and practical effect in this case.

“Specifically, the Court is persuaded that the preparation and approval of a detailed funding plan that complies with all of the requirements of Streets and Highways Code section 2704.08(c) is a necessary prerequisite for the preparation and approval of a second detailed funding plan under subdivision (d) of the Statute,

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<sup>4</sup> The Superior Court's ruling excepted the limited exemption of subparagraph (g); Cal. Streets & Hwys. Code sec. 2704.08(g), which allows Proposition 1-A bond funds to be used for environmental studies, planning, preliminary engineering, and right-of-way acquisition. This exception is limited to \$675 million, of which the Authority has expended about half as of the end of the prior fiscal year.

which in turn is a necessary prerequisite to the Authority's expenditure of any bond proceeds for construction or real property and equipment acquisition, other than for costs described in subdivision (g)."<sup>5</sup>

At this point it remains to be seen whether, and if so when, the Authority might be able to develop funding plans that will satisfy the strict requirements of both subdivisions (c) and (d) of section 2704.08, and thereby be able to access Proposition 1-A bond funds for construction purposes. As recent as January 15, 2014, the Authority's Chairman, Dan Richards, testified before the House Transportation Subcommittee on Railroads, Pipelines, and Hazardous Materials that the Authority intended to comply with the Superior Court's decision.<sup>6</sup>

But in a dramatic turnaround only nine days later, on January 24, 2013 the Authority filed with the California Supreme Court a 49-page Petition For Extraordinary Writ of Mandate, Application For Temporary Stay, and Memorandum of Points and Authorities which asserts:

- "Two rulings of the Sacramento Superior Court . . . imperil the [high-speed rail] project . . . and threaten state and federal funding for the project." (p. 1)
- "Left undisturbed, the [*Validation* case] ruling would disrupt the State's ability to finance the high-speed rail project." (p. 1)
- "[T]he trial court's rulings have blocked access to bond funds appropriated by the Legislature for the foreseeable future and cast a cloud of uncertainty over the entire voter-approved project." (p. 10)

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5 The Superior Court's peremptory writ of mandate was issued on January 14, 2015.

6 "We have confidence that we can comply with this ruling and we can move this program forward, and it should move forward," said Dan Richard . . . Mr. Richard, the rail authority chairman, said officials would present a revised financing plan in the next two weeks that would answer the concerns expressed in the ruling." *N.Y. Times*, Jan. 6, 2014.

- “The consequences flowing from these rulings threaten to choke off funding for high-speed rail . . . .” (p. 15)
- “[T]he delay [the Authority] now faces as a result of the court's decision risks the catastrophic, for two reasons. First, the federal grant funds, by their terms, must be matched by the State and be spent by 2017 [citations omitted]. The kind of delays the Authority now faces puts those billions of dollars in jeopardy, because it is not clear that the bond proceeds will be available in time to match. Second, opponents of the project have used the trial court's ruling to fuel political efforts to withhold the federal grants entirely. (H.R. No. 3893, 113<sup>th</sup> Cong., 2d Sess. (2014).” (pp. 35-36)

On January 29, 2014 the California Supreme Court referred the Authority's Petition and Request For A Stay to the Third District Court of Appeals with directions that proceedings be expedited. On February 14, 2014 the District Court of Appeals issued an alternative writ of mandate and temporary stay of the trial court's writ of mandate, ordering that respondents response to the alternative writ be filed by March 17, 2014, and that petitioner's reply be filed 15 days thereafter.<sup>7</sup> It is expected that oral argument will be held by mid-April with a decision by the appellate court not long thereafter.

At this point, no one knows whether the trial court's rulings will be upheld or reversed, in whole or in part. If upheld because that is what the law requires and if the Authority's dire predictions of catastrophic consequences are correct, there will have to be an “agonizing reappraisal” of the California high-speed rail project at every level. Thus, the *Los Angeles Times* reported on December 13, 2013 that “legislators from both political parties say that even

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<sup>7</sup> [http://appellatecases.courtinfo.ca.gov/search/case/dockets.cfm?dist=3&doc\\_id=2067776&doc\\_no=C075668](http://appellatecases.courtinfo.ca.gov/search/case/dockets.cfm?dist=3&doc_id=2067776&doc_no=C075668).

the use of federal funds is questionable and the entire project needs to be reassessed.”<sup>8</sup>

## **II. Granting An Exemption In A Contentious Rail Construction Case Is Not The “Best Practice” Where The Project's Financial Viability Is In Doubt.**

The Board's task of determining whether or not to grant an exemption to the Authority's proposal to construct the Fresno to Bakersfield section of its proposed HSR system is not the facile exercise that the Authority would have us believe. On the contrary, the task requires the Board to make a searching examination of the present situation and, only if warranted, to make a finding that the application of section 10901 governing rail construction to this transaction is not necessary to carry out the transportation policy of section 10101 – which, in relevant part, is “to foster sound economic conditions in transportation” and “to ensure the development and continuation of a sound rail transportation system . . . to meet the needs of the public and the national defense.” (49 U.S.C. sec. 10101(4)-(5)). Approval of rail construction under section 190101 is to be granted “unless the Board finds that such activities are inconsistent with the public convenience and necessity” (49 U.S.C. sec. 10901)--which in turn requires satisfaction of the Board's long-established three-part test.<sup>9</sup>

As we will show below, there is mounting evidence that the Authority' project is not economically viable and would likely fail the Board's three-part test. However, we do not have to contend that “an exemption proceeding is [legally] improper when the project's

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<sup>8</sup> [http://www.latimes.com/local/la-me-bullet-future-20131214,0,464556\\_full.story#axzz2nstMcgSm](http://www.latimes.com/local/la-me-bullet-future-20131214,0,464556_full.story#axzz2nstMcgSm): “I am concerned about the state's risks,” said state Sen. Mark DeSaulnier (D-Concord), chairman of the state's transportation committee. “We should take a long, hard look.” . . . “[Dan] Richard ‘is whistling past the graveyard,’ said DeSaulnier, who doubts the rail authority can come up with the money it needs to comply with state law.” Ibid.

<sup>9</sup> See, infra, at p. 13 et seq.

financial viability is questioned,” as that is not the law. *Alaska Survival v. Surface Transportation Bd.*, 705 F.3d 1073 (9<sup>th</sup> Cir. 2013). Rather, we contend that while not improper as a matter of law, exemption proceedings would be ill-advised in a controversial mega-project of this significance. Thus, we concur with the Ninth Circuit's observation that “It might be argued with some force that it is not the best practice to employ the exemption process for a contentious project” where, as here, the project's financial viability is in serious difficulty. *Ibid.* Thus we urge the Board to exercise its statutory discretion wisely and make its own determination whether the Authority's project is financially viable based on its full and fair scrutiny--and that would normally require a section 10901 proceeding.

In its June 13, 2013 decision granting an exemption for the Merced-Fresno section, the Board acknowledged that it had previously “required a full application to review the financial fitness of the applicant and the financial viability of the proposed rail line construction” in *Ozark Mountain Railroad—Construction Exemption*, FD 32204 (ICC served Sept. 25, 1995). The Board said, however, that this precedent was factually distinguishable on the ground that here “the State and FRA have already committed funding to the Project, and have evaluated the project’s viability.” While that may have been the case then, these funding commitments are now “up in the air,” and any evaluation that either the State or the FRA made of the project's viability is now dependent on the Authority's contested access to State bond funds so

it can make the \$2.7 billion matching contributions required by the FRA.<sup>10</sup> Accordingly, the *Ozark Mountain Railroad* precedent no longer appears to be factually distinguishable.

### **III. The Absence of the “Discipline of the Marketplace” Puts Publicly Funded Projects At Increased Risk--Which Warrants Increased Scrutiny of Financial Fitness**

The Board's June 13, 2013 decision also noted:

“Many rail construction cases involve private rather than government funding. In such cases, the Board has typically declined to undertake a rigorous analysis of future profitability because the financial marketplace ultimately determines the viability of any rail line project and whether an authorized rail line is built. Thus, at least in privately funded construction cases, investors rather than the Board will determine if a proposed line will be financially viable.”

Because the Authority's project has no private funding there is no “discipline of the marketplace” to assure financial viability, the Board stated that certain commenters, including CC-HSR, argue “that, for that reason, a more rigorous analysis of future profitability—of the sort that could be conducted under a full application—should be required.” Unfortunately, the Board has misconstrued our contention. It was not “future profitability” but “financial viability” that needs to be analyzed to determine that the Authority has the financial ability to construct the high-speed rail facilities that are planned. This task does not necessarily require the Board to “revisit or override” the funding decisions of the California authorities or the FRA, whose decisions were of a different nature than what the Board requires in its financial

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<sup>10</sup> The Board also stated in support of its factual distinguishing the *Ozark Mountain Railroad* case that there was ample opportunity for public participation during the FRA process. There was no meaningful public participation in the FRA award decision process. That process was not transparent nor was it designed for public participation.

fitness test. In its simplest form, the Board's task is to protect the public interest by seeing to it that there are prudent and adequate financial resources in place to assure the construction of the planned high-speed rail facilities. This is what the Board can require of a private carrier where there are serious questions as to its financial fitness, and is what the Board should require here.

The significance of total absence of private-sector capital cannot be underestimated. *It tells us that the investment community has decided this project is so risky that it would not be prudent to invest in it.* This undeniable fact of economic life was acknowledged by the Authority *itself* nearly six years ago when its 2008 Business Plan stated: "The amount of private funding and timing of private sector participation will be a reflection of how risky the private sector perceives this project overall."<sup>11</sup> Without any private investment, this enterprise risk now shifts entirely to the public sector.

In these circumstances the underlying premise for the deregulation of rail construction is missing in action. Vice Chairman Mulvey made this point emphatically in his dissent in *Alaska Railroad Corp.*, STB Docket No. FD 34658, served Jan. 6, 2010:

"[I] believe that this presumption in favor of approving construction projects was targeted at private rail operators that expend mostly private funds to undertake the construction and risk of a new franchise. Here, the proponent of the construction is a railroad that has been heavily subsidized by the Federal government. Although the ARRC receives no operating subsidies, FRA has made capital grants available to it. Because Federal taxpayer dollars could be at

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<sup>11</sup> CHSRA 2008 Business Plan, Nov. 2008, p. 24.

risk through this construction project, the public convenience and necessity showing should be stronger -- not weaker -- than showings in support of privately-financed construction projects." (p. 14)

Similarly, in the instant case, Vice Chair Begeman's concurring opinion in the Board's December 4<sup>th</sup> decision urged the Board to withhold its approval of the Fresno-Bakersfield section until it has analyzed its financial fitness:

"The Board should not approve any segment of this enormous public works project unless it first carries out a comprehensive analysis of the segment at issue, including its financial fitness.

"Earlier this year, the Board rushed to meet the Authority's request for expedited action on the first segment of the project. Unfortunately, in order to do so and over my objections, the Board chose to ignore key components of the project's viability—its projected costs and funding. The Board reached a decision without looking at the project's financial fitness. For this and other reasons that I explained at the time, I could not fully support the Board's decision.

"Today's decision acknowledges the growing controversy regarding California's bond funding process. Considerable federal taxpayers' dollars are already at stake and the recent state court decisions may very likely impact construction timing and costs.

"Just as we need to consider the environmental aspects along with the transportation merits of this project before granting further approval, we should also understand its funding aspects, and then make a decision on a full record. The Authority's current petition fails to include any details about the project's finances. That void needs to be corrected before the Board acts further."

The sad truth is that in the absence of the “discipline of the marketplace” on major transportation projects, public agencies have a terrible record of bad planning, incompetent management, and huge cost overruns. An extensive study led by Oxford professor Bent Flyvbjerg on the difference between promises and performance for major transportation projects in Europe, Asia and the United States, summarized typical characteristics of such megaprojects:

- Such projects are inherently risky owing to long planning horizons and complex interfaces.
- Statistical evidence shows that such unplanned events are often unaccounted for, leaving budget and time contingencies sorely inadequate.
- As a consequence, misinformation about costs, benefits, and risks is the norm throughout project development and decision-making, including in the business case.
- The result is cost overruns and/or benefit shortfalls during project implementation.<sup>12</sup>

A common result of the lack of private investment in major transportation projects is that risk evaluation is not taken seriously; instead what you repeatedly see is facile treatment that rarely deals realistically with enterprise risk. Where, as with the present California high-speed rail plan, there is a history of “high political and organizational pressure,” there are institutional self-destructive forces at work, as explained by professor Flyvbjerg:

“[I]n situations with high political and organizational pressure the

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<sup>12</sup> Flyvbjerg, B, “Survival of the unfittest: why the worst infrastructure gets built—and what we can do about it,” *Oxford Review of Economic Policy*, vol. 25, no. 3, 2009, p. 345.  
<http://www.sbs.ox.ac.uk/centres/bt/Documents/UnfittestOXREPHelm3.4PRINT.pdf> .

underestimation of costs and overestimation of benefits is [not] caused by non-intentional technical error or optimism bias. . . . [I]n such situations promoters and forecasters *intentionally* use the following formula in order to secure approval and funding for their projects:

$$\text{underestimated costs} + \text{overestimated benefits} = \text{funding}$$

“Using this formula, and thus ‘showing the project at its best’ as one interviewee said above, results in an *inverted Darwinism, i.e. the survival of the unfittest*. It is not the best projects that get implemented, but the projects that look best on paper. And the projects that look best on paper are the projects with the largest cost underestimates and benefit overestimates, other things being equal. But the larger the cost underestimate on paper, the greater the cost overrun in practice. And the larger the overestimate of benefits, the greater the benefit shortfall. *Therefore the projects that have been made to look best on paper in this manner become the worst, or unfittest, projects in reality, in the sense that they are the very projects that will encounter most problems during construction and operations in terms of the largest cost overruns, benefit shortfalls, and risks of non-viability*. They have been designed like that, as disasters waiting to happen.”<sup>13</sup> (emphasis supplied)

When you combine the foregoing academic studies with the cynical views of key political leaders on how public funding of transportation mega-projects actually works, the reality is even worse. Thus, California political kingpin Willie Brown candidly wrote in his San Francisco Chronicle column last July:

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13 Flyvbjerg, B, “Survival of the unfittest: why the worst infrastructure gets built—and what we can do about it,” *Oxford Review of Economic Policy*, vol. 25, no. 3, 2009, p. 353.  
<http://www.sbs.ox.ac.uk/centres/bt/Documents/UnfittestOXREPHelm3.4PRINT.pdf>. See also Flyvbjerg, B., Bruzelius, N. & Rothengatter, W., *Megaprojects and Risk*. Cambridge U. Press, 2003, pp. 3-4.  
<http://catdir.loc.gov/catdir/samples/cam034/2002074193.pdf>.

“News that the [HSR] Transbay Terminal<sup>14</sup> is something like \$300 million over budget should not come as a shock to anyone.

“We always knew the initial estimate was way under the real cost. Just like we never had a real cost for the Central Subway or the Bay Bridge or any other massive construction project. So get off it.

“In the world of civic projects, the first budget is really just a down payment. If people knew the real cost from the start, nothing would ever be approved.

The idea is to get going. Start digging a hole and make it so big, there's no alternative to coming up with the money to fill it in.”<sup>15</sup>

In evaluating enterprise risk and the need for independent scrutiny of financial viability, the Board would be well advised to take into account the real-world differences between the “discipline of the marketplace” and the realities of public financing of transportation mega-projects.

#### **IV. There Is Mounting Evidence That The Authority Would Likely Fail The Board's Three-Part Test In A Section 10901 Proceeding.**

The regular procedure for obtaining Board for rail line construction is governed by 49 U.S.C. 10901(c), which specifies that the Board shall issue a certificate authorizing construction “unless the Board finds that such activities are inconsistent with the public convenience and necessity.”

“While the statute [section 10901] does not define “public convenience and necessity,” a three-part test has evolved to evaluate the public convenience and necessity, which requires a determination of whether: (1) the applicant is

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<sup>14</sup> The HSR Transbay Terminal is partly funded by a \$400 million grant from the FRA.

<sup>15</sup> *San Francisco Chronicle*, July 28, 2013; see <http://www.sfgate.com/bayarea/williesworld/article/When-Warriors-travel-to-China-Ed-Lee-will-follow-4691101.php>.

financially fit to undertake the construction and provide service; (2) there is a public demand or need for the proposed service; and (3) the construction project is in the public interest and will not unduly harm existing services. Public convenience and necessity is also evaluated in light of the rail transportation policy of 49 U.S.C. 10101.” *Dakota, Minnesota & Eastern RR Corp. [DM&E]*, STB Finance Docket No. FD-33407, Served Dec. 9, 1998, 15-16; Accord, *Northern Plains Resource Council v. Surface Transp. Bd.*, 668 F.3d 1067, 1092 (9th Cir. 2011); see also *Tongue River R.R. – Rail Construction & Operation*, STB Finance Docket No. 30186 (Sub-No. 2), STB served Nov. 8, 1996, at 14.

While there is an initial presumption that an application for a rail construction process should be approved, that presumption can be overcome by evidence that requires the applicant to establish that it satisfies the Board's three-part test. Thus, in the *DM&E* case, *supra*, the Board rejected the contention that opponents of rail construction bear a heavy burden of rebuttal, and instead ruled:

“[T]he statute [section 190101] merely provides that construction applications shall be granted unless we find that “such activities are inconsistent with the public convenience and necessity.” This means that where opponents have presented credible evidence challenging the elements that make up the “public convenience and necessity” determination (i.e., financial fitness and public demand or need) in a broad proposal such as this, it is critical for the applicant to respond to these allegations. In short, although there is now a presumption that construction projects satisfy the statutory standard, *the opposition here overcame that presumption by coming forward with credible evidence that required a response by DM&E*. Thus, . . . even given the more favorable policy toward line constructions evidenced by the recent changes to section

10901, *DM&E must still explain with specificity why this rail line is needed and applicant's financial fitness to carry the project through to completion, given the evidence presented by opponents in response to DM&E's initial filings.*" (pp. 17-18) (emphasis added).

The same approach should be applicable in this exemption proceeding, especially since the Authority's exemption petition was devoid of information on its "financial fitness," i.e., its ability to finance and complete the proposed rail construction. The exemption process should not be used to avoid careful scrutiny of an applicant's financial fitness where there is reason to believe that it would not pass the Board's three-part test in a section 10901 proceeding.

Once the Authority has provided such information, experience teaches that opponents should be afforded the opportunity to respond since we cannot anticipate what the Authority will put forward in the fluid and unpredictable situation now existing. Indeed, the Authority has been a moving target of late, "improvising on the edge of catastrophe."<sup>16</sup>

**1. Evidence that shows that the Authority is not "financially fit" to undertake the construction and provide service.**

Unless and until the Superior Court's key rulings in both the *Tos* case and the *Validation* case are overturned by the California Court of Appeal, the State is not in a position to sell the Proposition 1-A bonds needed to pay the Authority's matching contributions of \$2.7 Billion over the next few years as required by its agreement with the FRA.<sup>17</sup>

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<sup>16</sup> The phrase is borrowed from Robert Gates in *Duty: Memoirs of a Secretary At War*, (Alfred A. Knopf, 2014) p. 78

<sup>17</sup> This is because the State Treasurer (according to the *Los Angeles Times*) has taken the position that he will not attempt to sell the Proposition 1-A bonds without a court validation.

<http://articles.latimes.com/2013/nov/25/local/la-me-ln-judge-blocks-state-funding-bullet-train-20131125>.

In the unlikely event that all of the Superior Court's key rulings are overturned by the Court of Appeals and even if the Proposition 1-A bonds can be sold, the Authority would still not be able to spend or commit any bond proceeds for construction<sup>18</sup> without first obtaining approval of its Second Funding plan for its designated "usable segment," i.e., from Merced to the San Fernando Valley. See Cal. Streets & Hwys. Code sec. 2704.08(d). Among other requirements, under subdivision (d) the Second Funding Plan requires:

(1) a detailed funding plan for that corridor or usable segment thereof that . . . (B) identifies the sources of all funds to be used and anticipates [sic] time of receipt thereof based on offered commitments by private parties, and authorizations, allocations, or other assurances received from governmental agencies, . . . and (2) a report or reports, prepared by one or more financial services firms, financial consulting firms, or other consultants, independent of any parties, . . ., indicating that (A) construction of the corridor or usable segment thereof can be completed as proposed in the plan submitted pursuant to paragraph (1), (B) if so completed, the corridor or usable segment thereof would be suitable and ready for high-speed train operation, (C) upon completion, one or more passenger service providers can begin using the tracks or stations for passenger train service, (D) the planned passenger train service to be provided by the authority, or pursuant to its authority, will not require operating subsidy."

In order for the Authority to construct its designated "usable segment" it must finance its funding gap of at least \$25 Billion. Before committing *any* Proposition 1-A bond proceeds for

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<sup>18</sup> This would include, of course, the payment to the FRA of the Authority's required matching contributions of about \$2.7 billion.

construction, it must specifically identify the funding sources for that huge amount based on authorizations, allocations, or other assurances received from governmental agencies (since the Authority has acknowledged that there will be no private funding available for this “usable segment.”)<sup>19</sup> To date the Authority has not even proposed how it will fill the \$25 Billion funding gap, even though it cannot access bond funds for construction until it has the requisite funding assurances, and these are approved by independent experts—and potentially the state courts.

In a related development in the *Tos* case, on March 4th the Sacramento Superior Court rejected the Authority's motion to preclude the plaintiffs from proceeding to trial on their claims as taxpayers that certain of the Authority's proposed expenditures violate California prohibition of illegal expenditures and should be enjoined.<sup>20</sup>

Wholly apart from any litigation, there is evidence that the cost of constructing the Fresno-Bakersfield is significantly greater than it has funds for. Thus, it is probable that the cost to construct a HSR-Ready, Madera-to-Bakersfield section would be between \$9.2 and \$10 Billion—almost twice what it has on hand.<sup>21</sup> Moreover, the cost for constructing an Amtrak-

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19 The Authority conceded that “private-sector capital for construction of the [entire Merced to San Fernando Valley] IOS [Initial Operating Segment] is not available.” (Revised 2012 Business Plan, p. 7-14)

20 See <http://www.scribd.com/doc/210573315/California-High-Speed-Rail-Judge-rules-case-can-proceed>.

21 See *Addendum to Diminishing Prospects For The CHSRA's Initial Construction Section (ICS)* (Update 1 February 2014, <https://docs.google.com/viewer?a=v&pid=sites&srcid=ZGVmYXVsdGRvbWFpbnoxoc3JjYWxpZmZyfgd4OjFjYjllOGIyNDkyYmI5MmI>).

ready section would be \$7.8 billion—30% more than it has at hand.<sup>22</sup> And even if the Authority's litigation problems are resolved, it will still have a shortfall of at least \$600 Million for this section— even with its risky assumptions about soils conditions south of Fresno, and allocating no contingency funds in its latest Agreement with the DOT/FRA.<sup>23</sup> There is evidence that the Authority has low-balled its Operating and Maintenance (O&M) costs and estimated revenues to make it appear that it would be competitive with airline fares and still profitable, which the Authority believes to be critical in obtaining any private financing after it has commenced revenue operations between Merced and the San Fernando Valley. But the data shows that the Authority will have significant operating losses and will require an operating subsidy.

“The CHSRA’s latest O&M costs, 10¢ PPM, are less than a third of the average O&M costs of existing HSR systems. And they’re a sixth of Acela’s, the nearest equivalent because that Northeast Corridor train has similar labor, power and maintenance costs as will the California HSR system. *Both CHSRA’s revenues and O&M costs are ‘outliers’ when compared with actual HSR operations.* Even disregarding that some, if not much, of European HSR systems’ O&M costs don’t land on their operators’ accounts, the CHSRA’s revenues and O&M costs are unreasonably low. In short, the CHSRA ‘low balled’ both revenues and O&M expenses –revenues to seem to be competitive with airline fares, and O&M costs to seem to produce profits. . . . But even if the voter approved HSR project is built with no capital servicing

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22 Ibid.

23 See *Diminishing Prospects For The CHSRA's Initial Construction Section (ICS)*, July 29, 2013. <http://www.cc-hsr.org/assets/pdf/Prospects%20Report%20July%2029%202013.pdf>.

requirements, operating losses could run from over \$125 Million to nearly \$3 Billion per year. Whatever that loss is, it will last forever.”<sup>24</sup> (emphasis added).

On the revenue side of the equation, the evidence is clear that the Authority's proposed fare pricing is totally unrealistic.

**“Conclusions on CHSRA’s projected fares.** The two separate sets of data on revenues remarkably converge when translated into the DOT/FRA’s preferred metric, per passenger mile (PPM). *CHSRA is attempting to do something that seems to defy the laws of competitive economics—producing a profit in a market by charging fares that are half or less what the worldwide, established HSR operators realize per passenger mile.* Even in the USA’s marketplace, the Authority’s projected fares are a third of what the USA’s Acela Express charges, and only four-fifths what the barely profitable US airlines charge for their SF-LA routes.”<sup>25</sup> (emphasis added).

“The significant difference between actual USA and international HSR experiences of around 40¢ to 50¢ [revenue per passenger mile], and CHSRA’s planned average Phase 1 Blended 23¢ per passenger mile pricing plan—is irrefutable. This difference should be a very large ‘red flag’ for those charged with the fiduciary duty to protect California’s financial well-being.”<sup>26</sup>

There is considerable supporting detail and analysis in the reports highlighted in this section, which should be consulted if the Board needs more information regarding any of the report's

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24 See *To Repeat-The CHSRA’s Train Will Need A Subsidy Forever, 2d Ed.*, Dec. 17, 2012; <http://www.cchsr.org/assets/pdf/ToRepeatReport2ndEditionDec172012.pdf>

25 Id. at p. 24.

26 Id. at pp. 22-23.

conclusions.

**2. Evidence that shows that there is not sufficient public demand or need for the proposed service.**

The Authority's entire case for financial viability is predicated on its optimistic ridership projections which are primarily based on attracting *existing automobile users* to high-speed rail. This flies in the face of the experience of high-speed rail in Europe. In Spain, only 16% of high-speed rail passengers switched from cars to high-speed trains, and the experience in France (11%) is even lower.<sup>27</sup> This despite the higher operating costs for automobiles in Europe because of much higher gasoline prices. Yet the Authority implausibly projects that 73% of its passengers will be persons who previously made similar trips by automobile.<sup>28</sup>

Back in the real world:

“[I]f the European automobile passenger attraction experience were applied to the [CHSRA] California forecasts, ridership would be substantially lower, even assuming the likely unattainable higher CHSRA speeds. Ridership would be 64% lower.”<sup>29</sup>

This would constitute a drastic reduction in estimated ridership from 21.1 million/year to 7.6 million/year in the 2035 time period.<sup>30</sup> And if the attraction to high-speed rail of drivers from cars equals that of Europe, CHSRA's operating subsidies are projected to be \$124 million per

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27 Vranich, J. & Cox, W., *California High-Speed Rail: An Updated Due Diligence Report*, Reason Foundation, 2013, (“*Updated Due Diligence Report*”) pp. 16-17, Fig. 6, [http://reason.org/files/california\\_high\\_speed\\_rail\\_report.pdf](http://reason.org/files/california_high_speed_rail_report.pdf); Additional data for France is in the *Blue Sky Report: Blue Sky Consulting Group*, Oct. 16, 2012, pp. 9-10, table 3. Exh. A to the Declaration of Wendell Cox, available at <https://docs.google.com/viewer?a=v&pid=sites&srcid=ZGVmYXVsdGRvbWFpbncoc3JjYWxpZmZyGd4OjczNDE4ZTcxMTdiM2E2NTU>.

28 *Updated Due Diligence Report*, supra, pp. 16-17, Fig. 6.

29 *Updated Due Diligence Report*, supra, p. 21, table 2, Fig. 8.

30 Ibid.

year.<sup>31</sup>

“Accurate ridership and revenue projections are crucial to the financial success of any high speed rail project. . . . Should ridership projections be too high, revenue will be lower and financial losses can occur, with taxpayers picking up the tab.”<sup>32</sup>

The Authority's plans to persuade California drivers to switch to its high-speed rail trains for inter-regional travel fail to take into account the strong (some say excessive) attachment that Californians have to their personal automobiles, the auto-oriented, low-density development that characterizes most of the populated areas of California, and the very limited public transit options that are available in California (other than a few places including San Francisco.) As a result, high-speed rail is at a competitive disadvantage in California:

“High speed rail does not effectively compete with cars. Door-to-door travel times can be faster on high speed rail for longer trips [over 300-400 miles], but people who take longer trips by car have air travel options in larger markets. However, most such travel is by car. Costs are a principal driver of this. The perceived cost of driving is far less than the cost of a high speed rail fare. The car's cost advantage is increased by its advantage of door-to-door travel, so there is no need to arrange transportation from the high speed rail station to the final destination. Often, it will be necessary to pay parking costs at one end of a high speed rail trip and renting a car at the other end. These costs are avoided by car travel. Finally, the high speed rail cost disadvantage compared

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31 *Updated Due Diligence Report*, supra, p. 23, Table 3.

32 *Updated Due Diligence Report*, supra, p. 11.

to automobiles would be even higher where more than one person is traveling by car, thereby sharing the cost of operating the vehicle (compared with each person having to buy a ticket for the train).<sup>33</sup>

For many, if not most, airline and rail passengers in California, renting a car at their destination (a significant expense) is a practical necessity. High-speed rail's touted appeal—traveling rapidly from city center to city center—is not a particularly good fit for trips to the spread-out Los Angeles area or the Bay Area outside of downtown San Francisco or downtown San Jose (e.g. Apple, Chevron, Facebook, Genentech, Google, Hewlett-Packard, Lawrence Livermore National Laboratory, NASA, Safeway, Clorox, Sand Hill Road, SRI International, Stanford University, Tesla, University of California-Berkeley, YouTube, etc.) The dispersion of population and employment centers in the Los Angeles basin and the San Francisco Bay Area is the subject of a recent research study, High-Speed Rail Accessibility: What Can California Learn from Spain? by Professors Chuyuan Zhong and Mildred Warner of Cornell University and Germa Bel of the University of Barcelona.<sup>34</sup> This report “compares the proposed Los Angeles – San Francisco HSR corridor to the functioning HSR line between Madrid and Barcelona to assess relative accessibility based on urban structure.” *Id.* at p. 1. The researchers found that “urban structure limits the potential accessibility of HSR in the California context and warn[ed] HSR planners they should proceed with caution.” *Ibid.* The California-Spain HSR comparison was made because of the many similarities between the two regions and their HSR systems, actual in the case of Spain and proposed in California.

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<sup>33</sup> *Updated Due Diligence*, *supra.*, at p. 18.

<sup>34</sup> [http://mildredwarner.org.s3.amazonaws.com/2012/09/20/Zhong\\_Bel\\_Warner\\_HighSpeedRail\\_2012-b19b0817.pdf](http://mildredwarner.org.s3.amazonaws.com/2012/09/20/Zhong_Bel_Warner_HighSpeedRail_2012-b19b0817.pdf).

Id. at pp. 5-7. In addition, the Authority's Business Plans for 2009, 2011, and 2012 featured Spain as a comparable system and touted its success. The report found:

*“The accessibility analysis shows HSR is less attractive in Los Angeles and San Francisco than in Madrid or Barcelona, despite the upward biases in our estimates for Los Angeles. The critical importance of urban spatial form (mono-centric or polycentric) on the accessibility of HSR reflects spatial patterns of population, employment and income across the metropolitan region. Comparative analysis with the Spanish experience suggest that the California HSR demand estimates are overly optimistic, as the CHRSA analyses (2009, 2011, 2012) have not given sufficient attention to the disadvantages of a polycentric urban form on HSR accessibility.”* Id. at p. 30 (emphasis added).

The report also points out that HSR passengers are disproportionately higher-income, and that the centers of Madrid and Barcelona are high-income urban centers whereas San Francisco and Los Angeles are the opposite. Id. at pp. 18-20 and Fig. 4.

**3. Evidence that shows that the construction project is not in the public interest and will unduly harm existing services.**

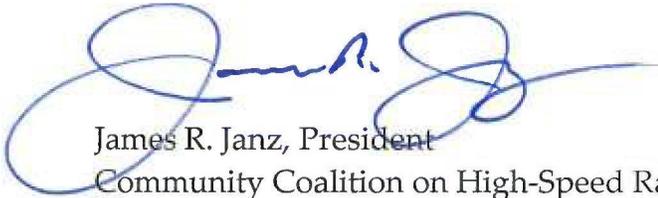
Evidence that shows that the proposed construction project will unduly harm existing passenger rail services is set forth in the opposition being filed by Citizens for California High Speed Rail Accountability, and is hereby incorporated by reference.

**CONCLUSION**

For the reasons stated the Board should afford CC-HSR and other parties opposing the Second Exemption Petition an opportunity to respond to information submitted by the Authority relating to its financial viability and, on the basis of a complete record, deny said Petition.

Dated: March 7, 2014

Respectfully submitted,



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**CERTIFICATE OF SERVICE**

I certify under penalty of perjury that I have this day served copies of this document upon all parties of record in this proceeding by first class or express mail.

Dated: March 7, 2014



James R. Janz, President CC-HSR