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September 1, 2010

VIA ELECTRONIC MAIL
Steve Kinsey, Chair
MTC Programming and Allocations Committee
Joseph P. Bort MetroCenter
101 Eighth Street
Oakland, California 94607

Re: Funding Backfill for Oakland Airport Connector Project

Dear Chair Kinsey and Committee Members:

Almost immediately upon FTA's withdrawal of $70 million from the Oakland Airport Connector project due to serious and endemic civil rights shortcomings at BART, MTC staff launched an effort to backfill those federal funds. That effort continues to run afoul of both statutory requirements and clear Commission policy. Most recently, staff sent the California Transportation Commission an unauthorized request to amend the State Transportation Improvement Program (STIP), in anticipation of a hearing and vote that your Committee has yet to hold. We respectfully request that you not hold that vote until staff has rescinded its unauthorized request which, by putting the cart before the horse, threatens to cast a cloud on the integrity of your vote.

Staff's efforts to obtain $20 million in STIP funds for the OAC project by-passed both this Committee and the Alameda CMA board, as noted in our letter to you of July 13 (copy attached). This resulted in an improper "technical adjustment" by CTC on July 1, which CTC has now effectively rescinded. It did so in recognition both of the impermissibility of adding a project to the STIP without a full-fledged STIP amendment, and of its violation of the Bagley-Keene open government law.

In response to our July 13 letter, Mr. Heminger denied, in his July 28 memo to the Commission (copy attached), that MTC staff initiated CTC's action to fold the OAC project into the STIP. He asserted that it was "the CTC [that] approached MTC staff to facilitate full funding of the OAC." He also implied that MTC staff was not aware of the need for approval by this Committee until CTC made a "re-classification of the proposed CC action from a 'technical change' . . . to a 'STIP amendment'" in July.

Documents uncovered in requests under the Public Records Act paint a very different picture, as detailed below. They demonstrate unequivocally

that MTC staff initiated the request for inclusion of the OAC in the STIP. They demonstrate that staff knew as early as May that the addition of a project to the STIP required a STIP amendment—and a vote of this Committee—rather than a "technical adjustment" within staff's authority. And they demonstrate an explicit effort by staff to accomplish their objective without bringing it to this Committee for its approval.

Your vigilance and attention to the importance of ensuring an open and transparent public process have now led staff to bring this matter to your Committee for its consideration in a public forum at which the merits and legality of the matter may at last be fully debated.

Nonetheless, staff's violations of proper and transparent public process have continued. The Commission has expressly decreed, in Resolution No. 3928, that a request by MTC to amend the STIP may be made only "following" your Committee's concurrence. Rather than await your Committee's action and authorization to forward a formal request for a STIP amendment to Caltrans, however, Deputy Director Flemer already made that request more than a month ago. Her July 30 letter (copy attached) formally "requests notice of this [OAC] amendment at the August 2010 meeting of the California Transportation Commission (CTC) meeting, for CTC action at its September 2010 meeting." It goes on to state that

> "MTC's Programming and Allocations Committee is <u>scheduled to take appropriate action</u> on this amendment at its next regularly scheduled meeting on September 8, 2010."

Staff's making of such a request, with what can only be read as an implicit promise that your Committee will ratify it after the fact, raises very serious concerns. Based on that implicit promise, CTC has already noticed the matter for hearing at its September meeting.

We assume that your Committee did not authorize this request in violation of the Brown Act. Lacking your authorization, however, this request was improper and must be rescinded. The very making of the request before any discussion or vote of your Committee has tainted the possibility of a fair public process. Any action your Committee takes while this request, and the prematurely noticed CTC action, stands unrevoked will unavoidably create the appearance that the Committee's public process was a mere formality leading to a pre-ordained outcome.

Staff's overzealous advocacy of funds for OAC has raised disturbing questions that go well beyond this particular project. The project was not identified by the local community in East Oakland as a priority in its MTC-sponsored Community-Based Transportation Plan in 2007. Many other pressing priorities were identified, yet (as noted in the accompanying letter of Urban Habitat) staff has not taken any steps to seek funding to meet those priorities.

The unanswered questions about staff's decision to take unauthorized heroic measures on BART's behalf are particularly troubling at a time when the Federal Transit Administration's Office of Civil Rights is probing MTC's failure to monitor BART's compliance with its Title VI obligations. That inquiry, as you know, includes questions about how MTC investigated the civil rights complaint related to BART's OAC project, and what penalty MTC assessed for BART's non-compliance. Before you decide that MTC's response to that non-compliance should be a reward rather than a penalty, we believe you will want answers to these questions.

For all of these reasons, this Committee should not vote on the staff proposal until staff has first rescinded Ms. Flemer's request, and CTC has taken the matter off of its September agenda.

A. MTC Staff Initiated CTC Action, Knowing That This Committee's Prior Approval Was Required, But Intentionally Proceeding without Seeking Its Approval.

Mr. Heminger's assertions that CTC reached out to re-program STIP funds to the OAC project without MTC's initiative are both implausible on their face and contradicted by documented facts.[1]

The assertions are implausible because state law explicitly requires MTC's action before the STIP can be amended. "The request for the amendment [must be] made by the entity that submitted the project or projects that are in the program and are to be changed by the amendment." (Gov. Code § 14531 (a) (1).) That is, the request must come from "the entity, either Caltrans or the regional agency, that originally nominated the STIP project(s) to be changed or deleted by the amendment."[2]

The factual record is equally clear that the initiative came from MTC, not CTC. As early as March 18, 2010—just a month after FTA's withdrawal of stimulus funds—CTC noted that MTC staff was "considering requesting programming for [the OAC] project" in the STIP. Referring to this CTC staff notation in his July 28 memo to your Commission, Mr. Heminger characterized it as stating that "the OAC project was being considered for programming in the STIP, but that additional information was needed to make a recommendation and finalize the programming." His gloss with the verb in the passive voice, however, ignored the crucial sentence, which reads:

> "BART Oakland Airport Connector - although not included in the ITIP or RTIP submittals, MTC, BART and Alameda have subsequently indicated that <u>they are considering requesting programming for this project</u>."[3]

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[1] In addition to the statements in his memo of July 28, Mr. Heminger stated orally at this Committee's July 14 meeting that MTC's STIP

> "procedure is that when [the Commission] adopts an RTIP, you send it to [CTC] and we do it through a public process…but that does not preclude CTC from doing something different, they are the decision maker on the STIP." (MTC Programming and Allocations Committee hearing of July 14, 2010, meeting audio beginning at 56' 45".)

Mr Heminger's July 28 memo includes the same statement. ("Although the projects in the RTIP are adopted by the Commission, the CTC is not precluded from making a different decision, given they are the final decision makers with regards to the STIP.")

[2] CTC, 2010 STIP Guidelines, § 67.

[3] The full notation reads as follows:

> "BART Oakland Airport Connector - although not included in the ITIP or RTIP submittals, MTC, BART and Alameda have subsequently indicated that they are

CTC's request for additional information was based entirely on the fact that MTC—not CTC—was "considering requesting programming" for the OAC project.

MTC's lead role in initiating this request is clear from numerous other documents. For instance, after MTC staff wrote in an email that "[w]e have heard (from Bimla, via ACCMA and ACTIA) that $10 million of STIP/SHOPP Swap from 880/29-23) could potentially go directly to BART OAC. . .", CTC executive director Bimla Rhinehart wrote:

> "That is not true. I told them that Caltrans needs their financial plan to assist in swapping the funds and that I could not speak or commit on behalf of Caltrans."

(Email of B. Rhinehart, dated May 18, 2010.) Another email refers to fund swaps that were "proposed by MTC." (Email of M. Weiss, dated May 18, 2010.) Still others have MTC staff "requesting that this STIP action still take place in May" (email of K. Kao, dated May 18, 2010), and acknowledging that "the region has explored a number [of] options to fund BART's Oakland Airport Connector project." (Email of K. Kao, dated June 11, 2010.)

MTC staff's initiative was coupled with an explicit decision to exclude this Committee. By April, MTC staff had already adopted a "principle" of "no[t] returning to the Commission" for approval.[4] A month later, Mr. McKeown wrote to Mr. Heminger that "P&A staff believe we do not need to return to the Commission for action." (Memo dated 5/27/10.)

Yet staff already knew that adding a project to the adopted STIP required an amendment, for which MTC commissioner action was required. As early as May 7, Scott Reid, Cabinet Secretary in the Office of Gov. Schwarzenegger, wrote that "<u>Once the local agencies take their appropriate actions</u>, Caltrans will request the item be placed on the CTC agenda." (Email forwarded to Anne Richman by BART.) MTC staff expressed doubt about proceeding by way of technical adjustment, as in MTC Staffer Kenneth Kao's note to Caltrans of May 18 stating "We are still concerned if this proposal would qualify as a technical adjustment to the 2010 STIP."

> considering requesting programming for this project. Without sufficient programming information, however, staff cannot make a programming recommendation."

2010 STIP Commission Staff Recommendations (Apr. 29, 2010) (copy attached).

[4] An "OAC Update" of April 22, 2010, apparently prepared by MTC staffer Anne Richman (copy attached), begins with the following statement:

> **MTC Principles**
>
> • No returning to the Commission
>
> • BART has funds available (HSR, STA, etc.)
>
> • STIP/ACCMA concern can be negotiated due to link with Warm Springs
>
> • Pursue TIFIA aggressively to keep financing costs low
>
> • Meet contractor deadline so as not to lose bid price
>
> • Confirm federal/FTA funding eligibility

He went on to write, "Could you give us your opinion on this proposal qualifying as a technical amendment in June, such that we would not have to do a formal (two-month) amendment?"

Far from authorizing MTC to violate its own procedures, CTC fully expected MTC to comply with them. As Mr. McKeown wrote to Mr. Heminger on May 27, CTC "would rely on us to meet our own internal requirements." (In fact, MTC is obliged to "verif[y] compliance with established state and regional policies" in connection with the RTIP and the STIP.[5]) Mr. McKeown went on to state, "However, if an agency, such as ACCMA were to go before the CTC and oppose the action, a letter from MTC specifically requesting the STIP change would certainly help support MTC's request."

In sum, this was not an action that CTC reached out to initiate. It was initiated by MTC staff, who expressly sought to proceed on the basis of the "principle" that this Committee's approval not be sought. As Mr. McKeown's note to Mr. Heminger indicates, moreover, it was MTC, rather than the Alameda CMA that was driving this process.

Despite evident doubts that a new project could be inserted into the STIP without a "formal (two-month) amendment," and a clear statement by CTC that MTC would not be excused from complying with its "own internal requirements," staff chose to support an approach that it had to know was both substantively and procedural improper.

Mr. McKeown's note to Mr. Heminger explains staff's conclusion that "we do not need to return to the Commission for action" by referring to the following language in MTC's Resolution adopting the 2010 RTIP:

> "RESOLVED, that the Executive Director may make adjustments to Attachment 'A' in consultation with the respective Congestion Management Agency (CMA) or County Transportation Planning Agency, to respond to direction from the California Transportation Commission . . . ."

This sort of "adjustment," however, cannot be made to add a new project, and staff knew that. Indeed, as Mr. Heminger himself now acknowledges, "<u>a STIP amendment adding a new project</u> requires approval of the MTC Programming and Allocations Committee pursuant to MTC Resolution No. 3928." (Memo to Commission of 7/28/10, p. 2, emphasis added.) Nor, of course, was MTC staff responding to any "direction" from CTC, other than the direction that it supply required information in support of its request.

This deliberate course of conduct by staff has already resulted in numerous violations of state law and of your Commission's own requirements. Since those violations have been brought to light, however, staff has only compounded the problem.

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[5] MTC Res. 3928, 2010 Regional Transportation Improvement Program, Policies, Procedures and Project Selection Criteria Attachment 2 at 4 of 12 (Oct. 28 2009) (available at http://www.mtc.ca.gov/funding/STIP/2010STIP/tmp-3928.pdf).

B. Staff's July 30 Request to Caltrans for A STIP Amendment, unless Authorized By This Committee, Must Be Rescinded.

Since this Committee's July 14 meeting, at which staff brought an informational update to you about CTC's July 1 action, staff has continued to proceed in a manner that violates state law and MTC procedures, and exposes this Committee to the spectacle of conducting a public hearing that can only be viewed as resulting in a foregone conclusion.

State law sets out several express requirements for STIP amendments, including the following:

- "The request for the amendment [must be] made by the entity that submitted the project or projects that are in the program and are to be changed by the amendment." (Gov. Code § 14531 (a) (1).)

- "The total amount programmed in each county for regional improvements [may] not exceed the county's share prior to the amendment, [unless] the total amount programmed in each county is treated as an adjustment to the share pursuant to Section 188.11 of the Streets and Highways Code." (Gov. Code § 14531 (a) (2).)

- "Public notice of the proposed amendments to the program or the plan shall be made at least 30 days before the [CTC] takes formal action on the proposed amendments." (Gov. Code § 14531 (b).)

MTC's guidelines implementing these statutory requirements expressly require that staff communication with Caltrans to request a "major" STIP change[6] only be made "[f]ollowing approval by" this Committee:

> **Step 2: MTC Review and Concurrence**
>
> - Once a complete request has been received, MTC P&A staff will <u>place the request on the MTC Programming and Allocations Committee (PAC) meeting agenda for concurrence of major changes</u>, or prepare a letter of concurrence for the Executive Director's signature for minor changes.
>
> - <u>Following approval by PAC</u> and/or the Executive Director, MTC will sign Caltrans' Request for Time Extension form and send it with a Letter of Concurrence to Caltrans District 4 with a copy to the appropriate CMA. (District 4 will ensure that the request is copied to the appropriate contacts at Caltrans Headquarters and CTC.)[7]

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[6] A "major change" includes any "request to program a new project (or delete a project)." MTC Resolution No. 3928, Attachment 2, p. 8 of 12 (emphasis added).

[7] MTC Resolution No. 3928, Attachment 2, p. 8 of 12 (emphasis added).

Commission policy in this regard is straightforward and sensible: First, staff receives a "complete request" from the CMA, approved by its Board.[8] Then, it agendizes the matter for this Committee's proposed concurrence. And then, only "[f]ollowing approval by PAC," it communicates that concurrence to Caltrans.

In clear violation of Commission policy, staff requested the STIP amendment more than a month before the matter came to this Committee for its action. In her July 30, 2010 letter to Caltrans, MTC's Ann Flemer states:

> "MTC requests notice of this [OAC] amendment at the August 2010 meeting of the California Transportation Commission (CTC) meeting, for CTC action at its September 2010 meeting. MTC's Programming and Allocations Committee is scheduled to take appropriate action on this amendment at its next regularly scheduled meeting on September 8, 2010. We will forward a final letter documenting the MTC action prior to the CTC meeting on September 23."

As a result of this premature action, the matter was agendized by CTC even before this Committee's agenda was issued. Upon receiving a carbon copy of Ms. Flemer's letter, CTC director Rhinehart issued a memo to CTC commissioners for their August 11-12 meeting, stating that MTC and local agencies "propose to amend the 2010 [STIP] to add the BART [OAC] project for $20 million of construction funding" and "request that the California Transportation Commission approve the requested STIP amendment at the next scheduled Commission meeting in September 2010."

The premature submission of a request for a STIP amendment on behalf of MTC—just a day after receiving the request from the CMA, and more than a month before this Committee has taken up the matter on its merits—is a very serious matter. If that submission were authorized by this Committee, it would have violated the Brown Act.[9] Assuming, as we do, that this Committee did not authorize staff's submission, its vote on September 8 would nonetheless do great damage both to the public process and to the integrity of this Committee: it would convey the impression that the vote to ratify staff's premature action is a foregone conclusion. That would invite the undermining of California's open government laws by rendering required local and regional public hearings a mere formality that could not be affected by public comment.

This Committee continues to need information before it votes on this proposal. It needs to know what action staff took to investigate BART's Title VI non-compliance, and it needs to know why

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[8] See "Step 1," MTC Resolution No. 3928, Attachment 2, pp. 5-8 of 12. This "complete request" must include a variety of forms, reports and assurances, as well as CMA policy board approval.

[9] Open government has already been a casualty of staff's heedlessness in seeking STIP funds for the OAC project. In "recogni[tion of] the importance of ensuring that the public has an adequate opportunity to comment on issues before the Commission and that any potential flaws in the process that was followed are corrected," CTC re-noticed the matter for its August meeting. (CTC notice of July 12, 2010.) Now, at the request of MTC staff, that matter has been pushed back to CTC's September meeting.

staff has chosen to lead the charge to backfill lost federal funds for this project, in preference to taking similarly zealous approach to funding the needs that the East Oakland community prioritized in the planning process that MTC asked it to conduct. It also needs an opportunity to review serious questions about the project, documented in a recent analysis prepared for TransForm.

In any event, this Committee's approval would be pointless, since CTC itself lacks the power to amend the STIP at its September meeting.

C. CTC Lacks the Power to Grant the Requested Amendment in Any Event.

For at least four reasons, CTC lacks the power to grant the requested amendment.

First, by law, once a state fiscal year (July 1 – June 30) has begun, the CTC may not allow STIP amendments to delete or change the funding programmed in that fiscal year.

> "An amendment may change the scope, cost or program year of any STIP project, except that the Commission will not amend the STIP . . . to delete or change the program year of the funding for any project component after the beginning of the fiscal year for which it is programmed."[10]

Second, CTC action would violate the statutory requirement that "[t]he total amount programmed in each county for regional improvements [may] not exceed the county's share prior to the amendment, [unless] the total amount programmed in each county is treated as an adjustment to the share pursuant to Section 188.11 of the Streets and Highways Code." (Gov. Code § 14531 (a) (2).) CTC's notice of its intention to amend the STIP does not mention any plan to delete the existing Alameda County project (Mission/880), which fully accounts for Alameda County's STIP share. The deletion of that project, like the addition of a new one, must be accomplished by a STIP amendment (see Gov. Code § 14531 (a) (1)).

Third, CTC has not properly noticed the matter for decision at its September 23 meeting. In tandem with the statute (Gov. Code § 14531 (b)), CTC's STIP Guidelines require 30 days' notice of a STIP amendment:

> "The Commission may amend the STIP at the request of the entity, either Caltrans or the regional agency, that originally nominated the STIP project(s) to be changed or deleted by the amendment. The Commission will amend the STIP only after providing at least 30 days public notice."[11]

The CTC Guidelines also provide that "Caltrans will review proposed amendments and forward them to the Commission for public notice and action."[12] CTC, both by statute and by its own Guidelines, has no authority to give "public notice" or take any "action" with respect to a

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[10] CTC, 2010 STIP Guidelines § 67 (emphasis added); see also MTC Resolution No. 3928 at 3 of 12; Caltrans, Local Assistance Program Guidelines at 23-8 (Dec. 3, 2009).

[11] CTC, 2010 STIP Guidelines, § 67.

[12] CTC, 2010 STIP Guidelines, § 67 (emphasis added).

proposed STIP amendment until it has received a valid request from Caltrans, by way of the regional agency, in this case MTC. Until a proper request has been approved, vetted by Caltrans, and then forward to CTC by Caltrans, CTC lacks the power to agendize a proposed amendment, or to give "public notice" of that amendment.

Finally, CTC may not take the action staff requests because the OAC is not otherwise fully funded. "The Commission will program a project component only if it finds that the component itself is fully funded, either from STIP funds or from other committed funds."[13] The OAC project is awaiting decision on other funding sources, and CTC may not proceed to include it in any STIP until those funds are secured.

D. Conclusion

Staff has not been candid either with this Commission or with the public about its efforts to reward BART's Title VI non-compliance with additional funding. Its calculated decision to pursue this funding through means it knew were improper, and based on the "principle" of keeping this Committee from exercising its proper role, have led to multiple violations of state law and MTC Commission policy. And its strenuous efforts on BART's behalf appear to come at the expense of the real unmet transportation needs that East Oaklanders identified at MTC's request in a broad participatory process just three years.

Rather than endorse staff's efforts to backfill funds lost as a result of Title VI violations, we respectfully suggest that your Committee would do better to direct staff to report on its efforts to monitor BART's Title VI compliance, and to prepare a plan of action for meeting the priority needs that East Oakland residents identified in MTC's recent Community-Based Transportation Plan, in which over 6,000 local residents participated in the hopes that MTC's promise of meeting those needs would not be put on a shelf.

Moreover, now that a new study commissioned by TransForm is raising major questions about the cost-effectiveness of the OAC project, and its ability to meet needs, it is all the more important that a full and fair public airing of the substantive issues take place at MTC.

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[13] CTC, 2010 STIP Guidelines, § 15. This provision continues:

"The Commission will regard non-STIP funds as committed when the agency with discretionary authority over the funds has made its commitment to the project by ordinance or resolution. For Federal formula funds, including RSTP, CMAQ, and Federal formula transit funds, the commitment may be by Federal TIP adoption. For Federal discretionary funds, the commitment may be by Federal approval of a full funding grant agreement or by grant approval."

This Committee should not vote on the staff proposal until the many serious questions about staff's role in this matter have been answered with frankness and transparency. In particular, the Committee should require staff to rescind its July 30 notice to Caltrans, and postpone its vote until CTC has taken the matter off of its September agenda, on which it was placed without this Committee's authorization.

Very truly yours,

Richard A. Marcantonio
Managing Attorney

Enclosures: Public Advocates letter of July 13, 2010
S. Heminger memo to Commission dated July 28, 2010
A. Flemer letter to CTC dated July 30, 2010
2010 STIP Commission Staff Recommendations (Apr. 29, 2010), p. 117
Documents obtained under the Public Records Act:
- MTC staff memo entitled "OAC Update," dated April 22, 2010
- Memo of R. McKeown to Heminger, dated May 27, 2010
- Email from S. Reid, dated May 7, 2010
- Email from K. Kao to Caltrans, dated May 18, 2010
- Email from K. Kao to B. Rhinehart, dated June 8, 2010
- Email from B. Rhinehart to Caltrans, dated May 18, 2010
- Email from M. Weiss, Caltrans, to J. Guzman, dated May 18, 2010