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February 12, 2021

Board of Directors  
California High-Speed Rail Authority  
770 L Street, Suite 620  
Sacramento, CA 95814

Re: Revised Draft 2020 Business Plan, 2021 Funding Plan, and  
violation of statutory prohibitions on subsidies for Central Valley  
Segment High-Speed Service

Dear Chair Richards and Board Members,

I am writing to you with regard to the Authority's Revised Draft 2020 Business Plan and its 2021 Funding Plan. Both plans call for the Authority to lease its San Joaquin Valley facilities to the San Joaquin JPA so it can operate "interim" high-speed rail passenger service (with a public subsidy) on the Authority's not-yet-completed Central Valley Segment. That segment would run from a northern terminus in Merced to a southern terminus in Bakersfield, with intermediate stops in Madera, Fresno and Kings/Tulare.

One of the acknowledged "risks" associated with providing this interim high-speed rail service is potential violation of two statutory prohibitions against providing high-speed rail passenger service requiring a public operating subsidy. Those prohibitions were established by Proposition 1A, a voter-approved 2008 bond measure that is providing major funding for constructing the segment.

The first prohibition, which appears in Streets & Highways Code §2704.08 subsection (c)(2)(J), requires the Authority to certify in its preliminary funding plans that, "The planned passenger service by the authority in the corridor or usable segment thereof will not require a local, state, or federal operating subsidy." The second, stronger prohibition, appearing in §2704.08 subsection (d)(2)(D), requires one or more independent consultants to review the Authority's second, final, funding plans and prepare a report indicating that, "...the planned passenger train service to be provided by the authority, *or pursuant to its authority*, will not require operating subsidy."

The Authority, in both the Business Plan and Funding Plan, claims to have circumvented both prohibitions by having the interim high-speed rail service provided by the San Joaquin JPA, rather than by the Authority itself. (See, Funding Plan at p. 68 Business Plan at p. 121.)

In addition, an article that appeared February 11, 2021 on the website of *Trains Magazine* includes the following:

The High-Speed Rail Authority signed a memorandum of understanding last fall with the San Joaquin Joint Powers Authority, which operates the Amtrak service with state-owned equipment, to operate the initial high-speed service. That means operating losses — *which Kelly said the new service would incur* — would be charged to the San Joaquin authority, not the high-speed agency.

That would avoid violating Proposition 1A, the 2008 ballot initiative that authorized the project. It forbids the authority from operating trains at a loss. Once the Valley is

connected to the Bay Area via a high-speed line from Madera to Gilroy, and then along the Caltrain corridor to San Francisco, service would be operated by Germany's Deutsche Bahn, the authority's early train operator. Kelly said ridership models then predict no operating losses. [emphasis added]

As some within the Authority may know, I have been following the California high-speed rail project since 2003, and represent former High-Speed Rail Authority Board Chair Quentin Kopp, among others, in litigation against the Authority for past violations of Prop. 1A. That litigation is currently pending in the Third District Court of Appeal. Over the years, I have spent considerable time studying the text of Proposition 1A. While the Authority's scheme of leasing its facilities to another public agency to operate the service may have succeeded in circumventing the prohibition in Streets & Highways Code §2704.08(c), the prohibition in §2704.08(d) is a different story.

Clearly, the Authority recognizes that it has used Proposition 1A funds to construct its Central Valley Segment, and proposes in its latest business plan and funding plan to use these funds to help complete that segment. Thus the prohibitions in §2704.08 subsections (c) and (d) would apply to that segment.

Because the Authority would not directly be providing the interim passenger rail service, it could properly certify under §2704.08(c) that *it* would not provide any of the planned interim passenger rail service, and hence would not violate the subsidy prohibition. The prohibition in §2704.08(d), however, is more problematic.

The California High-Speed Rail Act (Public Utilities Code Section 185000 et seq.), which set up and governs the Authority and high-speed rail operations in California, grants the Authority *exclusive "authorization and responsibility* for planning, construction, *and operation* of high-speed passenger train service at speeds exceeding 125 miles per hour in this state." (Public Utilities Code Section 185032, subsection (a) [emphasis added].) The Legislature was well aware of this provision when it wrote Proposition 1A.<sup>1</sup> When it stated in §2704.08(d) that an independent consultant must be able to provide a report indicating that the passenger train service provided by the Authority, *or pursuant to its authority*, could not require an operating subsidy, it clearly intended to foreclose the subterfuge that the Authority and its Board have proposed.

Because the Legislature granted the Authority exclusive authorization and responsibility for operating any passenger rail service in the state at speed exceeding 125 mph, the proposed interim service operation on the Central Valley Segment, with speeds of up to 185 mph, would clearly fall within that exclusive authority.<sup>2</sup> Thus, that service, being run on facilities constructed using Proposition 1A funding, *may not run at a loss and require an operating subsidy*, regardless of whether it is run directly by the Authority or by another entity under contract with the Authority. Any high-speed rail service within the State of California may only run under the Authority of, and with the permission of, the Authority. That is state law.

The Authority needs to rethink its plans. Having used Proposition 1A bond funds to build that segment, it must abide by the will of the voters who approved that measure. To attempt to do otherwise would be to invite a challenge under Code of Civil Procedure Section 526a, which prohibits the illegal use of public funds.

Most sincerely,

  
Stuart M. Flashman

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<sup>1</sup> Judge Kopp, who, as a legislator, authored the California High-Speed Rail Act, was chair of the Authority's Board when Prop. 1A was written.

<sup>2</sup> A slower speed train might not – but neither would it demonstrate commercial HSR service.

cc: Brian P. Kelly, CEO, CHSRA  
Hon. Anthony Rendon, Speaker, California State assembly  
Hon. Laura Friedman, Chair, Assembly Transportation Committee  
Hon. Vince Fong, Vice-Chair, Assembly Transportation Committee  
Hon. Toni G. Atkins, President Pro Tempore, California State Senate  
Hon. Lena A. Gonzalez, Chair, Senate Transportation Committee  
Hon. Patricia C. Bates, Vice-Chair, Senate Transportation Committee  
Hon. Quentin L. Kopp