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EXEMPT FROM FEES PER
GOVERNMENT CODE §6103

7 Attorneys for Plaintiffs
8 JOHN TOS; AARON FUKUDA;
AND COUNTY OF KINGS
9

10 **IN THE SUPERIOR COURT OF THE STATE OF CALIFORNIA**
IN AND FOR THE COUNTY OF SACRAMENTO

11 JOHN TOS, AARON FUKUDA, and COUNTY
12 OF KINGS,

Plaintiffs

13 v.

14 CALIFORNIA HIGH SPEED RAIL
15 AUTHORITY *et al.*,

Defendants

No. 34-2011-00113919 filed 11/14/2011

Judge Assigned for All Purposes:

HONORABLE MICHAEL P. KENNY

Department: 31

PLAINTIFFS' SUPPLEMENTAL BRIEF
ON ADDITION TO RECORD

Date: February 11, 2016

Time: 9:00 AM

Dept. 31

Judge: Hon. Michael P. Kenny

Trial Date: February 11, 2016

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INTRODUCTION

Plaintiffs John Tos *et al.* file this supplemental brief pursuant to the Parties’ stipulation and the Court’s order allowing additional briefing on a single important document added to the record after Plaintiffs’ opening brief had already been filed.¹ The document in question is a PowerPoint presentation (“Presentation”) dated October 3, 2013 and entitled, “2014 Business Plan Capital Cost Estimate Update.” (AG 031774 *et seq.*) It was apparently presented on that date to Defendant California High-Speed Rail Authority (“CHSRA”) and its officials by representatives of Parsons-Brinkerhoff (“P-B”), CHSRA’s principal consultant. The Presentation was part of the preparation of the Draft 2014 Business Plan (“Draft 2014 BP”), which, in turn, was the basis for the Final 2014 Business Plan (“Final 2014 BP”) that CHSRA adopted on April 10, 2014. (See, AG 009638 *et seq.* [materials for April 10, 2014 CHSRA Board meeting.]

The Presentation was apparently intended to provide CHSRA with updated capital cost information on its high-speed rail project (“Project”) for its Draft 2014 BP to satisfy the requirement, under Public Utilities Code §185033 subd. (b)(1)(A), that the biennial business plan include “the estimated capital costs for each segment or combination of segments.” However, none of the updated capital cost information from the Presentation was included in either the Draft 2014 BP or the Final 2014 BP. (Compare chart at AG 031775 [Presentation], 2014 capital cost of Initial Operating Segment, “IOS,” = \$35,754 – \$38,236 million; with that at AG 011080 [Final 2014 BP] capital cost for IOS = \$27,775 million.²) This was in spite of assurances given by the CHSRA CEO, Jeff Morales, that:

The Draft 2014 BP includes updated cost estimates as well as ridership and revenue forecasts – all of which have been informed by and improved upon through rigorous scrutiny and review by a range of external experts. These new forecasts serve as the basis for an updated financial analysis, which continues to show that the program is financially viable and, in turn, confirms that the private sector will regard this as an attractive investment.³ (AG 009316 [February 11, 2014 briefing memo on presentation of Draft 2014 BP – emphasis added].)

¹ Were it not for Defendants’ resistance to releasing the document and adding it to the record, it could have been addressed in Plaintiffs’ Opening Brief.

² The Presentation costs are given in 2012 dollars; the Draft 2014 BP costs, in 2013 dollars.

³ The costs in the Final 2014 BP were identical to those in the Draft 2014 BP. (Compare AG 009364 with AG 011080.)

1 While the Presentation showed a 31% increase in the low estimate for the IOS (AG
2 031775), the Final 2014 BP contained Year of Expenditure capital cost estimates that were
3 “essentially unchanged since 2012, down by less than one percent.” (AG 011082.)^{4,5} This brief
4 explains the significance of the Presentation and how it reinforces and augments the arguments
5 on financial viability presented in Section III.A of Plaintiffs’ Opening Brief.

6 ARGUMENT

7 I. THE PRESENTATION PROVIDED UPDATED HIGH AND LOW CAPITAL 8 COST ESTIMATES FOR USE IN THE DRAFT 2014 BP.

9 As shown by both the timing of the presentation and its actual title, P-B provided the
10 Presentation to CHSRA as input in the preparation of the Draft 2014 BP. The Draft 2014 BP
11 was unveiled and presented to the CHSRA Board of Directors on February 11, 2014. (See, AG
12 009313 *et seq.* [materials for February 11, 2014 Board meeting, including Draft 2014 BP].) The
13 accompanying briefing memo (AG 09316) describes some of the information and analysis
14 included in that plan, including supposedly updated cost estimates, ridership and revenue
15 forecasts, financial analysis, analysis of economic impacts and discussion of potential risks and
16 their mitigation/management.

17 Obviously, the draft plan did not just materialize out of thin air. CHSRA staff and
18 consultants had been collecting and preparing the included information for months. (See, e.g.,
19 AG 009138 *et seq.* [September 2013 Memorandum re: Ridership & Revenue Forecasting –
20 estimation results], AG 015004 [January 2014 Ridership/Revenue Model Version 2, Calibration
21 & Validation Briefing Book], AG 012047 [April 2014 Ridership and Revenue Technical
22 Memorandum]⁶; compare, AG 000781 [June 2011 Ridership and Revenue Model Report used as

23 ⁴ Like the Revised 2012 BP, the Final 2014 BP included only the lowest cost estimate for each
24 segment; rather than a range of potential costs, as suggested by the GAO. (AG 020384.)

25 ⁵ The Government Accountability Office (“GAO”), in a 2013 report (AG 020361), recommended
26 that CHSRA undertake independent cost estimates for its capital and O&M costs. (AG 020442.)
27 That recommendation was apparently not acted upon for the Final 2014 BP.

28 ⁶ The technical memorandum was dated April 18, 2014, after the cut-off date for evidence, but it
29 was clearly prepared well before this, as it was part of the materials on which the Final 2014 BP
30 was based. (AG 011085.) Other materials dated April 2014 were also presumably prepared
earlier, but dated as of their (belated) release to the public.

1 source material in Draft 2012 Business Plan – see generally AG 000190.) The Presentation
2 summarized much of this input.

3 Each of the slides in the Presentation represented P-B’s efforts to compile and summarize
4 information on the progress of the sections of the high-speed rail project gleaned from technical
5 reports and workshops. (See, e.g., AG 009161 *et seq.* [Sept. 2013 Bakersfield to Palmdale
6 Westside Bypass Feasibility Study presentation], AG 031369 [Feb. 2013 Alignment changes to
7 avoid wind farms], AG 031380 *et seq.* [June 2013 Wind resources impact study], AG 031471 *et*
8 *seq.* [March 2013 Bakersfield-Palmdale Engineering workshops meeting notes], AG 031476 *et*
9 *seq.* [March 2013 Bakersfield-Palmdale Engineering Workshops – Access Roads & Maintenance
10 Requirements], AG 009197 *et seq.*, [Sept. 2013 Regional Consultant Monthly Progress Report],
11 etc. [see, Miscellaneous Technical Documents section of record, starting at AG 022973].)

12 **II. THE PRESENTATION, AND THE TECHNICAL REPORTS THAT SUPPORTED
13 IT, SHOWED THAT PROJECT CAPITAL COSTS HAD INCREASED
14 SUBSTANTIALLY BEYOND WHAT WAS REPORTED IN THE FINAL 2014 BP.**

15 Perhaps the key slide in the Presentation is slide #2 (AG 031775), which showed that
16 capital costs for both the IOS and B2B (Bay to Basin) phases of the project had significantly
17 increased. Slide #3 (AG 031776) drilled down to the individual sections, showing major
18 increases in the Fresno-Bakersfield (“F-B”) and Bakersfield-Palmdale (“B-P”) sections. Many
19 of these changes can be explained by Slide #4 (AG 031777), which showed the more advanced
20 design stage of those two sections, meaning that more detailed information had become
21 available. In particular, the Fresno-Bakersfield section now had a project EIR completed (see
22 generally Section D2 of record), with set alignment details allowing costs to be more accurately
23 determined, while in 2012 that section’s alignment was only conceptual. Similarly, the
24 Bakersfield-Palmdale section, which in 2012 was only at a highly conceptual 5% design state,
25 was now at a more detailed 15% design stage.⁷

26 The Presentation also explained (AG 031779) the standard assumptions about
27 contingencies and aggregated costs, such as for Preliminary Engineering and Engineering

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⁷ Nevertheless, multiple alignment option were still under consideration; hence the high and low estimates for the most and least expensive alignment options.

1 (“PE/E”), Project Management (“PM”) and Construction Management (“CM”).⁸ These cost
2 assumptions were presumably the same as for the Revised 2012 BP.⁹ Capital cost estimates were
3 adjusted down by 12% to reflect that the accepted CP-1 bid came in under budget.¹⁰ (AG
4 031782.) Nevertheless, capital costs for the Fresno-Bakersfield segment rose by two billion
5 dollars, and those for Bakersfield-Palmdale rose even more than that. (AG 031786.) The
6 Fresno-Bakersfield increase was due to increased use of viaducts, and taller viaducts, plus
increased costs for utilities and right of way acquisition. (AG 031791.)

7 For Bakersfield-Palmdale, the increase involved significantly more cut/fill (i.e., earth
8 moving), tall and long viaduct structures (heights of over 300 feet, and a total length of 25 or
9 more miles – see AG 09170) and extensive tunneling. (*Id.*) The technical studies that underlaid
10 the Presentation documented the sources of some of these cost increases. (See, e.g., AG 009179-
11 9184 [factors increasing cost from 2012¹¹], AG 031369 *et seq.* [new alignments with increased
12 costs to avoid wind farms]; AG 029710 [summary of geologic and seismic hazards, showing
13 high seismic hazards for Tehachapi Mountains segment of alignment].) Even with the extensive
14 cost increases, the studies for this section indicated that all of the alternatives had major
15 problems. (AG 009181 [design standards], 031718-031719 [new alignments have problems with
16 cement plant and wind farms], 031721 [new alignments have more than 15 miles of tunnels].)
17 This suggested that further change in the alignment might be needed, resulting in further delay
18 and even higher costs. (See, AG 009199 [work halted on supplemental alternative analysis until
19

20 ⁸ Assumed costs included connecting to the utility grid (AG 031780), but presumably did not
21 include the cost of building the additional renewable energy facilities required by CHSRA’s
22 commitments. (AG 011064, 015960.)

23 ⁹ P-B was CHSRA’s primary consultant in preparing both business plans.

24 ¹⁰ This reduction was dependent on the assumption that the lower bids, tendered during the slow
25 recovery from the “Great Recession,” will continue for the next ten to fifteen years. That
26 assumption is, of course, highly questionable.

27 ¹¹ Note particularly the estimated time required for tunneling. (AG 009192) With 11.5 miles of
28 double-bored tunnel required for WB#2 (AG 009183), that would amount to 23 miles of
29 tunneling – as much as 8-12 years (AG 009192) - well beyond the time indicated in the Final
30 2014 BP for the IOS to be completed - unless multiple or binocular tunnel boring machines (AG
027366) were used. Either of these contingencies, however, would, in itself, force cost increases
well beyond those included in the Presentation.

1 steep grade issue resolved], 014922[regional consultant’s close-out memo discusses problems
2 with alignment alternatives through Tehachapi Mountains].)¹²

3 **III. THE FINAL 2014 BP UNJUSTIFIABLY, AND WITHOUT SUBSTANTIAL**
4 **SUPPORTING EVIDENCE, IGNORED THE EVIDENCE CONTAINED IN THE**
5 **PRESENTATION, AND CLUNG TO THE COST AND SCHEDULE FROM THE**
6 **REVISED 2012 BP.**

7 With the evidence in the Presentation – and the overwhelming evidence in the supporting
8 technical reports – indicating increased costs and major delays in the Bakersfield - Palmdale
9 Section, one would expect not only to see these cost increases and delays reflected in the Draft
10 and Final 2014 Business Plans, but also in the business plans’ discussion of significant risks and
11 their mitigation. In particular, one would expect to see at least some mention of the delay in
12 starting construction, which according to the Revised 2012 BP, was to begin in 2013 (AG
13 001949), but had not even begun by mid-2014, when the Final 2014 BP was approved.
14 Nevertheless, the Final 2014 BP shows almost exactly the same construction schedule as the
15 Revised 2012 BP. (Compare diagram at AG 001949 with that at AG 011079.)

16 Similarly, one would have expected to see the cost increases in the Fresno – Bakersfield
17 and Bakersfield – Palmdale Sections reflected in a cost increase for the IOS¹³. Instead, however,
18 the Year of Expenditure cost of the IOS in the Final 2014 BP is virtually identical to that in the
19 Revised 2012 BP. (Compare AG 011082 [\$31.2 billion - Final 2014 BP] with AG 001950
20 [\$31.3 billion - Revised 2012 BP].)

21 One might also expect to see some reference in the Final 2014 BP’s section on risks and
22 their management/mitigation to the various increased costs and delays identified in the
23 Presentation and its supporting technical reports, more specifically the increased cost and
24 continuing delay in right of way acquisition (AG 031786, 031790 – 031793.) However, Section
25 8 of the Final 2014 BP (AG 011109 *et seq.*) contains absolutely no discussion of the risk from

26 ¹² It should be noted that although P-B’s March 2014 Project Management Team Monthly
27 Invoice Report identifies Fall 2015 as the date for final environmental approvals for the
28 Bakersfield – Palmdale Section (AG 014998), the draft EIR/EIS for this section has not yet been
29 completed for circulation. Indeed, it is not clear whether a final alignment upon which to base
30 the EIR/EIS had been identified then, or even now.

¹³ The Presentation does show a much smaller cost increase for the Merced – Fresno Section.
(AG 031776, 031790.) However, even with that, the overall unescalated IOS cost increased by
\$6.3 to \$8.4 billion. (AG 031775.)

1 increased costs, or, for that matter, inadequate funding, although it does discuss risks related to
2 cash flow. (See also AG 015563 – 015571 [discussion of risks in 2013 report to Legislature].)

3 Likewise, there is no discussion of the potential for construction delays due to technical
4 issues such as tunnel boring and maximum grade limitations. While there is a section on right of
5 way acquisition that mentions delay in acquiring property, no mention is made of increased cost;
6 even though it was apparent even in 2014 that delay in property acquisition was rampant. (See,
7 AG 014996 [March 2014 P-B Program Report indicating that, with surveying still underway,
8 property acquisition has not yet begun on the Fresno – Bakersfield Section].)¹⁴

9 CONCLUSION

10 The CHSRA's approval of the Final 2014 BP arbitrarily, unjustifiably, and without any
11 evidentiary support ignored the evidence presented in the Presentation, and the supporting
12 evidence from technical documentation. Instead, the Final 2014 BP essentially retained¹⁵ the
13 same costs and construction schedule presented in the Revised 2012 BP. The fantasy presented
14 in the Final 2014 BP fails to reflect the evidence in the Presentation and supporting documents,
15 which made it readily apparent that CHSRA had neither the time nor resources necessary to
16 complete construction of the IOS, or even of the 130-mile initial construction section. Without
17 the ability to complete even a small section of working high-speed rail, it was simply impossible
18 for CHSRA to honestly claim with a straight face that the Project and its alignment were
19 financially viable.

20 Dated: November 15, 2015

21 

22 STUART M. FLASHMAN

23 *Attorney for Plaintiffs John Tos et al.*

24 _____
25 ¹⁴ It also appears that the data in the Presentation was not provided to the Peer Review Group, as
26 the PRG comments on the Draft 2014 BP make no mention of cost increases or delays. (AG
27 011127 *et seq.*)

¹⁵ Taking into account inflation adjustment.

PROOF OF SERVICE BY MAIL AND ELECTRONIC MAIL

I am a citizen of the United States and a resident of Alameda County. I am over the age of eighteen years and not a party to the within above-titled action. My business address is 5626 Ocean View Drive, Oakland, CA 94618-1533.

On November 16, 2015, I served the within PLAINTIFFS' SUPPLEMENTAL BRIEF ON ADDITION TO THE RECORD on the parties listed below by depositing true copies thereof enclosed in sealed envelopes with first class postage thereon fully prepaid, in a United States mailbox in Oakland, California addressed as follows:


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In addition, on the above-same day, I also sent electronic copies of the above-same document, converted to "pdf" format, as e-mail attachments, to the above-same parties at the e-mail addresses shown above.

I, Stuart M. Flashman, hereby declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Executed at Oakland, California on November 16, 2015.



Stuart M. Flashman