Los Angeles County
Metropolitan Transportation Authority

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Los Angeles, CA 90012-2952

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Metro

July 25, 2013

TO: **BOARD OF DIRECTORS**

THROUGH: **ARTHUR T. LEAHY**
CHIEF EXECUTIVE OFFICER

FROM: **MICHAEL TURNER**
GOVERNMENT RELATIONS DIRECTOR FOR STATE AFFAIRS

SUBJECT: **CHRONOLOGY OF COMMUNICATIONS RELATING TO THE WITHHOLDING OF FEDERAL TRANSIT FUNDS DUE TO THE CALIFORNIA PUBLIC EMPLOYEE PENSION REFORM ACT (PEPRA)**

ISSUE

At the board staff briefing on July 18, 2013, board staff inquired about the communications relating to the delay in our federal grants due to the transit unions contention that the state pension reform law violates their collective bargaining rights. Below is a chronology of communications regarding this issue, each item is linked to its corresponding document.

DISCUSSION

October 2012

- October 12th: Amalgamated Transit Union (ATU) – California Transit Association (CTA) "Letter claiming PEPRA violates 13(c) of Federal Transit Law, and would require the Federal Transit Authority (FTA) to withhold Federal Grants"

November 2012

- November 20th: ATU – US Department of Labor (USDOL) "Letter objecting to FTA grant application"
- November 20th: Union Transportation Union (UTU) – USDOL "Letter objecting to Los Angeles County Metropolitan Transportation Authority (Metro) FTA grant application"
- November 30th: Metro – USDOL "Letter countering objections filed by the UTU and ATU"

December 2012

- December 5th: Board Box "California Public Employees' Pension Reform Act of 2013 and Federal 13c(2) Agreement Requirements
- December 6th: USDOL – ATU, UTU, and Metro "Response to Objections to Employee Protection Terms for Pending FTA Grant Application"
- December 12th: ATU – Metro "Response to USDOL's Rulings/ATU's Proposal"
- December 12th: UTU – Metro "UTU's Proposal to USDOL's Determination that Objections Filed are Sufficient"
- December 19th: UTU – Metro "Letter to Don Ott regarding PEPRA"

January 2013

- January 4th: Transportation Communications International Union (TCU) - Metro "Letter expressing TCU adoption of both the position and the proposal of ATU expressed in the December 12th letter"
- January 16th: Finance, Budget and Audit Committee- Receive and File Report
- January 24th: Closed Session Discussion on Pension Reform
- January 29th: ATU Grievance Form "Grievance filed on behalf of the Union and all affected bargaining unit employees"
- January 29th: ATU, UTU, and TCU – USDOL "Final Proposal regarding Metro's FTA Application"

February 2013

- February 5th: ATU – USDOL "Objections to Referral Terms FTA Application"
- February 13th: Metro – USDOL: "Letter from County Counsel regarding Metro FTA Applications"
- February 21st Executive Management Committee Board Report "AB 160 Neutral work with author position"

March 2013

- March 12th Legislative Alert "Joint Letter to Acting US Secretary of Labor Seth Harris"
- March 14th: ATU – USDOL "Response to the California Labor Agency's Legal Analysis regarding PEPRA and labor requirements of Section 13(c)"
- March 22nd: USDOL – Metro, Orange County Transportation Authority, San Diego Metropolitan Transit System, and Sacramento Regional Transit District "Response to March 8th letter to Acting Secretary Seth Harris"

*Due to large size document is not attached but remains available upon request

- March 28th: USDOL-Metro, ATU, UTU, and TCU "Briefing Schedule for FTA Grant Application"

April 2013

- April 18th: ATU – USDOL "Initial brief on behalf of Local 1277 concerning the protections to be applied in the pending grants"*
- April 18th: Metro – USDOL "Initial brief in response to the briefing schedule and instructions set forth in the March 28th letter from USDOL*
- April 18th: UTU – USDOL "Initial Brief in response to the briefing schedule and instructions set forth in the March 28th letter from USDOL*
- April 18th: TCU – USDOL "Initial brief in response to the briefing schedule and instructions set forth in the March 28th letter from USDOL*
- April 30th: Metro – USDOL "Reply Brief to the initial briefs of the ATU, UTU, and TCU*
- April 30th: TCU – USDOL "Reply Brief in accordance with the USDOL March 28th letter*
- April 30th: ATU – USDOL "Reply Brief in accordance with the March 28th letter*

May 2013

- May 2nd: Metro – USDOL "Unprofessional Actions of the UTU in its reply"
- May 14th: USDOL – Metro, ATU, UTU, and TCU "Verification of Pension Calculations"
- May 15th: Metro – USDOL "Factual misrepresentation in the ATU Reply"
- May 17th: ATU – USDOL "Letter in response to USDOL request that parties review the Department's preliminary calculation*
- May 22nd: Board Box "California Public Employees' Pension Reform Act and Federal 13c Agreement Requirements
- May 23rd: Metro – USDOL "Letter in response to USDOL request that parties review the Department's preliminary calculation

June 2013

- June 14th: Legislative Alert "Metro transmits Letters to Members of Congress and State Legislators Regarding Status of Federal Grants"
- June 19th: Finance, Budget, and Audit Committee
    i. Chief Financial Officer Report "PEPRA 13c issues remain unresolved"
    ii. Legislative Update

July 2013

- July 17th "PEPRA/13(c)" Receive and File

*Due to large size document is not attached but remains available upon request

Metro Government Relations also provided regular updates on this issue at the Finance, Budget & Audit, and, Executive Management Committees meetings.

NEXT STEPS

A closed session item is scheduled at the July Board Meeting to continue discussion of Public Employees' Pension Reform Act and Federal 13(C) (2) Agreement requirements. Staff will continue to provide regular updates at the Finance & Audit, and, Executive Management Committees meetings.

*Due to large size document is not attached but remains available upon request

AMALGAMATED TRANSIT UNION

5025 WISCONSIN AVE., N.W. WASHINGTON, D.C. 20016-4139
(202) 537-1645 FAX (202) 244-7824

October 12, 2012

VIA FIRST CLASS MAIL

Joshua Shaw
Executive Director
California Transit Association
Suite1000
1415 L Street
Sacramento, CA 95814

Dear Mr. Shaw:

The undersigned writes on behalf of various constituent locals of the Amalgamated Transit Union in California regarding an urgent matter involving the application of the new Public Employees' Pension Reform Act of 2013, AB 340 (Furutani), Stats. 2012, Chapter 296 ("PEPRA"), which if not immediately remedied will jeopardize California Transit Agencies' continued eligibility to receive up to $1,115,178,307 of federal assistance from the Federal Transit Administration in fiscal year 2013 and beyond. See attached Apportionment of Federal Transit Funds by Urbanized Area in California.

For many decades now, California transit agencies have received billions of federal assistance from the Federal Transit Administration, U.S. Department of Transportation, to improve and operate their transit systems. Federal transit law requires the U.S. Department of Labor to certify certain employee protective terms and conditions to which these transit agencies are bound for the benefit of mass transit employees before federal funds are released to a transit agency.

More specifically, Section 13(c) requires that certified employee protections include, among other things, provisions necessary for "the preservation of rights, privileges, and benefits (including continuation of pension rights and benefits) under existing collective bargaining agreements or otherwise [and] the continuation of collective bargaining rights[.]" 49 U.S.C. 5333(b)(2)(A), (B). 13(c)

In circumstances where state law materially affect the rights or interests of employees protected by Section 13(c), interested labor unions are given the opportunity to object to the DOL's certification addressing a FTA grant which is s precondition to the FTA's release of federal funds. *29 C.F.R. Part 215.3.* Indeed, federal transit law does not permit the Secretary of Labor to certify a grantee's employee protection agreements where workers previously enjoyed collective bargaining rights but those rights were subsequently diminished or eliminated altogether by state law. *See generally Amalgamated Transit Union v. Donovan*, 767 F.2d 939 (D.C. Cir. 1985).

Recently, in response to the enactment of Massachusetts legislation that abolished the health care plan for Massachusetts Bay Transportation Authority employees and amended the terms of the transit system's retirement plan, the DOL found that the new law prevented MBTA from complying with the express provisions of Section 13(c) as it precludes collective bargaining between the MBTA and its employees over mandatory subjects of bargaining. *DOL's June 23, 2011, Response to Objections for MBTA grant.* The DOL ruling specifically stated that "[t]he state law appears to have removed mandatory and/or traditional subjects of collective bargaining from the consideration of the parties and may prevent the MBTA from continuing the collective bargaining rights of employees, as required by Section 13(c)(2) of the Federal Transit Act." Thus, unless remedied, the DOL could not certify protective terms and conditions.

Equally relevant, in connection with pending transit agencies' grants in Michigan, the DOL found that several recently enacted state laws (e.g., Public Acts 4, 54, 152, and 63) diminished or eliminated collective bargaining rights protected by Section 13(c). The DOL stated that "for many transit recipients in Michigan where a collective bargaining relationship exists with represented transit employees, [] these Public Acts impact that relationship and therefore may render a grantee ineligible for federal assistance under 5333(b) 49 U.S.C." *DOL's August 16, 2012, Cover Letter to Referral for Michigan DOT grant.*

As you are aware, on September 12, 2012, California Governor Brown signed AB 340 which will apply to all public employers and public pension plans on and after January 1, 2013. The implementation of this law will undermine federally protected collective bargaining rights and collective bargaining agreements and thus pose severe consequences on transit agencies' eligibility to receive federal funds under Section 13(c) of the Federal Transit Act, now codified as 49 U.S.C. Section 5333(b).

Among other mandates, the new Pension Reform law will require the following:

- Raise the minimum retirement ages;
- Reduce pension benefits for new public employees;
- Impose new formulas for calculating pensions for new public employees;
- Impose various measures designed to avoid pension spiking; and
- Adjust the compensation cap annually and requires certain contributions from employees to equal to one-half of normal costs of the plan.

The new law only exempts the University of California and stand alone, independent requirement plans offered by charter cities and counties that do not participate in the CalPERS or the 1937 Act County Requirement System requirements. Thus, the majority of California transit agencies' pension plans appear to be covered by PEPRA.

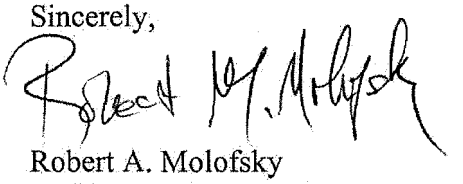
Consistent with the U.S. DOL's rulings mentioned above, because PEPRA removes or limits mandatory and/or traditional subjects of collective bargaining from negotiations by the parties, this new law will prevent many transit agencies from continuing the collective bargaining rights of

employees, as required by Section 13(c)(2) of the Federal Transit Act, 49 U.S.C. 5333(b)(2)(B). In short, these transit agencies will stand to loose billions of federal dollars unless action is taken immediately to address this problem.

We would like to meet with you as soon as possible to discuss a solution. If you have any questions, please do not hesitate to contact the undersigned or Associate General Counsel Jessica Chu at 202-537-1645.

We look forward to hearing your response.

Sincerely,



Robert A. Molofsky
ATU Special Counsel

Attachment

yre/1

c: D. Armijo, AC Transit
M. Wiley, Sacramento RTD
M. Burns, Santa Clara Valley Transportation
D. DeMartino, San Joaquin RTD
K. Hamm, Fresno
C. Sedoryk, Monterey-Salinas Transit
M. Scanlon, San Mateo Cnty. Transit District
L. Jackson, Long Beach PTC
A. Leahy, Los Angeles Cnty. MTA
L. Rubio, Riverside Transit Agency
M. Oglesby, SunLine Transit Agency
P. Jablonski, San Diego Metropolitan Transit System
G. Crunican, San Francisco Bay Area Rapid Transit
D. Mulligan, Golden Gate Bridge Highway & Transportation District
R. Ramacier, Central Contra Costa Transit Authority
M. Victoria, Omnitrans
L. Hanley, Int'l. President ATU
W. McLean, ATU
Y. Salazar, ATU
A. Withington, ATU
C. Hudson, ATU
Y. Williams, Local 192
M. Guerra, Local 256
L. Springer, Local 265
A. Wagner, Local 276
R. Steitz, Local 1027
C. Lu, Local 1225
N. Silver, Local 1277
J. Gotcher, Local 1309
A. Bryant, Local 1555
R. Smith, Local 1574
R. Messier, Local 1575
F. Woody, Local 1605
J. Caldwell, Local 1704
B. Lunch, Esq.
E. Bissen, Esq.
W. Flynn, Esq.
B. Broad, Esq.
J. Lund, DOL
A. Comer, DOL

Apportionment of Federal Transit Funds by Urbanized Area in California	
MAP-21 UZA Apportionment, FY 2013	
Urbanized Area	Total
Antioch, CA	10,998,203
Arroyo Grande-Grover	877,370
Bakersfield, CA	7,970,788
Camarillo, CA	1,455,016
Chico, CA	2,361,559
Concord, CA	46,903,403
Davis, CA	3,310,493
Delano, CA	1,606,008
El Centro-Calexico, CA	3,191,649
El Paso de Robles (Paso-Atascad)	1,469,545
Fairfield, CA	2,820,890
Fresno, CA	11,366,862
Gilroy-Morgan Hill, CA	1,629,103
Hanford, CA	2,652,016
Hemet, CA	3,479,052
Lompoc, CA	1,791,011
Los Angeles-Long Beach, CA	409,819,193
Madera, CA	1,756,539
Manteca, CA	1,880,210
Merced, CA	2,759,270
Mission Viejo-Lake Fort Clemente, CA	14,772,650
Modesto, CA	5,054,945
Napa, CA	1,740,742
Indio-Cathedral City, C	4,813,571
Lancaster-Palmdale, C	15,588,770
Livermore, CA	1,680,888
Lodi, CA	1,730,933
Oxnard, CA	12,125,073
Petaluma, CA	1,249,467
Porterville, CA	1,995,550
Redding, CA	1,799,931
Reno, NV--CA	5,748,880
Sacramento, CA	35,157,752
Salinas, CA	4,440,529
San Diego, CA	96,998,335
San Francisco-Oakland, CA	245,196,164
San Jose, CA	67,881,806
San Luis Obispo, CA	2,449,921
Santa Barbara, CA	5,525,235
Santa Clarita, CA	5,348,760
Santa Cruz, CA	4,367,154
Santa Maria, CA	3,729,728
Santa Rosa, CA	5,135,644
Seaside-Monterey, CA	3,066,345
Simi Valley, CA	2,874,475
Stockton, CA	11,564,088
Thousand Oaks, CA	6,262,862
Tracy, CA	2,018,132
Turlock, CA	2,302,036
Vacaville, CA	2,360,341
Vallejo, CA	3,830,967
Victorville-Hesperia, CA	3,919,129
Visalia, CA	4,231,235
Watsonville, CA	1,957,667
Woodland, CA	1,410,156
Yuba City, CA	2,372,733
Yuma, AZ--CA	2,377,533
Subtotal	**1,115,178,307**

AMALGAMATED TRANSIT UNION

5025 WISCONSIN AVE., N.W. WASHINGTON, D.C. 20016-4139
(202) 537-1645 FAX (202) 244-7824

November 20, 2012

VIA FACSIMILE

John Lund
Deputy Assistant Secretary
Office of Labor-Management Standards
U.S. Department of Labor
Room N5112
200 Constitution Avenue, NW
Washington, DC 20210

Re: **OBJECTIONS TO REFERRAL TERMS**
FTA Application
Los Angeles County Metropolitan Transportation Authority
Acquisition of 44 Composite 40-Foot Buses
(CA-95-X042) #2

Dear Mr. Lund:

The undersigned writes on behalf of, and as special "Section 13(c)" counsel for, Amalgamated Transit Union Local 1277 in response to a November 9, 2012, electronic transmission from the Office of Labor-Management Standards regarding the above grant application and the employee protections which are to attach in connection therewith pursuant to the labor requirements of the Federal Public Transportation Act, 49 U.S.C. § 5333(b).

The Department of Labor envisions issuing a certification action permitting award of the funding sought here on the basis of the terms and conditions set forth in the August 13, 1997, Section 5333(b) Capital Protective Arrangement to which the Los Angeles County MTA and the local union have each been declared a deemed contractual party.

Please be advised that the Union objects to the proposed certification action because the following "raises material issues that may require alternative employee protections" and/or there have been "changes in legal or factual circumstances that may materially affect the rights or interests of employees." 29 C.F.R. § 215.3(d)(3)(i),(ii). As explained more fully below, there has been a change in California law that will remove or limit certain mandatory and/or traditional subjects of collective bargaining in violation of Section 13(c) requirements.

On September 12, 2012, California Governor Brown signed the Public Employees' Pension Reform Act of 2013, AB 340 (Furutani), Stats. 2012, Chapter 296 ("PEPRA"), which will apply to all public employers and public pension plans on and after January 1, 2013. Among other mandates, the new Pension Reform law will require participating employers to unilaterally implement changes to retirement benefits without first bargaining with their employee representative(s) by:

- Raising the minimum retirement ages;
- Reducing pension benefits for new public employees;
- Imposing new formulas for calculating pensions for new public employees;
- Imposing various measures designed to avoid pension spiking; and
- Adjusting the compensation cap annually and requiring certain contributions from employees to equal to one-half of the normal costs of the plan.[1/]

Moreover, the new law only exempts the University of California and stand alone, independent requirement plans offered by charter cities and counties that do not participate in the CalPERS or the 1937 Act County Requirement System requirements. Thus, there is no doubt that this law will impact LACMTA employees' pension benefits.[2/]

Under California law, collective bargaining over retirement/pension benefits specifically is a mandatory subject of bargaining.[3/] LACMTA and ATU Local 1277 have jointly established, through collective bargaining, a defined benefit pension plan for the benefit of LACMTA employees represented by ATU Local 1277. *See attached relevant portion of the collective bargaining*

[1/] For more information regarding AB 340, please see the following links:

- For the text of AB 340:
http://www.leginfo.ca.gov/pub/11-12/bill/asm/ab_0301-0350/ab_340_bill_20120912_chaptered.pdf
- For the CA Senate Analysis of AB 340:
http://www.leginfo.ca.gov/pub/11-12/bill/asm/ab_0301-0350/ab_340_cfa_20120831_125720_sen_floor.html

[2/] Among others, the following transit systems represented by various ATU local unions also provide public pension plans covered by AB 340: Alameda-Contra Costa Transit; Sacramento Regional Transit District; Santa Clara Valley Transportation; San Joaquin Regional Transit District; Monterey-Salinas Transit; Riverside Transit Agency; SunLine Transit Agency; Bay Area Rapid Transit; San Mateo County Transit District; Golden Gate Bridge Highway and Transportation District; Central Contra Costa Transit Authority; and Omnitrans.

[3/] LACMTA is a special transit district, created by California Public Utilities Code Section 30750 *et* seq. Public Utilities Code Section 30750(c) states that "the obligation of the district to bargain collectively shall extend to all subjects of collective bargaining." Moreover, Public Utilities Code Section 40451 states that "[t]he adoption, terms and conditions of the retirement systems covering employees of the district in a bargaining unit represented by a labor organization shall be pursuant to a collective bargaining agreement between such labor organization and the district."

agreement between LACMTA and ATU Local 1277.[4/] The plan provides a variety of retirement options and formulas, including a "23 and out" option in which an employee is eligible for normal retirement, regardless of age, once he or she has accrued 23 years of service credit. In addition, for those without 23 year of service, normal retirement is possible at age 55 after 10 years of service. Also through collective bargaining the parties have agreed upon a formula in which LACMTA contributes the normal cost of the plan, up to 11% of payroll, and LACMTA and the employees share any normal cost in excess of 11%. That is, if the normal cost of the plan is 15%, LACMTA pays 13% and the employees pay 2%.

Prior to the passage of AB 340, the bargaining parties regularly negotiated over the benefits provided by the plan, including the age of normal retirement, the benefit formula, and the existence of programs such as "23 and out." Crucially, the parties negotiated over the employee's share of the normal cost of the plan, ultimately reaching a compromise in which employees "pick-up" a portion of plan costs. Negotiations over all these benefit features have been central to public sector collective bargaining in California for decades, allowing parties to trade off various changes in pension benefits for other economic items of importance.

AB 340, has stripped ATU and other unions representing transit employees of the right to negotiate over any of these critical aspects of their pension benefits. Indeed, the parties can no longer negotiate the benefit formula, definition of final compensation, applicability of the formula to past and/or future service, the employer pick-up, or other benefit features, effectively putting an end to collective bargaining relative to the core subject of retirement benefits.

Thus, under AB 340, pension benefits for current employees are effectively "frozen" and no benefit improvements (over a very low cost threshold) can be negotiated after December 31, 2012. And the benefit features for "new" employees (those hired on or after January 1, 2013) are now entirely determined by statute: for new employees, the formula is fixed at "2% at 62"; all compensation is measured with respect to the final three years of employment; amendments related to benefit accruals are restricted to future service; the employee share is increased, and employers are prohibited from picking up any part of it. Furthermore, for both current and new employees, AB 340 prohibits the purchase of airtime after December 31, 2012. AB 340 eliminates all discretionary authority with respect to these matters, thus relieving transit agencies of the duty to bargain over them.

Based on the foregoing, the implementation of this law will undermine federally protected collective bargaining rights and collective bargaining agreements and thus pose severe consequences on LACMTA's eligibility to receive federal funds under Section 13(c) of the Federal Transit Act, now codified as 49 U.S.C. Section 5333(b). More specifically, Section 13(c) requires that certified employee protections include, among other things, provisions necessary for "the preservation of rights, privileges, and benefits (including continuation of pension rights and benefits) under existing

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[4/] Please note that this is a draft, unsigned copy of the CBA that has been reached in principal between the parties. The execution of this agreement is forthcoming.

collective bargaining agreements or otherwise [and] the continuation of collective bargaining rights[.]" 49 U.S.C. 5333(b)(2)(A), (B).

Indeed, Paragraph (3) of the 1997, Capital Protective Arrangement states "[a]ll rights, privileges, and benefits (including pension rights and benefits) of employees covered by this agreement (including employees having already retired) under existing collective bargaining agreements or otherwise . . . shall be preserved and continued by [LACMTA]." Additionally, Paragraph (4) requires "[t]he collective bargaining rights of employees covered by this Arrangement . . . shall be preserved and continued."

Federal transit law does not permit the Secretary of Labor to certify a grantee's employee protection agreements where workers previously enjoyed collective bargaining rights but those rights were subsequently diminished or eliminated altogether by state law. *See generally Amalgamated Transit Union v. Donovan*, 767 F.2d 939 (D.C. Cir. 1985).

For example, recently, in response to the enactment of Massachusetts legislation that abolished the health care plan for Massachusetts Bay Transportation Authority employees and amended the terms of the transit system's retirement plan, the DOL found that the new law prevented MBTA from complying with the express provisions of Section 13(c) as it precludes collective bargaining between the MBTA and its employees over mandatory subjects of bargaining. *DOL's June 23, 2011, Response to Objections for MBTA Grants ((MA-70-X001)#1, (MA-15-X008), and (MA-04-0049)).* The DOL ruling specifically stated that "[t]he state law appears to have removed mandatory and/or traditional subjects of collective bargaining from the consideration of the parties and may prevent the MBTA from continuing the collective bargaining rights of employees, as required by Section 13(c)(2) of the Federal Transit Act."

Equally relevant, in connection with pending transit agencies' grants in Michigan, the DOL found that several recently enacted state laws (e.g., Public Acts 4, 54, 152, and 63) diminished or eliminated collective bargaining rights protected by Section 13(c). The DOL stated that "for many transit recipients in Michigan where a collective bargaining relationship exists with represented transit employees, [] these Public Acts impact that relationship and therefore may render a grantee ineligible for federal assistance under 5333(b) 49 U.S.C." *DOL's August 16, 2012, Cover Letter to Referral for Michigan DOT Grant (MI-04-0052)#2.*

For the aforementioned reasons, the continuation of collective bargaining rights cannot be satisfied here because PEPRA removes or limits mandatory and/or traditional subjects of collective bargaining from negotiations by the parties. In sum, this new law will prevent many transit agencies, including LACMTA, from continuing the collective bargaining rights of employees, as required by Section 13(c)(2) of the Federal Transit Act, 49 U.S.C. 5333(b)(2)(B). Accordingly, in order for the protective terms and conditions to be "fair and equitable", the DOL must now take the necessary action to ensure that the rights afforded to employees under Section 13(c) are, and will continue to be, protected.

* * *

If the Department of Labor should determine it needs further detail in order to make a determination as to the validity of the foregoing objections, please provide us with prompt written notice of the information desired. Otherwise, we will look forward to notification as to the "status of [our] objections" by no later than Thursday, December 6, 2012. See November 9, 2012, referral at p. 2.

Sincerely,

Jessica M. Chu
Associate General Counsel

yre

Enclosures

c: Y. Williams, Local 192
M. Guerra, Local 256
L. Springer, Local 265
A. Wagner, Local 276
R. Steitz, Local 1027
C. Lu, Local 1225
N. Silver, Local 1277
J. Gotcher, Local 1309
A. Bryant, Local 1555
R. Smith, Local 1574
R. Messier, Local 1575
F. Woody, Local 1605
J. Caldwell, Local 1704
D. Garcia, Local 1756
L. Hanley, ATU
W. McLean, ATU
A. Withington, ATU
C. Hudson, ATU
B. Broad, Esq.
B. Lunch, Esq.
M. Rosenberg, Esq.
B. Ross, Esq.
J. Lund, DOL
A. Comer, DOL
D. Marchant, DOL
N. DeCastro, LACMTA
J. Sutter Starke, Esq.

AGREEMENT

LOS ANGELES COUNTY
METROPOLITAN
TRANSPORTATION AUTHORITY

&

AMALGAMATED TRANSIT UNION
LOCAL 1277

JULY 1, 2010 — JUNE 30, 2013

Metro

ARTICLE 37

PENSION PLAN

SECTION A – INCORPORATE IN AGREEMENT

The Pension Plan, known as the Los Angeles County Metropolitan Transportation Authority-Maintenance Employees' Retirement Income Plan, is incorporated herein and made a part hereof by reference. This plan covers the employees coming within the terms and provisions of this Labor Agreement.

SECTION B – IDENTIFICATION OF PLAN AND AMENDMENTS

The Pension Plan referred to above is the Plan amended as of July 1, 2000, and approved by the Authority and the Union. The term of this Plan will be as shown in Article 44 hereof.

SECTION C – AVAILABILITY OF DISTRIBUTION OF PLAN

Copies of a booklet describing the Plan referred to herein are on file in the offices of the Authority and Union.

SECTION D – COVERAGE FOR EMPLOYEES SERVING AS UNION REPRESENTATIVES

The Authority will pay the normal cost of contributions for current service for employees of the Authority who are on leave of absence while serving as full-time elected Union representatives of Local 1277 of the Union.

SECTION E – 401K PLAN

The LACMTA will establish a 401K plan pursuant to IRS Code 415c.3 which will be available to all ATU represented employees.

All contributions shall be made by employees. Contributions will be deducted bi-weekly on a pre-tax basis.

This 401K Plan will be administered by the LACMTA's Plan Administrator in accordance with IRS regulations.

SECTION F – CONVERSION OF CONTRACTUAL PAID TIME INTO PLAN CONTRIBUTIONS

Employees may elect to have their vacation pay, floating holidays, and CTO cashed out and put via direct deposit into the employees' 401K or 457 account, subject to the maximum allowable under applicable tax laws. Employees may elect this option once anytime between the months of June 1st and March 31st of the following calendar year. Floating holidays and CTO will first be converted to vacation and then placed in the 401K or 457 account. The maximum amount that can be placed in the 401K or 457 account is an amount equal to six (6) floating holidays, any hours of CTO, and the vacation accrued by the employee. If an employee has bid vacation or floating holidays which will not be used after this conversion, those bids will be released and others may bid on it using the usual rules.

SIDE LETTER OF AGREEMENT

97-01 – PENSION PLAN

The Pension Plan agrees to pay the reasonable fees for attendance for an ATU designated attorney, representing ATU, at the Pension Committee and Pension Investment Committee meetings.

SIDE LETTER OF AGREEMENT

2006-003 – CHANGES TO THE PENSION DOCUMENT

LACMTA and ATU will make the necessary modifications to the pension document to change the pension final salary base from the current high thirty six (36) month average to the highest twelve (12) month average. The effective date of this change will be July 1, 2008.

LACMTA and ATU agree that the pension plan will pay three (3) payments of four hundred dollars ($400) to all retirees receiving a pension annuity payment. The first payment of four hundred dollars ($400) will be paid on November 15, 2006, the second payment of four hundred dollars ($400) will be paid on November 15, 2007, and the final payment of four hundred dollars ($400) will be paid on November 15, 2008.

M. B. FUTHEY JR.
President, Transportation Division

JOHN PREVISICH
Assistant President, Transportation Division

KIM N. THOMPSON
General Secretary and Treasurer,
Transportation Division

LEGAL DEPARTMENT

KEVIN C. BRODAR
General Counsel

ERIKA A. DIEHL
Assistant General Counsel

TRACEY L. NEIGHBORS
Paralegal

SMART UTU
Sheet Metal, Air, Rail and Transportation

Transportation Division

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PHONE: 216-228-9400 • FAX: 216-228-0937
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November 20, 2012

OLMS-TransitGrant@dol.gov

J. Douglas Marchant
Project Representative
Division of Statutory Programs
Office of Labor-Management Standards
U.S. Department of Labor
Washington, D.C. 20210

RE: EMPLOYEE PROTECTIONS REFERRAL OF PENDING FTA GRANT APPLICATION(S)
Los Angeles County Metropolitan Transportation Authority
Purchase 44 40-Foot Composite Buses
CA-95-X042-02

Dear Mr. Marchant:

United Transportation Union ("UTU") hereby respectfully objects to the terms and conditions proposed by the Department of Labor ("DOL") in your "referral" letter dated November 9, 2012, on both grounds set forth in 29 C.F.R. § 215.3(d)(3).

Section 215.3(d)(3) provides that "[t]he [DOL] will consider an objection to be sufficient when: (i) The objection raises material issues that may require alternative employee protections under 49 U.S.C. § 5333(b); or (ii) The objection concerns changes in legal or factual circumstances that may materially affect the rights or interests of employees." 29 C.F.R. § 215.3(d)(3).

UTU has a specific concern about a change in the legal circumstances that may materially affect the rights or interests of employees represented by UTU. On September 12, 2012, California Governor Brown signed the Public Employees' Pension Reform Act of 2013, AB 340 (Furutani), Stats. 2012, Chapter 296 ("PEPRA" or "Reform Act") into law, which will take effect January 1, 2013. The Reform Act provides, in pertinent part: "notwithstanding any other law, [it] shall apply to all state and local public retirement systems and to their participating employers, including the Public Employees' Retirement System ... county and district retirement systems created pursuant to the County Employees Retirement Law of 1937, independent public

retirement systems, and to individual retirement plans offered by public employers." *Id.* at § 7522.02(a)(1). "Public retirement systems" are defined thereunder as "any pension or retirement system of a public employer, including, but not limited to, an independent retirement plan offered by a public employer that the public employer participates in or offers to its employees for the purpose of providing retirement benefits, or a system of benefits for public employees that is [qualified under the Internal Revenue Code]." *Id.* at § 7522.04(j). Further, "public employer" includes "any political subdivision of the state or agency or instrumentality of the state or subdivision of the states, including, but not limited to .. any public agency, authority, board, commission, or district." § 7522.04(i). Among other mandates, the PEPRA will: raise the minimum retirement ages; reduce pension benefits for new public employees; impose new formulas for calculating pensions for new public employees; impose various measures designed to avoid pension spiking; and adjust the compensation cap annually; and require certain contributions from employees to equal one-half of the normal costs of the plan. The new law only exempts the University of California and stand-alone, independent requirement plans offered by charter cities and counties that do not participate in CalPERS or the 1937 Act County Requirement System requirements. *See* § 7522.02(a)(2). Thus, the majority of California transit agencies' pension plans appear to be covered by PEPRA. UTU-represented employees at LACMTA are covered under the Los Angeles County Metropolitan Transportation Authority-United Transportation Union Retirement Income Plan, and prior to the passage of the PEPRA, bargained over the benefits and contributions thereunder (*See, e.g.*, Article 48 of the LACMTA and UTU CBA attached hereto as Exhibit A). Because LACMTA is a public agency that sponsors a public retirement system for its employees, the Reform Act appears to apply to LACMTA plans.

Under 49 U.S.C. § 5333(b), "[a]s a condition of financial assistance ... the interests of employees affected by the assistance shall be protected under arrangements the Secretary of Labor concludes are fair and equitable." These arrangements must include various provisions for "the preservation of rights, privileges, and benefits (including the continuation of pension rights and benefits) under existing collective bargaining agreements or otherwise [and] the continuation of collective bargaining rights." 49 U.S.C. § 5333(b)(2)(A), (B). As noted in the DOL's letter, these protections were memorialized in the 13(c) protective agreement between the Los Angeles County Metropolitan Transportation Authority ("LACMTA") and UTU. The agreement provides, in pertinent part:

> All rights, privileges, and benefits (including pension rights and benefits) of employees covered by this Agreement (including employees having already retired) under existing collective bargaining agreements or otherwise, or under any revision or renewal thereof, shall be preserved and continued by the [LACMTA]; provided, however, that such rights, privileges and benefits not previously vested may be modified or altered by collective bargaining and agreement by the parties thereto to substitute other rights, privileges, and benefits.

Agreement Pursuant to Section 13(c) of the Federal Transit Act, As Amended at 2 (January 16, 1997). These protections were additionally memorialized in the 13(c)

Unified Protective Arrangement ("UPA")[1] dated January 3, 2011, which provides, in pertinent part:

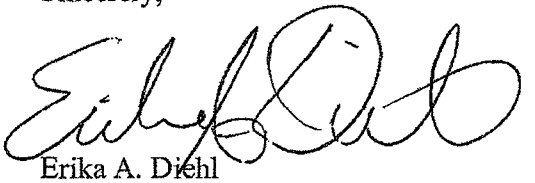
> All rights, privileges, and benefits (including pension rights and benefits) of employees covered by this arrangement (including employees having already retired) under existing collective bargaining agreements or otherwise, or under any revision or renewal thereof, shall be preserved and continued.

Id. at 2.

As a result of the UTU-represented employees' loss of bargaining rights under California law, the protective agreement above is insufficient and cannot be complied with. Consequently, LACMTA cannot be allowed to receive federal funds based on this present situation where LACMTA cannot be found to be in compliance with 49 U.S.C. § 5333(b). *See generally Amalgamated Transit Union v. Donovan*, 767 F.2d 939 (D.C. Cir. 1985); *Local Div. 589, Amalgamated Transit Union v. Mass.*, 666 F.2d 618 (1st Cir. 1981).

This letter satisfies the threshold for objections under 29 C.F.R. § 215.3(d)(i) and (ii), as the alternative arrangements are now necessary to satisfy the Act and there has been a change in the legal circumstances due to the passage of AB340. UTU is certainly willing to work towards reaching an arrangement to satisfy 29 C.F.R. § 215.3(a)(2).

Sincerely,



Erika A. Diehl
Assistant General Counsel

cc: M.B. Futhey, Jr., President – Transportation Division
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B. Morr, Vice President Bus Dept.
J.P. Jones, CA SLD LO-005
J. A. Williams, General Chairperson, GO-875
K.C. Brodar, General Counsel – Transportation Division

[1] UTU additionally represents the employees in the service area formerly represented by the Montebello Bus Operators' Association ("MBOA"), who are covered by the UPA.

CERTIFICATE OF SERVICE

This is to certify that on this 20th day of November, 2012, a copy of the foregoing United Transportation Unions' Objections to the DOL's "referral" letter dated November 9, 2012, has been sent via email to following:

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/s/ Erika A. Diehl

AGREEMENT

BETWEEN

LOS ANGELES COUNTY METROPOLITAN TRANSPORTATION AUTHORITY

Metro &

UNITED TRANSPORTATION UNION

JULY 1, 2010 THROUGH JUNE 30, 2014

EXHIBIT A

ARTICLE 48

PENSION PLAN

SECTION 1. INCORPORATED IN CONTRACT

The Pension Plan known as the Los Angeles County Metropolitan Transportation Authority-United Transportation Union Retirement Income Plan, as amended effective July 1, 1994, is incorporated herein and made a part hereof by reference. This plan covers the employees coming within the terms and provisions of this Contract.

SECTION 2. IDENTIFICATION OF PLAN AND AMENDMENTS

The Pension Plan referred to above is the Plan made effective July 1, 1994, by the fourteenth Amendment. This Amendment, approved by the Authority and the United Transportation Union, is to be created in accordance with a Memorandum of Agreement signed August 23, 1994.

SECTION 3. AVAILABILITY OF COPIES OF PLAN

Copies of the above referred to Plan are on file in the offices of the Authority and the Union.

SECTION 4. TERM OF PENSION AGREEMENT

This Pension Agreement is for a ~~thirty-six (36~~forty-eight (48) month period, July 1, ~~2006~~2010 through June 30, ~~2009~~2014.

SECTION 5. RECIPROCITY

The parties agree to modify the LACMTA-UTU Pension plan to provide reciprocity to vested UTU employees who transfer to the PTSC PERS retirement system as an LACMTA and/or PTSC employee. This provision will not apply to employment outside of LACMTA or another PERS agency.

THOMPSON COBURN LLP

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November 30, 2012

J. Douglas Marchant
Project Representative
Division of Statutory Programs
Department of Labor
200 Constitution Avenue, N.W.
Washington, D.C. 20210

Re: Los Angeles County Metropolitan Transportation Authority
CA-95-X042-02

Dear Mr. Marchant:

We are writing on behalf of the Los Angeles County Metropolitan Transportation Authority (LA Metro) in response to the objections filed by the United Transportation Union (UTU) and the Amalgamated Transit Union (ATU) with regard to the Department of Labor's November 9, 2012 referral of the above-referenced grant.

The UTU and ATU objections contend that the pension reform legislation recently enacted by the State of California[1] affects the Secretary's ability to certify LA Metro's grants because PEPRA prevents the continuation of collective bargaining rights of employees under section 13(c). Both the UTU and ATU cite *Amalgamated Transit Union v. Donovan*[2] in support of their objection. The objections should be rejected by the Department on the basis that PEPRA does not affect the pension benefits or rights of existing LA Metro employees, and does not remove the pension issue from the scope of collective bargaining. There is thus no denial of the right of existing employees to bargain collectively over pension issues under section 13(c)(2),

[1] The Public Employee's Pension Reform Act of 2013 (PEPRA).

[2] 767 F.2d 939 (D.C. Circuit 1985).

nor is there any denial of, or failure to preserve, existing pension terms and benefits under collective bargaining agreements under section 13(c)(1).

PEPRA limits the pension benefits that can be offered to *new employees* -- individuals who are hired after January 1, 2013.[3] These individuals, who are prospective employees to be hired in the future are unknown, have no current 13(c) rights, are not currently represented by the unions, and have no current existing pension rights that are or will be affected.[4] Moreover, the benefit formulas for existing employees are not changed by PEPRA. Thus, the confines of PEPRA do not affect the pension rights of existing employees, and cannot serve as the basis for an objection.

In contrast to the facts here presented, the *ATU v. Donovan* case, *supra*, addressed the issue of the *removal* of certain subjects from the scope of bargaining. The *Donovan* court held that the Georgia law which barred MARTA from negotiating over certain subjects prevented the continuation of bargaining over those benefits as mandated by 13(c). As stated by the court:

> ". . . we conclude that the Secretary is not free to certify an agreement that does not provide for the continuation of collective bargaining rights. Act 1506 prevents the continuation of such rights by *removing* several mandatory subjects from the scope of collective bargaining and by arguably conferring upon MARTA unilateral control over wages." 767 F.2d 939, at 956.

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[3] The Department should be aware that the PEPRA statute does not go into effect until January 1, 2013 and new hires will not be required to contribute at least 50% of their total annual normal cost of their pension benefit as determined by the plan actuary until the expiration of the unions' current collective bargaining agreements which is in June, 2013 for the ATU and June, 2014 for the UTU. Not only do these individuals not have 13(c) rights, but the objections do not present issues that concern employees of LA Metro or this grant, and are clearly prospective in nature. The objections thus as a result do not present material issues or legal or factual circumstances that affect the interests of employees to satisfy the objection standards in § 215.3(d)(3) of the Department's Guidelines.

[4] Section 13(c) preserves and continues *existing* collective bargaining rights of employees. Section 13(c)(1) preserves rights under *existing* collective bargaining agreements and section 13(c)(2) requires the *continuation* of collective bargaining rights. *See* 49 U.S.C. 5333(b)(2)(A) and (B). These individuals do not have "existing" bargaining rights which are protected by 13(c).

PEPRA *does not remove* the pension issue from bargaining, in contrast to the Georgia statute. Pensions can still be the subject of bargaining at LA Metro. There is thus no failure to "continue" collective bargaining rights, as is alleged by the ATU and UTU in their objections. Further, *Donovan* did not address "diminishing" collective bargaining rights, as alleged by the ATU in their objection letter. *Donovan* instead dealt with and focused only on the *elimination* of bargaining over specific subjects. As stated in *Donovan*, the issue and concern was that the effect of Georgia law was to "remove" certain subjects from the scope of bargaining (767 F.2d 939 at 951), to "bar" MARTA from negotiating over certain benefits (767 F.2d 939 at 952), and to "foreclose negotiations" on certain subjects (769 F.2d 939 at 952). The essence of *Donovan* is that when bargaining over a mandatory subject is *precluded* by state law, the "continuation" of bargaining as required under 13(c) may be prevented.[5]

While PEPRA puts in place certain standards for funding pensions and contribution requirements for new employees, these are issues routinely addressed by state and Federal law. The Internal Revenue Code already limits pensionable compensation, sets vesting requirements, sets a maximum on defined benefits, limits contributions and benefits by imposing specific dollar and pay limits, and sets investment and loan rules for governmental pension plans applicable to LA Metro's plan. *See, e.g.*, 26 U.S.C. §§ 401, 415, and 503. Similarly, statutory floors and limitations on wages, hours of work, and other mandatory subjects of bargaining certainly exist and apply. Caps and minimums on wages, hours and working conditions are not a new concept and apply to mandatory subjects of bargaining. None of these provisions prevent the "continuation" of bargaining required by section 13(c), nor have they precluded certification by the Secretary, since bargaining over the mandatory subject still exists within the limitations set by applicable law. The purported "limitations" on bargaining imposed by PEPRA are no different than other well established legal constraints on wages, hours, and working conditions.

[5] It is curious that the UTU cites the *Local Division 589, ATU v. Commonwealth of Massachusetts* case, 666 F.2d 618 (1st Cir. 1981), since that decision supports the ability of the States to enact legislation concerning bargaining. As stated by the court, 13(c) assurances do not create a permanent set of specific collective bargaining conditions which the state cannot change. *Id.* at 634-635. The court concluded in the case that the state statute controlled and applied despite different provisions in the 13(c) protections.

In addition, the express language of section 13(c) labor protection recognizes the applicability of statutory law to bargaining and that the confines of law apply and determine the parameters of bargaining. As stated in paragraph (4) of LA Metro's 1997 13(c) Agreement: "The collective bargaining rights of employees covered by this Arrangement . . . *as provided by applicable laws* . . . shall be preserved and continued." (emphasis added) Here, the applicable law (PEPRA) still permits LA Metro and the unions to negotiate pension benefits, within the confines and caps imposed by PEPRA, and the give and take of bargaining can still occur over economic terms. Nor does PEPRA confer in LA Metro unilateral control over pensions, a basic concern of the *Donovan* court. The subject of pensions is still a topic that must be bargained with the unions under the state statutory standards, and thus LA Metro clearly does not have unilateral control over the pension issue.

Finally, the ATU's objection letter contains numerous inaccurate statements concerning PEPRA that are misleading and mischaracterize the legislation, and cannot properly serve as the basis for finding the objection sufficient. The ATU's allegation that PEPRA will require employers to unilaterally implement changes to minimum retirement ages and annual compensation caps without bargaining is not accurate -- bargaining will continue over these issues as to current employees. Similarly, the ATU's statement that the parties can no longer negotiate the benefit formula, the employer "pick up" of employee contributions, or other benefit features is not accurate. For current employees, the parties can still negotiate benefit enhancements to future service. Even for prospective new employees (which as addressed above do not present 13(c) issues), the parties still can negotiate benefit formulas and employer "pick up" beneath the caps established by PEPRA. The ATU also claims that pension benefits are "frozen" and no benefit improvement can be negotiated. Again, untrue. The parties can still negotiate enhanced pension benefits for existing employees for future service. The ATU's allegations as to new employees are similarly incorrect -- the statement that benefit features for new employees are now entirely determined by statute is inaccurate. Benefits are capped, not "determined", by PEPRA and thus can be bargained. The ATU's conclusory statement that PEPRA eliminates "all discretionary authority" and relieves transit agencies of the duty to

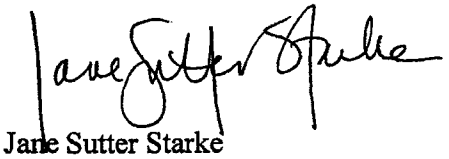
bargain is completely inaccurate as much discretion remains to be exercised and bargaining remains for both existing and new employees within the scope of PEPRA.

Based on the foregoing, the Department should find the UTU and ATU objections insufficient and should certify the grant on the 13(c) terms proposed in the Department's referral letter.

The Department's consideration of this correspondence is appreciated.

Very truly yours,

Thompson Coburn LLP

By 
Jane Sutter Starke

cc: Ronald W. Stamm, Principal Deputy County Counsel, LA Metro
Erika A. Diehl, Assistant General Counsel, UTU
Jessica M. Chu, Associate General Counsel, ATU
John Lund, Deputy Assistant Secretary, DOL
Ann Comer, Chief, Division of Statutory Programs, DOL

JSS/blt

Metropolitan Transportation Authority
One Gateway Plaza
Los Angeles, CA 90012-2952
213.922.2000 Tel
metro.net

Metro

DECEMBER 5, 2012

TO: **BOARD OF DIRECTORS**

THROUGH: **ARTHUR T. LEAHY**
CHIEF EXECUTIVE OFFICER

FROM: **DON OTT**
EXECUTIVE DIRECTOR, EMPLOYEE AND LABOR RELATIONS

SUBJECT: **CALIFORNIA PUBLIC EMPLOYEES' PENSION REFORM ACT OF 2013 AND FEDERAL 13(C)(2) AGREEMENT REQUIREMENTS**

ISSUE

On September 12, 2012, Governor Brown signed Assembly Bill 340 (Furutani), the Public Employees' Pension Reform Act (PEPRA), which establishes limits on California public employee defined benefit pension plans for new employees. The MTA's pension plans must be modified to comply with AB 340.

Several collective bargaining units (CBUs) representing transit employees in California have asserted that PEPRA is inconsistent with collective bargaining rights in federal 13(c)(2) agreements, and its implementation would therefore disqualify California transit agencies from receiving federal funds for projects. They have filed their objections with the Department of Labor, which must certify that agencies that apply for FTA funds comply with 13(c)(2).

BACKGROUND

Certain federal requirements regarding collective bargaining apply to federal funding recipients. Section 13(c)(2) of the Federal Transit Act, codified as 49 U.S.C. 5333(b)(2)(B), requires preservation of rights, privileges and benefits (including continuation of pension rights and benefits) under existing collective bargaining agreements. Federal grant recipients from the FTA must sign 13(c)(2) agreements as a condition of receiving federal funding.

PEPRA requires that public agencies with defined benefit plans for their employees, with the exception of charter cities, comply with AB 340. These requirements apply to new plan members hired on or after January 1, 2013.

Since plans for current employees are not affected by PEPRA, essentially, new plans must be adopted for new employees. Among the significant changes that affect the plans for new employees are:

- Average of 36 month final compensation for calculation of the new employee's pension benefit
- Limitations on the maximum pension benefit for new employees
- 50% cost sharing, i.e., new employees must pay 50% of the normal cost of their pension benefit
- Suspension of pension benefits for employees who rehire and return to the plan from which they retired

When FTA receives applications for funding assistance, the Department of Labor (DOL) must certify that collective bargaining rights of employees are continued under section 13(c)(2). If objections to certification are raised, the DOL follows an administrative process in which it requires that the parties negotiate to settle differences that gave rise to the objections. Ultimately, the DOL has the right to withhold certification where circumstances inconsistent with federal requirements are not resolved.

As stated above, at least two CBUs representing transit workers in California have submitted objections to DOL certification on the grounds that PEPRA violates 13(c)(2) collective bargaining protections. MTA submitted a letter to the DOL in which we argued that current employees are not affected by PEPRA and it does not remove the pension issue from the scope of collective bargaining. Therefore, we believe there has been no denial of the right of existing employees to collectively bargain over pension issues under 13(c)(2). The DOL has not yet responded to the MTA's letter.

In addition to our direct contact with the DOL, the MTA is on the Executive Committee of the California Transit Association, which has headed up a state-wide effort to clarify PEPRA and 13(c)(2) issues.

MTA and union pension plan trustees have been working with plan attorneys and actuaries to determine plan provisions that would be required to comply with PEPRA.

Under the current PEPRA law, the MTA and unions will be required to adopt new plans for new employees hired on or after January 1, 2013. This will require negotiations with each CBU. Based on those negotiations, staff will recommend new plans that meet the PEPRA requirements to the Board as they are agreed upon with local CBUs.

NEXT STEPS

Staff will update the Board on our progress in resolving the PEPRA and 13(c)(2) issues as well as negotiations for new PEPRA-compliant MTA/union pension plans.

U.S. Department of Labor

Office of Labor-Management Standards
Washington, D.C. 20210

December 6, 2012

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Re: RESPONSE TO OBJECTIONS TO
EMPLOYEE PROTECTION TERMS FOR
PENDING FTA GRANT APPLICATION
Los Angeles County Metropolitan
Transportation Authority
Purchase 44 40-Foot Composite Buses
CA-95-X042-02

Dear Ms. Chu, Ms Diehl, and Ms. Stark:

This is in response to the letters of November 20, 2012, from Ms. Chu, on behalf of Amalgamated Transit Union Local 1277 (ATU), and Ms. Diehl, on behalf of the United Transportation Union (UTU), in which they register certain objections to the Proposed Terms for Employee Protection Certification contained in the Department's referral letter of November 9, 2012, concerning the above referenced Federal Transit Administration grant application. This also responds to a subsequent letter from Ms. Starke, representing the Los Angeles County Metropolitan Transit Authority (LACMTA).

Pursuant to Department Guidelines (29 CFR Part 215), the objections of the ATU and UTU were timely received. The ATU and UTU represent employees of the LACMTA and have objected to the Department of Labor's (Department's) proposed certification based on their belief that the newly enacted Public Employees' Pension Reform Act of 2013, AB 340 (Furutani), Stats. 2012, Chapter 296 (PEPRA) raises material issues that may require alternative employee protections under 49 U.S.C. 5333(b) and/or concerns changes in legal or factual circumstances that may materially affect the rights or interests of employees represented by the unions. Specifically, the ATU and UTU allege that PEPRA affects the ability of the LACMTA to satisfy the rights of ATU and UTU represented employees under 49 U.S.C. 5333(b)(2)(A), which requires the preservation of rights, privileges, and benefits (including continuation of pension rights and benefits) under existing collective bargaining agreements or otherwise; 49 U.S.C. 5333(b)(2)(B), which requires the continuation of collective bargaining rights; and the referred protective arrangements, which additionally require protections similar to those of 49 U.S.C. 5333(b)(2)(A) and (B).

The Department has reviewed the objections concerning the newly enacted PEPRA and has determined that PEPRA constitutes a change in legal or factual circumstances that may materially affect the rights or interests of employees represented by the ATU and the UTU. See 29 CFR 215.3(d)(3)(ii). The state law appears to have removed mandatory and/or traditional subjects of collective bargaining from the consideration of the parties and may prevent the LACMTA from continuing the collective bargaining rights of employees, as required by Section 13(c)(2) of the Federal Transit Act, codified as 49 U.S.C. 5333(b)(2)(B). Therefore, pursuant to the Guidelines at 29 CFR 215.3, the Department has determined that certain of the objections of the ATU and UTU are sufficient.

Consequently, under the provisions of the Department's Guidelines, the LACMTA, ATU, and UTU **are directed to engage in good faith negotiations and/or discussions for a period not to exceed** January 7, 2013, to seek a mutually acceptable resolution of the issues concerning the continuation of collective bargaining between the LACMTA and the labor organizations representing its employees in the face of the recently enacted PEPRA. The Department requests that the parties negotiate a mutually acceptable accommodation of all relevant sections of PEPRA. Without opining on the adequacy of any potential accommodations, the parties may consider accommodations that include, but are not limited to, an agreement concerning mandatory subjects of collective bargaining, a protocol for influencing the determination of collective bargaining subjects over which the parties no longer have direct or complete control, and/or other accommodations of the newly enacted sections of PEPRA to the collective bargaining process.

During the negotiation period, the Department's resources are available for technical assistance and mediation. The Department will monitor the progress

of negotiations and, pursuant to its Guidelines, may suggest alternative protective arrangements for consideration of the parties. Should the parties resolve these issues and reach agreement, the Department will review the agreement(s) to ensure that all statutory requirements are met and, if so, will issue a final certification on the basis of the agreement(s).

In order to ensure good faith negotiations as contemplated in the Department's Guidelines at 29 CFR 215.3, the ATU and UTU should immediately contact the LACMTA and make such proposals as are appropriate under the Department's negotiating directive described above. In the event that the LACMTA chooses not to negotiate or does not respond to the unions initial proposals in a timely manner, the Department may deny certification on the basis of the objections from the ATU and UTU. Any party(ies) who choose(s) not to negotiate or accept(s) an existing proposal in settlement of this matter should so inform the opposing party(ies) and the Department. Alternatively, if the opportunity to negotiate is declined or ignored, the ATU and UTU should submit a statement confirming their attempts to contact the LACMTA in lieu of a final proposal and supporting statements.

For any issues not resolved through negotiations, the parties are to prepare final proposals covering the unresolved issues, along with supporting statements, which are to be submitted to the Department by January 8, 2013, the first business day after negotiations are completed.

Although the Department's Guidelines permit an interim certification within five (5) days of the end of negotiations, such is not anticipated in this case due to the substantial possibility that the parties' failure to negotiate a statutorily sufficient resolution to the issues in this matter may render the LACMTA ineligible for the receipt of Federal funds. See the Department's Guidelines at 29 CFR 215.39(h).

If you have any questions or need any additional information, you may contact me by phone at (202) 693-1227, by FAX at (202) 693-1342, or by e-mail at Marchant.J@dol.gov.

Sincerely,

J. Douglas Marchant

J. Douglas Marchant
Project Representative

Enclosures

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Leslie Rogers/FTA Region IX

Nela De Castro/LACMTA
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Keith Uriarte/AFSCME Council 57
James P. Hoffa, c/o Eileen Smith/IBT
Paul Knupp/Guerrieri, Clayman, Bartos, & Parcelli
Bonnie Morr, c/o Cara McGint/UTU
Steve Remige/ALADS
Richard Edelman/O'Donnell, Schwartz & Anderson
Edwin D. Hill/IBEW
Mary Kay Henry/SEIU
Gordon Hubel/SCCCC
Isaih Gilkey/MBOA
Delia Delgado/MCEA
Gloria Gallardo/MMMA

Digitally signed by Yvette Shelton
DN: cn=Yvette Shelton, o=U.S. Department of Labor, ou=Office of Labor Management Standards/ Division of Statutory Programs, email=shelton.yvette@dol.gov, c=US
Date: 2012.12.06 15:10:25 -05'00'

AMALGAMATED TRANSIT UNION

5025 WISCONSIN AVE., N.W. WASHINGTON, D.C. 20016-4139
(202) 537-1645 FAX (202) 244-7824

December 12, 2012

VIA FACSIMILE & EMAIL

Jane Sutter Starke
Attorney
Thompson Colburn LLP
Suite 600
1909 K Street, NW
Washington, DC 20006

Re: **RESPONSE TO DOL'S RULING/ATU'S PROPOSAL**
FTA Application
Los Angeles County Metropolitan Transportation Authority
(CA-95-X042) #2

Dear Ms. Starke:

The undersigned writes on behalf of, and as special "Section 13(c)" counsel for, Amalgamated Transit Union Local 1277 ("Local 1277"). In accordance with the DOL's December 6, 2012, response to the ATU's objections to the employee protective terms for pending Los Angeles County Metropolitan Transportation Authority ("LACMTA") Grant (CA-95-X042) #2, this serves to initiate good faith negotiations/discussions with LACMTA. More specifically, the DOL determined that the newly enacted Public Employees' Pension Reform Act of 2013, AB 340 (Furutani), Stats 2012, Chapter 296 (PEPRA) "appears to have removed mandatory and/or traditional subjects of collective bargaining from the consideration of the parties and may prevent the LACMTA from continuing the collective bargaining rights of employees, as required by Section 13(c)(2) of the Federal Transit Act, codified as 49 U.S.C. 5333(b)(2)(B)."

Accordingly, we propose that LACMTA agree to join the ATU in supporting and seeking prompt enactment of an amendment to PEPRA that exempts transit workers' pension plans (including PERS, where applicable) from the provisions of PEPRA so that collective bargaining over pension/retirement benefits for all LACMTA employees represented by Local 1277 is fully restored by:

- Sending a joint letter to the Governor of California, California Attorney General's office, the California Secretary of Labor, the Senate President Pro Tem, and the Assembly Speaker urging immediate action to support the amendment; and
- Sending a joint letter to the California Transit Association to request its support of the amendment.

It is our judgment that the above proposal is the only option to protect the process of collective bargaining over pension/retirement benefits for current and new employees of LACMTA as required by Section 13(c).

As the parties are directed to engage in good faith negotiations and/or discussions for a period not to exceed January 7, 2013, we look forward to hearing a response from LACMTA in a timely fashion.

Sincerely,

Jessica M. Chu
Associate General Counsel

yre

c: J. Lindsay, Local 1277
W. McLean, ATU
N. DeCastro, LACMTA
B. Lunch, Esq.
B. Broad, Esq.
E. Diehl, Esq.
J. Lund, DOL
A. Comer, DOL
J. Marchant, DOL

M. B. FUTHEY JR.
President,Transportation Division

JOHN PREVISICH
Assistant President, Transportation Division

KIM N. THOMPSON
General Secretary and Treasurer,
Transportation Division

LEGAL DEPARTMENT

KEVIN C. BRODAR
General Counsel

ERIKA A. DIEHL
Assistant General Counsel

TRACEY L. NEIGHBORS
Paralegal

SMART UTU
Sheet Metal, Air, Rail and Transportation

Transportation Division

24950 COUNTRY CLUB BLVD., STE. 340
NORTH OLMSTED, OHIO 44070-5333
PHONE: 216-228-9400 • FAX: 216-228-0937
www.utu.org

December 12, 2012

Via Email and US Mail

Ms. Jane Sutter Starke
Attorney
Thompson Colburn LLP
Suite 600
1909 K Street, NW
Washington, DC 20006

Re: UTU'S PROPOSAL TO DOL'S DETERMINATION THAT OBJECTIONS FILED ARE SUFFICIENT
FTA Application
Los Angeles County Metropolitan Transportation Authority
Purchase 44 40-Foot Composite Buses
CA-95-X042-02

Dear Ms. Stark:

In furtherance of the DOL's directive for ATU, UTU, and LACMTA to engage in good faith negotiations and/or discussions by January 7, 2013, United Transportation Union ("UTU") agrees with and adopts the letter dated October 12, 2012, written by Jessica Chu, on behalf of Amalgamated Transit Union ("ATU") Local 1277.

UTU wholeheartedly agrees with ATU's proposal that LACMTA agree to join the Organizations in supporting and seeking an amendment exempting transit workers' pension plans from PEPRA. Such proposal is the only option to protect the process of collective bargaining over pension/retirement benefits for current and new employees of LACMTA, as required by Section 13(c) of the Federal Transit Act, codified as 49 U.S.C. 5333(b).

Sincerely,

Erika A. Diehl
Assistant General Counsel

cc: M.B. Futhey, Jr., President – Transportation Division
J. Previsich, Assistant President – Transportation Division
J.A. Stem, National Legislative Director – Transportation Division
J. Risch, Assistant National Legislative Director – Transportation Division
B. Morr, Vice President Bus Dept.
J.P. Jones, CA SLD LO-005
J. A. Williams, General Chairperson, GO-875
K.C. Brodar, General Counsel – Transportation Division
J. Chu, ATU Associate General Counsel
Nela De Castro, LACMTA
Lee Saunders, c/o William Wilkinson, AFSCME
Keith Uriarte, AFSCME Council 57
James P. Hoffa, c/o Eileen Smith, IBT
Paul Knupp, Guerrieri, Clayman, Bartos, & Parcelli
Steve Remige, ALADS
Richard Edelman/O'Donnell, Schwartz & Anderson
Edwin D. Hill, IBEW
Mary Kay Henry, SEIU
Gordon Hubel, SCCCC
Delia Delgado, MCEA
Gloria Gallardo, MMMA
J. Lund, DOL
A. Comer, DOL
J. Marchant, DOL

united transportation union
GENERAL COMMITTEE OF ADJUSTMENT
15999 Cypress Ave. • Irwindale, CA 91706 • (213) 624-5567 • (818) 962-9980

December 19, 2012
Don Ott
LACMTA
One Gateway Plaza
Los Angeles, CA 90012

Dear Mr. Ott:

This letter is being sent in regards to AB-340. We are requesting that we enter into some discussions in regards to compliance with AB-340 and the negative impact it will have on the drivers that SMART-UTU represent.

Please advise when MTA will be ready to begin the discussions.

Sincerely,

James A Williams

James A William
General Chairman

Cc: J. Douglas Marchant
J.P. Jones
Ericka Diehr
Victor Baffoni
Bonnie Moore

GUERRIERI, CLAYMAN, BARTOS & PARCELLI, P.C.
1625 MASSACHUSETTS AVENUE, N.W.
SUITE 700
WASHINGTON, D.C. 20036-2243

(202) 624-7400
FACSIMILE: (202) 624-7420

JOSEPH GUERRIERI, JR.
ROBERT S. CLAYMAN
JEFFREY A. BARTOS
CARMEN R. PARCELLI
ELIZABETH A. ROMA
PAUL E. KNUPP III
N. SKELLY HARPER

January 4, 2013

VIA ELECTRONIC & REGULAR MAIL

Jane Sutter Starke
Thompson Colburn LLP
1909 K Street NW
Suite 600
Washington, DC 20006

Re: Los Angeles County Metropolitan Transportation Authority
FTA Application Nos. CA-04-0261 & CA-04-0232-01

Dear Ms. Starke:

I am writing on behalf of the Transportation Communications Union/IAM ("TCU/IAM") and pursuant to the Department of Labor's "Response to Objections" letter dated December 28, 2012, concerning the objections raised by the TCU/IAM to the Department's proposed terms for employee protection certification of the above-referenced FTA grant applications, which were based on the now-effective Public Employees' Pension Reform Act of 2013 ("PEPRA").

The TCU/IAM hereby joins and adopts in full the position and proposal of the Amalgamated Transit Union ("ATU) Local 1277 as expressed in Jessica Chu's letter to you dated December 12, 2012. As described therein, PEPRA forecloses LACMTA from satisfying the requirements of Section 13(c) of the Federal Transit Act (49 U.S.C. § 5333(b)) absent an amendment exempting transit workers' pensions from PEPRA.

AMALGAMATED TRANSIT UNION

5025 WISCONSIN AVE., N.W. WASHINGTON, D.C. 20016-4139
(202) 537-1645 FAX (202) 244-7824

December 12, 2012

VIA FACSIMILE & EMAIL

Jane Sutter Starke
Attorney
Thompson Colburn LLP
Suite 600
1909 K Street, NW
Washington, DC 20006

Re: **RESPONSE TO DOL'S RULING/ATU'S PROPOSAL**
FTA Application
Los Angeles County Metropolitan Transportation Authority
(CA-95-X042) #2

Dear Ms. Starke:

The undersigned writes on behalf of, and as special "Section 13(c)" counsel for, Amalgamated Transit Union Local 1277 ("Local 1277"). In accordance with the DOL's December 6, 2012, response to the ATU's objections to the employee protective terms for pending Los Angeles County Metropolitan Transportation Authority ("LACMTA") Grant (CA-95-X042) #2, this serves to initiate good faith negotiations/discussions with LACMTA. More specifically, the DOL determined that the newly enacted Public Employees' Pension Reform Act of 2013, AB 340 (Furutani), Stats 2012, Chapter 296 (PEPRA) "appears to have removed mandatory and/or traditional subjects of collective bargaining from the consideration of the parties and may prevent the LACMTA from continuing the collective bargaining rights of employees, as required by Section 13(c)(2) of the Federal Transit Act, codified as 49 U.S.C. 5333(b)(2)(B)."

Accordingly, we propose that LACMTA agree to join the ATU in supporting and seeking prompt enactment of an amendment to PEPRA that exempts transit workers' pension plans (including PERS, where applicable) from the provisions of PEPRA so that collective bargaining over pension/retirement benefits for all LACMTA employees represented by Local 1277 is fully restored by:

- Sending a joint letter to the Governor of California, California Attorney General's office, the California Secretary of Labor, the Senate President Pro Tem, and the Assembly Speaker urging immediate action to support the amendment; and
- Sending a joint letter to the California Transit Association to request its support of the amendment.

It is our judgment that the above proposal is the only option to protect the process of collective bargaining over pension/retirement benefits for current and new employees of LACMTA as required by Section 13(c).

As the parties are directed to engage in good faith negotiations and/or discussions for a period not to exceed January 7, 2013, we look forward to hearing a response from LACMTA in a timely fashion.

Sincerely,

Jessica M. Chu
Associate General Counsel

yre

c: J. Lindsay, Local 1277
W. McLean, ATU
N. DeCastro, LACMTA
B. Lunch, Esq.
B. Broad, Esq.
E. Diehl, Esq.
J. Lund, DOL
A. Comer, DOL
J. Marchant, DOL

Los Angeles County
Metropolitan Transportation Authority

One Gateway Plaza
Los Angeles, CA 90012-2952

213.922.2000 Tel
metro.net

Metro

FINANCE, BUDGET AND AUDIT COMMITTEE
JANUARY 16, 2013

SUBJECT: PENSION REFORM ACT

ACTION: RECEIVE AND FILE

RECOMMENDATION

Receive and file report on the impacts of the pension reform act.

ISSUE

At its October 2012 meeting, the Committee requested a report on the impacts of the California Public Employees' Pension Reform Act of 2013 ("PEPRA") as it relates to hiring and compensation for future MTA employees.

DISCUSSION

PEPRA, which is effective on January 1, 2013, imposes significant reforms on the pension plans provided by public employers. While the significant changes apply only to new employees hired on or after January 1, 2013, all employees are subject to certain reforms contained within the act. Seyfarth Shaw, counsel for the MTA, former SCRTD, plans that we administer for UTU, ATU, TCU, AFSCME and Non-Contract, has advised us that PEPRA applies to all public defined benefit plans, as well as PERS for Non-Contract, AFSCME, and Teamsters employees.

PEPRA's significant provisions affecting new members include:

- Reduced benefit formula of 2% at 62
- Mandates that employees pay half of normal cost
  - Prohibits employer from paying required employee contribution
- Limits pensionable compensation
- Final compensation based 36 month average

Attachment A highlights changes required by PEPRA affecting current and future MTA employees.

Hiring/Retention

PEPRA creates a lower benefit tier in the respective pension plans for substantially all MTA employees hired after January 1, 2013. However, since PEPRA applies to virtually all state and local governments, it does not put MTA at any disadvantage with other California public sector agencies with respect to pension benefits. The vast majority of our jobs, transit operations, are only found in the public sector.

For jobs where we compete with the private sector, the new lower pension benefit narrows the generally favorable governmental pension benefit advantage over private sector retirement plans such as 401k matching, profit sharing and stock ownership plans where those ultimate benefits are dependent on financial market conditions.

Certain MTA unions have asserted that PEPRA violates their members' rights under Section 13(c) (2) of the Federal Transit Act and have filed a complaint with the U.S. Department of Labor. Separate reports on this issue have been presented to the Board.

NEXT STEPS

Staff will advise the Board if challenges in hiring and retention are encountered as a result of PEPRA and recommend mitigation strategies.

ATTACHMENT

A. Significant PEPRA Provisions

Prepared by: Donna R. Mills, Interim Treasurer, (213) 922-4047

Terry Matsumoto
Chief Financial Services Officer

Arthur T. Leahy
Chief Executive Officer

ATTACHMENT A

SIGNIFICANT PEPRA PROVISIONS

	Reform Act Provision	New Members only	All Members	Effective date 1/1/2013 unless otherwise indicated
1	Maximum benefit formula permitted 2% at 62, minimum retirement age of 52	X		
2	Employees pay 50% of normal cost	X		ATU: 6/30/2013; UTU, Teamsters: 6/30/2014
3	Final compensation based on 36 month highest average	X		ATU only; all other plans already compliant with 36 month requirement
4	Pensionable compensation for benefit calculation is <= Social Security wage amount; 120% of SS wage if not covered by SS	X		
5	Post-retirement employment with same Plan prohibits exceeding 960 hours without reinstatement; 180 day sit-out required to return to work without reinstatement		X	
6	Prohibits retroactive benefit improvements		X	
7	Prohibits Airtime Purchase		X	

Thursday, January 24, 2013 9:00 AM

MINUTES

Regular Board Meeting
Board of Directors

One Gateway Plaza
3rd Floor Board Room

Called to Order at 9:38 a.m.

Directors Present

Michael Antonovich, Chair
Diane DuBois, 1st Vice Chair
Richard Katz, 2nd Vice Chair
John Fasana
José Huizar
Don Knabe
Gloria Molina
Ara J. Najarian
Pam O'Connor
Mark Ridley-Thomas
Antonio Villaraigosa
Mel Wilson
Zev Yaroslavsky
Michael Miles, non-voting member

Officers

Arthur T. Leahy, Chief Executive Officer
Michele Jackson, Board Secretary
Karen Gorman, Ethics Officer
Karen Gorman, Acting Inspector General
County Counsel, General Counsel

1. APPROVED **Consent Calendar** Items: 2, 9, 18, 19, 20, 23, 24, 25, 26, 27, 28, 29, 30, 31, 32, 33, 34, 50, 52, 53**, 54, 55, 56**, 57**, 58, 59, 66, 67, 68, 70, 85, 86, 87, 88 and 89.

   **REQUIRES 2/3 VOTE

   Consent Calendar items were approved by one motion.

AN	JF	JH	ZY	PO	RK	MA	MRT	DD	DK	AV	GM	MW
Y	Y	Y	Y	Y	Y	Y	Y	Y	Y	Y	Y	Y

2. APPROVED ON CONSENT CALENDAR **Minutes of the Regular Board Meeting held December 13, 2012.**

3. Chair's Report – NO ACTION.

4. RECEIVED Chief Executive Officer's Report.
   - Presented Proclamation to the City of El Monte

AN	JF	JH	ZY	PO	RK	MA	MRT	DD	DK	AV	GM	MW
P	P	P	P	A	P	P	P	P	P	A	A	P

9. APPROVED ON CONSENT CALENDAR:

   A. adopting the **Investment Policy**;

   B. the **Financial Institutions Resolution** authorizing financial institutions to honor signatures of LACMTA Officials; and

   C. delegating to the Treasurer or his/her designees, the authority to invest funds for a one-year period, pursuant to California Government Code Section 53607.

****

AN = A. Najarian	PO = P. O'Connor	DD = D. DuBois	MW = M. Wilson
JF = J. Fasana	RK = R. Katz	DK = D. Knabe	
JH = J. Huizar	MA = M. Antonovich	AV = A. Villaraigosa	
ZY = Z. Yaroslavsky	MRT = M. Ridley-Thomas	GM = G. Molina	

LEGEND: Y = YES , N = NO, C = CONFLICT, ABS = ABSTAIN, A = ABSENT, P = PRESENT
C = Soft Conflict; **C = Hard Conflict**

18. APPROVED ON CONSENT CALENDAR the proposed updates and new projects for the **Measure R Highway Operational Improvement funding for the Arroyo Verdugo and Las Virgenes/Malibu Subregions, and for Interstate 405, I-110, I-105, and SR-91 Ramp and Interchange Improvements (South Bay)**.

19. AUTHORIZED ON CONSENT CALENDAR the Chief Executive Officer to:

    A. award and execute a cost plus fixed fee (CPFF) Contract No. PS4720-3004 to Cambridge Systematics, Inc. for an amount not to exceed $7,662,203 for **Gateway Cities Transportation Strategic Plan Phase II**; and

    B. executing individual contract modifications as required, but not to exceed a total of up to 15% of the total contract amount to cover the cost of any unforeseen issues that may arise during the performance of the contract.

20. AUTHORIZED ON CONSENT CALENDAR the Chief Executive Officer to:

    A. execute contract modification No. 12 to Contract No. PS4340-1939 with URS Corporation to **address public comments on the I-710 South Corridor Project Draft EIR/EIS, incorporate project changes, changes in state and federal approval requirements, evaluate a Preferred Alternative, re-circulate the Draft EIR/EIS and complete the Final EIR/EIS,** in an amount not to exceed $9,190,276, increasing the total contract amount from $29,521,327 to $38,711,603, and a contract extension of 27 months;

    B. execute contract modification No. 6 to Contract No. PS4340-1940 with Moore Iaconfano Goltsman, Inc., for the continued facilitation of community outreach services through the completion of the Final EIR/EIS, in an amount not to exceed $863,028, increasing the total contract amount from $2,329,284 to $3,192,312, and a contract extension of 24 months;

(Continued on next page)

(Item 20 – continued from previous page)

C. increase Contract Modification Authority for PS4340-1939 by $919,028 and PS4340-1940 by $86,303, thus increasing total contract modification authority from $2,521,000 to $3,526,331, to cover the cost of any unforeseen issues that may arise during the performance of the contracts;

D. execute any necessary agreement(s) with third parties (e.g. Gateway Cities Council of Governments, Gateway Cities, Southern California Edison, Los Angeles County, U.S. Army Corps of Engineers) to provide coordination and technical support for the completion of the EIR/EIS and the development and implementation of individual I-710 Early Action Projects, in an amount not to exceed $2,500,000, increasing the total amount from $900,000 to $3,400,000 for FY12 through FY15.

AN	JF	JH	ZY	PO	RK	MA	MRT	DD	DK	AV	GM	MW
						C						

23. APPROVED ON CONSENT CALENDAR:

A. authorizing the Chief Executive Officer to execute modification No. 3 to Contract No. PS40102178-19-01-01 with Arellano Associates to provide **outreach services for the High Desert Corridor** environmental clearance for an additional term of 24 months in the firm-fixed amount of $699,944 increasing the Total Contract Value from $598,939 to $1,298,883; and

B. Contract Modification Authority specific to Contract No. PS40101178-19-01-01 with Arellano Associates in the amount of $100,000.

24. AUTHORIZED ON CONSENT CALENDAR:

A. the Chief Executive Officer to:

1. execute modification No. 2 to Contract No. PS-4370-2622 with KOA Corporation (Contractor) in the firm-fixed amount of $1,090,851 to complete the Draft Environmental Impact Statement/Report (DEIS/R) for the **East San Fernando Valley North-South Rapidways project** increasing the total contract value from $4,556,307 to $5,647,158; and

2. increase Contract Modification Authority to Contract No. PS4370-2622 in the amount of $218,170;

B. changing the name of the project from East San Fernando Valley North/South Rapidways to East San Fernando Valley Transit Corridors; and

C. receiving and filing the alternatives being moved forward into the DEIS/R.

25. AMENDED ON CONSENT CALENDAR the **Funding Agreement between the Gold Line Construction Authority and the MTA for Phase 2A** to increase funds associated with CEQA/NEPA compliance, preliminary engineering and planning for Phase 2B along with revised conditions for payment of such funds based upon milestones.

26. APPROVED ON CONSENT CALENDAR the CEO to amend the **Gold Line Foothill Extension Funding Agreement to allow projected savings on MTA Project Costs to pay for MTA requested operational and safety betterments** and other MTA Projects Costs. MTA will cap its Project Costs at $173.6 million.

27. AUTHORIZED ON CONSENT CALENDAR the Chief Executive Officer to enter into an Exclusive Negotiation Agreement with a joint venture of Polis Builders, Ltd., The McGregor Company, and St. Nicholas Foundation, Inc. **to develop a mixed-use joint development project on a set of MTA-owned and private parcels situated immediately adjacent to the Vermont/Santa Monica Station on the Metro Red Line**; and amend the FY13 budget to allow any deposits that may be collected from Developer to offset support costs.

AN	JF	JH	ZY	PO	RK	MA	MRT	DD	DK	AV	GM	MW
			C									

28. AUTHORIZED ON CONSENT CALENDAR the Chief Executive Officer to **sell approximately 80,000 square feet of surplus property located adjacent to the Orange Line Right-of-Way, west of the Balboa Orange Line station**, in Van Nuys to George E. Moss, or his assign, in accordance with the Purchase Term Sheet.

AN	JF	JH	ZY	PO	RK	MA	MRT	DD	DK	AV	GM	MW
			C									

29. AUTHORIZED ON CONSENT CALENDAR the Chief Executive Officer to:

A. execute a one (1) year Exclusive Negotiation Agreement and Planning Document, with an option to extend for up to an additional one (1) year, with McCormack Baron Salazar, Inc. ("MBS"), or a development entity controlled and managed by McCormack Baron Salazar, Inc. that is reasonably approved by the Chief Executive Officer, to, among other things, **explore the feasibility of developing a grocery store/market and associated parking on 1.56 acres of Metro property (the "Site") located on the south side of Cesar E. Chavez Avenue between Fickett and Matthews Streets, in Boyle Heights**; and

B. terminate an existing Joint Development Agreement with MBS to develop and construct on the Site a mixed-use project containing 73 affordable apartments and approximately 3,250 square feet of retail space.

30. ADOPTED ON CONSENT CALENDAR **the Conceptual Development Guidelines for 1.95 acres of Metro property located south of Cesar Chavez Avenue between Soto and Matthews Streets in Boyle Heights.**

31. ADOPTED ON CONSENT CALENDAR the **"Conceptual Development Guidelines" for the Metro Gold Line 1st/Soto Station site and the Metro-owned parcel on the opposite corner**.

32. ADOPTED ON CONSENT CALENDAR the **Conceptual Development Guidelines for the Metro Gold Line Mariachi Plaza Station site and the Metro-owned parcel on the southeast corner of Bailey Street and Pennsylvania Avenue**.

33. AUTHORIZED ON CONSENT CALENDAR the Chief Executive Officer to:

A. execute a twenty-four-month Exclusive Negotiating Agreement, with an option to extend for up to two additional (6)-month terms, with Cohen Brothers Realty Corporation of California (CBRCC) to:

1. **explore the feasibility of developing a Master Plan for a proposed mixed-use development to co-exist with the Metro Division 7 Maintenance and Operations facility and the adjacent West Hollywood Sheriff's Station site,** both located north of the Pacific Design Center Campus in the City of West Hollywood, and

2. negotiate the key terms and conditions of a Joint Development Agreement and Ground Lease(s) which respect MTA's interests relating to both interim and long-term operational and fiscal requirements associated with the proposed facilities and development; and

B. amend the FY13 budget to allow any deposits that may be collected from CBRCC to be expensed to cover any out-of-pocket costs that may be incurred. These deposits are currently estimated at $50,000.

AN	JF	JH	ZY	PO	RK	MA	MRT	DD	DK	AV	GM	MW
			C			C	C		C			

34. APPROVED ON CONSENT CALENDAR amending FY13 Budget to add one new **Civil Rights Analyst position at the H1L pay grade for Civil Rights Programs Compliance Division** to oversee federal grant subrecipient compliance with Federal Transit Administration Civil Rights regulations and guidance.

36. RECEIVED AND FILED reports on a business plan to deliver the **High Desert Corridor (HDC) Project as a public-private partnership in the form of a toll concession with upfront public funding, and the feasibility of including other development opportunities and uses in the HDC.**

ANTONOVICH MOTION that the Board directs the CEO to return no later than the March 2013 Planning Committee with a proposal for a pre-development agreement (or similar Public-Private Partnership method) that would capture the potential for combined investment in and development of the Victorville to Los Angeles (via Palmdale) High Speed Rail Corridor.

This proposal will also engage the private sector to examine efficiencies, cost savings, time savings and best practices in developing this rail corridor.

AN	JF	JH	ZY	PO	RK	MA	MRT	DD	DK	AV	GM	MW
A	A	Y	A	Y	Y	Y	Y	Y	Y	A	A	Y

47. RECEIVED **report on System Safety.**

AN	JF	JH	ZY	PO	RK	MA	MRT	DD	DK	AV	GM	MW
A	A	P	A	P	P	P	P	P	P	A	A	P

48. RECEIVED presentation on **LACMTA's safety culture – Findings and Recommendations.**

AN	JF	JH	ZY	PO	RK	MA	MRT	DD	DK	AV	GM	MW
A	A	P	A	P	P	P	P	P	P	A	A	P

50. AUTHORIZED ON CONSENT CALENDAR the Chief Executive Officer to negotiate a **Memorandum of Understanding with the City of Los Angeles to add the Transit Access Pass to the City of Los Angeles City Service Card**. Provide a one-time, 7-day pass for the first 10,000 card holders as an incentive to promote transit use and encourage cardholders to purchase the card.

51. CARRIED OVER FOR 60 DAYS AS AMENDED: approval of **YAROSLAVSKY MOTION** that the monthly maintenance fee be waived for 6 months for all participants who either work or reside in Los Angeles County; and

    FURTHER that Staff continue to gather and analyze data and provide the Board with quarterly updates.

    FASANA AMENDMENT to terminate accounts after 6 months of non-use.

52. AUTHORIZED ON CONSENT CALENDAR the Chief Executive Officer to award a 24-month, firm fixed price contract under Bid Number 13-0006 to **Valley Power Systems, the lowest responsive and responsible bidder for bus manifolds** for an amount not to exceed $2,501,314, inclusive of sales tax and a one year option.

53. APPROVED ON CONSENT CALENDAR BY 2/3 VOTE:

    A. the Chief Executive Officer to **award a five-year firm fixed unit rate contract PS54302898 to Southern AM Engineering to provide Fare Collection System mid-life maintenance services** in an amount not-to-exceed $1,470,034; and

    B. that there is only a single source of procurement for these mid-life maintenance services, and the purchase of these services is for the sole purpose of maintaining existing equipment already in use. The Board hereby authorizes the purchase pursuant to Public Utilities Code section 130237.

54. APPROVED ON CONSENT CALENDAR:

A. the Chief Executive Officer **to award a firm fixed price contract under RFP No. OP33202869 with New Flyer of America, Inc. for the manufacturing and delivery of 550 forty-foot CNG transit buses**, in the amount of $302,094,182 for the base contract buy including tax and delivery, exclusive of contract Options for up to 350 additional buses for a total of 900 buses;

B. increasing the Life-Of-Project budget for capital project 201056 – 550 40-Foot Bus Buy from $297,070,000 to $304,943,000, an increase of $7,873,000; and

C. amending the FY13 budget to add two new engineering FTE's in Strategic Vehicle and Infrastructure Delivery (Cost Center 3043) to support this project.

55. AUTHORIZED ON CONSENT CALENDAR the Chief Executive Officer to award a 24-month, firm fixed price contract under Bid Number 13-0008 to **The Jankovich Company, the lowest responsive and responsible bidder for synthetic oil** for an amount not-to-exceed $2,282,526, inclusive of sales tax consisting of a base year and a one-year option.

56. APPROVED ON CONSENT CALENDAR BY 2/3 VOTE:

A. ratifying the **award of a firm fixed price contract to Ansaldo STS USA (formerly Union Switch & Signal (US&S)) ("Ansaldo") for the upgrade of the existing solid-state train control equipment** for an amount not-to-exceed $7,867,854; and

B. that there is only a single source of procurement for the upgrade of the Metro Green Line (MGL) Train Control Equipment (MicroLok I) to Ansaldo's MicroLok II system. The existing MGL MicroLok I Train Control Equipment is proprietary. The purchase is for the sole purpose of replacing existing equipment already in use. The Board hereby authorizes the purchase of Ansaldo MicroLok II pursuant to Public Utilities Code section 130237.

57. APPROVED ON CONSENT CALENDAR BY 2/3 VOTE:

A. ratifying the **award of a firm fixed price contract to Wabtec Passenger Transit for friction brake overhaul services of 52 P2000 Light Rail Vehicles (LRV)** for an amount not-to-exceed $1,664,000; and

B. that there is only a single source of procurement for the overhaul of the friction brake equipment on the P2000 LRV fleet (P2000 LRV). The purchase is for the sole purpose of overhauling existing friction brake equipment for continued safe operations. The Board hereby authorizes the purchase of overhaul services for the P2000 LRV friction brakes equipment pursuant to Public Utilities Commission Code Section 130237.

58. AUTHORIZED ON CONSENT CALENDAR the CEO to award a five-year firm fixed unit rate contract, OP33672967 to Woods Maintenance Services Inc., the lowest responsive, responsible bidder, in an amount not-to-exceed $810,000, effective January 1, 2013 for **Metro Red/Purple Line tunnel cleaning services**.

59. AUTHORIZED ON CONSENT CALENDAR the Chief Executive Officer **to award a 36-month, firm fixed price contract under Bid Number 13-0013 to North American Bus Industries, the lowest responsive and responsible bidder for bus bellow assemblies** for an amount not-to-exceed $4,449,563, inclusive of sales tax and two one-year options.

66. AUTHORIZED ON CONSENT CALENDAR the Chief Executive Officer to **execute Contract Modification No. 52 to Contract No. C0942 with Sema Construction Inc. for a Mutual Release and Settlement Agreement** resolving all claims and disputes in the amount of $1,750,000 increasing the total contract value from $17,558,527 to $19,308,527. This action does not increase the Life-of-Project Budget.

67. AUTHORIZED ON CONSENT CALENDAR the Chief Executive Officer to **enter into a bid stipend agreement with each of the pre-qualified proposers for the Regional Connector Transit Corridor Project in an amount of $1,000,000 per stipend agreement for unsuccessful responsive proposers.** Upon contract award to the successful responsive and responsible proposer, the common construction industry practice is to pay a stipend to each unsuccessful responsive proposer because of the high cost of producing a competitive and comprehensive engineering and cost proposal.

AN	JF	JH	ZY	PO	RK	MA	MRT	DD	DK	AV	GM	MW
						C				C		

68. AUTHORIZED ON CONSENT CALENDAR the Chief Executive Officer to enter into a **bid stipend agreement with each of the pre-qualified proposers for the Westside Subway Extension Project in the amount of $1,500,000 per stipend agreement for unsuccessful responsive proposers.** Upon contract award to the successful responsive and responsible proposer, the common construction industry practice is to pay a stipend to each unsuccessful responsive proposer because of the high cost of producing a competitive and comprehensive proposal.

69. APPROVED BY 2/3 VOTE:

A. that awarding design-build contracts pursuant to Public Utilities Code Section 130242 (b) will achieve **private sector efficiencies in the integration of the design, project work, and components related to the construction of an awning at Metro Blue Line Maintenance Facility** in Los Angeles County; and

B. authorizing the Chief Executive Officer to solicit and award design-build contract for the awning construction at Metro Blue Line Maintenance Facility, pursuant to Public Utilities Code Section 130242 (a), (c), (d), & (e).

AN	JF	JH	ZY	PO	RK	MA	MRT	DD	DK	AV	GM	MW
A	A	Y	Y	Y	Y	Y	Y	Y	Y	A	A	Y

70. AUTHORIZED ON CONSENT CALENDAR:

A. ratifying the decision to **proceed with work for value engineering and additional design for the Patsaouras Plaza Busway Station** pending contract change; and

B. the Chief Executive Officer to increase the cumulative contract modification authority from $200,000 to $500,000 to execute additional contract modifications, if required, to Contract No. PS0933432406A for additional design or professional services for the Patsaouras Plaza Busway Station.

71. AUTHORIZED the Chief Executive Officer to negotiate and execute a:

A. Contract Modification No. 41 to Contract No. PS43502000 with Parsons Brinckerhoff, Inc. to provide engineering support services during the solicitation process, design for relocation of utilities, design support services during construction and continued **Advanced Preliminary Engineering for Section 1 of the Westside Subway Extension Project**, in an amount not to exceed $18,845,160, increasing the total contract value from $90,107,773 to $108,952,933;

AN	JF	JH	ZY	PO	RK	MA	MRT	DD	DK	AV	GM	MW
Y	Y	Y	A	Y	Y	C	A	Y	Y	A	A	Y

B. Contract Modification No. 42 with Parsons Brinckerhoff, Inc. for a single source award to perform Final Design Services for Division 20 Yard Modifications to support the turn-back and other modifications to the existing yard and Shop facilities for the extension of the Metro Purple Line, in an amount not to exceed $2,803,946, increasing the total contract value from $108,952,933 to $111,756,879;

AN	JF	JH	ZY	PO	RK	MA	MRT	DD	DK	AV	GM	MW
Y	Y	Y	Y	Y	Y	C	A	Y	Y	A	A	Y

(Continued on next page)

(Item 71 – continued from previous page)

C. establish Project 865522 Westside Subway Extension Section 2 to Century City using CP 865518 FY13 unused funds to date; and authorize the CEO to negotiate and execute a Contract Modification No. 43 to Contract No. PS43502000 with Parsons Brinckerhoff, Inc. to provide continued Advanced Preliminary Engineering for Section 2 of the Westside Subway Extension Project, in an amount not to exceed $8,879,740, increasing the total contract value from $111,756,879 to $120,636,619; and

AN	JF	JH	ZY	PO	RK	MA	MRT	DD	DK	AV	GM	MW
Y	N	Y	Y	Y	Y	C	A	Y	N	A	A	Y

~~D. establish Project 865523 Westside Subway Extension Section 3 to Westwood/VA Hospital using CP 865518 FY13 unused funds to date; and authorize the CEO to negotiate and execute a Contract Modification No. 44 to Contact No. PS43502000 with Parsons Brinckerhoff, Inc. to provide continued Advanced Preliminary Engineering for Section 3 of the Westside Subway Extension Project, in an amount not to exceed $7,256,823, increasing the total contract value from $120,636,619 to $127,893,442 to include both Recommendations C and D.~~

84. APPROVED AS AMENDED BY DUBOIS, MOLINA AND WILSON **continuation of first, second, and third decade Measure R project development work while we seek a viable financial strategy to allow acceleration of Measure R projects**.

AMENDMENT: Before any of the suggested strategies are placed into action or are further articulated we would like staff to return to the Board with the following analysis as part of the financial strategy:

A. a strategy for keeping ALL second and third decade projects in shelf-ready condition for federal funding on an accelerated schedule on equal footing; including funding plans <u>consistent with the LRTP</u>;

B. identification and funding requirements for state of good repair and major rehabilitation through the second and third decade;

(Continued on next page)

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C. more detail on cash flow requirements to fund operations, state of good repair, call for projects, other programs in an accelerated environment that includes bonding against Prop A & C revenues;

D. detail on the proposed "financial and process paths" to pursue with the FTA on the South Bay Green Line Extension, Eastside Gold Line Phase II Extension, West Santa Ana Branch, Gold Line Foothill Extension and Metro Airport Connector;

E. develop funding plans for the remaining 12 highway initiatives that are in the planning stage or not under consideration for 3P. These plans should include anticipated MCA and TIFIA programming commitments; and

F. estimate of the public investment required to support 3P investment (environmental review, right-of-way, other costs).

Return to the Board with this information at the March 2013 meeting.

AN	JF	JH	ZY	PO	RK	MA	MRT	DD	DK	AV	GM	MW
Y	Y	Y	Y	Y	Y	Y	ABS	Y	Y	Y	Y	Y

85. ADOPTED ON CONSENT CALENDAR the **proposed amendments to the Administrative Code relating to Title VI definitions.**

86. ADOPTED ON CONSENT CALENDAR **the proposed 2013 Federal and State Legislative Program.**

87. APPROVED ON CONSENT CALENDAR **the revised Los Angeles - San Diego - San Luis Obispo Rail Corridor Agency Joint Powers Agreement.**

88. AUTHORIZED ON CONSENT CALENDAR the Chief Executive Officer to:

A. **award a 30-month, firm fixed price contract under RFP No. PS92402983 to AST Corporation, the highest rated proposer, for the Oracle Enterprise Business Suite** (FIS) upgrade project at a firm fixed price amount of $3,779,900; and

B. exercise options not to exceed $1,873,100 for the implementation of Oracle Business Intelligence and Oracle Fusion Middleware software.

89. APPROVED ON CONSENT CALENDAR:

A. a contract modification to Contract No. PO PS71302754, Holland & Knight, LLP, **for Federal Advocacy services for a six month schedule extension through August 30, 2013**, increasing the total contract value by $74,000 from $220,000 to $296,000; and

B. receiving and filing **a new solicitation for Federal Legislative Advocacy.**

AN	JF	JH	ZY	PO	RK	MA	MRT	DD	DK	AV	GM	MW
		C										

90. APPROVED:

A. authorizing the CEO **to execute a Contract modification to Contract #OP2461010 with Cubic Transportation Systems, Inc. for an amount not to exceed $610,000 to procure and install four Tap Ticket Vending Machines (TVMs) at El Monte Transit Center** increasing the value of the contract from $160,416,339 to $161,026,339;

B. additional contract modification authority for Contract #OP2461010 with Cubic Transportation Systems, Inc., for an amount not to exceed $500,000 for miscellaneous contract changes for the remainder of FY2013 increasing the value of the contract from $161,026,339 to $161,526,339; and

(Continued on next page)

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C. an annual contract modification authority for Contract #OP2461010 with Cubic Transportation Systems, Inc., for the life of the contract in an amount not to exceed $500,000 per year.

AN	JF	JH	ZY	PO	RK	MA	MRT	DD	DK	AV	GM	MW
A	A	Y	Y	Y	Y	Y	Y	Y	Y	A	A	Y

91. RECEIVED **Civil Rights update**.

AN	JF	JH	ZY	PO	RK	MA	MRT	DD	DK	AV	GM	MW
A	A	A	A	P	P	P	P	P	P	A	A	P

95. RECEIVED oral presentation from **Gina Marie Lindsey regarding Airport Metro Connector Project.**

AN	JF	JH	ZY	PO	RK	MA	MRT	DD	DK	AV	GM	MW
P	P	P	P	A	P	P	P	P	P	P	P	P

96. APPROVED BY 2/3 VOTE:

A. adopting **"Universal City/Studio City Station" as the official name for Metro Rail's current Universal City Station**;

B. adopting **"Civic Center/Grand Park/Tom Bradley Station" as the official name for Metro Rail's current Civic Center/Tom Bradley station**;

C. adopting **"Wilshire/Western/Alfred Hoyun Song Station" as the official name for Metro Rail's current Wilshire/Western Station**; and

D. approving the staff plan to implement the above changes at minimal cost without using operating funds.

AN	JF	JH	ZY	PO	RK	MA	MRT	DD	DK	AV	GM	MW
Y	Y	A	Y	Y	Y	Y	A	Y	Y	A	A	Y

97. **WITHDRAWN:** RECEIVE **I-405 and Orange Line Chronology and Status Update**.

98. **WITHDRAWN:** FINANCE, BUDGET AND AUDIT COMMITTEE RECOMMENDED (5-0) approval of **KATZ MOTION regarding State Route North 710 Project** that the MTA Board consider the following:

A. Direct the Chief Executive Officer to report back at the ~~March~~ February 2013 MTA Board on the following:

1. a description of the study area and the limits of the project;

2. a complete project schedule that identifies major milestones;

3. the current scope of work being performed by staff and consultants;

4. a project cost breakdown related to all the alternatives being evaluated including:

a. Bus Rapid Transit (BRT)

b. Light Rail Transit (LRT)

c. surface freeway

d. underground tunnel

e. other options being considered

5. a report on consultant services and related costs to date; and

B. discontinue any technical ~~and public outreach~~ efforts until the Board receives a full report at the ~~March~~ February 2013 Board meeting.

99. APPROVED:

A. holding a public hearing on the proposed Resolution of Necessity; and

B. adopting the Resolution of Necessity authorizing the commencement of an **eminent domain action to acquire a full take on Parcel HS-2104 (APN 4015-019-005) for the Crenshaw LAX Transit Corridor Project.**

AN	JF	JH	ZY	PO	RK	MA	MRT	DD	DK	AV	GM	MW
A	A	Y	Y	Y	Y	Y	Y	Y	Y	A	A	Y

100. APPROVED:

A. holding a public hearing on the proposed Resolution of Necessity; and

B. adopting the Resolution of Necessity authorizing the commencement of an **eminent domain action to acquire a full take on Parcels HS-2102 and 2103 (APN 4015-019-002, 4015-019-003, 4015-019-004) for the Crenshaw LAX Transit Corridor Project**.

AN	JF	JH	ZY	PO	RK	MA	MRT	DD	DK	AV	GM	MW
A	A	Y	Y	Y	Y	Y	Y	Y	Y	A	A	Y

101. FAILED DUE TO CONFLICTS AND ABSENCES:

A. authorizing the Chief Executive Officer to **finalize negotiations with the recommended banks and enter into reimbursement agreements and related documents for direct-pay letters of credit**:

1. with Sumitomo Mitsui Banking Corporation ("Sumitomo") for a commitment amount of $75 million for a three-year term at an estimated cost of $1,135,000, including legal fees and other related expenses;

(Continued on next page)

NON-CONSENT CONTINUED:

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2. with Union Bank for a commitment amount of $75 million for a three-year term at an estimated cost of $1,130,000, including legal fees and other related expenses;

B. if unable to reach agreement with one or both of the recommended banks, authorizing the CEO to finalize negotiations with each successively ranked bank for agreements having three year terms and estimated costs; and

C. adopting a resolution that approves the selection of Sumitomo and Union Bank or successor(s), a form of the reimbursement agreement on file with the Board Secretary and makes certain benefit findings in compliance with the Government Code.

(REQUIRES SEPARATE, SIMPLE MAJORITY BOARD VOTE)

AN	JF	JH	ZY	PO	RK	MA	MRT	DD	DK	AV	GM	MW
A	A	C	Y	Y	Y	Y	C	Y	C	A	A	Y

102. APPROVED **YAROSLAVSKY MOTION** that this board direct Metro's counsel in conjunction with the CEO and the Inspector General/Ethics Officer, to amend the MTA Administrative Code, Board Member Code of Conduct and Employee Code of Conduct, and develop specific policies and procedures that define the allowable parameters of communications between the MTA CEO and Board members or their staff with regard to a pending procurement in order to protect the integrity and independence of MTA's procurement process; and

FURTHER that beginning immediately, the CEO be prohibited from discussing any procurements which are currently in its blackout period with any member of the Board or his/her staff until the proposed amendments to the Employee Code of Conduct are presented to the Board and acted upon.

AN	JF	JH	ZY	PO	RK	MA	MRT	DD	DK	AV	GM	MW
Y	Y	Y	Y	Y	Y	Y	Y	Y	Y	Y	Y	Y

103. DISCUSSED **Los Angeles County proposed Clean Water, Clean Beaches Measure**, impact to Metro and possible direction by the Board related to this measure.

AN	JF	JH	ZY	PO	RK	MA	MRT	DD	DK	AV	GM	MW
Y	Y	A	Y	Y	Y	Y	A	Y	Y	Y	A	Y

104. DISCUSSED the possibility of **purchasing new chairs for the MTA Board room and MTA Board Conference room**.

AN	JF	JH	ZY	PO	RK	MA	MRT	DD	DK	AV	GM	MW
Y	Y	A	A	Y	Y	Y	A	Y	Y	A	A	A

105. **CLOSED SESSION:**

A. Public Employee Performance Evaluation – G.C. 54957
Chief Executive Officer

NO REPORT.

B. Conference with Real Estate Negotiator – G.C. 54956.8
Property: Taylor Yards Parcel C, San Fernando Road, Los Angeles, CA
Agency Negotiators: Roger Moliere and Greg Angelo
Negotiating parties: Taylor Yards, LLC, a subsidiary of McCormack Baron Salazar, Inc.
Under negotiation: Price and terms of payment

NO REPORTABLE ACTION.

C. Conference with Legal Counsel – Existing Litigation – G.C. 54956.9(a)
Today's IV, Inc. (Bonaventure Hotel) v. LACMTA, Case No. BS139540

NO REPORT.

(Continued on next page)

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D. Conference with Legal Counsel – Anticipated Litigation- G.C. 54956.9(b)
Significant Exposure to Litigation (2 cases)

NO REPORT.

E. Conference with Legal Counsel – Anticipated Litigation- G.C. 54956.9(c)
Initiation of Litigation (1 case)

NO REPORT.

F. Conference Regarding Potential Threats to Public Services and Facilities - G.C. 54957:
While there may be no immediate threat, this is to provide the Board with a confidential update by Ruthe Holden, Chief Auditor, and Paul Taylor, Deputy Chief Executive Officer, on security related matters.

NO REPORT.

G. Conference with Labor Negotiator – G.C. 54957.6
Agency Representative: Richard Hunt
Employee Organizations: TCU, AFSCME

NO REPORT.

H. Conference with Labor Negotiator – G.C. 54957.6
Agency Representative: Don Ott
Employee Organizations: ATU, UTU, TCU

The Board voted to support legislative exemption from Public Employee Pension Reform Act (PEPRA) for transit workers' pension plans.

AN	JF	JH	ZY	PO	RK	MA	MRT	DD	DK	AV	GM	MW
A	A	A	A	Y	Y	Y	Y	Y	Y	A	A	Y

ADJOURNED at 2:30 p.m. in memory of Yolanda Louwers, daughter of Congressmember Grace Napolitano.

Prepared by: Collette Langston
Board Specialist

Michele Jackson, Board Secretary

Amalgamated Transit Union - Local 1277

Tel: (323) 222-1277
Fax: (323) 222-1335

1744 North Main St.
Los Angeles, California 90031-2517

January 29, 2013

Grievance

This is a grievance filed on behalf of the Union and all affected bargaining unit employees.

It has come to the attention of ATU Local 1277 that the LACMTA has not enrolled employees hired since 1/1/13 into the LACMTA - Maintenance Employees Pension Plan, the regular pension plan for our unit. These employees should be subject to all the terms and conditions of the pension plan.

This action violates the ATU 1277 - LACMTA Agreement as that agreement requires all employees to be covered fully by the plan.

The remedy sought is to cover fully those employees retroactive to their hire date and cover fully all employees hired hereafter.

As this is a LACMTA - wide problem, there is no need for a hearing before the Division Management. The Labor Relations office may provide the answer at Step 1. The Union will respond to a timely written response. If LACMTA feels a hearing is necessary, please contact James Lindsay at (213) 210-7352.

Thank you.

Sincerely,

James Lindsay
President/ Business Agent

AS:cs
opeiu/537
afl-cio, clc

January 29, 2013

VIA FACSIMILE & EMAIL

John Lund
Deputy Assistant Secretary
Office of Labor-Management Standards
U.S. Department of Labor
Room N5112
200 Constitution Avenue, NW
Washington, DC 20210

Re: **ATU, UTU AND TCU/IAM'S[1] FINAL PROPOSAL**
FTA Application
Los Angeles County Metropolitan Transportation Authority
(CA-95-X042) #2, (CA-04-0261), and (CA-04-0232) #1

Dear Mr. Lund:

In accordance with the DOL's December 6, 2012, ruling on the unions' objections to the employee protective terms for the above-cited pending Los Angeles County Metropolitan Transportation Authority ("LACMTA") grants, please find below the unions' final proposal with supporting statements to address the principal issue here – i.e., the 49 U.S.C. § 5333(b)(2)(B) requirement to continue the collective bargaining rights of employees over mandatory subjects in light of PEPRA.

To that end, the unions jointly propose that:

1) LACMTA agree that the same pension benefits provided to ATU-, UTU-, and TCU/IAM-represented employees hired after January 1, 2013, will be the same as those hired before January 1, 2013, (including part-time employees transitioning to full-time employees) so that the terms and conditions of the current pension plan will remain unchanged for all employees.

2) LACMTA agree to join the ATU, UTU, and TCU/IAM in supporting and seeking prompt enactment of an amendment to PEPRA that exempts transit workers' pension plans (including

[1] Although the DOL deadline for TCU/IAM to submit its final proposal is February 8, 2013, TCU/IAM voluntarily joins and adopts the ATU and UTU's negotiations schedule and deadline to submit final proposal to the DOL.

PERS, where applicable) from the provisions of PEPRA so that collective bargaining over pension/retirement benefits for all LACMTA employees represented the unions are fully restored by:

a) Sending a joint letter to the Governor of California, California Attorney General's Office, the California Secretary of Labor, the Senate President Pro Tem, and the Assembly Speaker urging immediate action to support the amendment; and
b) Sending a joint letter to the California Transit Association to request its support of the amendment.

It is our judgment that the above proposal is the only option to protect the process of collective bargaining over pension/retirement benefits for current and new employees of LACMTA as required by Section 13(c). Indeed, the DOL has already found that PEPRA presents circumstances that are inconsistent with 49 U.S.C. § 5333(b), as it removes mandatory and/or traditional subjects of bargaining.[2] Thus, absent a legislative amendment exempting transit workers' pension plans from PEPRA, the DOL simply cannot issue any certification (whether interim/provisional or final) here.

Moreover, the DOL previously stated that while it appreciates a transit agencies' willingness to address the limiting language of a state law that conflicts with Section 13(c) requirements through future negotiations, this expression of prospective intent does not satisfy current Section 13(c) obligations. See attached August 19, 2011, DOL ruling in connection with Battle Creek Transit System Grant (MI-90-X627), at pp. 2-3, and January 10, 2013, DOL ruling in connection with Sacramento Regional Transit District Grant (CA-03-0806) #3, p. 2, fn. 1 (finding that SRTD offer to bargain with the unions over the impacts of PEPRA does not necessarily obviate 49 U.S.C. § 5333(b)(2)(B) requirement to continue the collective bargaining rights of employees over mandatory subjects).

Despite the DOL's ruling, we have been informed that certain LACMTA drivers represented by UTU have already been affected by PEPRA. More specifically, LACMTA has failed to enroll certain part-time drivers that have been made full-time since January 1, 2013, in the LACMTA's pension plan as required by the applicable collective bargaining agreement. This unilateral implementation of PEPRA directly undermines federally protected collective bargaining rights and collective bargaining agreements and thus poses severe consequences to its continued eligibility to receive federal funds under Section 13(c).

Based on the foregoing, there is no basis for the DOL to issue a certification under 29 C.F.R. 215.3(h). Consistent with past DOL action, where circumstances exists that are inconsistent with 49 U.S.C. § 5333(b), the Department has withheld certification until such circumstances have been resolved. See attached September 13, 2012, DOL Ruling in connection with City of Kalamazoo Grant (MI-90-X651), at p. 2. In sum, there is simply no procedure or mechanism that can be agreed upon by the parties to continue collective bargaining rights over all mandatory

[2] The unions hereby incorporate herein by reference our objections filed on November 20, 2012, and December 7, 2012 by ATU; on November 20, 2012, and December 14, 2012 by UTU; and on January 4, 2013, by TCU/IAM.

and/or traditional subjects of bargaining and overcome the limitations imposed by PEPRA on such rights.

We therefore request the DOL to issue its final ruling and find that Federal transit law does not permit the Secretary of Labor to certify LACMTA's employee protection agreements because represented employees here previously enjoyed collective bargaining rights but those rights have been subsequently diminished or eliminated altogether as a result of the enactment of PEPRA.

Sincerely,

Jessica M. Chu
Counsel for ATU

Erika Diehl
Counsel for UTU

Carla Siegel /JMC
Carla Siegel
Counsel for TCU/IAM

Attachments

yre

c: J. Lindsay, Local 1277
B. Lunch, Esq.
B. Broad, Esq.
W. Flynn, Esq.
A. Comer, DOL
J. Marchant, DOL
G. Woodman, Esq.
N. De Castro, LACMTA

AMALGAMATED TRANSIT UNION

5025 WISCONSIN AVE., N.W. WASHINGTON, D.C. 20016-4139
(202) 537-1645 FAX (202) 244-7824

February 5, 2013

VIA FACSIMILE

John Lund
Deputy Assistant Secretary
Office of Labor-Management Standards
U.S. Department of Labor
Room N5112
200 Constitution Avenue, NW
Washington, DC 20210

Re: **OBJECTIONS TO REFERRAL TERMS**
FTA Application
Los Angeles County Metropolitan Transportation Authority
Additional Funding for Preventive Maintenance Costs
(CA-90-Y717) #7

Dear Mr. Lund:

The undersigned writes on behalf of, and as special "Section 13(c)" counsel for, Local 1277 which represent certain LACMTA employees in response to a February 1, 2013, electronic communication from the Office of Labor-Management Standards. More specifically, we here address the employee protections which are to be applied in connection with the above-referenced pending grant application pursuant to the labor requirements of the Federal Public Transportation Act, 49 U.S.C. §5333(b).

As you are aware, the ATU recently filed objections – which are hereby incorporated herein – to the DOL referral terms for LACMTA Grant (CA-95-X042) #2 based on the enactment of the Public Employees' Pension Reform Act of 2013, AB340 (Furutani), Stats. 2012, Chapter 296 ("PERPA"), which will apply to LACMTA's pension plan on and after January 1, 2013. The DOL subsequently found in its December 6, 2012, initial determination that the ATU's objections presented a "change in legal or factual circumstances that may materially affect the rights or interests of employees." We therefore request that the DOL consolidate its handling of this grant with the above-referenced FTA grant because the issues involved are all indistinguishable. See the DOL's December 28, 2012, Response to Objections in connection with LACMTA Grants (CA-04-0261) and (CA-04-0232)#1.

* * *

If the Department of Labor should determine it needs further detail in order to make a determination as to the validity of the foregoing objections, please provide us with prompt written notice of the information desired. Otherwise, we will look forward to notification as to the "status of [our] objections" by no later than Friday, March 1, 2013. See February 1, 2013, referral at p. 2.

Sincerely,

Jessica M. Chu
Associate General Counsel

mk

c: N. Silver, Local 1277
W. McLean, ATU
A. Withington, ATU
N. De Castro, LACMTA
G. Woodman, Esq.
B. Lunch, Esq.
W. Flynn, Esq.
B. Broad, Esq.
C. Siegal, Esq.
P. Knupp, Esq.
E. Diehl, Esq.
A. Comer, DOL
J. Marchant, DOL

COUNTY OF LOS ANGELES
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JOHN F. KRATTLI
County Counsel

February 13, 2013

J. Douglas Marchant
Project Representative
Division of Statutory Programs
Department of Labor
200 Constitution Avenue, N.W.
Washington, D.C. 20210

Re: Los Angeles County Metropolitan Transportation Authority
FTA Applications
CA-04-0261
CA-04-0232-01
CA-95-X042-02
CA-90-Y717-07

Dear Mr. Marchant:

As in-house counsel who advises the Los Angeles County Metropolitan Transportation Authority (MTA) and its management trustees on pension matters, I would like to share with you the legal bases for our opinion that the California Public Employees' Pension Reform Act of 2013 (PEPRA) does not extinguish pension benefits under existing MTA-Union collective bargaining agreements, nor does PEPRA discontinue MTA's statutory duty to collectively bargain with its unions on all mandatory subjects of bargaining, including retirement benefits.

MTA Enabling Law

MTA was created by statute in 1993 to become the single successor to the Los Angeles County Transportation Commission (LACTC), a county transportation commission, and the Southern California Rapid Transit District (SCRTD), a transit district.[1] The Legislature gave MTA all the powers, duties,

[1] Cal. Public Utilities Code § 130050.2: "There is hereby created the Los Angeles County Metropolitan Transportation Authority. The authority shall be the single successor agency

rights and obligations of its predecessors, LACTC and SCRTD. To ensure that MTA inherited all the attributes of its predecessors, the Legislature directed that "MTA" would be substituted in place of "LACTC" or "RTD", wherever these terms appear in law.[2] And, specifically with regard to labor obligations, MTA's enabling law expressly states that:

> "Notwithstanding any other provision of law, the Los Angeles County Metropolitan Transportation Authority shall assume the duties, obligations, and liabilities of the Southern California Rapid Transit District, including those duties, obligations, and liabilities arising from or relating to collective bargaining agreements or labor organizations imposed by state or federal law . . ."[3]

RTD's enabling law, applicable to MTA through section 130051.14, imposes obligations on MTA to bargain with its unions with regard to pension benefits. Section 30750(a) mandates that MTA "bargain in good faith and make all reasonable efforts to reach agreement on the terms of a written contract governing wages, hours, and working conditions. Pensions are considered a form of wages, and MTA law mandates that "[t]he adoption, terms, and conditions of the retirement systems covering employees of the MTA in a bargaining unit represented by a labor organization shall be pursuant to a collective bargaining agreement between such labor organization and the MTA."[4]

When considering PEPRA's impacts on MTA's unions, it is important to recognize that **MTA's statutory obligation to engage in collective bargaining cannot be limited or restricted by any other law**:

> "The obligation of the MTA to bargain in good faith with a duly designated or certified labor organization and to execute a written collective bargaining agreement with that labor organization covering the

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(...continued)
to the Southern California Rapid Transit District and the Los Angeles County Transportation Commission . . ."

Unless otherwise noted, all further statutory references shall refer to the California Public Utilities Code.

[2] Sections 130051.13; and 130051.14.

[3] Section 130051.16.

[4] Section 30451.

wages, hours, and working conditions of the employees represented by that labor organization in an appropriate unit, and to comply with the terms of that collective bargaining agreement, *shall not be limited or restricted by any other provision of law.* The obligation of the MTA to bargain collectively shall extend to all subjects of collective bargaining . . ."[5] (emphasis added.)

MTA also has the statutory authority to perform any acts necessary to accept federal aid:

"The MTA may accept contributions or loans from the United States . . . for the purpose of financing the acquisition, construction, development, joint development, maintenance, and operation of transit facilities . . . in accordance with any legislation which Congress may have adopted . . . under which aid, assistance, and cooperation may be furnished by the United States. . . *The MTA may do any and all things necessary . . . in order to avail itself of the aid, assistance, and cooperation under any federal legislation now or hereafter enacted. . .*"[6] (emphasis added.)

PEPRA Does Not Restrict or Limit MTA's Collective Bargaining Obligations

The level of pension benefits for current employees is a form of wages and falls within a union's scope of representation under labor laws applicable to MTA. Thus, to the extent MTA has discretion over new pension benefits for new employees and other requirements relating to current employees' pension benefits, MTA must negotiate over the areas within its discretion. *San Mateo City School Dist. v. Public Employment Relations Bd.* (1983) 33 Cal.3d 850, 864-865.

With regard to the pension benefits acquired through collective bargaining by MTA's current employees, nothing in the new pension reform law requires or authorizes MTA to take such benefits away unilaterally. Thus, for the most part, plan benefits in effect on December 31, 2012 for members as of that date are not affected by PEPRA. Existing employees keep the same retirement benefits they have under their existing retirement plans as of December 31, 2012. There is no change required for the defined benefit plan formula, use of 12 months (in the case of ATU members; 36 months for UTU and TCU members) to determine

[5] Section 30750(c).

[6] Section 30701.

final average compensation, the amount of compensation that may be taken into account or early retirement factors.

In fact, a number of changes that *enhance* benefits may continue to be collectively bargained for existing members. For example, PEPRA clearly allows enhancements as long as they are for future service.[7] Moreover, while there is a limit on establishing new supplemental *defined benefit* plans after 2012 that would provide additional retirement benefits, there is no limit on establishing supplemental *defined contribution* plans.

Most of PEPRA's provisions apply to new members who join a public retirement system for the first time on or after January 1, 2013. With few exceptions, every public employer that provides a defined benefit plan must provide a plan to new members that has a prescribed formula. The general member formula is 2% @ 62[8] with specific reductions for earlier retirement and increased for later retirements up to 2.5% @ 67.[9] Employers and unions that start with a higher formula may keep the higher formula for existing employees or agree to a lower formula plan, but lower benefits for existing employees cannot be imposed by impasse.

Notwithstanding the 2% @ 62 benefit formula for new employees stated in PEPRA, the new law permits a retirement system to use its existing formula or an alternative formula as long as the formula results in no greater risk or cost to the employer than the defined benefit formula required by PEPRA.[10] The actuaries for MTA's pension plans have developed alternative benefit formulas for new employees that have no greater risk and no greater cost than the defined benefit formula prescribed by PEPRA, but the unions have thus far declined to negotiate an alternative formula for new members.

Even with these new limits on defined benefit plans for new employees, there continue to be opportunities for the MTA and its unions to negotiate

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[7] Government Code 7522.44.

[8] A "2% @ 62" formula refers to the standard type of benefit formula in public retirement systems which determines the benefit available to the member (without any actuarial reduction) at retirement by multiplying a stated percentage (2%) of the member's final average compensation (for new members, over no fewer than 36 months) at a stated age (62), which is multiplied by the member's years of service credit.

[9] Government Code 7522.20.

[10] Section 7522.02(d).

substantially higher retirement benefits through supplemental defined contribution plans. Under current tax laws, MTA's defined contribution plans can receive *annual* contributions of up to *$51,000* per participant, an amount well in excess of what would be needed to restore new employees' retirement benefits that may be capped by PEPRA. Especially for younger employees, this level of contributions can provide a very high final retirement benefit, far better than a high formula defined benefit plan. Thus, notwithstanding PEPRA, MTA retains the ability to negotiate supplemental defined contribution plans which may be used in work-arounds to the defined plan limits for new employees.

For existing members in MTA's pension plans, there are no provisions in PEPRA for cost sharing. Cost sharing for existing union members will continue to be governed by the terms of each collectively bargained plan. MTA's ability to require current employees to make pension contributions has not changed under PEPRA. Because PEPRA is long (60 pages) and complex, there are misconceptions regarding the scope and breadth of some of its provisions. For example, MTA's unions may believe that PEPRA allows MTA to require that current employees pay 50% of normal cost of benefits beginning in 2018. However, the unions would be mistaken if they believe that MTA can unilaterally impose mandatory cost-sharing for current employees outside of the collective bargaining process. Nothing in PEPRA authorizes MTA to require current employees to pay 50% of their total annual pension cost, beginning in 2018.[11] Consistent with traditional principles of collective bargaining and its statutory mandates, MTA may continue to negotiate employee contributions to fund its pension plans on a sound actuarial basis.

New members must pay at least 50% of the normal cost of their defined benefit plan effective January 1, 2013 or the date their current collective bargaining agreement expires, whichever is later. Of course, any impacts of mandatory cost sharing for new members can be fully mitigated through negotiations for supplemental defined contribution plans.

As of January 1, 2013, PEPRA prohibits the purchase of "airtime", but MTA's pension plans do not provide employees the opportunity to purchase airtime. The unions have never expressed an interest in airtime or attempted to negotiate airtime for their members. Regardless of any theoretical impacts over the loss of potential airtime, the unions' ability to negotiate additional service

[11] Only PERS contracting agencies and school districts can unilaterally impose this cost-sharing requirement in 2018. MTA does not contract with PERS for retirement benefits.

credit for *qualified service*, such as prior government service and military service, remains unaffected by PEPRA.[12]

Notwithstanding PEPRA's mandates, MTA can continue to fulfill its collective bargaining obligations with its unions. Opportunities still exist for providing benefit enhancements for existing and new members, consistent with PEPRA. For current workers, PEPRA in no way affects their pension benefit formula, the employer and employee contributions to fund such benefits on a sound actuarial basis, or the need to collectively bargain any changes to the formula or contributions. In fact, PEPRA explicitly recognizes that if existing workers' pension rights are to be changed, that change must necessarily occur through collective bargaining and agreement of the parties.

MTA remains ready, willing and able to negotiate pension benefits and the limited impacts of PEPRA with its unions. Such negotiations could include discussions of: 1) optional benefits for existing employees and new members; 2) employer paid member contributions for existing employees; and 3) new defined contribution plans. PEPRA does not remove mandatory subjects of bargaining under California law from the collective bargaining process applicable to MTA. Therefore, we do not believe that PEPRA limts or restricts in any meaningful way, MTA's statutory obligations to collectively bargain with its unions on pension benefits, a traditional subject of collective bargaining.

Based on the continuing ability of the MTA to collectively bargain over pension benefits and issues consistent with 13(c), there is no basis to withhold interim certification of the pending grants. No circumstances exist as a factual and legal matter that warrant withholding certification within the meaning of section 215.3(h) of the Department's 13(c) Guidelines. Further, under the terms of an interim certification no action can be taken that would irreparably harm employees. MTA's existing collective bargaining agreements remain in place and the MTA has committed to bargain these issues and thus employee interests remain protected.

We appreciate your continuing analysis of this matter, and look forward to working with the Department of Labor to resolve the unions' 13(c) objections, so that MTA can continue to avail itself of FTA grants needed for the acquisition, construction, maintenance and operation of public transit facilities in the County of Los Angeles.

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[12] Government Code 7522.46.

Very truly yours,

JOHN F. KRATTLI
County Counsel

By Ronald W. Stamm
RONALD W. STAMM
Principal Deputy County Counsel
Transportation Division

RWS

c: John Lund, Deputy Assistant Secreatary, DOL
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Metro

EXECUTIVE MANAGEMENT COMMITTEE
FEBRUARY 21, 2013

SUBJECT: STATE LEGISLATION

ACTION: ADOPT STAFF RECOMMENDED POSITIONS

RECOMMENDATION

A) **AB 160 (Alejo)** –Would exempt from the Public Employees' Pension Reform Act (PEPRA), by exempting from the definition of public retirement system, employer plans whose employees' collective bargaining rights are protected by a specific provision of federal law. **NEUTRAL WORK WITH AUTHOR**

B) **SCA 4 (Liu) and SCA 8 (Corbett) –** Would provide that the imposition, extension, or increase of a special tax by a local government for the purpose of providing funding for transportation projects requires 55% approval. **SUPPORT**

ATTACHMENTS

A. AB 160 (Alejo) Legislative Analysis
B. SCA 4 (Liu) and SCA 8 (Corbett) Legislative Analysis

Prepared by: Michael Turner, State Affairs Director (213.922.2122)
Marisa Yeager, Federal and State Affairs Manager
Desarae Jones, Assistant Administrative Analyst

Paul C. Taylor
Deputy Chief Executive Officer

Arthur T. Leahy
Chief Executive Officer

ATTACHMENT A

BILL: **AB 160**

AUTHOR: **ASSEMBLYMEMBER LUIS ALEJO (D-SALINAS)**

SUBJECT: **PUBLIC EMPLOYEES' PENSION REFORM ACT (PEPRA)**

STATUS: **ASSEMBLY PUBLIC EMPLOYEES, RETIREMENT AND SOCIAL SECURITY**

POSITION: **NEUTRAL WORK WITH AUTHOR**

RECOMMENDATION

Staff recommends that the Board adopt a neutral work with author position on AB 160 which exempts represented public transit employees from PEPRA.

ISSUE

Last year the State adopted PEPRA. Since that time, labor unions representing certain public transit employees have asserted to the United States Department of Labor (DOL) that PEPRA impairs pension benefits contained in existing collective bargaining agreements and restricts collective bargaining rights, in violation of the protections in Section 13(c) of the Federal Transit Act. Before federal transit funds can be disbursed, the DOL must certify that grant recipients are compliant with Section 13(c) and has withheld certification of grants to California transit agencies. DOL is currently withholding certification of $33 million in federal grants requested by Metro.

PROVISIONS

PEPRA modified the pension plan requirements that may be offered by various government entities. Included in these reforms were provisions affecting benefit formulas, the definition of what comprises pensionable earnings, limits on pensionable earnings, and other matters. PEPRA also calls for new members to pay 50% of the normal cost of benefits and strengthens the rules involving pension forfeiture for public employees and elected officials who commit job-related felonies. Although most PEPRA provisions affect new employees, a few sections apply to current employees, such as the elimination of "airtime", new rules for retirees returning to public employment, and pension forfeiture for felons.

AB 160 would:

- Exempt represented public transit employees from PEPRA by exempting any group of employees that are protected under Section 13(c) of the Federal Transit Act.

DISCUSSION

Labor unions representing public transit employees in California have objected to the grant applications of various transit agencies by asserting that PEPRA violates their federally protected bargaining rights. The DOL has withheld certification of grants to agencies including, the Orange County Transportation Authority, Sacramento Regional Transit District, Monterey Salinas Transit and Metro, amongst others. Metro currently has $33 million in grants where the certification is being withheld because of unions' Section 13(c) objections. During 2013 we intend to apply for almost $500 million in grants which could be implicated by this dispute.

The following outlines the general arguments for and against the bill. Since these matters are pending legal review at DOL, this is a summary of the general arguments offered by labor unions and transit agencies and is not meant to be an exhaustive legal review of the issues.

The labor unions representing public transit employees argue that PEPRA violates their federally protected bargaining rights by reducing benefits without collective bargaining. They assert that provisions such as increased contributions by employees cannot be mandated by state law and must be bargained according to federal law. They further argue that since PEPRA violates federal law, federal transit funds cannot flow to California transit agencies.

Transit agencies have argued that PEPRA does not violate federal law because collective bargaining can still take place. Transit agencies further assert that no employees have been harmed by PEPRA since the provisions apply to new employees hired after Jan. 1, 2013. Since these employees had no benefits prior to January 1, 2013 their benefits have not been reduced. Transit agencies further argue that since collective bargaining may still take place, there is no violation of federal law so DOL should certify grants to California transit agencies.

Fundamentally the conflict arises due to the enactment of PEPRA by the state, which labor unions assert violates federal law. Transit agencies are caught in this dispute by virtue of FTA grants being withheld. Transit agencies believe that pension benefits can continue to be bargained. However transit agencies are not empowered to resolve an issue or dispute between state and federal law. While transit agencies around the state have continued to argue that PEPRA does not violate federal law these arguments have not resolved the conflict. Staff therefore believes that this is fundamentally a conflict caused by a law enacted by the state and is therefore an issue that should be resolved by the state. Clearly local transit agencies have significant risk due to this conflict such as the $500 million in funding for Los Angeles County transportation projects. We will continue to work with both the DOL and the State of California to pursue some resolution of the dispute.

DETERMINATION OF SAFETY IMPACT

Staff has reviewed this proposal and has determined that the legislation will not have an impact on safety.

FINANCIAL IMPACT

At this time Metro has $33 million in grants pending in the federal process. Throughout 2013 Metro intends to apply for approximately $500 million in federal grants which could be withheld if this issue is not resolved.

PEPRA could provide some long-term savings to the agency, primarily due to the mandatory contributions for new employees required by the Act.

ALTERNATIVES CONSIDERED

Staff considered supporting the legislation on the premise that it might provide a path for DOL to provide an interim certification. DOL has communicated that they do not believe that Metro's support for a pending piece of legislation would allow DOL to certify our grants. Supporting the legislation could also reduce the long-term savings that could be achieved through PEPRA.

NEXT STEPS

Staff will continue to work with both the DOL and State Department of Labor as well as with the Legislature and Administration to urge a prompt resolution to this issue.

ATTACHMENT B

BILL: **SCA 4 and SCA 8**

AUTHOR: **SENATOR CAROL LIU (D-PASADENA)**

SENATE MAJORITY LEADER ELLEN M. CORBETT (D-SAN LEANDRO)

SUBJECT: **LOWER VOTE THRESHOLD FOR SPECIAL TRANSPORTATION SALES TAX MEASURES**

STATUS: **SENATE**

ACTION: **SUPPORT**

RECOMMENDATION

Staff recommends that the Board approve a SUPPORT position on SCA 4 and SCA 8, which would authorize a local government to impose a sales tax exclusively for transportation improvements upon approval of 55 percent of the voters of the local government, rather than the current 2/3rds vote requirement.

ISSUE

Article XIIIC of the California Constitution is the overriding statutory authority for voter approval of local taxes. Approval thresholds for state and local taxes, fees, bonds, and other revenues are generally either by 2/3's or majority approval of either/or the respective governing body and the voters of the jurisdiction proposing to impose.

PROVISIONS

SCA 4 and SCA 8 are identical measures which would:

- Amend California State Constitution to provide that the imposition, extension, or increase of a special tax by a local government for the purpose of funding transportation projects requires a 55 % approval of voters voting on the proposition;

DISCUSSION

California's transportation system is largely reliant on local transportation sales taxes. There are 19 so called "Self-Help" sales tax counties (including Los Angeles County) in California, representing 85% of the state's population. A number of these 19 counties measures are facing the needed reauthorization of existing taxes by local voters as the impending sunset dates are approaching.

In 1995, the State Supreme Court ruled that these transportation taxes require a 2/3rds vote to be created, extended or increased. Most of these taxes are of limited duration and agencies have sought to extend them. While these taxes are supported by more than a majority of the votes the 2/3 threshold has sometimes been difficult to achieve.

The California Transportation Commission recently completed a statewide transportation needs assessment which identified almost $540 billion in needs over ten years throughout the state. However, only $242 billion in funding is available and 65% of that is from local sources. This reliance on local revenue sources is expected to increase as state and federal funding sources decline.

In the 2012 general election, Los Angeles County and Alameda County's transportation sales tax extension measures failed passage by narrow margins, less than 1%. This has caused transportation stakeholders in the state to discuss lowering the vote threshold for transportation sales tax measure. Senators Liu and Corbett have introduced these measures for the State legislature to consider this issue and upon approval of the legislature by a 2/3rds vote, would be placed before the California voters at the next regularly scheduled general election.

The Metro Board of Directors has previously voted to support if amended similar measures in 2003 with ACA 7 (Dutra) and SCA 2 (Torlakson). These measures would have reduced the voting requirement to a simple majority for sales taxes related to transportation.

The Legislature is also expected to consider other measures to lower the vote threshold for various other taxes. It is possible that the legislature may adopt a broader measure which lowers the vote threshold for other taxes as well. Staff recommends that the Board support these transportation specific measures. Staff will report back to the Board throughout the year as the discussions on vote threshold legislation continue.

SCA 8 supporters include the Silicon Valley leadership group, Self-Help Counties Coalition, California Transportation Commission, Transportation Agency for Monterey County and Metropolitan Transportation Commission. No opposition is known as of the date of this report's submission.

Staff recommends that the Board adopt a support position on SCA 4 and SCA 8.

DETERMINATION OF SAFETY IMPACT

Staff has reviewed the legislation and has found that its implementation would have no impact on safety at the agency.

FINANCIAL IMPACT

This legislation could have a financial benefit to the agency should the Board decide to place an extension of Measure R on the ballot in the future.

ALTERNATIVES CONSIDERED

Staff has considered adopting either a neutral or oppose position on the bill. An oppose position would be inconsistent with past Board positions and a neutral position would foreclose our ability to speak to an issue which could benefit our agency.

NEXT STEPS

Should the Board decide to adopt the support work with author position on SCA 4 and SCA 8, staff will work with the Senators to pursue passage of the legislation and continue to keep the Board informed as this issue is addressed throughout the legislative session.

Tuesday, March 12, 2013
130312-1

In this Issue:

Joint Letter to Acting U.S. Secretary of Labor Seth Harris

Joint Letter to Acting U.S. Secretary of Labor Seth Harris

Metro along with the Orange County Transportation Authority, the San Diego Metropolitan Transit System and Sacramento Regional Transit, sent a letter to Acting United States Secretary of Labor Seth D. Harris, urging the United States Department of Labor to release federal transit funding currently being withheld from public transit agencies in California. We will continue to keep you apprised as this issue continues to unfold. Should you have any questions, please do not hesitate to contact me.

http://libraryarchives.metro.net/DB_Attachments/130312_Letter_to_DOL.pdf

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March 8, 2013

Mr. Seth D. Harris
Acting Secretary of Labor
U.S. Department of Labor
200 Constitution Avenue, N.W.
Washington, D.C. 20210

Dear Acting Secretary Harris:

We are writing collectively to urge you to release federal transit funding currently being withheld by the Department of Labor (Department) from public transit agencies in California on the basis of alleged conflicts between Section 13(c) and the Public Employees' Pension Reform Act (PEPRA).

This dispute arose almost four months ago, triggered by organized labor's opposition to pension reforms enacted by the State Legislature in California. For our agencies alone, over $145 million in federal grant dollars are being blocked by this dispute—funds that are critically needed and that have been allocated to us by the Congress. If the Department continues to withhold grants to California, California transit agencies stand to lose $2 billion in transit assistance annually.

The Department is withholding this funding based on allegations by the unions that PEPRA violates transit agencies' Section 13(c) obligation to engage in collective bargaining over pension issues; it does not appear the Department has done any independent analysis of the law or the various fact situations presented. However, when this issue was analyzed in detail by the California Labor and Workforce Development Agency, that agency found no conflict between the requirements of PEPRA and 13(c) and determined that (a) PEPRA preserves the ability of current and future employees to engage in good faith bargaining, and (b) PEPRA does not permit employers to unilaterally determine and impose pension terms. See Letter from Secretary Marty Morgenstern to Acting Department Secretary Seth D. Harris, February 13, 2013. As stated in Secretary Morgenstern's letter: "My legal staff[1] and I have reviewed this matter carefully and concluded that PEPRA does not limit a local transit

[1] The Secretary's letter is accompanied by a detailed legal opinion by the agency's General Counsel, Mark Woo-Sam, that examines the history and purpose of Section 13(c) (including Federal case law) and the specific changes to state pension law made by PEPRA, and concludes that PEPRA protects the rights of employees to bargain collectively over pension issues and is "fully consistent" with the requirements of Section 13(c).

authority's ability to bargain or to enter into fair and equitable protective agreements or arrangements to satisfy 13(c)."

Furthermore, each of the transit agencies signatory hereto has determined that it has the legal authority to bargain collectively over pension issues, following the enactment of PEPRA, and that it is willing and able to engage in that collective bargaining with the affected unions. Bargaining over pension issues and compliance with PEPRA are not mutually exclusive endeavors.

Despite all of this, we find ourselves still waiting for critical grant funds, and unfortunately, we see no indication that the Department has a plan or timetable for addressing this issue. The Department has failed to meet its own guidelines regarding the process and timing for the resolution of 13(c) certification disputes. With all due respect, this is simply not acceptable. Our public transit agencies need these federal funds to buy rolling stock and equipment, to build and rehabilitate facilities, to pay transit workers, to maintain existing jobs and create new employment opportunities, and to do the day-to-day maintenance activities that are essential for public safety. To deny us these funds has a direct and immediate impact on public transit and on transit dependent riders. Due to the significant lead time required for transit agencies to make service changes in response to budget cuts, the continued delay and threats to this funding source will require California transit agencies to begin the service-cut planning and public hearing process within the next 30 days. This will include analyzing what routes and employee positions will be impacted and/or eliminated due to the loss of funding.

In the larger picture, the State of California, finally showing signs of economic recovery, needs these funds to foster infrastructure development and economic development and growth. We share with the Administration and the Department of Labor the desire to create jobs and improve economic conditions. The financial resources to transit agencies in California represented by these grants are essential to that economic recovery.

The only solution to this dilemma that has been offered by the labor unions is to change State law, a change that is not only legally unnecessary but has also gone from being uncertain to being unlikely. Moreover, for a Federal Department to dictate such a change would be to effectively override a state legislative decision on how best to manage and control public pension costs in the state -- costs that are borne by the State and by local entities, not by the Federal Government.

We urge you to resolve this issue and allow this critical transit funding to be released.

Sincerely,

Arthur T. Leahy
Chief Executive Officer
Los Angeles County Metropolitan Transportation Authority

Darrell Johnson
Chief Executive Officer
Orange County Transportation Authority

Paul C. Jablonski
Chief Executive Officer
San Diego Metropolitan Transit System

Michael R. Wiley
General Manager/CEO
Sacramento Regional Transit District

c: California Congressional Delegation
The Honorable Ray LaHood, Secretary of Transportation
Peter Rogoff, FTA Administrator
John Lund, Deputy Assistant Secretary, DOL

AMALGAMATED TRANSIT UNION

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March 14, 2013

VIA FACSIMILE & EMAIL

John Lund
Deputy Assistant Secretary
Office of Labor-Management Standards
U.S. Department of Labor
Room N5112
200 Constitution Avenue, NW
Washington, DC 20210

Dear Mr. Lund:

We are writing to respond to the California Labor Agency's legal analysis regarding the interplay between AB 340 and labor requirements of the Federal Public Transportation Act, 49 U.S.C. §5333(b), commonly referred to as Section 13(c). Attached hereto is a Memorandum of Position.

The California Labor Agency's conclusion that PEPRA's provisions allow for the "continuation of collective bargaining rights", as protected by Section 13(c), is not supported by the controlling law and contrary to the Department of Labor's (DOL) established policies and precedents in comparable cases.

The legislative purpose of PEPRA is not at issue here; rather, at issue is whether the clear diminution of the continuing right to bargain over mandatory and/or traditional subjects prevents California transit agencies from meeting and complying with the statutorily required employee protection requirements. Where, as here, collective bargaining rights have been impaired by state law, those states were compelled to expressly exempt transit agencies from coverage under those state laws (WI), amend their statutes to cure the underlying curtailment of bargaining rights (GA, MA), and secure permitted waivers (MI) to ensure that their states' transit grantees were able to satisfy Section 13(c)'s requirements as a condition of receiving federal transit funds.

If California does not follow suit and exempt Section 13(c)-protected transit employees from PEPRA's reach, California transit agencies' eligibility for continued federal funding is imperiled. As the law went into effect on January 1, 2013, even transit districts/agencies which understand the tension between the state and the federal laws find themselves between a rock and a hard place.

The California Labor Agency analysis misunderstands the meaning of "the continuation of collective bargaining rights" within the context of Section 13(c). Notably, the continuation of collective bargaining rights does *not* mean that collective bargaining rights are *generally* preserved or that the ability to "bargain around" or "bargain alternatives" to pension benefits is

preserved. Indeed, what the California Secretary of Labor describes as remaining in the wake of PEPRA is no more than "effects" bargaining; effects bargaining traditionally is all that remains when a subject is removed from substantive consideration (*e.g.*, the effects of the implementation of a management right with regard to a reorganization or other exercise of management right). Contrary to the California Labor Secretary's suggestion, the collective bargaining rights do not have to be entirely extinguished to abridge Section 13(c); the *diminution* of existing collective bargaining rights offends Section 13(c)'s protections as well. *Donovan v. Amalgamated Transit Union*, 767 F.2d 939, 947-949 (D.C. Cir. 1985).

The California Labor Secretary suggests that there is "no authority" that state law which modifies benefit levels, and accordingly impairs the scope of bargaining, "is incompatible with the letter or spirit of Section 13(c)." (CA Labor Department Memo, at 2.) Simply stated, the California Labor Agency found "no authority" because it either missed or ignored the entire body of controlling law. Rather than a dearth of authority, decades of consistent U.S. Department of Labor rulings since the mid 1980's provide the controlling precedent and practice with regard to the issues raised in the ATU's and various other unions' objections following the enactment of PEPRA and Section 13(c) requirements. As our accompanying memorandum addresses in detail, the collected body of DOL rulings in this area provide the "missing" law, and lead to the inexorable conclusion that PEPRA, which sets pension benefit levels and essentially preempts any meaningful bargaining over public sector pensions, eliminates or diminishes traditional collective bargaining rights so as to violate Section 13(c)'s protections.

While PEPRA's provisions might be unique to California, state laws which impair existing collective bargaining rights by setting benefit levels or curtailing the right to bargain in certain areas are legion. Accordingly, the DOL has had the opportunity to weigh in – and has denied issuing certification(s) of protective labor conditions – where other states imposed similar legislative mandates. Thus, as set out more fully in our accompanying memorandum, the DOL consistently found that state laws which diminish collective bargaining rights as in Georgia, Michigan, Wisconsin, New Jersey, and Massachusetts, among other states, ran afoul of Section 13(c) obligations.

Likewise, the suggested remedy here (an amendment to PEPRA exempting transit employees protected by Section 13(c) from PEPRA's provisions), is not new or unique. As addressed in detail in our accompanying memorandum, a legislative remedy – effectively exempting transit employees from the offending statute – was achieved in each of the states. Indeed, the *Donovan* decision itself resulted in an amendment to the MARTA enabling statute in Georgia restablishing the right to bargain over previously restricted mandatory subjects. And, in jurisdictions such as Kalamazoo, Michigan, where the transit employer chose not to secure a permitted exemption afforded by the state statute, DOL withheld its certification of the then-pending grant.

As the accompanying legal memorandum demonstrates, the formidable body of DOL rulings and case precedents in this area support our analysis. In this regard, in connection with all post PEPRA grants, we reiterate that the DOL has already found that PEPRA "appears to have removed mandatory and/or traditional subjects of collective bargaining from the consideration of the parties and may prevent [transit systems in California] from continuing the collective

bargaining rights of employees, as required by Section 13(c)(2) of the Federal Transit Act". *See* DOL's Multiple Responses to Objections from California Grantees, as cited in our accompanying memorandum.

While this pending matter may place a financial burden on the affected California agencies, the overriding obligation of the Department is to fully and properly apply and enforce the federal protections long afforded to our nation's 200,000 transit workers.

Thank you for your consideration of these important issues. I stand ready to respond to any questions you may have or requests for additional information.

Sincerely,

Robert A. Molofsky (DBS)

Robert A. Molofsky
General Counsel to ATU

Enclosure

yre/1

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Victor Guerra, President/Business Agent, ATU Local 256
Loretta Springer, President/Business Agent, ATU Local 265
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MEMORANDUM

TO: Interested Parties

FROM: Jessica Chu, Associate General Counsel (CDBS)
Robert Molofsky, General Counsel to ATU RAM (CDBS)

DATE: March 14, 2013

SUBJECT: ATU Position on PEPRA'S Adverse Impact on Collective Bargaining Rights Protected by Section 13(c)

Introduction

This is in response to the California Labor Agency and Workforce Development Agency's ("CA Labor Agency") legal memorandum setting forth its position on California transit agencies' ability to comply with Section 13(c) requirements following the passage of PEPRA. Contrary to CA Labor Agency's conclusion, ATU submits that the controlling law, DOL policy and precedent compels an outcome that renders California transit agencies ineligible for federal transit funds as a result of PEPRA's adverse effect on collective bargaining rights of transit employees protected under Section 13(c).

Issues Presented

The pertinent issue here is whether the clear diminution of collective bargaining rights under PEPRA over mandatory and/or traditional subjects prevents California transit agencies from complying with Section 13(c). Any analysis must be measured against the standard developed in *Amalgamated Transit Union v. Donovan,* 767 F.2d 939, 947 (D.C. Cir. 1975) and as consistently applied by the DOL since *Donovan*. Mainly, DOL has repeatedly stated that it is well established that "Federal transit law does not permit the Secretary of Labor to certify a grantee's employee protection agreements ***where workers previously enjoyed collective bargaining rights but those rights were subsequently diminished or eliminated altogether by state law.***"[1]

The CA Labor Agency, while not disagreeing that PEPRA removes certain mandatory subject matters from bargaining, nevertheless argues that California state agencies retain sufficient ability to engage in collective bargaining and therefore can continue to comply with Section 13(c) requirements. This position taken by the CA Labor Agency, however, is not supported by controlling law and well established DOL policy and precedent.

At the onset, we set forth two guiding principles which have long controlled DOL's action and analysis when faced with state laws that adversely affect collective bargaining rights. First, the purpose of Section 13(c)(1) and (2) is to preserve rights, privileges and benefits under existing

[1] *See e.g.*, DOL's September 8, 2011, Response to Objections in connection with Suburban Mobility Authority for Regional Transportation Grants (MI-37-X043) #3, (MI-90-X756) #1, and (MI-90-X758) #1; DOL's August 29, 2011, Response to Objections in connection with New Jersey Transit Corporation Grant (NJ-05-0027) #1; DOL's July 29, 2011, Response to Objections in connection with City of Eau Claire (WI-04-0048).

collective bargaining agreements and protect those rights from being unilaterally altered. *See e.g.*, DOL's May 20, 2011, Final Response to Objections in connection with Capital Area Transportation Authority (MI-95-X065). Second, "Federal transit law, in particular 49 U.S.C. 5333(b)(2)(A) and (B) prohibits the Secretary of Labor from certifying a grantee's employee protection agreements where workers previously enjoyed collective bargaining rights but those rights were subsequently diminished or eliminated altogether" by state law. *Id.*

Background on PEPRA

By way of background, on September 12, 2012, California Governor Brown signed the Public Employees' Pension Reform Act of 2013, AB 340 (Furutani), Stats. 2012, Chapter 296 ("PEPRA") which became effective on January 1, 2013, and applies to most transit workers' public pension plans. Among other mandates, the new Pension Reform law requires covered employers to unilaterally implement changes to retirement benefits without first bargaining with their employee representative(s) by:

- Raising the minimum retirement ages;
- Reducing pension benefits for new public employees;
- Imposing new formulas for calculating pensions for new public employees;
- Imposing a definition of "final compensation";
- Fixing the vesting schedule; and
- Adjusting the compensation cap annually and requiring certain contributions from employees to equal to one-half of the normal costs of the plan.

ATU Objections

Following the passage of PEPRA, the ATU has registered objections pursuant to 29 C.F.R. Part 215.3 with the DOL in connection with its Section 13(c) certification processing of grants submitted by various California transit agencies on the basis that PEPRA has stripped ATU and other unions representing transit employees of the right to negotiate over critical aspects of their pension benefits in violation of Section 13(c).[2] In sum, various California ATU locals and transit agencies, under PEPRA, can *no longer negotiate* (among others) the benefit formula, definition of final compensation, applicability of the formula to past and/or future service, the employer pick-up, or other benefit features, which effectively diminishes and/or eliminates collective bargaining relative to these core subjects of retirement benefits that are inherently connected to other retirement benefit features.

In response to our objections, the DOL has already determined that PEPRA constitutes a change in legal or factual circumstances that may materially affect the rights or interests of employees represented by the ATU. *See* 29 C.F.R. 215.3(d)(3)(ii). In fact, the DOL has

[2] *See e.g.* ATU's objections to the DOL's referral for Los Angeles County Metropolitan Transit Authority Grants (CA-04-0261), (CA-04-0232) #1, (CA-95-X042) #2, and (CA-90-Y717) #7; ATU's objections to the DOL's referral for Monterey-Salinas Transit Grant (CA-90-Z022); ATU's objections to DOL's referral for Sacramento Regional Transit District (CA-03-0806) #2; ATU's objections to DOL's referral for San Diego Metropolitan Transit System Grant (CA-04-0267); ATU's objections to Alameda-Contra Costa Transit District (CA-95-X021); ATU's objections to DOL's referral for San Francisco Bay Area Rapid Transit District Grant (CA-04-0212); ATU's objections to DOL's referral for Riverside Transit Agency (CA-90-Z034); and ATU's objections to DOL's referral for Santa Clara Valley Transportation Authority (CA-95-X149).

concluded that the state law appears to have removed mandatory and/or traditional subjects of collective bargaining from the consideration of the parties and may prevent California transit agencies from continuing the collective bargaining rights of employees, as required by Section 13(c)(2) of the Federal Transit Act, codified as 49 U.S.C. 5333(b)(2)(B).[3] Further, DOL has repeatedly stated that it is well established that Federal transit law does not permit the Secretary of Labor to certify a grantee's employee protection agreements ***where workers previously enjoyed collective bargaining rights but those rights were subsequently diminished or eliminated altogether by state law.***[4]

For the reasons explained below, the CA Labor Agency's submission to the DOL fails to provide any basis which would warrant the DOL reaching a different conclusion today and therefore its arguments should be rejected outright.

I. PEPRA removes and/or diminishes collective bargaining over pension benefit levels in violation of Section 13(c)'s mandate to assure the continuation of collective bargaining rights.

The CA Labor Agency asserts that PEPRA merely modifies one aspect of a public employer's authority over compensation and imposes reasonable conditions on employers in offering defined pensions but does not impose any limitation on the full opportunity for good faith negotiations over employee compensation. In making such an assertion, the Agency overlooks the legislative history of Section 13(c), misreads and misapplies applicable case law, and wholly ignores the DOL's well established policy and precedent.

A. The legislative history of Section 13(c) of the Urban Mass Transportation Act unambiguously demonstrates that the Congressional intent of the Act is to require transit agencies to assure the continuation of collective bargaining rights – not merely aspire to achieve a goal of assuring collective bargaining rights.

As an initial matter, although the CA Labor Agency frames Section 13(c) to merely require a transit agency to "achieve a goal" of assuring a continued right to collective bargaining, this contention is premised on a flawed interpretation of Section 13(c) and is inconsistent with the statute's legislative history. In fact, as originally drafted, Section 13(c) would have only "encouraged" the continuation of collective bargaining rights. See H.R. REP. No. 204, 88th Cong., 1st Sess. 20 (1963). This standard, however, was deemed to be too vague and afforded

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[3] *See e.g.* DOL's February 8, 2013, Response to Objections in connection with AC Transit Grant (CA-95-X021); DOL's December 6, 2012, Response to Objections in connection with LACMTA Grant (CA-95-X042) #2; DOL's February 5, 2013, Response to Objections in connection with Monterey-Salinas Transit Grant (CA-03-0823); DOL's January 10, 2013, Response to Objections in connection with Sacramento Regional Transit District Grant (CA-03-0806) #3; DOL's February 13, 2013, Response to Objections in connection with San Diego Metropolitan Transit System/Metropolitan Transit Development Board Grant (CA-04-0267).

[4] *See e.g.* DOL's September 8, 2011, Response to Objections in connection with Suburban Mobility Authority for Regional Transportation Grants (MI-37-X043) #3, (MI-90-X756) #1, and (MI-90-X758) #1; DOL's August 29, 2011, Response to Objections in connection with New Jersey Transit Corporation Grant (NJ-05-0027) #1; DOL's July 29, 2011, Response to Objections in connection with City of Eau Claire (WI-04-0048).

little if any protections to unionized workers. 109 Cong. Rec. 5675 (1953). The language was therefore amended, requiring in mandatory terms the continuation of collective bargaining rights.[5] Equally significant, Congress rejected qualifying the continuation of collective bargaining rights "to the extent not inconsistent with state law."

In *Amalgamated Transit Union v. Donovan*, the court found that the effect of amending the original language indicated that Congress meant to *require* the continuation of collective bargaining rights and the Secretary of Labor does not have the discretion to ignore the statute's requirements and certify a labor agreement that does not provide for the continuation of collective bargaining rights. 767 F.2d 939, 947 (D.C. Cir. 1975). Accordingly, the CA Labor Agency's argument that PEPRA is "fair" or "sound fiscal policy" does not allow the DOL to certify labor agreements which do not – and cannot under PEPRA – provide for the "continuation of collective bargaining rights." *Id.* at 946.

B. The CA Labor Agency misinterprets and misapplies the doctrines established in Donovan which do not allow the DOL to certify Section 13(c) agreements/arrangements where changes in state law adversely affects collective bargaining rights.

While it is true that the court in *Donovan* concluded that Section 13(c) did not impose upon the states the precise definition of "collective bargaining" established by the NLRA, and state and local governments are free to choose any collective bargaining policy they wish, *they may, however, only receive federal assistance if the requirements of Section 13(c) are met.* The Donovan court further found that Section 13(c) protects the process of collective bargaining and that "[t]he substantive provisions of collective bargaining agreements may change, but section 13(c) requires that the changes be brought about through collective bargaining, not by state fiat." *Id.* at 953.

Consistent with the *Donovan* ruling and reasoning, the DOL has uniformly applied its well established policy that Section 13(c) does not permit the Secretary of Labor to certify a grantee's employee protection agreements where workers previously enjoyed collective bargaining rights but those *rights were subsequently diminished or eliminated altogether. Id.* at 947-949. Thus, a state may not take action that fails to preserve and protect employee rights incorporated into the parties' protective arrangements and continue its eligibility to receive of Federal transit funds. *See e.g.* DOL's September 9, 2011, Response to Objections for SMART Grant (MI-37-X043) #1; (MI-90-X765) #1; (MI-90-X758) #1.

The question at issue is whether PEPRA, by imposing limits on certain pension benefit levels from negotiations between the transit agency and union(s), precludes public transit agencies in California from meeting their Section 13(c) obligation to continue collective bargaining rights. While the CA Labor Agency maintains that PEPRA imposes reasonable conditions on employers in offering defined pensions as one aspect of overall employee compensation and otherwise does

[5] The plain language of Section 13(c) states that "[Section 13(c)] [a]rrangements . . . shall include provisions that may be necessary for . . . the continuation of collective bargaining rights . . . ." 49 U.S.C. § 5333(b)(2)(B).

not impose any limitation on the full opportunity for good faith negotiations over employee compensation, its position does not conform with DOL precedent.

Michigan Cases

For example, Michigan passed Public Act 152 which required public employees to pay a certain percentage of the overall cost of purchasing health insurance, *i.e.*, limited a public employer's ability to agree to pay for health care benefits by imposing either a hard cap requirement or, in lieu thereof, the option of paying no more than 80% of the total annual costs of the health care plan. The DOL found that before this law was enacted, the parties were able to negotiate over all mandatory subjects of collective bargaining without any restrictions on the levels of benefits. As such was the case, the DOL determined that the Michigan law, *by placing restrictions on levels of benefits, diminishes the collective bargaining rights that the employees represented by unions previously enjoyed, contrary to the provisions of Section 13(c). See e.g.* DOL's Response to Objections in connection with City of Kalamazoo Grant (MI-90-X651), at p. 2.

To overcome restrictions under P.A. 152, the DOL advised the Michigan transit agencies to exempt themselves pursuant to an exemption provision included in the law in order for the DOL to issue certification. The DOL ultimately withheld its certification in one instance because the grantee refused to exempt itself from the limitations imposed by P.A. 152. DOL's September 13, 2012, letter in connection with the City of Kalamazoo Grant (MI-90-X651).

Similar to Public Act 152, and as acknowledged by the CA Labor Agency, PEPRA imposes limitations on certain aspects of defined benefits which diminishes the collective bargaining rights that employees represented by unions previously enjoyed, in violation of Section 13(c) requirements. Indeed, prior to the passage of PEPRA, California transit agencies and their union(s) regularly bargained over a variety of retirement options and formulas, including but not limited to the retirement age, definition of final compensation, formulas for calculating pensions, applicability of the formula to past and/or future service, vesting schedule, and employer pick-up/contribution levels from employees – all of which are now prohibited by PEPRA. In short, despite CA Labor Agency describing these limits as "reasonable", PEPRA has stripped ATU and other unions representing transit employees of their right to negotiate over any of these critical aspects of their pension benefits and effectively put an end to collective bargaining relative to the core subject of retirement benefits.

For the aforementioned reasons, CA Labor Agency's contention that "[n]othing in [PEPRA] eliminates collective bargaining rights, or even forecloses negotiation on public pensions" is disingenuous at best and inconsistent with the principles established in *Donovan* and DOL's application of those principles.

C. Recent policy and precedent established by the DOL following Donovan has been wholly ignored by the CA Labor Agency.

The CA Labor Agency states that it has found no authority suggesting that any modification to state law affecting public employee compensation or pensions, and by extension the scope of potential bargaining, is incompatible with the letter or spirit of Section13(c). In reaching such a

conclusion, it completely misses and ignores recent DOL rulings in connection with states which have enacted similar laws limiting collective bargaining rights.

Other State Precedents

In addition to Michigan Public Act 152 mentioned above, the DOL has opined on its ability to certify Section 13(c) agreements/arrangements where public sector collective bargaining rights have been curtailed by legislation in other states such as **Wisconsin**, **New Jersey**, and **Massachusetts**. In **Wisconsin**, Act 10 was passed in 2011, which included provisions that limit collective bargaining to wages only. In **New Jersey**, Public Law 2011, Chapter 78 passed and contained health benefit reform provisions that mandated all active employees pay a certain percentage of their health care benefits, depending on their salary levels and the type of coverage. Additionally, Chapter 78 established a "floor" for employee contributions so that no employee could pay an amount that was less than 1.5% of the employee's compensation. In **Massachusetts**, the MBTA enabling statute was amended which dictated the health care coverage of all active employees and MBTA retirees be transferred to a plan administrated by the State's General Insurance Commission for other public sector workers.

In each of these instances, the DOL consistently held that the Secretary was not permitted to certify a grantee's employee protection agreements *where workers previously enjoyed collective bargaining rights but those rights were subsequently diminished or eliminated altogether."*[6]

As a result, in order for the DOL to issue certifications addressing transit agencies' grants in these states, the DOL required the restoration of collective bargaining rights previously enjoyed by the employees represented by unions prior to the passage of the law limiting those rights. Notably, **Wisconsin** subsequently passed Wisconsin Act 32 exempting transit workers from Wisconsin Act 10. *See* DOL's August 15, 2011, Response to Objections in connection with City of Eau Claire Grant (WI-04-0048). The **New Jersey's** Assistant Attorney General issued an opinion assuring the DOL that Chapter 78 did not apply to New Jersey Transit workers and therefore has no impact on transit workers' collective bargaining rights. *See* DOL's September 9, 2011, Response to Objections in connection with New Jersey Transit Corporation (NJ-05-0027)#1, *et al.* The **Massachusetts** legislature subsequently enacted legislation enabling the MBTA to negotiate and create a Health and Welfare Trust Plan that provides for supplemental benefits. *See* DOL's September 9, 2011, certification addressing MBTA Grant (MA-70-X001) #1. As discussed above, Public Act 152 in Michigan provided for a local unit of government to exempt itself from the provisions of the law restricting collective bargaining rights. The DOL required Michigan transit agencies to exempt themselves before any certifications could be issued. *See* DOL's September 13, 2012, letter in connection with the City of Kalamazoo Grant (MI-90-X651).

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[6] *See e.g.* DOL's response to objections for City of Eau Claire Grant (WI-04-0048); DOL's August 29, 2011, response to objections for New Jersey Transit Corporation Grant (NJ-05-0027) #1; DOL's June 23, 2011, response to objections for MBTA Authority Grants (MA-70-X001) #1, MA-15-X008; and MA-04-0049; DOL's August 16, 2012, Cover Letter to Referral for SMART Grant (MI-90-X756) #2 and DOL's September 9, 2011, response to objections for SMART Grant (MI-37-X043) #1, (MI-90-X756) #1, and (MI-90-X758) #1.

II. PEPRA is entirely inconsistent with California's history regarding public transit labor relations.

Contrary to the assertions of the CA Labor Agency, PEPRA is entirely inconsistent with California's history of public transit labor relations. California's transit agencies and transit districts have been permitted to negotiate the terms and benefits of their retirement systems for decades.

The majority of California transit districts were created by the California Legislature. *See, e.g.,* Cal. Pub. Util. Code Section 24501 *et seq.* (Alameda-Contra Costa Transit District), Cal. Pub. Util. Code Section 28500 *et seq.* (Bay Area Rapid Transit District), Cal. Pub. Util. Code Section 30750 *et seq.* (Los Angeles Metropolitan Transit Authority), Cal. Pub. Util. Code Section 40000 *et seq.* (Orange County Transit District), Cal. Pub. Util. Code Section 102000 *et seq.* (Sacramento Regional Transit District), Cal. Pub. Util. Code Section 103000 *et seq.* (San Mateo County Transit District), Cal. Pub. Util. Code Section 95000 *et seq.* (Santa Barbara Metropolitan Transit District), Cal. Pub. Util. Code Section 100000 *et seq.* (Santa Clara Valley Transportation Authority), Cal. Pub. Util. Code Section 50000 *et seq.* (San Joaquin Regional Transit District).[7]

The enabling legislation for each legislatively-created district includes labor relations provisions, in order to ensure compliance with Section 13(c) of UMTA.[8] The enabling legislation also typically includes provisions regarding the availability of collectively bargained pension benefits. *See e.g.* Sections 25301, 30451, 102430, 103440, 100370.

There is no question that the terms, conditions and benefits of these pension plans are subject to the collective bargaining process. In *Stockton Metropolitan Transit District*[9] *v. Amalgamated Transit Union*, 132 Cal.App.3d 203 (1982), the Court of Appeals determined that the terms of the collectively bargained retirement plan were subject to interest arbitration as required by both the Section 13(c) protective agreement as well as the district's enabling legislation.

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[7] A few transit districts (*e.g.*, Sunline Transit Agency, Central Contra Costa Transit Authority) are Joint Powers Agencies, entities created under the auspices of the Joint Powers Act (Cal. Gov. Code Section 6500 *et seq.*) The remaining transit districts are generally creations of charter cities (*e.g.*, San Francisco MUNI, Long Beach Transit) which are statutorily exempt from PEPRA. Such transit districts, such as Monterey-Salinas Transit, are created under the Meyers-Milias-Brown Act (MMBA). Under California Government Code section 3504, the scope of representation for MMBA jurisdictions includes "all matters relating to employment conditions and employer-employee relations, including, but not limited to, wages, hours, and other terms and conditions of employment . . . ." (Gov. Code sec. 3504.) The phrase "wages, hours, and other terms and conditions of employment" has been liberally construed consistent with federal precedent, from which the language was drawn." *Int'l Assoc. of Fire Fighters Union v. Pleasanton*, 56 Cal. App. 3d 959, 968 (1976). California courts have applied federal precedent in cases interpreting the scope language in the MMBA. *See Fire Fighters Union v. City of Vallejo*, 12 Cal.3d 608 (1974)(California Supreme Court found that the language "wages, hours, and other terms and conditions of employment" was a term of art that the California Legislature had taken directly from the NLRA and its interpretive cases.)

[8] Most California transit districts were created prior to the enactment of state labor relations laws such as the Meyers-Milias-Brown Act (MMBA). Without the inclusion of labor relations provisions in each district's enabling legislation, those employees would have lacked the right to organize, in violation of Section 13(c).

[9] The Stockton Metropolitan Transit District was the predecessor to the San Joaquin Regional Transit District.

The history of California transit districts' pension plans is wholly separate from the pension plans created pursuant to the County Employees Retirement Act of 1937. ("CERL"). Furthermore, CERL applies only to county employees. Gov. Code Section 31469(a). California transit districts are separate legal entities from California counties, and their employees are not county employees for purposes of CERL. Thus, contrary to the California Labor Agency, CERL *has no applicability to public transit pension plans.* CERL does not regulate *any* transit district pension plan. Rather, transit district pension plans are self-regulated by their boards of trustees,[10] who act as fiduciaries pursuant to Article 16, Section 17 of the California Constitution.

The California Labor Agency also erroneously relies on the Public Employees' Retirement Law (PERL) to further claim that California has a history of regulating public pensions. PERL governs the California Public Employees' Retirement System (CalPERS). PERL is *not* a statutory scheme designed to generally regulate public employee pensions, but rather a statutory scheme which regulates a specific, statewide pension system. In the course of collective bargaining, employers and unions may *elect* to join CalPERS and subject themselves to the requirement of PERL, but that decision is reached through collective bargaining. PERL does not restrict the possible agreements which may be reached during that bargaining. For example, prior to the passage of PEPRA, nothing prevented a transit district and its labor organization(s) from negotiating a supplemental pension in addition to CalPERS, or even withdrawing from CalPERS altogether and establishing an independent pension plan. Electing to join CalPERS is an option to be discussed during bargaining – the PERL has no general applicability to California pension law.

III. The California Labor Agency's NLRA precedent and minimum state labor standards analysis is wrong.

The Agency's discussion of NLRA precedent quite literally turns the law on its head, applying a line of cases holding that *minimum* state labor standards are not preempted by the NLRA to the situation here, where a *maximum* ceiling is imposed on negotiated employee benefits. As a general rule, *minimum* state labor standards (minimum wage, occupational health and safety and workers compensation, unemployment insurance and so on) "affect union and nonunion employees equally, and neither encourage nor discourage the collective-bargaining processes that are the subject of the NLRA." *Metropolitan Life Insurance Co. v. Massachusetts*, 471 U.S. 724, 755 (1985). In that case, the Court sustained a Massachusetts law requiring health insurance policies to provide minimum mental-health benefits; and in *Malone v. White Motor Corp.*, 435 U.S. 497 (1978), the other case cited in the Agency's memorandum, the Court sustained a Minnesota law requiring pre-ERISA pension plans to comply with minimum vesting and funding standards.

The remarkable assertion made by the Agency is that at least prior to the passage of ERISA, a state law could have *reduced and fixed* the level of pension benefits available to private sector

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[10] *See e.g.* Cal. Pub. Util. Code Section 99159 (providing provides for equal labor-management representation on public transit pension boards).

workers, as PEPRA does for public sector workers, without discouraging the collective bargaining process protected by the NLRA. But this is plainly wrong: such a state law would offend any notion of equitable bargaining. "The NLRA is concerned primarily with establishing an equitable process for determining terms and conditions of employment, and not with particular substantive terms of the bargain that is struck when the parties are negotiating from relatively equal positions." *Metropolitan Life Insurance Co. v. Massachusetts*, 471 U.S. at 753. Under PEPRA, obviously, parties are *not* negotiating from relatively equal positions.

Indeed, the Supreme Court has held that the NLRA *does* preempt state laws which, like PEPRA, *limit* the economic terms parties are permitted to negotiate. For example, it has held that the application of Ohio antitrust law to invalidate certain rates agreed to through collective bargaining was preempted by the NLRA because it "would frustrate the parties' solution of a problem which Congress has required them to negotiate in good faith toward solving, and in the solution of which it imposed no limitations relevant here." *See, Teamsters Local 24 v. Oliver*, 358 U.S. 283, 296 (1959). That is exactly what PEPRA does: thoroughly frustrate bargaining parties' solution of a difficult problem they would otherwise be required to negotiate in good faith.

Furthermore, the California courts have expressly rejected the claim that transit industry pension plans are a subject over which the state has exclusive control. *Stockton Metropolitan Transit District v. Amalgamated Transit Union,* 132 Cal.App.3d 203 (1982). The *Stockton* court held that Section 13(c) protective agreements do not violate state sovereignty, and that the terms of the district's pension plan were subject to binding interest arbitration.

Conclusion

Based on the aforementioned, the legal opinion reached by the CA Labor Agency that PEPRA does not abridge the collective bargaining rights of mass transit employees in a manner that violates Section 13(c) is not supported by DOL's longstanding principles, DOL's rulings, and applicable case law. The passage of PEPRA has undoubtedly rendered covered public transit agencies in California incapable of complying with its Section 13(c) agreements or arrangements. Under PEPRA, transit agencies in California indeed now lack the authority to agree to the necessary fair and equitable arrangements as the state law governing them do not preserve the employees' collective bargaining rights.

Therefore, consistent with the DOL's past actions, in order for California transit agencies to continue to be eligible to receive federal funds in light of PEPRA, there must be restoration of collective bargaining rights over pension design currently foreclosed by PEPRA. It is our belief that the only way to do so is for California to pass Assembly Bill 160, an amendment exempting transit workers' pension plans from PEPRA.

The following is a summary of Assembly Bill No. 340 (2011-2012 Sess.) (the Public Employee Pension Reform Act, or "PEPRA").[1]

I. WHAT DOES PEPRA DO?

A. Current Public Employees (hired before January 1, 2013)

- ***Retired Annuitants***—Limits all public employee retirees from working (and simultaneously collecting a pension) more than 960 hours per year for a public employer, and requires a 180-day cooling-off period before a retiree may return to work, subject to certain limited exceptions. (Gov. Code, § 7522.56(d), (f).) Similarly, public school employees are not allowed to earn any further compensation or retirement credit during the first 180 days after retirement. (Ed. Code, §§ 24214, 24214.5.)

- ***Airtime***—Ends the ability of public employees to purchase nonqualified service time, or "airtime," with no further applications for such credit accepted after January 1, 2013. (Gov. Code, § 7522.46.)

- ***Equal Sharing of Pension Costs***—Requires certain state employees to make additional contributions toward their pension benefits, as specified. (Gov. Code, § 20683.2.) Authorizes as of January 1, 2018, but does not necessarily require, employers to set their employee contribution level at 50 percent of normal cost of pension benefits, for public employees who are members of, or whose employers contract with, CalPERS or 1937 Act systems. (Gov. Code, §§ 20516.5, 31631.5.) If an employer seeks a 50-50 split, requires ordinary good faith bargaining between government employers and local government employees. (Gov. Code, §§ 20516, 20516.5(c), 31631.5.) If the employer does not reach an agreement with the employee bargaining units by January 1, 2018, then the employer may impose a 50-50 split in costs, but only to the extent that the employee's contribution does not exceed certain percentages of overall employee pay. (See Gov. Code, §§ 20516.5(b), (c); 20683.2.)

    - The 50-50 cost-sharing standard for current employees does not apply to employees of special districts, including transit agencies, that are statutorily authorized to operate independent retirement systems outside of CalPERS or 1937 Act county systems.

- ***Ban on Double-Dipping***—Requires a public retiree hired by a public agency or school district, or appointed to a full-time state board or commission, to suspend his or her retirement allowance and/or to serve as a non-salaried member of the board or commission. (Gov. Code, §§ 7522.56(b), (c); 7522.57(a)–(d); Ed. Code, § 24214.)

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[1] Transit entities in California have several options for addressing the retirement needs of their employees. Some contract for the provision of retirement benefits with the California Public Employees' Retirement System (CalPERS) or a retirement system established under the County Employees Retirement Law of 1937 (the "1937 Act"). Transit agencies contracting with CalPERS or a 1937 Act county retirement system are subject to the same general set of statutory retirement rules as the state and county members themselves. Other transit entities participate in pension trusts governed by the Employee Retirement Income Security Act of 1974 (ERISA) or established their own, locally administered retirement system.

- ***Ban on Pension Spiking***—Consistent with case law, "compensation earnable" for the purpose of pension calculations for public employees who are members of, or whose employers contract with, 1937 Act systems does not include the amount of unused vacation or sick leave exceeding the amount of unused vacation or sick leave that may be earned and payable in each 12-month period during the final average salary period. (Gov. Code, § 31461.)

- ***Pension Forfeiture Due to Felony Conviction***—Forfeits public officials' and employees' pension and related benefits upon conviction of certain felonies, such as those connected with obtaining salary or pension benefits. (Gov. Code, §§ 7522.70, 7522.72, 7522.74.)

- ***Ban on Retroactive Benefit Enhancements***—Limits any pension benefit enhancements (issued after January 1, 2013) to apply to only service performed on or after the date of enhancement. Bars benefit enhancements based on work completed before issuance of the enhancement. (Gov. Code, § 7522.44(a).)

- ***Ban on Improved Health Benefits for Non-Unionized Public Employees***—Prevents public employers from providing elected or appointed officials, trustees, non-unionized employees, or managers with a health benefit schedule that is more advantageous than what is provided to other employees of the same public agency. (Gov. Code, § 7522.40.)

- ***Limit on Pension Holidays***—Requires that public agencies and their employees fund the normal cost rate for the pension at all times, except when the following three factors exist: (1) The pension plan is above the 120 percent funding level; (2) the retirement system actuary determines that continuing to accrue excess earnings would disqualify the pension plan's tax-exempt status under the Internal Revenue Code; and (3) The receipt of additional contributions would conflict with the pension board's fiduciary responsibilities under article XVI, section 17 of the California Constitution. (Gov. Code, § 7522.52.)

- ***Power to Audit County- or District-Level Pension Plans***—Authorizes 1937 Act county retirement boards to conduct an audit of a county or district's administration of pension benefits to ensure proper administration of the system. (Gov. Code, § 31543.)

- ***Authorization of Full Payment of Pension Costs***—Authorizes county board of supervisors or local districts to require employees pay all or part of the employer's contribution to the pension plan, in addition to the employee's 50 percent share of the normal costs for the pension benefits, subject to certain restrictions. <u>For unionized employees, requires that the county or local agency first collectively bargain an agreement with the employees' bargaining units before requiring payment of the employer's pension costs.</u> (Gov. Code, §§ 31631, 31631.5.)

- ***Industrial Disability Payment***—Allows safety employees qualifying for an "industrial disability" payment to receive the greater of the following: (1) 50 percent of the employee's final compensation plus any annuity purchased with his/her contributions; (2) a service retirement, if he or she qualifies; or (3) an actuarially reduced retirement

formula, for each quarter year of service less than age 50, if that amount is higher than 50 percent salary. (Gov. Code, §§ 7522.66, 21400.)[2]

B. New Public Employees (hired on or after January 1, 2013)

- ***Equal Sharing of Pension Costs***—Requires new public employees to contribute at least 50 percent of the normal cost of their pension benefits, unless such a requirement would conflict with the terms of an existing memorandum of understanding. Any renewal, amendment, or extension of the contract is subject to the minimum 50-percent requirement. For state employees, member contribution rates are specified in statute. (Gov. Code, § 7522.30(a), (c), (f)., 20683.2)

- ***Collective Bargaining Requirement for Increases in Employee Share***—Prohibits increasing the employee contribution rate above 50 percent (or any higher, if it is already above 50 percent) unless such increase has been collectively bargained, and bans the employer's use of impasse procedures to pursue such increases. (Gov. Code, § 7522.30(e).)

- ***Pension Cap***—New employees' defined benefit compensation factor is limited to the Social Security contribution and benefit base (currently $113,700), or 120 percent of that limit (currently $136,440) for employees who do not receive Social Security. (Gov. Code, § 7522.10(c).)

- ***Retirement Ages***

  1. *Non-safety employees*—Implements a 2 percent at age 62 defined-benefit for all new non-safety employees. (Gov. Code, § 7522.20) The earliest retirement age is 52 (increased from age 50), and the formula tops out at 2.5 percent at age 67 (increased from 63). (Gov. Code, §§ 7522.20, 21076, 21076.5.)

  2. *Public school teachers*—Implements a 2 percent at age 62 defined-benefit for new teachers and educators. Sets the earliest retirement age at 55, and the formula tops out at 2.4 percent at 65. The normal retirement age is 62. (Ed. Code, §§ 24202.6(a), 24202.7.)

  3. *Safety employees*—Sets minimum retirement age at 50, after 5 years of service, and full-vesting retirement age at 57. (Gov. Code, § 7522.25(a)-(c).) Provides three available retirement formulas: 2 percent at age 57; 2.5 percent at age 57; and 2.7 percent at age 57. (*Ibid.*)

- ***Ban on Pension Spiking***—"Final compensation" for the purpose of pension calculations will be defined as the highest average annual compensation over a three-year period, and

[2] An "industrial" disability is defined as "disability or death as a result of injury or disease arising out of and in the course of his or her employment as such a member." (Gov. Code, § 20046.) Before PEPRA, most state and local government employees were eligible to receive an industrial retirement disability offering only the first two options noted above. (See Gov. Code, §§ 21406–21409, 21411–21414.)

exclude special bonuses, unplanned overtime, and unused vacation or sick leave. (Gov. Code, §§ 7522.32(a), 7522.34.)

- ***Limit on Salary Used to Determine Employer Contribution***—Would prohibit public employer from making any contribution to an employee's retirement plan based on any compensation exceeding the federal level (currently $255,000). (Gov. Code, § 7522.42(a).)

- ***Exclusion of Various State Offices and Positions from Eligibility in Pension Plan***—Prevents constitutional officers, the Insurance Commissioner, and selected state miscellaneous and industrial members, hired, elected, or appointed on or after January 1, 2013, from participating in the Legislators' Retirement System. They would continue to be optional members in CalPERS. (Gov. Code, §§ 9355.4, 9355.41, 9355.45, 20281.5.)

II. WHAT DOESN'T PEPRA DO?

A. Current Public Employees (hired before January 1, 2013)

- PEPRA will authorize as of January 1, 2018, but **not necessarily require**, employers to set employee contribution levels at 50 percent of normal cost of pension benefits, for current public employees who are members of, or whose employers contract with, CalPERS or 1937 Act systems. PEPRA also does **not** permit employers to refuse to engage in collective bargaining regarding any aspect of their employee's contributions. (See Gov. Code, §§ 20516.5(c); 31631.5.)

- PEPRA does **not** require current employees who are members of, or whose employers contract with, CalPERS or a 1937 Act retirement plan to contribute *more than* 50 percent of the normal cost of their pension benefits (see Gov. Code, § 20516.5(b).), and conditions any attempt to increase the employee contribution rate above 50 percent on the parties reaching a collective bargaining agreement—there can be no imposition of such additional contribution via impasse procedures (see *id.*, § 20516(b), 31631.5).

- PEPRA allows employers participating in CalPERS or a 1937 Act retirement plan to impose specific contributions levels, which generally represent a 50-50 split in contributions, where no agreement between employer and employee bargaining units has been reached by January 1, 2018. But PEPRA does **not** permit such imposition in excess of specified percentages of a local employee's overall pay. (Gov. Code, §§ 20516.5(b), 31631.5(a).)

- The 50-50 cost-sharing standard for current employees does **not** apply to employees of special districts, including transit agencies, that are statutorily authorized to operate independent retirement systems outside of CalPERS or 1937 Act county systems. PEPRA does not require that current members of those independent systems pay 50 percent of normal costs.

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- PEPRA does **not** permit increasing the new employee contribution rate above 50 percent (or any higher, if it is already above 50 percent) where such increase has not been collectively bargained. (Gov. Code, § 7522.30(e).)

- PEPRA did **not** introduce the concept of linking certain pension benefit factors with set retirement ages, which is longstanding. (See, e.g., Gov. Code, § 21350 et seq.)

C. In General

- PEPRA does **not** impose any limitation on collective bargaining regarding base salaries and wage rates, standby pay, overtime premiums, bonuses, pay differentials, employer-provided allowances, or health and other benefits.

III. What Subjects Remain Open to Collective Bargaining After PEPRA?

Although PEPRA adjusts the scope of defined benefit pensions previously allowed under California law, it places few, if any, restrictions on the traditional collective bargaining matters of base salaries and wage rates, hours, fringe benefits, standby pay, overtime, work assignments, promotions, bonuses, pay differentials, employer-provided allowances, or health and other benefits. And even in the area of pensions, considerable latitude for collective bargaining on the relevant elements remains for transit employees. For example, PEPRA does not stand as an obstacle to substantive bargaining over participation in, and contributions to, defined contribution qualified retirement plans such as a 401(k) or 457(b) plan, or other forms of deferred compensation as the parties may bargain. In fact, nothing in PEPRA prohibits the negotiation of an actuarially equivalent retirement benefit to that which may have been allowable through a defined benefit pension prior to PEPRA.

cc Don ott
Raffi H.

U.S. Department of Labor

Office of Labor-Management Standards
Washington, D.C. 20210

March 22, 2013

Receive

MAR 26 2013

Office of the CEO

Arthur T. Leahy
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Los Angeles County Metropolitan
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Los Angeles, CA 90012-2952

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Sacramento Regional Transit District
P.O. Box 2110
Sacramento, CA 95812-2110

LABOR & EMPLOYEE RELATIONS
2013 MAR 28 A 8:22

Dear Gentlemen:

Thank you for your letter dated March 8 to Seth Harris, Acting Secretary of Labor, which has been forwarded to the Office of Labor Management Standards for a response. Let me assure you that the Department of Labor takes this matter very seriously and has been working continuously since we learned of PEPRA to fully understand its far-reaching implications. In November 2012, the Department began receiving objections from California unions. On November 30, 2012, and again on December 11, 2012, the Department reached

out to the state of California for guidance with respect to the effects of PEPRA on transit employees' and California transit agencies' continuing obligation to bargain under 13(c). The Department received the California Workforce Development Agency's response on February 13, 2013. The Department has since been working with attorneys in the Governor's office to develop effective resolutions which may allow for 13(c) certification while respecting the letter of the California statute.

Within the next week, you will be receiving detailed briefing instructions and a timetable for completing the certification process. We appreciate your cooperation in preparing and filing these briefs on time. Simultaneously, the Department will continue communications with State officials, as appropriate, to gather information and understanding necessary to make our final determinations in these matters.

In your letter, you suggested that further delay in certification of your capital grants might require California transit agencies to begin the service-cut planning. Please be advised we have received assurances that none of the signatories to this letter have any pending capital grants that will expire on or before September 30, 2013 and that you have partial year allocations for which you may yet apply . We do not take lightly the possibility of employment or service impacts. If you have any additional questions in this regard, please contact your FTA regional administrator.

Sincerely,

Stephen J. Wilkerts for J.L.

John Lund, Ph.D
Director, Office of Labor Management Standards

U.S. Department of Labor

Office of Labor-Management Standards
Washington, D.C. 20210

March 28, 2013

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Paul Knupp
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Re: Briefing Schedule for FTA Application
Los Angeles County Metropolitan Transportation Authority
Purchase 44 40-Foot Composite Buses
CA-95-X042-02

Purchase an Additional 22 40-Ft. CNG Buses
CA-04-0232-01
Design & Construction of Lankershim Blvd. Underground Pedestrian Passage

(Metro Orange Line BRT to Red Line Subway)
CA-04-0261

Dear Parties:

This is in reference to the above captioned grant applications which are pending certification by the Department of Labor (Department) under Section 5333(b) of the Federal transit statute.

Following the submission of final positions by the parties, the Department, pursuant to its Guidelines at 29 CFR 215.3(e), is responsible for determining the manner in which the remaining issues are to be resolved. Although the Guidelines at 29 CFR 215.3(d)(7) permit an interim certification of the grants, based on terms and conditions no less protective than those in its referrals of November 9 and December 6, 2012, the Department has determined that such cannot be granted. There may be circumstances inconsistent with the statute based on certain provisions of the newly enacted Public Employees' Pension Reform Act of 2013, AB 340 (Furutani), Stats. 2012, Chapter 296 (PEPRA). See the Department's Guidelines at 29 CFR 215.3(h).

The Department has concluded that the best way to proceed is to request the parties to submit briefs on the following specified issues. The questions in this letter about specific positions result from assertions that were made during discussions between the parties and in correspondence to the Department. A briefing schedule is established later in this letter for the parties' submissions to the Department.[1]

Enclosed with this schedule are documents provided to the Department which may contribute to the Department's understanding of PEPRA issues.[2] In addition to responding to the numbered items below, any party to this briefing schedule may address the contents of these documents within the limits for briefs set forth below.

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[1] This briefing order does not cover the unions' objections to the Department's referral of February 1, 2013, for grant number CA-90-Y717-07, which involves operating assistance and on which American Federation of State County and Municipal Employees Local 3634 also filed objections.

[2] The documents include: Letter and Memorandum dated February 13, 2013, from the State of California Labor & Workforce Development Agency; Letter and Memorandum from the ATU dated March 14, 2013; and undated and untitled Summary of Assembly Bill No. 340 from the Office of the Governor of California.

Please provide the Department with your arguments regarding the following:

1. The LACMTA is asked to support, and the ATU, UTU, and TCU (collectively termed "Unions"), are asked to rebut, the position that employees hired on or after January 1, 2013 (termed "new employees") have no existing collective bargaining rights protected by Section 13(c).[3] In so doing cite and analyze specific authorities relied upon in your discussion, including but not limited to decisions of responsible adjudicatory agencies, rulings of State or Federal courts, and the legislative history of Section 13(c) of the Federal transit act.

2. Whether or not the existing collective bargaining agreements cover new employees hired within the lifetime of the agreements. Cite specific authorities relied upon in your answer. Also, provide an analysis as to how the issues presented by PEPRA's treatment of new employees would impair or not impair the existing collective bargaining agreement and continue or not continue collective bargaining rights.

3. For each effect of PEPRA on the rights, privileges, and benefits of employees hired prior to January 1, 2013 (termed "current employees"), describe how collective bargaining can and will, or cannot, be continued under the provisions of the new law. In doing so, please identify with specificity the existing pension plan and benefits and the applicable provision(s) of PEPRA. In answering this question, the LACMTA is also asked to support, and the Unions, are asked to either support or rebut, the position that LACMTA may provide benefit enhancements for existing employees, consistent with PEPRA and the continuation of collective bargaining rights.[4]

4. For each effect of PEPRA on the rights, privileges, and benefits of *new* employees, describe how collective bargaining can and will, or cannot, be continued under the provisions of the new law. In doing so, please identify with specificity the existing pension plan and benefits and the applicable provision(s) of PEPRA. Additionally, the LACMTA is asked to support, and the Unions, are asked to either support or rebut, the position that LACMTA may provide benefit enhancements for new employees, consistent with PEPRA and the continuation of collective bargaining rights.[5]

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[3] This question is based on LACMTA's argument set forth in its "Response to Objections" letter to the Department, from Jane Sutter Starke, Attorney, Thompson Coburn, LLP (November 30, 2012)(on file with the Department) p. 2.

[4] The phrasing "benefit enhancements" is quoted directly from the letter to the Department from John Krattli, County Counsel, and Ronald Stamm, Principal Deputy County Counsel of Los Angeles (February 13, 2012)(on file with the Department) p. 6.

[5] *See* footnote 3.

5. Whether or not the LACMTA does, or may, participate in an independent retirement system outside of CalPERS and/or the 1937 Act county system. Include the bargaining history since the inception of the employees' participation in the current pension system(s) and any previous private or public employee pension plan(s). If any such bargaining history or right is claimed, provide a justification of how such bargaining can or cannot continue for current and new employees given all relevant provisions of PEPRA.

6. The LACMTA is asked to support, and the Unions are asked to support or rebut, the County of Los Angeles' statement that the LACMTA's "statutory obligation to engage in collective bargaining cannot be limited or restricted by any other law." [6] Provide an analysis as to whether or not such statutory authority under the California Public Utilities Code, provides the LACMTA with an exemption from PEPRA or any specific provisions of PEPRA.

The initial submission by the parties should be received by the legal representatives of the other party and by the Department at the address for this office, Room N-5112, no later than 4:00 p.m. on Wednesday, April 17, 2013. Responses will be due at the Department of Labor by 4:00 p.m. on Monday, April 29, 2013, and shared between the parties in a timely manner.

Initial briefs should not exceed 20 pages in length, including footnotes, on standard letter size (8½ x 11 inch) paper. Margins should be no less than one inch on all four sides of each page, and text and footnotes should be single spaced with a font size no smaller than 12 points. If you include quotes from, or references to, previous arguments involving other employee protection cases, these must be included in the body of the brief or its footnotes and must be fully descriptive of the point in question in order to be considered. The Department will use its judgment in researching any prior cases or determinations cited as references, but will not consider wholesale incorporation of previous arguments into the instant case. Text of proposed protective arrangements, copies of previous DOL certifications and determinations, excerpts from federal, state or local statutes, excerpts from relevant arbitration or court decisions, and visuals such as maps, charts, or graphs may be included as attachments, if properly referenced to text or footnotes in the body of the briefs, and will not count against page limitations.

Reply briefs are not to exceed 15 pages and must conform to the same format and limitations as initial briefs. In addition, reply briefs must be limited to the

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[6] *See* letter to the Department from John Krattli, County Counsel, and Ronald Stamm, Principal Deputy County Counsel of Los Angeles (February 13, 2012)(on file with the Department), p. 2.

rebuttal of arguments presented by the other party in its initial brief. No new issues may be included in reply briefs.

Any submission which does not comply with the parameters, limitations, and deadlines specified above may be subject to exclusion from consideration in the Department's determination of this matter.

If you have any questions, I can be reached by phone at (202) 693-1227, by FAX at (202) 693-1342, or by e-mail at Marchant.J@dol.gov.

Sincerely,

J. Douglas Marchant

Project Representative

Enclosures (3)

cc: Scheryl Portee/FTA
Leslie Rogers/FTA Region IX
Jane Sutter Starke/Thompson Coburn, LLP
Michael L. Artz/AFSCME

Digitally signed by Janice Williams
DN: cn=Janice Williams, o=U.S. Department of Labor, ou=OLMS, email=williams.janice@dol.gov, c=US
Date: 2013.03.28 14:33:21 -04'00'

The following is a summary of Assembly Bill No. 340 (2011-2012 Sess.) (the Public Employee Pension Reform Act, or "PEPRA").[1]

I. WHAT DOES PEPRA DO?

A. Current Public Employees (hired before January 1, 2013)

- ***Retired Annuitants***—Limits all public employee retirees from working (and simultaneously collecting a pension) more than 960 hours per year for a public employer, and requires a 180-day cooling-off period before a retiree may return to work, subject to certain limited exceptions. (Gov. Code, § 7522.56(d), (f).) Similarly, public school employees are not allowed to earn any further compensation or retirement credit during the first 180 days after retirement. (Ed. Code, §§ 24214, 24214.5.)

- ***Airtime***—Ends the ability of public employees to purchase nonqualified service time, or "airtime," with no further applications for such credit accepted after January 1, 2013. (Gov. Code, § 7522.46.)

- ***Equal Sharing of Pension Costs***—Requires certain state employees to make additional contributions toward their pension benefits, as specified. (Gov. Code, § 20683.2.) Authorizes as of January 1, 2018, but does not necessarily require, employers to set their employee contribution level at 50 percent of normal cost of pension benefits, for public employees who are members of, or whose employers contract with, CalPERS or 1937 Act systems. (Gov. Code, §§ 20516.5, 31631.5.) If an employer seeks a 50-50 split, requires ordinary good faith bargaining between government employers and local government employees. (Gov. Code, §§ 20516, 20516.5(c), 31631.5.) If the employer does not reach an agreement with the employee bargaining units by January 1, 2018, then the employer may impose a 50-50 split in costs, but only to the extent that the employee's contribution does not exceed certain percentages of overall employee pay. (See Gov. Code, §§ 20516.5(b), (c); 20683.2.)

    - The 50-50 cost-sharing standard for current employees does not apply to employees of special districts, including transit agencies, that are statutorily authorized to operate independent retirement systems outside of CalPERS or 1937 Act county systems.

- ***Ban on Double-Dipping***—Requires a public retiree hired by a public agency or school district, or appointed to a full-time state board or commission, to suspend his or her retirement allowance and/or to serve as a non-salaried member of the board or commission. (Gov. Code, §§ 7522.56(b), (c); 7522.57(a)–(d); Ed. Code, § 24214.)

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[1] Transit entities in California have several options for addressing the retirement needs of their employees. Some contract for the provision of retirement benefits with the California Public Employees' Retirement System (CalPERS) or a retirement system established under the County Employees Retirement Law of 1937 (the "1937 Act"). Transit agencies contracting with CalPERS or a 1937 Act county retirement system are subject to the same general set of statutory retirement rules as the state and county members themselves. Other transit entities participate in pension trusts governed by the Employee Retirement Income Security Act of 1974 (ERISA) or established their own, locally administered retirement system.

- ***Ban on Pension Spiking***—Consistent with case law, "compensation earnable" for the purpose of pension calculations for public employees who are members of, or whose employers contract with, 1937 Act systems does not include the amount of unused vacation or sick leave exceeding the amount of unused vacation or sick leave that may be earned and payable in each 12-month period during the final average salary period. (Gov. Code, § 31461.)

- ***Pension Forfeiture Due to Felony Conviction***—Forfeits public officials' and employees' pension and related benefits upon conviction of certain felonies, such as those connected with obtaining salary or pension benefits. (Gov. Code, §§ 7522.70, 7522.72, 7522.74.)

- ***Ban on Retroactive Benefit Enhancements***—Limits any pension benefit enhancements (issued after January 1, 2013) to apply to only service performed on or after the date of enhancement. Bars benefit enhancements based on work completed before issuance of the enhancement. (Gov. Code, § 7522.44(a).)

- ***Ban on Improved Health Benefits for Non-Unionized Public Employees***—Prevents public employers from providing elected or appointed officials, trustees, non-unionized employees, or managers with a health benefit schedule that is more advantageous than what is provided to other employees of the same public agency. (Gov. Code, § 7522.40.)

- ***Limit on Pension Holidays***—Requires that public agencies and their employees fund the normal cost rate for the pension at all times, except when the following three factors exist: (1) The pension plan is above the 120 percent funding level; (2) the retirement system actuary determines that continuing to accrue excess earnings would disqualify the pension plan's tax-exempt status under the Internal Revenue Code; and (3) The receipt of additional contributions would conflict with the pension board's fiduciary responsibilities under article XVI, section 17 of the California Constitution. (Gov. Code, § 7522.52.)

- ***Power to Audit County- or District-Level Pension Plans***—Authorizes 1937 Act county retirement boards to conduct an audit of a county or district's administration of pension benefits to ensure proper administration of the system. (Gov. Code, § 31543.)

- ***Authorization of Full Payment of Pension Costs***—Authorizes county board of supervisors or local districts to require employees pay all or part of the employer's contribution to the pension plan, in addition to the employee's 50 percent share of the normal costs for the pension benefits, subject to certain restrictions. <u>For unionized employees, requires that the county or local agency first collectively bargain an agreement with the employees' bargaining units before requiring payment of the employer's pension costs.</u> (Gov. Code, §§ 31631, 31631.5.)

- ***Industrial Disability Payment***—Allows safety employees qualifying for an "industrial disability" payment to receive the greater of the following: (1) 50 percent of the employee's final compensation plus any annuity purchased with his/her contributions; (2) a service retirement, if he or she qualifies; or (3) an actuarially reduced retirement

formula, for each quarter year of service less than age 50, if that amount is higher than 50 percent salary. (Gov. Code, §§ 7522.66, 21400.)[2]

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exclude special bonuses, unplanned overtime, and unused vacation or sick leave. (Gov. Code, §§ 7522.32(a), 7522.34.)

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STATE OF CALIFORNIA
Labor & Workforce Development Agency

GOVERNOR Edmund G. Brown Jr. • SECRETARY Marty Morgenstern

Agricultural Labor Relations Board • California Unemployment Insurance Appeals Board
California Workforce Investment Board • Department of Industrial Relations
Employment Development Department • Employment Training Panel

February 13, 2013

Seth D. Harris
Acting Secretary of Labor and Deputy Secretary of Labor
U.S. Department of Labor
200 Constitution Avenue, NW
Washington, DC 20210

Dear Acting Secretary Harris,

Thank you for requesting our input on the pension reform implemented by California Assembly Bill No. 340 (the Public Employee Pension Reform Act, or "PEPRA"), and its potential impact on grantees' obligations under the Federal Public Transportation Act, codified at 49 U.S.C. § 5333(b) ("Section 13(c)" of the Urban Mass Transportation Act). My legal staff and I have reviewed this matter carefully and concluded that PEPRA does not limit a local transit authority's ability to bargain or to enter into fair and equitable protective agreements or arrangements that satisfy Section 13(c).

As explained in the attached legal memorandum, the changes in state pension law implemented by PEPRA do not impede Section 13(c)'s goal of assuring a continued right to collective bargaining. California's effort to bolster the sustainability of defined benefit pension systems for public employees also does not eliminate the important right of employees to engage in "meaningful, 'good faith' negotiations with their employer over wages, hours and other terms and conditions of employment." (*Donovan v. Amalgamated Transit Union*, 767 F.2d 939, 951 (D.C. Cir. 1985).) To the contrary, PEPRA merely modifies, prospectively, certain aspects of the defined benefit pension plan than can be offered by a public employer. It does not permit employers to unilaterally determine and impose terms under which defined benefit pensions may be provided. And, most importantly, PEPRA retains the ability of current and future employees to engage in good faith collective bargaining. (Compare *Donovan*, 767 F.2d at 954 [Section 13(c) violation found where state legislature removed mandatory subjects of collective bargaining previously enjoyed by employees, including work assignments, benefits, and hours].)

PEPRA promotes retirement security for public employees by placing common-sense limits on the defined benefit pensions that can be offered to future employees. Again, these prospective changes do not impede the ability of current or future workers to engage in good faith collective bargaining and, accordingly, do not conflict with the requirements of Section 13(c). Furthermore, nothing in PEPRA prevents a local transit authority from negotiating other retirement or compensation benefits designed to offset the changes in defined benefit pensions in which future workers may be enrolled.

I am optimistic that the enclosed memorandum will address your concerns about PEPRA and that you will be able to certify that California's grantees continue to be fully eligible for federal grant awards. Please call me before you make any final decisions or take action on this matter. I will make myself and my staff available to answer any remaining questions that might be raised about AB 340's interplay with Section 13(c).

Sincerely,

Marty Morgenstern
Secretary
California Labor and Workforce Development Agency

Enclosure

Cc: Elmy Bermejo, Director OCIA, US DOL
John Lund, PhD, Director OLMS, US DOL
Ann Comer, Chief OLMS-DSP, US DOL
J. Douglas Marchant, Project Representative, OLMS, US DOL

Memorandum

DATE: February 13, 2013

TO: Marty Morgenstern
Secretary, Labor & Workforce Development Agency

FROM: Mark Woo-Sam
General Counsel, Labor & Workforce Development Agency

SUBJECT: Impact of the Public Employee Pension Reform Act on the Labor Requirements of the Federal Public Transportation Act.

You have asked me to analyze the potential impact of Assembly Bill No. 340 (2011-2012 Sess.) (the Public Employee Pension Reform Act, or "PEPRA") on grantees' obligations under the Federal Public Transportation Act, codified at 49 U.S.C. § 5333(b) (commonly referred to as "Section 13(c)" of the Urban Mass Transportation Act of 1964). Section 13(c) requires that employee protections, commonly referred to as "protective arrangements" must be certified by the Department of Labor before federal transit funds can be released to a mass transit provider. The law protects transit employees and requires the continuation of collective bargaining rights, and protection of their wages, benefits, and other conditions of employment.

Section 13(c) does not, however, enshrine in state law a permanent set of collective bargaining conditions, nor does it compel states to adopt an immutable set of pension laws. It does, however, require the continuation of the right to meaningful bargaining over wages, hours, and other key employment terms, including pensions. PEPRA does not materially diminish the right of transit employees to engage in good faith collective bargaining over wages, hours, benefits, and other terms and conditions of their employment. It also does not alter any vested rights, privileges, or benefits under existing collective bargaining agreements.

Fundamentally, AB 340 is a refinement of longstanding laws that govern the terms and obligations of defined benefit pensions for public employees. Occasional changes to state pension laws are necessary both to provide for changing employee retirement needs as well as the future solvency of retirement systems. Notably, the changes that PEPRA makes are almost

entirely prospective—they apply to new employees hired after January 1, 2013. And any amendments that might apply to current employees exempt employees working under a current MOU.

For these and all the reasons explained below, I conclude that PEPRA does not abridge the collective bargaining rights of mass transit employees in a manner that violates Section 13(c).

1. Changes to the Contours of State Pension Law Do Not Impede Section 13(c)'s Goal of Assuring a Continued Right to Collective Bargaining.

Congress implemented Section 13(c) of the Urban Mass Transit Act of 1964 (now the Federal Public Transportation Act) "[t]o prevent federal funds from being used to destroy the collective-bargaining rights of organized workers." (*Jackson Transit Authority v. Local Division 1285, Amalgamated Transit Union*, 457 U.S. 15, 17 (1982).) The statute is also "a means to accommodate state law [] collective bargaining, not as a means to substitute a federal law of collective bargaining for state labor law." (*Id.* at 27.) Central to Section 13(c) is the concept of continued good faith collective bargaining:

> Congress struck a delicate balance in Section 13(c). The statute provides that state law should govern the labor relations of public transit authorities and their employees, but it conditions federal transit aid, in part, on the continuation of collective bargaining rights. In setting out those rights, Congress chose not to incorporate the entire structure and requirements of the NLRA into Section 13(c), for to do so would force states to choose between federal transit aid and their exclusion from the coverage of the NLRA. On the other hand, Congress made it clear that federal labor policy would dictate the substantive meaning of collective bargaining for purposes of Section 13(c). "Good faith" bargaining, to a point of impasse if necessary, over wages, hours and other terms and conditions of employment has always been the essence of federally-defined collective bargaining rights.

(*Donovan v. Amalgamated Transit Union*, 767 F.2d 939, 950 (D.C. Cir. 1985) [emphasis added].)

I have found no authority suggesting that any modification to state law affecting public employee compensation or pensions, and by extension the scope of potential bargaining, is incompatible with the letter or spirit of Section 13(c). In fact, courts have rejected that notion:

> § 13(c)'s framers intended a limited set of provisional protections. . . . To erect upon § 13(c) assurances a near permanent set of specific collective bargaining conditions which the state cannot change is to go beyond this limited purpose.

> [T]o find that specific § 13(c) assurances override state law would also go beyond § 13(c)'s objective of assuring "fair and equitable" arrangements. Clearly, a state law could modify a particular § 13(c) assurance without inevitably bringing about an unfair or inequitable result. . . . Congress's general intent to secure fair arrangements does not require the implementation of any particular set of detailed provisions. Indeed, if the specific detailed provisions of a § 13(c) assurance prevail over any conflicting change in state law, the Secretary of Labor would lose any ongoing power to exercise discretion-to decide whether or not a change makes the state system as a whole unfair to the transit workers. This result would be anomalous given a legislative history stressing the need for flexibility and discretion.

(*Amalgamated Transit Union v. Massachusetts*, 666 F.2d 618, 634 (1st Cir. 1981) [emphasis added].)

In *Donovan v. Amalgamated Transit Union*, the court similarly recognized that Section 13(c)'s requirement to continue collective bargaining rights "neither imposed upon the states the precise definition of 'collective bargaining' established by the NLRA and the case law that has developed under that Act, nor did it employ a term of art devoid of all meaning, leaving the states free to interpret and define it as they saw fit." (*Donovan*, 767 F.2d at 949.) Against this need for flexibility, the court defined the standard to be employed in evaluating compliance with Section 13(c) – one that requires the continuation of the right to meaningful representation in negotiations over wages, hours, and other key employment terms:

> Section 13(c)'s requirement, therefore, that labor protective agreements provide for "the continuation of collective bargaining rights" means, at a minimum, that where employees enjoyed collective bargaining rights prior to public acquisition of the transit system, they are entitled to be represented in meaningful, "good faith" negotiations with their employer over wages, hours and other terms and conditions of employment. Collective bargaining does not exist if an employer retains the power to establish wages, hours and other conditions of employment without the consent of the union or without at least first bargaining in good faith to impasse over disputed mandatory subjects. It is against this standard that we must measure Act 1506 and MARTA's labor protective agreement.

(*Id.* at 951 [emphasis added].)

Significantly, provision 3 of the Department of Labor's Unified Protective Arrangement (both December 23, 2008, and as updated January 3, 2011), as well the National (Model) Agreement Pursuant to Section 13(c), recognize that state law may foreclose further bargaining on subjects that had been previously bargained:

> All rights, privileges, and benefits (including pension rights and benefits) of employees covered by this agreement (including employees having already retired) under existing collective bargaining agreements or otherwise, or under any revision or renewal thereof, shall be preserved and continued; provided, however that such rights, privileges and benefits which are not foreclosed from further bargaining under applicable law or contract may be modified by collective bargaining and agreement by the Recipient and the union involved to substitute other rights, privileges and benefits.

(Dept. of Labor, Office of Labor-Management Standards, Unified Protective Arrangement (Jan. 3, 2011) provision 3, [emphasis added].)

The foregoing authorities compel the conclusion that Section 13(c) requires a thoughtful qualitative assessment of whether a state's enactments truly eliminate meaningful, good faith collective bargaining over wages, hours and other terms and conditions of employment. Laws that explicitly or implicitly preclude negotiation over mandatory subjects of bargaining will run afoul of this standard. On the other hand, laws like AB 340, which merely modify one aspect of a public employer's authority over compensation, but retain and ensure the ability of current and future employees to engage in good faith collective bargaining, do not.

2. PEPRA Protects the Rights of Employees to Bargain Collectively.

Consistent with the strong right of public employees in California to collectively bargain, AB 340 fully meets the standard articulated in *Donovan*. In *Donovan*, the state legislature removed several mandatory subjects of collective bargaining previously enjoyed by the employees—work assignments, just cause for discharge, subcontracting, fringe benefits for part-time employees, and the number of regular hours of work and overtime. The court emphasized that even with respect to subjects that were not specifically excluded from bargaining: "one cannot be sure whether the Georgia law even requires 'good faith' bargaining over those matters that are subject to negotiations. The statute appears silent on the question and we have been referred to no state judicial decisions indicating an enforceable duty to bargain." (*Donovan*, 767 F.2d at 954.) Against this backdrop, the court correctly determined that by vesting essentially unfettered unilateral control over the terms and conditions of employment without requiring good faith negotiation, Georgia had for all practical purposes eliminated the public transit employee's previously held collective bargaining rights. The state's legal restrictions were therefore antithetical to Section 13(c)'s purpose and express requirements.

In contrast, the statutory changes and continuing robust framework for collective bargaining following AB 340 are not analogous to the elimination of collective bargaining in *Donovan*. Nothing in AB 340 eliminates collective bargaining rights, or even forecloses negotiation on public pensions. Nor does PEPRA grant public employers unilateral authority to establish any aspect of employee work hours, compensation, or benefits by management fiat. Where the state in *Donovan* vested full control in the employer to set the terms and conditions of employment without good faith bargaining, AB 340 prevents employers from doing that. AB 340 sets terms under which public employers may provide defined benefits rather than permitting employers to unilaterally determine and impose them. In doing so, AB 340 adjusts California's prior and frequently-amended laws under which public employers may offer defined benefit pensions; but, it in no way alters the employers' duty to engage in good faith bargaining over pension benefits, or the employees' ability to enforce that duty. Thus, while PEPRA imposes reasonable conditions on employers in offering defined pensions as one aspect of overall employee compensation, it does not impose any limitation on the full opportunity for good faith negotiations over employee compensation, including base salaries and wage rates, overtime premiums, standby pay, pay differentials, bonuses, employer-provided allowances, health and other benefits.

Even within the subcategory of retirement benefits and deferred compensation, PEPRA does not restrict the right to collective bargaining over defined contribution pensions, severance pay, holiday pay, vacation or other compensatory time off and retiree health benefits. Ultimately, AB 340 provides conditions for certain aspects of an important, but narrow, aspect of employee compensation, while leaving open for negotiation the vast interrelated other forms of employee compensation and retirement benefits.

3. The Vague Objections Made to PEPRA Do Not Withstand Scrutiny.

Certain aspects of AB 340 have been singled out as potential areas of concern with respect to Section 13(c) obligations. Principally, these are:

- Requiring that employees contribute at least 50% of the normal costs of their pension benefit;
- Imposing new formulas for calculating pensions for new public employees;
- Imposing anti pension-spiking measures;

- Raising minimum retirement ages;
- Imposing pensionable income limits.

Given the generality of the objections raised, and their conclusory nature, it is difficult to respond with specificity to these contentions. It is important to recognize, however, that the relevant provisions of PEPRA primarily just refined existing laws and apply principally to persons who were not employed by public entities when AB 340 took effect. Moreover, I note that in at least one instance, the objecting labor group concedes that PEPRA has no impact on its current negotiated collective bargaining agreement.

The changes made by PEPRA must be understood in the context of California's well-settled rule that prospective employees have no vested right to any benefits prior to accepting employment, and therefore a public agency is free to change those benefits prior to hiring. (*See Miller v. State of California*, 18 Cal.3d 808, 814-815 (1977) [pension benefits vest upon acceptance of employment]; *Kern v. City of Long Beach*, 29 Cal.2d 848, 855 (1947).) Thus, AB 340's modification of defined benefit pensions for persons hired *after* the law became effective cannot be considered a diminution or abridgment of collective bargaining rights for those persons, as they did not possess any preexisting rights before they were hired.

One aspect of PEPRA merits additional discussion—the provision involving employees sharing in the normal costs of defined benefit pensions. California Government Code section 7522.30(f) provides that if the terms of a memorandum of understanding in effect on January 1, 2013, would be impaired by this cost sharing provision of PEPRA, the requirement shall not apply until the expiration of that contract. Moreover, Government Code section 7522.30 requires collective bargaining if an employer wishes employees to bear greater than 50% of the normal costs of the defined benefit pension, and expressly *forbids* the employer from utilizing impasse procedures to achieve this. (Cal. Gov. Code § 7522.30(e)(3).)

PEPRA also must be viewed in the context of California's long history of regulating pension rights. It bears emphasizing that AB 340's modifications to an employers' authority to provide defined benefit pensions did not create unprecedented restrictions where none previously existed. Under the comprehensive statutory schemes of the County Employees' Retirement Law (Cal. Gov. Code § 31450, et seq., "CERL") enacted in 1937, and the Public Employees' Retirement Law (Cal. Gov. Code, § 20000, et seq.; "PERL"), employers subject to these acts

have for decades lacked legal authority to provide defined benefit pension plans that did not conform to CERL's and PERL's specific requirements, which necessarily governed both the provision of defined benefits, and the funding of those benefits.

Manifestly, the solvency of pension plans and the entities providing them is critical to the delivery of earned pension benefits. PEPRA promotes this vital goal by regulating the promised pension benefits and aspects of their funding, and in so doing maintains the legislature's longstanding commitment to ensuring the actuarial soundness of public pensions. (See *Valdes v. Cory*, 139 Cal.App.3d 773, 786 (1983) ["our review of the present law, its statutory antecedents and the legislative history dispel any doubt that the Legislature intended to create and maintain the PERS on a sound actuarial basis."].) Thus, both the CERL and the PERL have strictly governed aspects of defined benefit pensions including, pension formulas, minimum retirement ages, vesting, employee contributions, employer contributions, definitions of compensation for the purposes of pension formulas and maximum compensation limitations. While specific provisions regulating defined benefit pensions have varied over the decades following enactment of the CERL and PERL, fundamentally, the essential elements of defined benefit pensions have been governed by the prescriptions of state law since 1937, for employers subject to these laws.

In sum, AB 340 does not alter a California public employers' duty to engage in good faith bargaining over wages, hours, and other terms and conditions of employment, including pensions, and in no way impedes the ability to comply with Section 13(c)'s requirements.

4. Precedents under the NLRA Illustrate the Compatibility Between State Law and Federal Collective Bargaining Policies.

In light of Section 13(c)'s function in promoting the underlying policies of the National Labor Relations Act, it may be useful to draw a comparison to precedents analyzing the NLRA's interaction with state laws. The NLRA is concerned primarily with establishing an equitable process for determining terms and conditions of employment, and not with particular substantive terms of the agreement. (*Metropolitan Life Ins. Co. v. Massachusetts*, 471 U.S. 724, 753 (1985).)

The Supreme Court's holdings on NLRA preemption confirm that a state's regulation of certain matters impacting employment, and therefore the potential scope of bargaining, can be entirely consistent with the NLRA's collective bargaining goals. Rejecting a challenge to a

Massachusetts law which set mandatory provisions for health care plans even as applied to employer-provided health insurance, the Court analyzed the long history of state regulation for the benefit of workers, and found no conflict with the NLRA, stating:

> [T]here is no suggestion in the legislative history of the [NLRA] that Congress intended to disturb the myriad state laws then in existence that set minimum labor standards, but were unrelated in any way to the processes of bargaining or self-organization.

(*Id.* at 756.) Moreover, before the enactment of the Employee Retirement Income Security Act of 1974 (ERISA) (Pub. L. No. 93-40), Congress recognized pensions as an appropriate area for state regulation. Describing the history of the federal Welfare and Pension Plan Disclosure Act of 1958 ("Disclosure Act", Pub. L. No. 85-836, 72 Stat. 997, repealed and replaced by ERISA) the Supreme Court observed that Congress contemplated the states would play a vital role in pension regulation:

> As we understand the 1958 Disclosure Act and its legislative history, the collective-bargaining provisions at issue here dealt with precisely the sort of subject matter "which Congress . . . indicated may be left to [regulation] by the several states." Congress clearly envisioned the exercise of state regulation power over pension funds, and we do not depart from *Oliver* in sustaining the Minnesota statute.

(*Malone v. White Motor Corp.*, 435 U.S. 497, 506 (1978).) Thus, in *Malone*, the Court held that the NLRA did not preempt Minnesota's Private Pension Benefits Protection Act, which regulated funding and vesting of employee pension plans. In specifically affirming the role of state pension regulation within the NLRA, the Court explained:

> There is little doubt that under the federal statutes governing labor-management relations, an employer must bargain about wages, hours, and working conditions and that pension benefits are proper subjects of compulsory bargaining. <u>But there is nothing in the NLRA . . . which expressly forecloses all state regulatory power with respect to those issues, such as pension plans, that may be the subject of collective bargaining</u>.

(*Id.* at 504-505 [emphasis added].) The Court reached this result notwithstanding the dissents' argument and characterization of the state law in a manner similar to the present objections to PEPRA:

> The statute in this case removes from the bargaining table certain means of dealing with an inevitable trade-off between somewhat conflicting industrial relations goals—the tension between maintaining competitive standards of present compensation and, at the same time, creating a solvent fund for the security of long-term employees upon retirement.

(*Id.* at 516 [Powell J., Burger, C.J., dissenting].)

It is against this backdrop that the requirements of Section 13(c) must be understood and applied. When it enacted the Urban Mass Transportation Act of 1964, the precursor to the Federal Public Transportation Act, Congress considered state authority to regulate employee pensions to be fully compatible with the NLRA's collective bargaining policies and requirements. As a consequence, Section 13(c)'s requirement to continue collective bargaining should similarly be understood as compatible with California's longstanding regulation of public pensions.

Ultimately, AB 340 is analogous to the above precedents and other state regulation of employment conditions that are consistent with the goals of the NLRA. By refining California's existing laws governing the provision of defined benefit pensions, AB 340 protects public employees by ensuring that defined benefit pensions comply with standards designed to promote employee well-being in their retirement and, as necessarily tied to this, the fiscal solvency of those systems charged with supplying the benefits. Since the CERL's enactment in 1937, California has restricted the ability of public employers subject to the Act to unilaterally determine and impose all terms and conditions of defined benefit pensions; PEPRA merely continues this history of regulation.

To the extent that employers and employees engage in meaningful collective bargaining over the vast menu of wage, health, and retirement benefits, and aspects of defined benefit pensions affected by AB 340, AB 340 contemplates this bargaining will occur, mandates it on some subjects and poses no barrier to it in others. AB 340 is therefore fully consistent with the goals and requirements of Section 13(c).

AMALGAMATED TRANSIT UNION

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(202) 537-1645 FAX (202) 244-7824

March 14, 2013

VIA FACSIMILE & EMAIL

John Lund
Deputy Assistant Secretary
Office of Labor-Management Standards
U.S. Department of Labor
Room N5112
200 Constitution Avenue, NW
Washington, DC 20210

Dear Mr. Lund:

We are writing to respond to the California Labor Agency's legal analysis regarding the interplay between AB 340 and labor requirements of the Federal Public Transportation Act, 49 U.S.C. §5333(b), commonly referred to as Section 13(c). Attached hereto is a Memorandum of Position.

The California Labor Agency's conclusion that PEPRA's provisions allow for the "continuation of collective bargaining rights", as protected by Section 13(c), is not supported by the controlling law and contrary to the Department of Labor's (DOL) established policies and precedents in comparable cases.

The legislative purpose of PEPRA is not at issue here; rather, at issue is whether the clear diminution of the continuing right to bargain over mandatory and/or traditional subjects prevents California transit agencies from meeting and complying with the statutorily required employee protection requirements. Where, as here, collective bargaining rights have been impaired by state law, those states were compelled to expressly exempt transit agencies from coverage under those state laws (WI), amend their statutes to cure the underlying curtailment of bargaining rights (GA, MA), and secure permitted waivers (MI) to ensure that their states' transit grantees were able to satisfy Section 13(c)'s requirements as a condition of receiving federal transit funds.

If California does not follow suit and exempt Section 13(c)-protected transit employees from PEPRA's reach, California transit agencies' eligibility for continued federal funding is imperiled. As the law went into effect on January 1, 2013, even transit districts/agencies which understand the tension between the state and the federal laws find themselves between a rock and a hard place.

The California Labor Agency analysis misunderstands the meaning of "the continuation of collective bargaining rights" within the context of Section 13(c). Notably, the continuation of collective bargaining rights does *not* mean that collective bargaining rights are *generally* preserved or that the ability to "bargain around" or "bargain alternatives" to pension benefits is

preserved. Indeed, what the California Secretary of Labor describes as remaining in the wake of PEPRA is no more than "effects" bargaining; effects bargaining traditionally is all that remains when a subject is removed from substantive consideration (*e.g.*, the effects of the implementation of a management right with regard to a reorganization or other exercise of management right). Contrary to the California Labor Secretary's suggestion, the collective bargaining rights do not have to be entirely extinguished to abridge Section 13(c); the *diminution* of existing collective bargaining rights offends Section 13(c)'s protections as well. *Donovan v. Amalgamated Transit Union*, 767 F.2d 939, 947-949 (D.C. Cir. 1985).

The California Labor Secretary suggests that there is "no authority" that state law which modifies benefit levels, and accordingly impairs the scope of bargaining, "is incompatible with the letter or spirit of Section 13(c)." (CA Labor Department Memo, at 2.) Simply stated, the California Labor Agency found "no authority" because it either missed or ignored the entire body of controlling law. Rather than a dearth of authority, decades of consistent U.S. Department of Labor rulings since the mid 1980's provide the controlling precedent and practice with regard to the issues raised in the ATU's and various other unions' objections following the enactment of PEPRA and Section 13(c) requirements. As our accompanying memorandum addresses in detail, the collected body of DOL rulings in this area provide the "missing" law, and lead to the inexorable conclusion that PEPRA, which sets pension benefit levels and essentially preempts any meaningful bargaining over public sector pensions, eliminates or diminishes traditional collective bargaining rights so as to violate Section 13(c)'s protections.

While PEPRA's provisions might be unique to California, state laws which impair existing collective bargaining rights by setting benefit levels or curtailing the right to bargain in certain areas are legion. Accordingly, the DOL has had the opportunity to weigh in – and has denied issuing certification(s) of protective labor conditions – where other states imposed similar legislative mandates. Thus, as set out more fully in our accompanying memorandum, the DOL consistently found that state laws which diminish collective bargaining rights as in Georgia, Michigan, Wisconsin, New Jersey, and Massachusetts, among other states, ran afoul of Section 13(c) obligations.

Likewise, the suggested remedy here (an amendment to PEPRA exempting transit employees protected by Section 13(c) from PEPRA's provisions), is not new or unique. As addressed in detail in our accompanying memorandum, a legislative remedy – effectively exempting transit employees from the offending statute – was achieved in each of the states. Indeed, the *Donovan* decision itself resulted in an amendment to the MARTA enabling statute in Georgia restablishing the right to bargain over previously restricted mandatory subjects. And, in jurisdictions such as Kalamazoo, Michigan, where the transit employer chose not to secure a permitted exemption afforded by the state statute, DOL withheld its certification of the then-pending grant.

As the accompanying legal memorandum demonstrates, the formidable body of DOL rulings and case precedents in this area support our analysis. In this regard, in connection with all post PEPRA grants, we reiterate that the DOL has already found that PEPRA "appears to have removed mandatory and/or traditional subjects of collective bargaining from the consideration of the parties and may prevent [transit systems in California] from continuing the collective

bargaining rights of employees, as required by Section 13(c)(2) of the Federal Transit Act". *See* DOL's Multiple Responses to Objections from California Grantees, as cited in our accompanying memorandum.

While this pending matter may place a financial burden on the affected California agencies, the overriding obligation of the Department is to fully and properly apply and enforce the federal protections long afforded to our nation's 200,000 transit workers.

Thank you for your consideration of these important issues. I stand ready to respond to any questions you may have or requests for additional information.

Sincerely,

Robert A. Molofsky (DBS)

Robert A. Molofsky
General Counsel to ATU

Enclosure

yre/1

c: Yvonne Williams, President/Business Agent, ATU Local 192
Victor Guerra, President/Business Agent, ATU Local 256
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Peter Saltzman, Esq.

MEMORANDUM

TO: Interested Parties

FROM: Jessica Chu, Associate General Counsel JC (DBS)
Robert Molofsky, General Counsel to ATU RAM (DBS)

DATE: March 14, 2013

SUBJECT: ATU Position on PEPRA'S Adverse Impact on Collective Bargaining Rights Protected by Section 13(c)

Introduction

This is in response to the California Labor Agency and Workforce Development Agency's ("CA Labor Agency") legal memorandum setting forth its position on California transit agencies' ability to comply with Section 13(c) requirements following the passage of PEPRA. Contrary to CA Labor Agency's conclusion, ATU submits that the controlling law, DOL policy and precedent compels an outcome that renders California transit agencies ineligible for federal transit funds as a result of PEPRA's adverse effect on collective bargaining rights of transit employees protected under Section 13(c).

Issues Presented

The pertinent issue here is whether the clear diminution of collective bargaining rights under PEPRA over mandatory and/or traditional subjects prevents California transit agencies from complying with Section 13(c). Any analysis must be measured against the standard developed in *Amalgamated Transit Union v. Donovan,* 767 F.2d 939, 947 (D.C. Cir. 1975) and as consistently applied by the DOL since *Donovan.* Mainly, DOL has repeatedly stated that it is well established that "Federal transit law does not permit the Secretary of Labor to certify a grantee's employee protection agreements ***where workers previously enjoyed collective bargaining rights but those rights were subsequently diminished or eliminated altogether by state law.***"[1]

The CA Labor Agency, while not disagreeing that PEPRA removes certain mandatory subject matters from bargaining, nevertheless argues that California state agencies retain sufficient ability to engage in collective bargaining and therefore can continue to comply with Section 13(c) requirements. This position taken by the CA Labor Agency, however, is not supported by controlling law and well established DOL policy and precedent.

At the onset, we set forth two guiding principles which have long controlled DOL's action and analysis when faced with state laws that adversely affect collective bargaining rights. First, the purpose of Section 13(c)(1) and (2) is to preserve rights, privileges and benefits under existing

[1] *See e.g.*, DOL's September 8, 2011, Response to Objections in connection with Suburban Mobility Authority for Regional Transportation Grants (MI-37-X043) #3, (MI-90-X756) #1, and (MI-90-X758) #1; DOL's August 29, 2011, Response to Objections in connection with New Jersey Transit Corporation Grant (NJ-05-0027) #1; DOL's July 29, 2011, Response to Objections in connection with City of Eau Claire (WI-04-0048).

collective bargaining agreements and protect those rights from being unilaterally altered. *See e.g.*, DOL's May 20, 2011, Final Response to Objections in connection with Capital Area Transportation Authority (MI-95-X065). Second, "Federal transit law, in particular 49 U.S.C. 5333(b)(2)(A) and (B) prohibits the Secretary of Labor from certifying a grantee's employee protection agreements where workers previously enjoyed collective bargaining rights but those rights were subsequently diminished or eliminated altogether" by state law. *Id.*

Background on PEPRA

By way of background, on September 12, 2012, California Governor Brown signed the Public Employees' Pension Reform Act of 2013, AB 340 (Furutani), Stats. 2012, Chapter 296 ("PEPRA") which became effective on January 1, 2013, and applies to most transit workers' public pension plans. Among other mandates, the new Pension Reform law requires covered employers to unilaterally implement changes to retirement benefits without first bargaining with their employee representative(s) by:

- Raising the minimum retirement ages;
- Reducing pension benefits for new public employees;
- Imposing new formulas for calculating pensions for new public employees;
- Imposing a definition of "final compensation";
- Fixing the vesting schedule; and
- Adjusting the compensation cap annually and requiring certain contributions from employees to equal to one-half of the normal costs of the plan.

ATU Objections

Following the passage of PEPRA, the ATU has registered objections pursuant to 29 C.F.R. Part 215.3 with the DOL in connection with its Section 13(c) certification processing of grants submitted by various California transit agencies on the basis that PEPRA has stripped ATU and other unions representing transit employees of the right to negotiate over critical aspects of their pension benefits in violation of Section 13(c).[2] In sum, various California ATU locals and transit agencies, under PEPRA, can *no longer negotiate* (among others) the benefit formula, definition of final compensation, applicability of the formula to past and/or future service, the employer pick-up, or other benefit features, which effectively diminishes and/or eliminates collective bargaining relative to these core subjects of retirement benefits that are inherently connected to other retirement benefit features.

In response to our objections, the DOL has already determined that PEPRA constitutes a change in legal or factual circumstances that may materially affect the rights or interests of employees represented by the ATU. ***See*** **29 C.F.R. 215.3(d)(3)(ii).** In fact, the DOL has

[2] *See e.g.* ATU's objections to the DOL's referral for Los Angeles County Metropolitan Transit Authority Grants (CA-04-0261), (CA-04-0232) #1, (CA-95-X042) #2, and (CA-90-Y717) #7; ATU's objections to the DOL's referral for Monterey-Salinas Transit Grant (CA-90-Z022); ATU's objections to DOL's referral for Sacramento Regional Transit District (CA-03-0806) #2; ATU's objections to DOL's referral for San Diego Metropolitan Transit System Grant (CA-04-0267); ATU's objections to Alameda-Contra Costa Transit District (CA-95-X021); ATU's objections to DOL's referral for San Francisco Bay Area Rapid Transit District Grant (CA-04-0212); ATU's objections to DOL's referral for Riverside Transit Agency (CA-90-Z034); and ATU's objections to DOL's referral for Santa Clara Valley Transportation Authority (CA-95-X149).

concluded that the state law appears to have removed mandatory and/or traditional subjects of collective bargaining from the consideration of the parties and may prevent California transit agencies from continuing the collective bargaining rights of employees, as required by Section 13(c)(2) of the Federal Transit Act, codified as 49 U.S.C. 5333(b)(2)(B).[3] Further, DOL has repeatedly stated that it is well established that Federal transit law does not permit the Secretary of Labor to certify a grantee's employee protection agreements ***where workers previously enjoyed collective bargaining rights but those rights were subsequently diminished or eliminated altogether by state law.***[4]

For the reasons explained below, the CA Labor Agency's submission to the DOL fails to provide any basis which would warrant the DOL reaching a different conclusion today and therefore its arguments should be rejected outright.

I. PEPRA removes and/or diminishes collective bargaining over pension benefit levels in violation of Section 13(c)'s mandate to assure the continuation of collective bargaining rights.

The CA Labor Agency asserts that PEPRA merely modifies one aspect of a public employer's authority over compensation and imposes reasonable conditions on employers in offering defined pensions but does not impose any limitation on the full opportunity for good faith negotiations over employee compensation. In making such an assertion, the Agency overlooks the legislative history of Section 13(c), misreads and misapplies applicable case law, and wholly ignores the DOL's well established policy and precedent.

A. The legislative history of Section 13(c) of the Urban Mass Transportation Act unambiguously demonstrates that the Congressional intent of the Act is to require transit agencies to assure the continuation of collective bargaining rights – not merely aspire to achieve a goal of assuring collective bargaining rights.

As an initial matter, although the CA Labor Agency frames Section 13(c) to merely require a transit agency to "achieve a goal" of assuring a continued right to collective bargaining, this contention is premised on a flawed interpretation of Section 13(c) and is inconsistent with the statute's legislative history. In fact, as originally drafted, Section 13(c) would have only "encouraged" the continuation of collective bargaining rights. See H.R. REP. No. 204, 88th Cong., 1st Sess. 20 (1963). This standard, however, was deemed to be too vague and afforded

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[3] *See e.g.* DOL's February 8, 2013, Response to Objections in connection with AC Transit Grant (CA-95-X021); DOL's December 6, 2012, Response to Objections in connection with LACMTA Grant (CA-95-X042) #2; DOL's February 5, 2013, Response to Objections in connection with Monterey-Salinas Transit Grant (CA-03-0823); DOL's January 10, 2013, Response to Objections in connection with Sacramento Regional Transit District Grant (CA-03-0806) #3; DOL's February 13, 2013, Response to Objections in connection with San Diego Metropolitan Transit System/Metropolitan Transit Development Board Grant (CA-04-0267).

[4] *See e.g.* DOL's September 8, 2011, Response to Objections in connection with Suburban Mobility Authority for Regional Transportation Grants (MI-37-X043) #3, (MI-90-X756) #1, and (MI-90-X758) #1; DOL's August 29, 2011, Response to Objections in connection with New Jersey Transit Corporation Grant (NJ-05-0027) #1; DOL's July 29, 2011, Response to Objections in connection with City of Eau Claire (WI-04-0048).

little if any protections to unionized workers. 109 Cong. Rec. 5675 (1953). The language was therefore amended, requiring in mandatory terms the continuation of collective bargaining rights.[5] Equally significant, Congress rejected qualifying the continuation of collective bargaining rights "to the extent not inconsistent with state law."

In *Amalgamated Transit Union v. Donovan*, the court found that the effect of amending the original language indicated that Congress meant to *require* the continuation of collective bargaining rights and the Secretary of Labor does not have the discretion to ignore the statute's requirements and certify a labor agreement that does not provide for the continuation of collective bargaining rights. 767 F.2d 939, 947 (D.C. Cir. 1975). Accordingly, the CA Labor Agency's argument that PEPRA is "fair" or "sound fiscal policy" does not allow the DOL to certify labor agreements which do not – and cannot under PEPRA – provide for the "continuation of collective bargaining rights." *Id.* at 946.

B. The CA Labor Agency misinterprets and misapplies the doctrines established in Donovan which do not allow the DOL to certify Section 13(c) agreements/arrangements where changes in state law adversely affects collective bargaining rights.

While it is true that the court in *Donovan* concluded that Section 13(c) did not impose upon the states the precise definition of "collective bargaining" established by the NLRA, and state and local governments are free to choose any collective bargaining policy they wish, *they may, however, only receive federal assistance if the requirements of Section 13(c) are met.* The Donovan court further found that Section 13(c) protects the process of collective bargaining and that "[t]he substantive provisions of collective bargaining agreements may change, but section 13(c) requires that the changes be brought about through collective bargaining, not by state fiat." *Id.* at 953.

Consistent with the *Donovan* ruling and reasoning, the DOL has uniformly applied its well established policy that Section 13(c) does not permit the Secretary of Labor to certify a grantee's employee protection agreements where workers previously enjoyed collective bargaining rights but those *rights were subsequently diminished or eliminated altogether. Id.* at 947-949. Thus, a state may not take action that fails to preserve and protect employee rights incorporated into the parties' protective arrangements and continue its eligibility to receive of Federal transit funds. *See e.g.* DOL's September 9, 2011, Response to Objections for SMART Grant (MI-37-X043) #1; (MI-90-X765) #1; (MI-90-X758) #1.

The question at issue is whether PEPRA, by imposing limits on certain pension benefit levels from negotiations between the transit agency and union(s), precludes public transit agencies in California from meeting their Section 13(c) obligation to continue collective bargaining rights. While the CA Labor Agency maintains that PEPRA imposes reasonable conditions on employers in offering defined pensions as one aspect of overall employee compensation and otherwise does

[5] The plain language of Section 13(c) states that "[Section 13(c)] [a]rrangements . . . shall include provisions that may be necessary for . . . the continuation of collective bargaining rights . . . ." 49 U.S.C. § 5333(b)(2)(B).

not impose any limitation on the full opportunity for good faith negotiations over employee compensation, its position does not conform with DOL precedent.

Michigan Cases

For example, Michigan passed Public Act 152 which required public employees to pay a certain percentage of the overall cost of purchasing health insurance, *i.e.*, limited a public employer's ability to agree to pay for health care benefits by imposing either a hard cap requirement or, in lieu thereof, the option of paying no more than 80% of the total annual costs of the health care plan. The DOL found that before this law was enacted, the parties were able to negotiate over all mandatory subjects of collective bargaining without any restrictions on the levels of benefits. As such was the case, the DOL determined that the Michigan law, *by placing restrictions on levels of benefits, diminishes the collective bargaining rights that the employees represented by unions previously enjoyed, contrary to the provisions of Section 13(c). See e.g.* DOL's Response to Objections in connection with City of Kalamazoo Grant (MI-90-X651), at p. 2.

To overcome restrictions under P.A. 152, the DOL advised the Michigan transit agencies to exempt themselves pursuant to an exemption provision included in the law in order for the DOL to issue certification. The DOL ultimately withheld its certification in one instance because the grantee refused to exempt itself from the limitations imposed by P.A. 152. DOL's September 13, 2012, letter in connection with the City of Kalamazoo Grant (MI-90-X651).

Similar to Public Act 152, and as acknowledged by the CA Labor Agency, PEPRA imposes limitations on certain aspects of defined benefits which diminishes the collective bargaining rights that employees represented by unions previously enjoyed, in violation of Section 13(c) requirements. Indeed, prior to the passage of PEPRA, California transit agencies and their union(s) regularly bargained over a variety of retirement options and formulas, including but not limited to the retirement age, definition of final compensation, formulas for calculating pensions, applicability of the formula to past and/or future service, vesting schedule, and employer pick-up/contribution levels from employees – all of which are now prohibited by PEPRA. In short, despite CA Labor Agency describing these limits as "reasonable", PEPRA has stripped ATU and other unions representing transit employees of their right to negotiate over any of these critical aspects of their pension benefits and effectively put an end to collective bargaining relative to the core subject of retirement benefits.

For the aforementioned reasons, CA Labor Agency's contention that "[n]othing in [PEPRA] eliminates collective bargaining rights, or even forecloses negotiation on public pensions" is disingenuous at best and inconsistent with the principles established in *Donovan* and DOL's application of those principles.

C. Recent policy and precedent established by the DOL following Donovan has been wholly ignored by the CA Labor Agency.

The CA Labor Agency states that it has found no authority suggesting that any modification to state law affecting public employee compensation or pensions, and by extension the scope of potential bargaining, is incompatible with the letter or spirit of Section13(c). In reaching such a

conclusion, it completely misses and ignores recent DOL rulings in connection with states which have enacted similar laws limiting collective bargaining rights.

Other State Precedents

In addition to Michigan Public Act 152 mentioned above, the DOL has opined on its ability to certify Section 13(c) agreements/arrangements where public sector collective bargaining rights have been curtailed by legislation in other states such as **Wisconsin**, **New Jersey**, and **Massachusetts**. In **Wisconsin**, Act 10 was passed in 2011, which included provisions that limit collective bargaining to wages only. In **New Jersey**, Public Law 2011, Chapter 78 passed and contained health benefit reform provisions that mandated all active employees pay a certain percentage of their health care benefits, depending on their salary levels and the type of coverage. Additionally, Chapter 78 established a "floor" for employee contributions so that no employee could pay an amount that was less than 1.5% of the employee's compensation. In **Massachusetts**, the MBTA enabling statute was amended which dictated the health care coverage of all active employees and MBTA retirees be transferred to a plan administrated by the State's General Insurance Commission for other public sector workers.

In each of these instances, the DOL consistently held that the Secretary was not permitted to certify a grantee's employee protection agreements *where workers previously enjoyed collective bargaining rights but those rights were subsequently diminished or eliminated altogether.*"[6]

As a result, in order for the DOL to issue certifications addressing transit agencies' grants in these states, the DOL required the restoration of collective bargaining rights previously enjoyed by the employees represented by unions prior to the passage of the law limiting those rights. Notably, **Wisconsin** subsequently passed Wisconsin Act 32 exempting transit workers from Wisconsin Act 10. *See* DOL's August 15, 2011, Response to Objections in connection with City of Eau Claire Grant (WI-04-0048). The **New Jersey's** Assistant Attorney General issued an opinion assuring the DOL that Chapter 78 did not apply to New Jersey Transit workers and therefore has no impact on transit workers' collective bargaining rights. *See* DOL's September 9, 2011, Response to Objections in connection with New Jersey Transit Corporation (NJ-05-0027)#1, *et al.* The **Massachusetts** legislature subsequently enacted legislation enabling the MBTA to negotiate and create a Health and Welfare Trust Plan that provides for supplemental benefits. *See* DOL's September 9, 2011, certification addressing MBTA Grant (MA-70-X001) #1. As discussed above, Public Act 152 in Michigan provided for a local unit of government to exempt itself from the provisions of the law restricting collective bargaining rights. The DOL required Michigan transit agencies to exempt themselves before any certifications could be issued. *See* DOL's September 13, 2012, letter in connection with the City of Kalamazoo Grant (MI-90-X651).

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[6] *See e.g.* DOL's response to objections for City of Eau Claire Grant (WI-04-0048); DOL's August 29, 2011, response to objections for New Jersey Transit Corporation Grant (NJ-05-0027) #1; DOL's June 23, 2011, response to objections for MBTA Authority Grants (MA-70-X001) #1, MA-15-X008; and MA-04-0049; DOL's August 16, 2012, Cover Letter to Referral for SMART Grant (MI-90-X756) #2 and DOL's September 9, 2011, response to objections for SMART Grant (MI-37-X043) #1, (MI-90-X756) #1, and (MI-90-X758) #1.

II. PEPRA is entirely inconsistent with California's history regarding public transit labor relations.

Contrary to the assertions of the CA Labor Agency, PEPRA is entirely inconsistent with California's history of public transit labor relations. California's transit agencies and transit districts have been permitted to negotiate the terms and benefits of their retirement systems for decades.

The majority of California transit districts were created by the California Legislature. *See, e.g.*, Cal. Pub. Util. Code Section 24501 *et seq.* (Alameda-Contra Costa Transit District), Cal. Pub. Util. Code Section 28500 *et seq.* (Bay Area Rapid Transit District), Cal. Pub. Util. Code Section 30750 *et seq.* (Los Angeles Metropolitan Transit Authority), Cal. Pub. Util. Code Section 40000 *et seq.* (Orange County Transit District), Cal. Pub. Util. Code Section 102000 *et seq.* (Sacramento Regional Transit District), Cal. Pub. Util. Code Section 103000 *et seq.* (San Mateo County Transit District), Cal. Pub. Util. Code Section 95000 *et seq.* (Santa Barbara Metropolitan Transit District), Cal. Pub. Util. Code Section 100000 *et seq.* (Santa Clara Valley Transportation Authority), Cal. Pub. Util. Code Section 50000 *et seq.* (San Joaquin Regional Transit District).[7]

The enabling legislation for each legislatively-created district includes labor relations provisions, in order to ensure compliance with Section 13(c) of UMTA.[8] The enabling legislation also typically includes provisions regarding the availability of collectively bargained pension benefits. *See e.g.* Sections 25301, 30451, 102430, 103440, 100370.

There is no question that the terms, conditions and benefits of these pension plans are subject to the collective bargaining process. In *Stockton Metropolitan Transit District*[9] *v. Amalgamated Transit Union*, 132 Cal.App.3d 203 (1982), the Court of Appeals determined that the terms of the collectively bargained retirement plan were subject to interest arbitration as required by both the Section 13(c) protective agreement as well as the district's enabling legislation.

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[7] A few transit districts (*e.g.*, Sunline Transit Agency, Central Contra Costa Transit Authority) are Joint Powers Agencies, entities created under the auspices of the Joint Powers Act (Cal. Gov. Code Section 6500 *et seq.*) The remaining transit districts are generally creations of charter cities (*e.g.*, San Francisco MUNI, Long Beach Transit) which are statutorily exempt from PEPRA. Such transit districts, such as Monterey-Salinas Transit, are created under the Meyers-Milias-Brown Act (MMBA). Under California Government Code section 3504, the scope of representation for MMBA jurisdictions includes "all matters relating to employment conditions and employer-employee relations, including, but not limited to, wages, hours, and other terms and conditions of employment . . . ." (Gov. Code sec. 3504.) The phrase "wages, hours, and other terms and conditions of employment" has been liberally construed consistent with federal precedent, from which the language was drawn." *Int'l Assoc. of Fire Fighters Union v. Pleasanton*, 56 Cal. App. 3d 959, 968 (1976). California courts have applied federal precedent in cases interpreting the scope language in the MMBA. *See Fire Fighters Union v. City of Vallejo*, 12 Cal.3d 608 (1974)(California Supreme Court found that the language "wages, hours, and other terms and conditions of employment" was a term of art that the California Legislature had taken directly from the NLRA and its interpretive cases.)

[8] Most California transit districts were created prior to the enactment of state labor relations laws such as the Meyers-Milias-Brown Act (MMBA). Without the inclusion of labor relations provisions in each district's enabling legislation, those employees would have lacked the right to organize, in violation of Section 13(c).

[9] The Stockton Metropolitan Transit District was the predecessor to the San Joaquin Regional Transit District.

The history of California transit districts' pension plans is wholly separate from the pension plans created pursuant to the County Employees Retirement Act of 1937. ("CERL"). Furthermore, CERL applies only to county employees. Gov. Code Section 31469(a). California transit districts are separate legal entities from California counties, and their employees are not county employees for purposes of CERL. Thus, contrary to the California Labor Agency, CERL *has no applicability to public transit pension plans.* CERL does not regulate *any* transit district pension plan. Rather, transit district pension plans are self-regulated by their boards of trustees,[10] who act as fiduciaries pursuant to Article 16, Section 17 of the California Constitution.

The California Labor Agency also erroneously relies on the Public Employees' Retirement Law (PERL) to further claim that California has a history of regulating public pensions. PERL governs the California Public Employees' Retirement System (CalPERS). PERL is *not* a statutory scheme designed to generally regulate public employee pensions, but rather a statutory scheme which regulates a specific, statewide pension system. In the course of collective bargaining, employers and unions may *elect* to join CalPERS and subject themselves to the requirement of PERL, but that decision is reached through collective bargaining. PERL does not restrict the possible agreements which may be reached during that bargaining. For example, prior to the passage of PEPRA, nothing prevented a transit district and its labor organization(s) from negotiating a supplemental pension in addition to CalPERS, or even withdrawing from CalPERS altogether and establishing an independent pension plan. Electing to join CalPERS is an option to be discussed during bargaining – the PERL has no general applicability to California pension law.

III. The California Labor Agency's NLRA precedent and minimum state labor standards analysis is wrong.

The Agency's discussion of NLRA precedent quite literally turns the law on its head, applying a line of cases holding that *minimum* state labor standards are not preempted by the NLRA to the situation here, where a *maximum* ceiling is imposed on negotiated employee benefits. As a general rule, *minimum* state labor standards (minimum wage, occupational health and safety and workers compensation, unemployment insurance and so on) "affect union and nonunion employees equally, and neither encourage nor discourage the collective-bargaining processes that are the subject of the NLRA." *Metropolitan Life Insurance Co. v. Massachusetts*, 471 U.S. 724, 755 (1985). In that case, the Court sustained a Massachusetts law requiring health insurance policies to provide minimum mental-health benefits; and in *Malone v. White Motor Corp.*, 435 U.S. 497 (1978), the other case cited in the Agency's memorandum, the Court sustained a Minnesota law requiring pre-ERISA pension plans to comply with minimum vesting and funding standards.

The remarkable assertion made by the Agency is that at least prior to the passage of ERISA, a state law could have *reduced and fixed* the level of pension benefits available to private sector

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[10] *See e.g.* Cal. Pub. Util. Code Section 99159 (providing provides for equal labor-management representation on public transit pension boards).

workers, as PEPRA does for public sector workers, without discouraging the collective bargaining process protected by the NLRA. But this is plainly wrong: such a state law would offend any notion of equitable bargaining. "The NLRA is concerned primarily with establishing an equitable process for determining terms and conditions of employment, and not with particular substantive terms of the bargain that is struck when the parties are negotiating from relatively equal positions." *Metropolitan Life Insurance Co. v. Massachusetts*, 471 U.S. at 753. Under PEPRA, obviously, parties are *not* negotiating from relatively equal positions.

Indeed, the Supreme Court has held that the NLRA *does* preempt state laws which, like PEPRA, *limit* the economic terms parties are permitted to negotiate. For example, it has held that the application of Ohio antitrust law to invalidate certain rates agreed to through collective bargaining was preempted by the NLRA because it "would frustrate the parties' solution of a problem which Congress has required them to negotiate in good faith toward solving, and in the solution of which it imposed no limitations relevant here." *See, Teamsters Local 24 v. Oliver*, 358 U.S. 283, 296 (1959). That is exactly what PEPRA does: thoroughly frustrate bargaining parties' solution of a difficult problem they would otherwise be required to negotiate in good faith.

Furthermore, the California courts have expressly rejected the claim that transit industry pension plans are a subject over which the state has exclusive control. *Stockton Metropolitan Transit District v. Amalgamated Transit Union,* 132 Cal.App.3d 203 (1982). The *Stockton* court held that Section 13(c) protective agreements do not violate state sovereignty, and that the terms of the district's pension plan were subject to binding interest arbitration.

Conclusion

Based on the aforementioned, the legal opinion reached by the CA Labor Agency that PEPRA does not abridge the collective bargaining rights of mass transit employees in a manner that violates Section 13(c) is not supported by DOL's longstanding principles, DOL's rulings, and applicable case law. The passage of PEPRA has undoubtedly rendered covered public transit agencies in California incapable of complying with its Section 13(c) agreements or arrangements. Under PEPRA, transit agencies in California indeed now lack the authority to agree to the necessary fair and equitable arrangements as the state law governing them do not preserve the employees' collective bargaining rights.

Therefore, consistent with the DOL's past actions, in order for California transit agencies to continue to be eligible to receive federal funds in light of PEPRA, there must be restoration of collective bargaining rights over pension design currently foreclosed by PEPRA. It is our belief that the only way to do so is for California to pass Assembly Bill 160, an amendment exempting transit workers' pension plans from PEPRA.

Ott, Don

From: Woodman, G. Kent [kwoodman@thompsoncoburn.com]
Sent: Thursday, March 28, 2013 12:00 PM
To: Stamm, Ronald; Ott, Don
Cc: Starke, Jane Sutter
Subject: Fw: Briefing schedule for CA-95-X042-02 & CA-04-0232-01
Attachments: ca-95-x042-02-etal brf-ord-CLEARED FINAL-misc.pdf; PEPRA-Renner.pdf; PEPRA-CA-LWDA-analysis.pdf; PEPRA-ram ltr.pdf

Well we finally got a briefing schedule. Multiple issues to address, as specified in the letter. Lets plan on having a call on Monday if possible.

From: Williams, Janice - OLMS [mailto:Williams.Janice@dol.gov]
Sent: Thursday, March 28, 2013 01:44 PM
To: Woodman, G. Kent; Erika Diehl <ediehl@smart-union.org>; pknupp@geclaw.com <pknupp@geclaw.com>; cgomes@geclaw.com <cgomes@geclaw.com>; Scheryl.Portee@dot.gov <Scheryl.Portee@dot.gov>; Leslie.Rogers@dot.gov <Leslie.Rogers@dot.gov>; Starke, Jane Sutter; martz@afscme.org <martz@afscme.org>
Cc: Marchant, Doug - OLMS <Marchant.J@dol.gov>
Subject: Briefing schedule for CA-95-X042-02 & CA-04-0232-01

The attached documents are the Department of Labor certification for the above captioned Federal Transit Administration project. If you have problems opening the attachments, cannot read the attachments, or have received this communication in error, please notify me by telephone (202-693 0177) or by electronic mail (williams.janice@dol.gov) immediately.

THOMPSON COBURN LLP

Jane Sutter Starke
P 202.585.6924
F 202.508.1024
jstarke@thompsoncoburn.com

May 2, 2013

John Lund
Deputy Assistant Secretary
Office of Labor-Management Standards
U.S. Department of Labor
200 Constitution Avenue, N.W.
Room N-5112
Washington, D.C. 20210

Re: Los Angeles County Metropolitan Transportation Authority
FTA Grant Applications
CA-95-X042-02
CA-04-0232-01
CA-04-0261

Dear Mr. Lund:

I am writing on behalf of Los Angeles County Metropolitan Transportation Authority (LACMTA) with regard to the above-referenced proceeding before the Department of Labor (Department), and specifically to object to the unprofessional actions of the UTU in its reply brief.

Pursuant to the Department's March 28, 2013 briefing instructions in this dispute, the Department requested the briefing of the issues through the simultaneous filing of initial and reply briefs. The reply briefs were to be filed April 30th -- after LACMTA agreed to the extension for filing requested by the ATU -- by 4:00 p.m. LACTMA filed its reply brief in accordance with that schedule and process -- a process typically followed by the Department in the briefing of certification disputes and reflected in its 13(c) Guidelines (29 C.F.R. § 215.3(e)(3)).

In reviewing the UTU's reply brief filed by Erika Diehl, it is apparent (and in fact admitted) that the UTU violated the integrity of the Department's briefing process and conduct of this proceeding. The UTU's footnote 3 (on page 3 of its reply brief) is direct evidence that the UTU reviewed LACMTA's reply and then modified its reply brief before filing, in order to

respond to LACMTA's argument in its reply. This action is in flagrant disregard of the Department's established process for the simultaneous filing of reply briefs, as well as offensive to any notion of procedural fairness and professional courtesy. As stated in the Department's March 28th briefing instructions at 4 "reply briefs *must be limited* to the rebuttal of arguments presented by the other party *in its initial brief*." (emphasis added) The Department's briefing instructions further require that reply briefs be "shared between the parties in a timely manner." *Id.* This requirement is to ensure fairness in this proceeding – to avoid giving one party the opportunity to change its reply brief before filing to respond to arguments made in an opposing party's reply brief. There is no process which allows for a sur-reply for the UTU. This action not only clearly violates the Department's process but reflects an attempt by the UTU to gain an unfair advantage in this highly visible and disputed proceeding before the Department. It is prejudicial to LACMTA's position and should be properly addressed by the Department if the integrity of this adjudication process under the Administrative Procedure Act (APA) is to be respected.[1]

Further, we cannot help but point out that the substance of the UTU's footnote 3 is still incorrect. As LACMTA pointed out in its reply brief, the UTU relies and continues to quote a Texas Court of Appeals decision which was *reversed* by the Texas Supreme Court in *Dallas Area Rapid Transit Authority v. ATU Local 1388,* 273 S.W.3d 659 (Tex. 2008). Attached are both decisions.[2] The UTU quote is mistakenly attributed to the Supreme Court, but in actuality the language is from the Court of Appeals decision, which the Texas Supreme Court is quoting in its review of the litigation history. The UTU obviously failed to notice (or chose to ignore) the Supreme Court's citation to the Court of Appeals decision at the end of the paragraph.[3]

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[1] *See* the D.C. Circuit Court's opinion in *Atlantic Richfield Co. v. U.S. Department of Energy,* stating: "We think the broad congressional power to authorize agencies to adjudicate 'public rights' necessarily carries with it power to authorize an agency to take such procedural actions as may be necessary to maintain the integrity of the agency's adjudicatory proceedings". 767 F.2d 771, 794 (D.C. Cir. 1984).

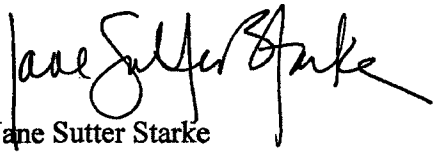
[2] The Texas Supreme Court decision is Attachment A. The Court of Appeals decision is Attachment B; it includes at page 900 the language quoted by the UTU.

[3] *See* page 664 of Attachment A and the cite in footnote 17 to the Court of Appeals decision (173 S.W.3d 896, 900 (Tex. App.-Dallas 2005)).

The Department's March 28th briefing instructions state as follows: "Any submission which does not comply with the parameters, limitations, and deadlines specified above may be subject to exclusion from consideration in the Department's determination of this matter." The UTU's unprofessional action in its reply brief clearly violated the Department's instructions. On that basis, LACMTA requests that the UTU reply brief be stricken from the record and receive no further consideration in this proceeding. Given the UTU's flagrant disregard of the Department's briefing instructions and the prejudicial impact on LACMTA, it is critical that the Department take this action to protect the integrity of the adjudicative process and ensure a fair proceeding is conducted.

Sincerely,

Thompson Coburn LLP

By 
Jane Sutter Starke

JSS/blt

Attachments (2)

cc: Erika Diehl, UTU
Ann Comer, DOL
Douglas Marchant, DOL
Don Ott, LACMTA
Ron Stamm, LACMTA
Kent Woodman, TC
Patricia Winchell, TC

ATTACHMENT A

trial. Because the Court holds otherwise, I respectfully dissent.

DALLAS AREA RAPID TRANSIT, Petitioner,

v.

AMALGAMATED TRANSIT UNION LOCAL NO. 1338, Respondent.

No. 06-0034.

Supreme Court of Texas.

Argued Nov. 14, 2007.

Decided Dec. 19, 2008.

Background: Labor union brought action against a Texas regional public transportation authority for breach of contract, relating to resolution of general grievance over wages and benefits. The 191st Judicial District Court, Dallas County, Catharina Haynes, J., denied authority's plea to the jurisdiction. Authority brought interlocutory appeal. The Dallas Court of Appeals, 173 S.W.3d 896, affirmed. Review was granted.

Holdings: The Supreme Court, Nathan L. Hecht, J., held that:

(1) the Texas Supreme Court has jurisdiction, under the Texas Constitution, to review a decision of a Texas intermediate appellate court in order to remove a conflict between the Texas intermediate appellate court decision and a decision of the United States Supreme Court, and

(2) the federal Urban Mass Transit Act of 1964 did not impliedly preempt the Texas regional public transportation authority's immunity from suit under Texas law.

Court of Appeals reversed; case dismissed.

1. Courts ⇐247(1)

Texas Supreme Court has jurisdiction, under the Texas Constitution, to review a decision of a Texas intermediate appellate court in order to remove a conflict between the Texas intermediate appellate court decision and a decision of the United States Supreme Court. Vernon's Ann.Texas Const. Art. 5, §§ 1, 3.

2. Courts ⇐91(1)

It is fundamental to the very structure of the Texas appellate system that the Texas Supreme Court's decisions be binding on the lower courts.

3. Courts ⇐247(1)

A Texas Court of Appeals holds differently from the Texas Supreme Court or the United States Supreme Court, for purposes of the Texas Supreme Court's jurisdiction, under the Texas Constitution, to review a decision of a Texas intermediate appellate court in order to remove a conflict between the Texas intermediate appellate court decision and a decision of the Texas Supreme Court or the United States Supreme Court, when there is inconsistency in their respective decisions that should be clarified to remove unnecessary uncertainty in the law and unfairness to litigants. Vernon's Ann.Texas Const. Art. 5, §§ 1, 3; V.T.C.A., Government Code §§ 22.001(e), 22.225(c).

4. Labor and Employment ⇐968
States ⇐18.46

Urban Mass Transit Act of 1964 (UMTA) did not impliedly preempt a Texas regional public transportation authority's immunity from suit under Texas law, with respect to a labor union's action for breach of contract, relating to the resolution of a general grievance over wages and benefits; immunity from suit under state law took nothing away from labor union to which it was entitled under UMTA, because UMTA required only that, as condi-

tion of federal financial assistance to a transportation authority, the interests of employees affected by the assistance had to be protected under arrangements the United States Secretary of Labor concluded were fair and equitable, the labor union did not argue that the arrangement negotiated by union and approved by Secretary of Labor was less than fair and equitable, and the arrangement did not provide for binding or judicially enforceable resolutions of general grievances. 49 U.S.C.A. § 5333(b); V.T.C.A., Government Code § 617.005; V.T.C.A., Transportation Code § 452.052(c).

5. States ⇐18.3

Federal law can preempt state law expressly or implicitly.

6. States ⇐18.5, 18.7

A federal statute implicitly preempts state law either when the scope of a federal statute indicates that Congress intended federal law to occupy a field exclusively, or when state law is in actual conflict with federal law.

7. States ⇐18.5

Implied-conflict preemption of state law may be found where it is impossible for a private party to comply with both state and federal requirements, or where state law stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.

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Hal K. Gillespie, Joseph Halcut Gillespie, Gillespie, Rozen, Watsky, Motley & Jones, P.C., Dallas, for Respondent.

Justice HECHT delivered the opinion of the Court.

Section 13(c) of the federal Urban Mass Transit Act of 1964 (the "UMTA", now the Federal Transit Act) conditions a public transportation authority's receipt of federal financial assistance on "arrangements the Secretary of Labor concludes are fair and equitable" to protect "the interests of employees affected by the assistance".[1] Such arrangements "shall include provisions that may be necessary for ... the preservation of rights, privileges, and benefits ... [and] the protection of individual employees against a worsening of their positions related to employment".[2]

In this case, a public transportation authority and its employees' union, operating under a 13(c) arrangement, resolved a general grievance over wages and benefits. The authority did not adhere to the resolution, and the union sued for breach of contract. The lower courts concluded that

1. Pub.L. No. 88–365, § 10(c), 78 Stat. 302, 307, redesignated as § 13(c) by Pub.L. No. 89–562, § 2, 80 Stat. 715, 716, as amended, now codified at 49 U.S.C. § 5333(b) (2006) ("As a condition of financial assistance under ... this title, the interests of employees affected by the assistance shall be protected under arrangements the Secretary of Labor concludes are fair and equitable. The agreement granting the assistance ... shall specify the arrangements.").

2. *Id.* § 5333(b)(2) ("Arrangements under this subsection shall include provisions that may be necessary for—(A) the preservation of rights, privileges, and benefits (including continuation of pension rights and benefits) under existing collective bargaining agreements or otherwise; (B) the continuation of collective bargaining rights; (C) the protection of individual employees against a worsening of their positions related to employment; (D) assurances of employment to employees of acquired public transportation systems; (E) assurances of priority of reemployment of employees whose employment is ended or who are laid off; and (F) paid training or retraining programs.").

the authority is not immune from suit.[3] The issue before us is whether section 13(c) preempts an authority's immunity from suit under state law. We hold that immunity is not preempted and that the union's recourse is to the procedures approved in the 13(c) arrangement. Accordingly, we reverse the judgment of the court of appeals and dismiss the case.

I

Petitioner Dallas Area Rapid Transit is a regional public transportation authority[4] that performs only governmental functions[5] and is immune from suit under Texas law.[6] Created in 1983 and funded with a one-cent sales tax,[7] DART assumed the operations of the Dallas Transit System, which the City of Dallas had acquired in 1963 from the privately owned Dallas Transit Company.[8] Company employees, and later System employees, were represented by Amalgamated Transit Union Local No. 1338, which now represents DART employees. ATU 1338 engaged in collective bargaining with the Company,[9] but Texas law prohibits a state political subdivision from collective bargaining with public employees.[10] This prohibition has been held to apply to the System,[11] DART,[12] and their employees, and ATU 1338 does not challenge its application here.[13] But public

3. 173 S.W.3d 896, 900 (Tex.App.-Dallas 2005).

4. *See* TEX. TRANSP. CODE §§ 452.001–.720.

5. *Id.* § 452.052(c) ("An authority is a governmental unit ... and the operations of the authority are not proprietary functions for any purpose....").

6. *See Guillory v. Port of Houston Auth.*, 845 S.W.2d 812, 812–815 (Tex.1993) (treating a port authority with only governmental functions as a political subdivision of the State for purposes of governmental immunity).

7. *See* DART HISTORY, DALLAS AREA RAPID TRANSIT, http://www.dart.org/about/history.asp (last visited October 31, 2008).

8. *See Dallas Area Rapid Transit v. Plummer*, 841 S.W.2d 870, 872 (Tex.App.-Dallas 1992, writ denied), *disapproved in part on other grounds by Texas Educ. Agency v. Leeper*, 893 S.W.2d 432, 445–446, n. 17 (Tex.1994); *Amalgamated Transit Union Local 1338 v. Dallas Public Transit Bd.*, 430 S.W.2d 107, 109 (Tex.Civ.App.-Dallas 1968, writ ref'd n.r.e.), *cert. denied*, 396 U.S. 838, 90 S.Ct. 99, 24 L.Ed.2d 89 (1969).

9. *See Local 1338*, 430 S.W.2d at 109–110.

10. TEX. GOV'T CODE § 617.002("(a) An official of the state or of a political subdivision of the state may not enter into a collective bargaining contract with a labor organization regarding wages, hours, or conditions of employment of public employees. (b) A contract entered into in violation of Subsection (a) is void. (c) An official of the state or of a political subdivision of the state may not recognize a labor organization as the bargaining agent for a group of public employees."), formerly TEX.REV.CIV. STAT. ANN. art. 5154c, first enacted by Act of April 17, 1947, 50th Leg., R.S., ch. 135, 1947 Tex. Gen. Laws 231.

11. *Local 1338*, 430 S.W.2d at 113–114.

12. *Stephens v. Dallas Area Rapid Transit*, 50 S.W.3d 621, 632–634 (Tex.App.-Dallas 2001).

13. Similar governmental entities are treated as state political subdivisions. *See* TEX. GOV'T CODE § 791.003(5) ("In this chapter: ... 'Political subdivision' includes any corporate and political entity organized under state law."); TEX. LOCAL GOV'T CODE § 335.075(a) (referring to "a political subdivision, including a metropolitan rapid transit authority created under Chapter 451, Transportation Code"); *id.* § 391.002(1) ("In this chapter: ... 'Governmental unit' means a[n] ... authority ... or other political subdivision of the state."); TEX. NAT. RES.CODE § 11.082(d)(4) ("In this section: ... 'Political subdivision' means a ... special-purpose district or authority."); TEX. TRANSP. CODE § 228.251(2) ("In this subchapter: ... 'Local governmental entity' means a political subdivision of the state, including ... a transportation corporation created under Chapter 431."); *id.* § 366.003(8) (same); *id.* § 370.003(8) (same); *id.* 370.032(a) ("[A regional mobility authority] is a body politic and corporate and a political subdivision of this state.").

employees may "present grievances concerning their wages, hours of employment, or conditions of work either individually or through a representative that does not claim the right to strike," [14] and ATU 1338 has presented grievances for DART employees.

DART receives federal financial assistance conditioned on a 13(c) Arrangement that was negotiated with ATU 1338 and approved by the Secretary of Labor on September 30, 1991. Attachment B to the 1991 Arrangement sets out "general grievance procedures ... for the purpose of giving an employee, individually or through such employee's representative, the opportunity to present grievances and appeals regarding establishment of, or failure to establish, specified wages, hours or conditions of work". For our purposes, those procedures may be summarized as follows:

- General grievances must be presented in writing to the human resources department head, who must meet with the employee or representative, provide a full hearing and review, and issue a written decision.
- The employee or representative may appeal to the executive director or invoke a fact-finding process.
- The fact-finding process is conducted by a three-member panel. One member is selected by each side, and the third is selected from a list of neutrals. After gathering facts, conducting hearings, and considering the opposing positions, the panel must issue a written report, making recommendations on unresolved issues.
- If the panel is unanimous, "the recommendations shall be deemed agreed upon as a final resolution of the issues submitted, except as otherwise modified by the parties' mutual agreement." But either partisan member of the panel may dissent. The panel must publish its findings and recommendations, and any dissents, in the local media.
- "[T]he fact-finding report and recommendations shall be advisory only" and shall not be binding on either party.[15]

The provisions of Attachment B, with minor changes, were included as section 8.10 of DART's Hourly Employment Manual.

In April 2001, ATU 1338 filed a general group grievance on behalf of DART employees seeking wage increases and better benefits. The grievance did not result in a fact-finding panel report under the Attachment B procedures; instead, DART and ATU 1338 signed a "General Grievance Resolution" in June 2002. The Resolution provided, among other things, that hourly employees would receive three annual 4% pay increases effective October 2001, October 2002, and October 2003. The Resolution stated that it "constitute[d] a final resolution to the issues raised in the General Grievance", barred ATU 1338 from filing another general grievance "concerning terms and conditions of employment, specified wages, hours, and conditions of work" for three years, and stated that "DART agrees that for the three year period it will not make any unilateral changes to DART's Hourly Employment Manual except for those issues remaining open herein." But the Resolution also contained important reservations under the heading, "Management Rights":

> 1. DART, at its sole discretion, possesses the right in accordance with applicable laws, to manage all operations, including the direction of the working force and the right to plan, direct and control the operation of all equipment

14. Tex. Gov't Code § 617.005.

15. The clause adding that the report and recommendations "shall not be binding" appears in DART's Hourly Employment Manual.

and other property of DART, except as modified by Section 8.10 of the DART Hourly Employment Manual and Section 617.005 of the Texas Government Code and DART's 13(c) Capital Arrangement certified by the Department of Labor on September 30, 1991 pursuant to USC § 5333(b), if applicable.... [N]othing herein changes DART's position that it has a unilateral right to establish employment conditions, set wages, hours of employment or conditions of work. In the event that DART makes any unilateral change except for issues remaining open herein during the term of this Resolution, such change relieves Local 1338 of its commitment not to file a General Grievance from October 1, 2001 to September 30, 2004.

2. Matters of inherent managerial policy are reserved exclusively to DART under law. These include but shall not be limited to such areas of discretion or policy as the functions and programs of DART, standards of service, its overall budget, utilization of technology, the organizational structure and selection and direction of personnel.

3. The listing of specific rights in this article is not intended to be, nor should be considered, restrictive or a waiver of any rights of management not listed and not specifically surrendered herein whether or not such rights have been exercised by DART in the past.

4. DART intends to abide by the provisions herein, and to resolve the general grievance as herein stated. By resolving this general grievance, DART does not intend to waive its legal obligations, including those set forth in its 13(c) Arrangement and its position that it may not legally enter into a legally binding and bilateral agreement with a labor organization regarding wages, hours, or conditions of employment of public employees. This general grievance is therefore resolved subject to all the foregoing limitations.

DART gave its employees the pay raises in 2001 and 2002, but not in 2003, and it unilaterally reduced other benefits, asserting that declining sales tax revenues required cost-saving measures. ATU 1338 sued for breach of contract based on DART's failure to comply with the 2002 Resolution. ATU 1338 sought money damages and injunctive relief. DART filed a plea to the jurisdiction claiming governmental immunity, which the trial court denied. On DART's interlocutory appeal, the court of appeals affirmed, holding that section 13(c) of the UMTA, as interpreted by the United States Supreme Court in *Jackson Transit Authority v. Local Div. 1285, Amalgamated Transit Union*,[16] preempted DART's immunity from ATU 1338's suit:

> Assuming state law provides that DART, as a governmental entity, is immune from suit, this immunity would obstruct accomplishing and executing Congress's full purposes and objectives under the UMTA. The UMTA, as interpreted in *Jackson Transit Authority*, is clear: state law is to control labor relations between local governments and unionized transit workers, as long as the workers' collective-bargaining rights are preserved before a local government receives federal aid. Congress designed section 13(c) of the UMTA "as a means to accommodate state law to collective bargaining." *Jackson Transit Auth.*, 457 U.S. at 27, 102 S.Ct. 2202, 72 L.Ed.2d 639. Although section 13(c) may be narrowly drafted to minimize its effects on state labor law, Congress's clear intent was to preserve collective-bargaining rights. Where state immunity law would preclude enforcement of

16. 457 U.S. 15, 102 S.Ct. 2202, 72 L.Ed.2d 639 (1982).

the rights preserved under section 13(c), Congress's objectives could not be accomplished. Therefore, state immunity law "is preempted and has no effect." [17]

We granted DART's petition for review.[18]

II

We begin with ATU 1338's argument that we lack jurisdiction over this interlocutory appeal. DART contends that we have jurisdiction because the court of appeals' decision conflicts with section 13(c) and *Jackson Transit Authority*. We first consider the extent of our jurisdiction and then how to apply it in this case.

A

Without an intermediate appellate court in Texas, this Court's workload soon became unmanageable.[19] The Constitution of 1876 limited the Supreme Court's appellate jurisdiction to civil cases and created a court of appeals for criminal cases and civil cases from county courts,[20] but this did little to alleviate the burden.[21] To preserve a right of appeal that was both broad and effective, constitutional amendments adopted in 1891 restructured the judiciary.[22] The Supreme Court's jurisdiction remained limited to civil cases.[23] The court of appeals became the Court of Criminal Appeals, with jurisdiction over criminal cases only.[24] The Legislature was required to divide the State into separate judicial districts and establish in each district a court of civil appeals with appellate jurisdiction over all civil cases in that district,[25] thereby placing appellate courts closer to the litigants and relieving the burden on the Supreme Court. To ensure uniformity in the development of the civil law, the 1891 constitutional amendments gave the Supreme Court appellate jurisdiction over "questions of law arising in the cases in the Courts of Civil Appeals in which the Judges of any Court of Civil Appeals may disagree, or where the several Court of Civil Appeals may hold differently on the same question of law".[26]

The enabling legislation enacted in 1892 reflected this constitutional priority while shifting the burden of appellate caseloads to the intermediate courts. The Supreme Court's jurisdiction was limited to cases in which the Courts of Civil Appeals had rendered a final judgment, as opposed to remanding for further proceedings, but there were exceptions to that limitation for cases in which Supreme Court review even at an intermediate stage was important. Three exceptions were for "[c]ases in which a civil court of appeals overrules its own decisions or the decision of another court of civil appeals or of the supreme court", "[c]ases in which the judges of any court of civil appeals may disagree", and "[c]ases in which any two of the courts of civil appeals may hold differently on the

17. 173 S.W.3d 896, 900 (Tex.App.-Dallas 2005) (citations omitted).

18. 50 Tex. Sup.Ct. J. 929 (June 29, 2007).

19. *See* 1 GEORGE D. BRADEN ET AL., THE CONSTITUTION OF THE STATE OF TEXAS: AN ANNOTATED AND COMPARATIVE ANALYSIS 399 (1977).

20. TEX. CONST. art. V, §§ 3, 6 (1876).

21. *See* 1 BRADEN, *supra* note 19, at 365 ("Despite the transfer of all criminal jurisdiction and some civil cases to the court of appeals in 1876, the supreme court's docket remained overcrowded.").

22. *Id.* at 399 ("The supreme court was falling so far behind that either the right to appeal had to be severely curtailed or the system had to be radically revised.").

23. TEX. CONST. art. V, § 3 (1891).

24. *Id.* §§ 4–5.

25. *Id.* § 6.

26. *Id.* § 3.

same question of law".[27] As we observed in 1895, these exceptions "were inserted for the purpose of enabling this court, *upon the first opportunity,* to settle questions of law upon which conflicting opinions were held by any of the courts having appellate jurisdiction,—so far, at least, as the opinion of this court can settle such questions".[28] Obviously, allowing conflicts in the law among the Courts of Civil Appeals to go unresolved could generate confusion that would offset the gains in efficiency those courts were designed to accomplish. The Supreme Court's jurisdiction was enlarged to provide for resolution of such conflicts. In 1913, the Court's jurisdiction was extended to all cases from the Courts of Civil Appeals, even if remanded,[29] and that remains the law.[30]

The 1892 legislation made decisions in a few types of cases final in the Courts of Civil Appeals, irrespective of conflicts among the courts. These were boundary and election disputes, slander and divorce cases, interlocutory appeals, and cases within the constitutional county courts' jurisdiction except probate matters and cases involving revenue laws or the validity of a statute.[31] But by 1953, the Legislature had concluded that the Supreme Court's jurisdiction should extend to all cases "in which the judges of the Courts of Civil Appeals may disagree upon any question of law material to the decision, or in which one of the Courts of Civil Appeals holds differently from a prior decision of another Court of Civil Appeals or of the Supreme Court upon a question of law".[32] That is the current law.[33]

Although the statutes governing this Court's jurisdiction have specifically addressed conflicts between our intermediate appellate courts and this Court, none has addressed conflicts between those courts and the United States Supreme Court. Such a conflict was presented in a 1979 divorce case, *Eichelberger v. Eichelberger.*[34] At that time, decisions in divorce cases were still final in the courts of civil appeals absent conflicts among Texas courts.[35] The court of civil appeals had

27. Act approved April 13, 1892, 22nd Leg., 1st C.S., ch. 14, § 1, 1892 Tex. Gen. Laws 19, 20, *reprinted in* 10 *H.P.N. Gammel, The Laws of Texas 1822–1897,* at 383, 384 (Austin, Gammel Book Co. 1898), formerly TEX.REV.CIV. STAT. ANN art. 1728 (1925).

28. *Sturgis Nat'l Bank v. Smyth,* 87 Tex. 649, 30 S.W. 898, 898 (1895) (emphasis added).

29. Act approved March 28, 1913, 33rd Leg., R.S., ch. 55, § 1, 1913 Tex. Gen. Laws 107, 107.

30. TEX. GOV'T CODE § 22.001(a)(1)-(2).

31. Act approved April 13, 1892, 22nd Leg., 1st C.S., ch. 15, § 5, 1892 Tex. Gen. Laws 25, 26, *reprinted in* 10 *H.P.N. Gammel, The Laws of Texas 1822–1897,* at 389, 390 (Austin, Gammel Book Co. 1898), formerly TEX.REV.CIV. STAT. ANN art. 1821 (1925).

32. Act of May 19, 1953, 53rd Leg., R.S., ch. 424, § 2, 1953 Tex. Gen. Laws 1026, 1027; *see State v. Wynn,* 157 Tex. 200, 301 S.W.2d 76, 77–78 (1957) (per curiam); *Cone v. Cone,* 153 Tex. 149, 266 S.W.2d 860, 861 (1954) (per curiam).

33. TEX. GOV'T CODE § 22.225(c). Pursuant to a constitutional amendment adopted in a 1980 election, the courts of civil appeals were renamed courts of appeals, and given criminal jurisdiction in 1981. TEX. CONST. art. V § 6; Tex. S.J. Res. 36, 66th Leg., R.S., §§ 5, 7, 1979 Tex. Gen. Laws 3223, 3224–3225, 3226 (effective Sept. 1, 1981); Act of June 1, 1981, 67th Leg., R.S., ch. 291, §§ 101–102, 149, 1981 Tex. Gen. Laws 761, 801–802, 820 (amending TEX.CODE CRIM. PROC. arts. 4.01, 4.03, effective Sept. 1, 1981).

34. 582 S.W.2d 395 (Tex.1979).

35. This finality was removed in 1987. Act of May 29, 1987, 70th Leg., R.S., ch. 1106, § 2, 1987 Tex. Gen. Laws 3804, 3804.

held that federal law did not preempt a divorce court's division of future railroad retirement benefits between spouses.[36] While the case was pending in this Court, the United States Supreme Court reached the opposite conclusion.[37] Although there was no statutory basis for this Court to take jurisdiction of the case, we concluded that we were constitutionally required to do so:

> We hold that under Article V, Sections 1 [38] and 3,[39] of the Constitution of Texas, the Supreme Court of Texas possesses the power, and thus the duty, to correct a decision of a Court of Civil Appeals that conflicts with the "supreme law of the land" [40] as established by the Congress and Supreme Court of the United States.[41]

Consistent with the Supreme Court's decision, we reversed the judgment of the court of civil appeals in part and rendered judgment.[42]

[1, 2] In the nearly thirty years since we decided *Eichelberger*, we have not invoked our constitutional jurisdiction to remove a conflict between a Texas appellate court and the United States Supreme Court,[43] but we adhere to our holding that this Court has such jurisdiction. From 1892 to 1953, the decisions of the courts of civil appeals were final in some cases and not subject to this Court's review, but this Court has never lacked jurisdiction to prevent an intermediate appellate court from conflicting with one of this Court's decisions.[44] It is fundamental to the very structure of our appellate system that this Court's decisions be binding on the lower courts.[45] We have no less authority to ensure that the lower courts follows the United States Supreme Court.

Nor should our holding in *Eichelberger* apply with any less force in interlocutory appeals.[46] On the contrary, the fact that provision has been made for an interlocu-

36. *Eichelberger v. Eichelberger*, 557 S.W.2d 587, 589 (Tex.Civ.App.-Waco 1977), *rev'd and rendered in part and aff'd in part*, 582 S.W.2d 395 (Tex.1979).

37. *Hisquierdo v. Hisquierdo*, 439 U.S. 572, 585–586, 99 S.Ct. 802, 59 L.Ed.2d 1 (1979).

38. Tex. Const. art. V, § 1 states in part: "The judicial power of this State shall be vested in one Supreme Court, in one Court of Criminal Appeals, in Courts of Appeals, in District Courts, in County Courts, in Commissioners Courts, in Courts of Justices of the Peace, and in such other courts as may be provided by law."

39. *Id.* art. V, § 3 states in part: "The Supreme Court shall exercise the judicial power of the state except as otherwise provided in this Constitution.... Its appellate jurisdiction shall be final and shall extend to all cases except in criminal law matters and as otherwise provided in this Constitution or by law."

40. U.S. Const. art. VI, cl. 2 ("This Constitution, and the Laws of the United States which shall be made in Pursuance thereof ... shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.").

41. *Eichelberger*, 582 S.W.2d at 397.

42. *Id.* at 403.

43. *Cf. County of Dallas v. Sempe*, 262 S.W.3d 315, 315–316 (Tex.2008) (per curiam) (concluding that the court of appeals' decision did not conflict with a decision of the United States Supreme Court).

44. Even if appellate jurisdiction were restricted, we have noted that such a conflict could be corrected by writ of mandamus. *State v. Wynn*, 157 Tex. 200, 301 S.W.2d 76, 78 (1957) (per curiam).

45. *In re K.M.S.*, 91 S.W.3d 331, 331 (Tex. 2002) (per curiam) ("[I]n reaching their conclusions, courts of appeals are not free to disregard pronouncements from this Court...."); *Lofton v. Texas Brine Corp.*, 777 S.W.2d 384, 386 (Tex.1989) ("This court need not defend its opinions from criticism from courts of appeals; rather they must follow this court's pronouncements.").

46. *Cf. In re H. V.*, 252 S.W.3d 319, 323 n. 26 (Tex.2008) (expressly refusing to reach the issue).

tory appeal indicates that the Legislature has determined that appellate review before a final judgment is important. It is surely no less important when a court of appeals' decision conflicts, not with another court of appeals' decision or a decision of this Court, but with a decision of the United States Supreme Court.

Accordingly, we conclude that we have jurisdiction over this case if the court of appeals's decision conflicts with the United States Supreme Court's decision in *Jackson Transit Authority*.

B

[3] We turn, then, to the question whether such a conflict exists. A court of appeals holds differently from this Court "when there is inconsistency in their respective decisions that should be clarified to remove unnecessary uncertainty in the law and unfairness to litigants." [47] We use this same standard in determining whether the court of appeals in this case has held differently from the United States Supreme Court.

In *Jackson Transit Authority*, the public transportation authority in Jackson, Tennessee had a 13(c) arrangement that guaranteed its employees' collective-bargaining rights, but the authority later refused to abide by a collective-bargaining agreement.[48] The union sued the authority in federal court for breach of both the 13(c) arrangement and the collective-bargaining agreement, but the district court dismissed the suit for want of subject-matter jurisdiction.[49] The court of appeals reversed, holding that the district court had federal-question jurisdiction [50] because the union's claim arose under the laws of the United States, and additionally, that section 13(c) implicitly provides for a federal cause of action.[51] The Supreme Court agreed that the district court had federal-question jurisdiction [52] but held that section 13(c) did not create a federal cause of action for breach of either the 13(c) arrangement or the collective-bargaining agreement.[53]

Under Tennessee law, the Jackson Transit Authority was authorized to enter into collective-bargaining agreements with its employees at the time its dispute with the union arose,[54] and the authority did not contend that it was immune from suit to enforce its agreements. Thus, the Supreme Court was not confronted with any issue of federal preemption of state governmental immunity. But DART and ATU 1338 argue that passages in the Supreme Court's opinion indicate its views on the subject. As DART points out, the Supreme Court emphasized that Congress intended section 13(c) arrangements and agreements under them to be governed by state law, not federal law:

47. TEX. GOV'T CODE § 22.001(e).

48. 457 U.S. 15, 18–19, 102 S.Ct. 2202, 72 L.Ed.2d 639 (1982). The authority contended that the union's agreement was with the authority's former manager, not with the authority itself. *Id.* at 19 n. 3, 102 S.Ct. 2202; *see Local Div. 1285, Amalgamated Transit Union v. Jackson Transit Auth.*, 1990 Tenn.App. LEXIS 901, at *5–*9, 1990 WL 210310, at *2–*4 (Tenn.Ct.App. Dec. 26, 1990).

49. 457 U.S. at 19, 102 S.Ct. 2202; 447 F.Supp. 88, 93–95 (W.D.Tenn.1977).

50. 28 U.S.C. § 1331 (2006).

51. 457 U.S. at 19–20, 102 S.Ct. 2202; 650 F.2d 1379, 1383 (6th Cir.1981).

52. 457 U.S. at 21 n. 6, 102 S.Ct. 2202.

53. *Id.* at 29, 102 S.Ct. 2202.

54. *See* TENN.CODE ANN. §§ 7–56–101 to –109. Prior to 1971, when these statutes were enacted, one court had held in *Weakley County Mun. Elec. Sys. v. Vick*, 43 Tenn.App. 524, 309 S.W.2d 792 (1957), that a governmental entity could not engage in collective bargaining with its employees. *See Local Div. 1285*, 1990 Tenn.App. LEXIS 901, at *4, 1990 WL 210310, at *1.

> A consistent theme runs throughout the consideration of § 13(c): Congress intended that labor relations between transit workers and local governments would be controlled by state law.[55]
>
> * * *
>
> Thus, Congress made it absolutely clear that it did not intend to create a body of federal law applicable to labor relations between local governmental entities and transit workers. Section 13(c) would not supersede state law, it would leave intact the exclusion of local government employers from the National Labor Relations Act, and state courts would retain jurisdiction to determine the application of state policy to local government transit labor relations. Congress intended that § 13(c) would be an important tool to protect the collective-bargaining rights of transit workers, by ensuring that state law preserved their rights before federal aid could be used to convert private companies into public entities. But Congress designed § 13(c) as a means to accommodate state law to collective bargaining, not as a means to substitute a federal law of collective bargaining for state labor law.[56]

DART argues that federal law should not preempt state immunity law any more than state labor law. But as ATU 1338 points out, other passages contemplate state-court actions to enforce section 13(c) arrangements and agreements under them:

> Indeed, since § 13(c) contemplates protective arrangements between grant recipients and unions as well as subsequent collective-bargaining agreements between those parties, it is reasonable to conclude that Congress expected the § 13(c) agreement and the collective-bargaining agreement, like ordinary contracts, to be enforceable by private suit upon a breach....
>
> The issue, then, is not whether Congress intended the union to be able to bring contract actions for breaches of the two contracts, but whether Congress intended such contract actions to set forth federal, rather than state, claims.[57]
>
> * * *
>
> Given this explicit legislative history, we cannot read § 13(c) to create federal causes of action for breaches of § 13(c) agreements and collective-bargaining contracts between UMTA aid recipients and transit unions. The legislative history indicates that Congress intended those contracts to be governed by state law applied in state courts.[58]

ATU 1338 argues that the right to sue a transportation authority to enforce its agreements is implicit in the Supreme Court's opinion.

The court of appeals agreed with ATU 1338, but we think both DART's and ATU 1338's arguments read far too much into the Supreme Court's opinion. The issue of federal preemption of state immunity law was simply not presented in the case, and we do not think the Supreme Court would have resolved it merely by implication. Even if we were mistaken about the Supreme Court's intention, we see no way to infer from its opinion what view it might take of the preemption issue. The court of appeals' decision is inconsistent with *Jackson Transit Authority* because the court of

55. 457 U.S. at 24, 102 S.Ct. 2202.

56. *Id.* at 27–28, 102 S.Ct. 2202 (footnotes and citation omitted).

57. *Id.* at 20–21, 102 S.Ct. 2202 (citation omitted).

58. *Id.* at 29, 102 S.Ct. 2202 (footnote omitted).

appeals read the opinion in that case to decide the preemption issue in the present case. The court of appeals' decision creates uncertainty in the law that is certainly unnecessary and may result in unfairness to litigants. The importance of clarity in the area is illustrated by the fact that the Supreme Court granted certiorari in *Jackson Transit Authority* "[b]ecause of the importance of the interpretation of § 13(c) for local transit labor relations".[59] For the same reason, we conclude it is important for this Court to reach the preemption issue presented in this case.

III

[4] We come at last to the issue itself, which is a narrow one. DART, for its part, concedes that it would not be immune from suit by ATU 1338 to require that the grievance procedures laid out in the Arrangement be followed. If, for example, DART refused to provide the hearing called for, or to engage in the prescribed fact-finding process, DART acknowledges that ATU 1338 could sue to enforce the Arrangement. ATU 1338, on the other hand, does not challenge the adequacy of the 1991 Arrangement under section 13(c) or argue that Texas law prohibiting collective bargaining by public employees is inapplicable to DART or is preempted by section 13(c). And while ATU 1338 argued below that DART is not immune from suit on its agreements, it has abandoned those arguments in this Court. We accept without comment all these concessions for purposes of this case. The issue before us comes down to this: does section 13(c) preempt DART's immunity from ATU 1338's suit to enforce the 2002 Resolution?

[5–7] Federal law can preempt state law expressly or implicitly.[60] ATU 133 8 does not contend that the UMTA contains any express preemption of state law. The United States Supreme Court has summarized implicit preemption as follows:

> [A] federal statute implicitly overrides state law either when the scope of a statute indicates that Congress intended federal law to occupy a field exclusively, or when state law is in actual conflict with federal law. We have found implied conflict pre-emption where it is impossible for a private party to comply with both state and federal requirements, or where state law stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.[61]

ATU 1338 focuses on the latter component of implied preemption, arguing that by preventing suit to enforce the 2002 Resolution, state immunity law stands as an obstacle to achieving the full purpose of section 13(c) to protect transit employees' interests.

But section 13(c) requires only that a transportation authority make arrangements that "the Secretary of Labor concludes are fair and equitable."[62] The 1991

59. *Id.* at 20, 102 S.Ct. 2202 (footnote omitted).

60. *Freightliner Corp. v. Myrick*, 514 U.S. 280, 286–287, 115 S.Ct. 1483, 131 L.Ed.2d 385 (1995); *Great Dane Trailers, Inc. v. Estate of Wells*, 52 S.W.3d 737, 743 (Tex.2001).

61. *Freightliner*, 514 U.S. at 287, 115 S.Ct. 1483 (citations and internal quotation marks omitted); *see also Great Dane*, 52 S.W.3d at 743.

62. Pub.L. No. 88–365, § 10(c), 78 Stat. 302, 307, redesignated as § 13(c) by Pub.L. No. 89–562, § 2, 80 Stat. 715, 716, as amended, now codified at 49 U.S.C. § 5333(b) (2006) ("As a condition of financial assistance under ... this title, the interests of employees affected by the assistance shall be protected under arrangements the Secretary of Labor concludes are fair and equitable. The agreement granting the assistance .... shall specify the arrangements.").

Arrangement was negotiated with ATU 1338 and was approved by the Secretary of Labor. As we have noted, ATU 1338 does not argue that the Arrangement is less than fair and equitable as required by section 13(c). The Arrangement, which achieves the full purposes of section 13(c), does not provide for binding or judicially enforceable general grievance resolutions. Under Attachment B, a hearing must be conducted, and if the grievance is not resolved, a fact-finding process ensues. But the end result of that process is an arbitration panel's report and recommendations that are expressly "advisory only" and not binding on either party. The report must be published in the local media, suggesting that the parties' recourse is then through political processes. Municipalities that are part of DART may be pressured to instruct the members each appoints to DART's governing board to adopt certain policies,[63] and municipalities may withdraw from DART altogether.[64]

ATU 1338 acknowledges that a fact-finding report produced under Attachment B cannot be enforced in court but argues that the 2002 Resolution is different. ATU 1338 cannot explain, however, why it should be entitled to enforce a general grievance resolution to which DART agreed when the process would not have produced an enforceable result had it continued to the end. The Resolution expressly recognized that it did not change DART's "position that it has a unilateral right to establish employment conditions, set wages, hours of employment or conditions of work." The Resolution also recognized that DART was not waiving "its position that it may not legally enter into a legally binding and bilateral agreement with a labor organization regarding wages, hours, or conditions of employment of public employees." Although the Resolution recited DART's intention to comply with its terms, it also provided that if DART made any unilateral change, the consequence would only be to relieve ATU 1338 of its commitment to a moratorium on filing general grievances.

ATU 1338 argues that for DART to be immune from this suit makes the Resolution pointless. But ATU 1338's complaint is with the 1991 Arrangement, not state immunity law. The Arrangement gave ATU 1338 no judicial recourse. DART's immunity from suit takes nothing away from ATU 1338 to which it was entitled under section 13(c). ATU 1338 argues that if it cannot sue to enforce the Resolution, it is left with no recourse at all. But the Resolution itself contemplates that if DART unilaterally failed to comply with its terms, ATU 1338 could simply file another general grievance and invoke the process provided by Attachment B.

Given that an arrangement can meet the requirements of section 13(c) without providing for judicial enforcement of grievance resolutions, nothing in that statute implicitly preempts state immunity law. Accordingly, we conclude that section 13(c) does not preempt DART's immunity from this suit.

* * *

The judgment of the court of appeals is therefore reversed and the case is dismissed.

63. *See* TEX. TRANSP. CODE §§ 452.571–.580.

64. *Id.* §§ 452.651–.662.

ATTACHMENT B

DALLAS AREA RAPID TRANSIT, Appellant

v.

AMALGAMATED TRANSIT UNION LOCAL NO. 1338, Appellee.

No. 05-05-00241-CV.

Court of Appeals of Texas, Dallas.

Oct. 14, 2005.

Background: Labor union brought action against regional transportation authority for violations of general grievance resolution. The 191st Judicial District Court, Dallas County, Catharina Haynes, J., denied authority's plea to the jurisdiction. Authority appealed.

Holding: The Court of Appeals, Whittington, J., held that federal Urban Mass Transportation Act (UMTA) preempted state governmental immunity law, and thus authority was not immune from suit.

Affirmed.

1. Pleading ⇐104(1)

"Plea to the jurisdiction" is a dilatory plea by which a party challenges a court's authority to determine the subject matter of an action.

See publication Words and Phrases for other judicial constructions and definitions.

2. Appeal and Error ⇐893(1)

Whether a trial court has subject-matter jurisdiction is a question of law to be reviewed de novo.

3. Appeal and Error ⇐863

In performing review of denial of plea to the jurisdiction, Court of Appeals does not look to the merits of the plaintiff's case but considers only the pleadings and the evidence pertinent to the jurisdictional inquiry.

4. Labor and Employment ⇐1514

States ⇐18.46

Federal Urban Mass Transportation Act (UMTA) preempted state governmental immunity law, and thus regional transit authority was not immune from suit concerning labor union's claim that authority violated general grievance resolution; UMTA's section governing arrangements to protect collective-bargaining interests of organized workers of public transit authorities under contracts granting federal aid under UMTA was designed to accommodate state law to collective bargaining, Congress's objectives could not be accomplished if state immunity law would preclude enforcement of rights preserved under those protective arrangements, and authority was not arm of the state. U.S.C.A. Const. Art. 6, cl. 2; 49 U.S.C.A. § 5333(b).

5. States ⇐18.5

If a state law conflicts with federal law, it is preempted and has no effect. U.S.C.A. Const. Art. 6, cl. 2.

6. States ⇐18.5

Preemption of state law that conflicts with federal law may be express or implied. U.S.C.A. Const. Art. 6, cl. 2.

7. States ⇐18.5

Federal law may impliedly preempt state law if it is impossible for a private party to comply with both state and federal requirements or if state law obstructs accomplishing and executing Congress's full purposes and objectives. U.S.C.A. Const. Art. 6, cl. 2.

8. Labor and Employment ⇐1265

Protective arrangements to protect collective-bargaining interests of organized workers of public transit authorities under contracts granting federal aid under feder-

al Urban Mass Transportation Act (UMTA) are valid and enforceable in state courts; arrangements are contracts, not collective-bargaining contracts. 49 U.S.C.A. § 5333(b).

9. Courts ⇐489(9)

Employees covered by agreement that protects collective-bargaining interests of organized workers of public transit authorities under contracts granting federal aid under federal Urban Mass Transportation Act, or their union, may bring a contract action in state court to enforce the agreement. 49 U.S.C.A. § 5333(b).

10. States ⇐18.5

Not all conflicts between federal statutes and state immunity laws result in preemption. U.S.C.A. Const. Art. 6, cl. 2.

Harold R. McKeever, Jr., Dallas Area Rapid Transit, Dallas, for appellant.

Hal K. Gillespie, Gillespie, Rozen, Watsky & Motley, P.C., Dallas, for appellee.

Before Justices WHITTINGTON, FRANCIS, and LANG.

OPINION

Opinion by Justice WHITTINGTON.

Amalgamated Transit Union Local No. 1338 sued Dallas Area Rapid Transit for violations of a general grievance resolution. DART filed a plea to the jurisdiction, claiming governmental immunity. The trial judge denied the plea. DART appeals, arguing in a single issue that the trial court did not have jurisdiction over ATU 1338's suit. We affirm the trial court's order.

Background

ATU 1338 is a labor organization representing employees of DART, a regional transportation authority. *See* Tex. Transp. Code Ann. §§ 452.001–.720 (Vernon 1999 & Supp.2004–05). In 2001, ATU 1338 filed a general group grievance on behalf of its bargaining unit members. In June 2002, DART and ATU 1338 entered into a general grievance resolution agreement to resolve the dispute. The resolution addressed salaries and wages for DART employees as well as other issues. In this lawsuit, ATU 1338 alleges DART breached the resolution agreement by failing to implement the pay increase included in the resolution and taking other unilateral actions inconsistent with the resolution. DART filed a plea to the jurisdiction, claiming the trial court lacked subject matter jurisdiction over ATU 1338's claims on the grounds of governmental immunity. ATU 1338 argued in response that state governmental immunity law was preempted by federal law. The trial judge denied DART's plea.

Standard of Review

[1–3] A plea to the jurisdiction is a dilatory plea by which a party challenges a court's authority to determine the subject matter of an action. *Bland Indep. Sch. Dist. v. Blue*, 34 S.W.3d 547, 554 (Tex. 2000). Whether a trial court has subject matter jurisdiction is a question of law to be reviewed de novo. *Tex. Natural Res. Conservation Comm'n v. IT–Davy*, 74 S.W.3d 849, 855 (Tex.2002). In performing this review, we do not look to the merits of the plaintiff's case but consider only the pleadings and the evidence pertinent to the jurisdictional inquiry. *County of Cameron v. Brown*, 80 S.W.3d 549, 555 (Tex.2002) (citing *Tex. Natural Res. Conservation Comm'n v. White*, 46 S.W.3d 864, 868 (Tex.2001)). Although federal

preemption is not usually a jurisdictional question, *see Mills v. Warner Lambert Co.*, 157 S.W.3d 424, 427 (Tex.2005) (federal preemption usually defense to plaintiff's suit but does not ordinarily deprive state court of jurisdiction), here it is asserted not to deprive the state court of jurisdiction but to maintain it despite DART's plea.

DISCUSSION

[4] DART argues the trial court did not have jurisdiction for five reasons. First, DART argues its status as a governmental entity provides it with immunity from ATU 1338's lawsuit. Second, DART argues it has not waived its immunity. Third, DART asserts it has not taken affirmative action to invoke the trial court's jurisdiction. Fourth, DART maintains federal law does not preempt state law to confer jurisdiction on the trial court. Fifth, DART argues ATU 1338's sole redress is through an administrative grievance process. Our resolution of the fourth argument is dispositive of the appeal. *See* TEX.R.APP. P. 47.1. DART's first, second, third, and fifth arguments are premised upon governmental immunity. We conclude the federal Urban Mass Transportation Act (UMTA) preempts state governmental immunity law in this case. *See* 49 U.S.C.A. § 5333(b) (West Supp.2005) (formerly designated as section 13(c) and referred to as section 13(c) in case law).

[5–7] "If a state law conflicts with federal law, it is preempted and has no effect." *Great Dane Trailers, Inc. v. Estate of Wells*, 52 S.W.3d 737, 743 (Tex.2001); *see also* U.S. CONST. art. VI, cl. 2 ("The laws of the United States are the 'supreme Law of the Land ... any Thing in the Constitution or Laws of any State to the Contrary notwithstanding'") (quoted in *Great Dane Trailers*, 52 S.W.3d at 743). Preemption may be express or implied. *See Great Dane Trailers*, 52 S.W.3d at 743. Federal law may impliedly preempt state law if it is impossible for a private party to comply with both state and federal requirements or if state law obstructs accomplishing and executing Congress's full purposes and objectives. *Great Dane Trailers*, 52 S.W.3d at 743; *see also Geier v. Am. Honda Motor Co.*, 529 U.S. 861, 882, 120 S.Ct. 1913, 146 L.Ed.2d 914 (2000) (because rule of state tort law upon which plaintiffs sued would have stood "as an obstacle to the accomplishment and execution of" important objectives of federal motor vehicle safety standard, it was preempted).

ATU 1338 contends application of state governmental immunity law would thwart Congress's intent and the purposes of the UMTA. The United States Supreme Court discussed the purposes of the UMTA in *Jackson Transit Authority v. Local Division 1285, Amalgamated Transit Union*, 457 U.S. 15, 102 S.Ct. 2202, 72 L.Ed.2d 639 (1982). At a time when many private transportation companies across the country were in "precarious financial condition," the UMTA "was designed in part to provide federal aid for local governments in acquiring failing private transit companies so that communities could continue to receive the benefits of mass transportation despite the collapse of the private operations." *Jackson Transit Auth.*, 457 U.S. at 17, 102 S.Ct. 2202. Congress was also aware, however, "that public ownership might threaten existing collective-bargaining rights of unionized transit workers employed by private companies." *Jackson Transit Auth.*, 457 U.S. at 17, 102 S.Ct. 2202. The Court continued,

> If, for example, state law forbade collective bargaining by state and local government employees, the workers might lose their collective-bargaining rights

> when a private company was acquired by a local government. To prevent federal funds from being used to destroy the collective-bargaining rights of organized workers, Congress included § 13(c) in the Act. Section 13(c) requires, as a condition of federal assistance under the Act, that the Secretary of Labor certify that "fair and equitable arrangements" have been made "to protect the interests of employees affected by [the] assistance." The statute lists several protective steps that must be taken before a local government may receive federal aid.... The protective arrangements must be specified in the contract granting federal aid.

Jackson Transit Auth., 457 U.S. at 17–18, 102 S.Ct. 2202 (citations omitted).

The *Jackson Transit Authority* Court noted Congress's concern that state law may forbid collective bargaining by state and local government employees, and thus "workers might lose their collective-bargaining rights when a private company was acquired by a local government." *See Jackson Transit Auth.*, 457 U.S. at 17, 102 S.Ct. 2202. In Texas, state law does prohibit collective bargaining by government employees. *See* TEX. GOV'T CODE ANN. § 617.002 (Vernon 2004) (official of state or political subdivision may not enter into collective bargaining contract with labor organization regarding wages, hours, or conditions of employment of public employees; any such contract void). DART, however, is a party to an "Arrangement Pursuant to Section 13(c) of the Urban Mass Transportation Act of 1964," under which DART agreed the "existing rights of employees covered by this Arrangement to present grievances concerning their wages, hours of work, or conditions of work, individually or through a representative ... shall be preserved and continued." *Arrangement Pursuant to Section 13(c) of the Urban Mass Transportation Act of 1964*, ¶ 4. DART makes annual certifications and assurances of its compliance with federal law and regulations to the Federal Transit Authority to obtain federal assistance, and a significant portion of DART's annual budget is derived from federal funds. Thus, the 13(c) arrangement between DART and ATU 1338 is consistent with Congress's intent "to prevent federal funds from being used to destroy the collective-bargaining rights of organized workers." *See Jackson Transit Auth.*, 457 U.S. at 17, 102 S.Ct. 2202.

While the issue in *Jackson Transit Authority* was whether Congress intended to create federal causes of action for breaches of section 13(c) agreements and collective bargaining contracts, *see Jackson Transit Auth.*, 457 U.S. at 21, 29, 102 S.Ct. 2202, the Court noted "it is reasonable to conclude that Congress expected the § 13(c) agreement and the collective-bargaining agreement, like ordinary contracts, to be enforceable by private suit upon a breach." *Jackson Transit Auth.*, 457 U.S. at 20–21, 102 S.Ct. 2202. The Court concluded the contracts at issue were to be governed by state, not federal, law. *See Jackson Transit Auth.*, 457 U.S. at 29, 102 S.Ct. 2202. The Court explained, "Congress designed § 13(c) as a means to accommodate state law to collective bargaining, not as a means to substitute a federal law of collective bargaining for state labor law." *Jackson Transit Auth.*, 457 U.S. at 28, 102 S.Ct. 2202.

[8, 9] We have also noted "arrangements under section 13(c) of the Urban Mass Transportation Act are not collective bargaining contracts," but are "contracts, albeit contracts required by federal statute." *Dallas Area Rapid Transit v. Plummer*, 841 S.W.2d 870, 874 (Tex.App.-Dallas 1992, writ denied), *abrogated in part on other grounds by Tex. Educ. Agen-*

cy v. Leeper, 893 S.W.2d 432, 446 (Tex. 1994) (Texas Uniform Declaratory Judgment Act waives governmental immunity for awards of attorneys' fees). Section 13(c) protective arrangements are "valid and enforceable in state courts." *Plummer*, 841 S.W.2d at 874. "Employees covered by a section 13(c) agreement, or their union, may bring a contract action in state court to enforce the agreement." *Plummer*, 841 S.W.2d at 874 (citing *Jackson Transit Auth.*, 457 U.S. at 29 n. 13, 102 S.Ct. 2202).

DART argues ATU 1338's claim is not for breach of a section 13(c) arrangement, but only for breach of the resolution agreement. We disagree. The general grievance resolution agreement recites that ATU 1338's grievance was addressed "in conformity with Section 8.10 of the DART Hourly Employment Manual and Section 617.005 of the Government Code and DART's [Section] 13(c) Capital Arrangement certified by the Department of Labor on September 30, 1991." As we noted in *Plummer*, "DART's personnel policy manual contains the grievance procedure properly promulgated pursuant to section 13(c) and, as part of the section 13(c) agreement, is binding on DART." *Plummer*, 841 S.W.2d at 874. We concluded in *Plummer* the trial court "was correct in finding that DART has a contractual duty to implement the Trial Board's award and that failing to do so constitutes a breach of that duty." *Plummer*, 841 S.W.2d at 874. As in *Plummer*, ATU 1338 "may bring a contract action in state court to enforce the agreement." *See Plummer*, 841 S.W.2d at 874.

Assuming state law provides that DART, as a governmental entity, is immune from suit, this immunity would obstruct accomplishing and executing Congress's full purposes and objectives under the UMTA. *See Great Dane Trailers*, 52 S.W.3d at 743; *Geier*, 529 U.S. at 882, 120 S.Ct. 1913. The UMTA, as interpreted in *Jackson Transit Authority*, is clear: state law is to control labor relations between local governments and unionized transit workers, as long as the workers' collective-bargaining rights are preserved before a local government receives federal aid. *See Jackson Transit Auth.*, 457 U.S. at 17, 27, 102 S.Ct. 2202. Congress designed section 13(c) of the UMTA "as a means to accommodate state law to collective bargaining." *Jackson Transit Auth.*, 457 U.S. at 27, 102 S.Ct. 2202. Although section 13(c) may be narrowly drafted to minimize its effects on state labor law, Congress's clear intent was to preserve collective-bargaining rights. Where state immunity law would preclude enforcement of the rights preserved under section 13(c), Congress's objectives could not be accomplished. Therefore, state immunity law "is preempted and has no effect." *See Great Dane Trailers*, 52 S.W.3d at 743.

[10] Not all conflicts between federal statutes and state immunity laws result in preemption. The United States Supreme Court held the State of Maine was immune from a suit by its employees under the Federal Fair Labor Standards Act because Congress cannot abrogate a state's sovereign immunity. *Alden v. Maine*, 527 U.S. 706, 754, 119 S.Ct. 2240, 144 L.Ed.2d 636 (1999) (applying sovereign immunity pursuant to Eleventh Amendment of United States Constitution). The rule in *Alden*, however, does not apply to DART in this case because DART is not an "arm of the state." *See Alden*, 527 U.S. at 756, 119 S.Ct. 2240 (sovereign immunity bars suits against State or "arm of the state" but not lesser governmental entity); *Williams v. Dallas Area Rapid Transit*, 242 F.3d 315, 322 (5th Cir.) (DART not "arm of the state" entitled to assert federal Eleventh Amendment immunity in case under Age

Discrimination in Employment Act), *cert. denied*, 534 U.S. 1042, 122 S.Ct. 618, 151 L.Ed.2d 540 (2001); *see also Hoff v. Nueces County*, 153 S.W.3d 45, 49 (Tex. 2004) (per curiam) (Eleventh Amendment immunity does not bar suit against "lesser entities" such as county). As noted in *Alden*, "certain limits are implicit in the constitutional principle of sovereign immunity;" it "does not bar all judicial review of state compliance with the Constitution and valid federal law." *Alden*, 527 U.S. at 755, 119 S.Ct. 2240. Here, state immunity law does not bar judicial review of ATU 1338's claims.

We affirm the trial court's denial of DART's plea to the jurisdiction.

In re Richard F. GERRY, Relator.

No. 12–05–00225–CV.

Court of Appeals of Texas,
Tyler.

Oct. 19, 2005.

Background: Husband filed motion to substitute counsel in divorce action. The County Court at Law, Nacogdoches County, Jack A. Sinz, J., denied motion, based on counsel's disqualification. Husband filed petition for writ of mandamus.

Holding: The Court of Appeals, James T. Worthen, C.J., held that County Court did not abuse its discretion in finding that wife had shared privileged information with attorney in firm of proposed substitute counsel, such that the firm was disqualified from representing husband in the divorce.

Petition denied.

1. Mandamus ⇐3(2.1), 28

Mandamus will issue when a trial court commits a clear abuse of discretion for which the relator has no adequate remedy at law.

2. Mandamus ⇐28

A trial court clearly abuses its discretion, such that mandamus relief is warranted, if it reaches a decision so arbitrary and unreasonable as to amount to a clear and prejudicial error of law.

3. Mandamus ⇐28

In order to find an abuse of discretion warranting mandamus relief, the reviewing court must conclude that the facts and circumstances of the case extinguish any discretion in the matter.

4. Mandamus ⇐4(4)

A party generally lacks an adequate appellate remedy, for purposes of mandamus, if its counsel is disqualified.

5. Attorney and Client ⇐21.5(1)

Trial court did not abuse its discretion in finding that wife, who met with attorney before filing for divorce to discuss possible legal representation in divorce, had shared privileged information with attorney, such that the firm was disqualified from representing husband in the divorce; wife testified that she related information relevant to the issues in the divorce to the attorney and provided documents for copying, and attorney testified that she recalled little of what was discussed in the meeting and admitted that wife could have shared facts that she did not recall and that wife could have provided confidential information. Rules of Evid., Rule 503(a)(1); State Bar Rules, V.T.C.A., Government Code Title 2, Subtitle G App. A, Art. 10, § 9, Rules of Prof.Conduct, Rules 1.05, 1.09(a)(3), (b).

U.S. Department of Labor

Office of Labor-Management Standards
Washington, D.C. 20210

May 14, 2013

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Re: Verification of Pension Calculations
Los Angeles County Metropolitan Transportation Authority
Purchase 44 40-Foot Composite Buses
CA-95-X042-02

Purchase an Additional 22 40-Ft. CNG Buses
CA-04-0232-01

Design & Construction of Lankershim Blvd. Underground Pedestrian Passage (Metro Orange Line BRT to Red Line Subway)
CA-04-0261

Dear Parties:

This is in reference to the above captioned grant applications which are pending certification by the Department of Labor (Department) under Section 5333(b) of the Federal transit statute.

The material submitted by the parties, under the Department's Guidelines at 29 C.F.R. 215.3(e)(3), remains under consideration. The Department has performed a preliminary calculation of the effects of the benefit changes under PEPRA as applied to ATU. The attached table provides the benefit formula and monthly benefit as applied to ATU under PEPRA, and the benefit formula and monthly benefit provided under the current collective bargaining agreement. The estimates assume that a retiree has monthly final compensation of $5,000. The $5,000 figure is reduced by $133.33 per section 1.G.1 of the plan document in the ATU collective bargaining agreement.
The Department requests that the parties review and verify the accuracy of the Department's calculations in writing no later than Thursday, May 13, 2013. If inaccuracies are identified, please clearly explain such inaccuracies using the attached table and provide corrected estimates.

If you have any questions, I can be reached by phone at (202) 693-1193, by FAX at (202) 693-1342, or by e-mail at comer.ann@dol.gov.

Sincerely,

Ann Comer

Ann Comer, Chief
Division of Statutory Programs

Enclosures (1)

cc: Scheryl Portee/FTA
Leslie Rogers/FTA Region IX
Robert Molofsky/ATU
Dan Smith/ATU
Jane Sutter Starke/Thompson Coburn, LLP
Michael L. Artz/AFSCME

Digitally signed by Janice Williams
DN: cn=Janice Williams, o=U.S. Department of Labor, ou=OLMS, email=williams.janice@dol.gov, c=US
Date: 2013.05.14 16:58:52 -04'00'

Department of Labor Monthly Benefit Amount Estimates for LACMTA employees represented by ATU based on Plan Documents and Materials Provided by the Parties

The estimates below assume that a retiree has monthly final compensation of $5,000. The $5,000 figure is reduced by $133.33 per section 1.G.1 of the plan document.

	22 years of service	23 years of service	30 years of service	35 years of service
ATU CBA Age 55	$1,037 (21.3% of $4,866.67)	$2,433 (50.0% of $4,866.67)	$3,066 (63.0% of $4,866.67)	$3,553 (73.0% of $4,866.67)
PEPRA Age 55	$1,430 (1.3% x $5,000 x 22)	$1,495 (1.3% x $5,000 x 23)	$1,950 (1.3% x $5,000 x 30)	$2,275 (1.3% x $5,000 x 35)
ATU CBA Age 60	$1,441 (29.6% of $4,866.67)	$2,433 (50.0% of $4,866.67)	$3,066 (63.0% of $4,866.67)	$3,553 (73.0% of $4,866.67)
PEPRA Age 60	$1,980 (1.8% x $5,000 x 22)	$2,070 (1.8% x $5,000 x 23)	$2,700 (1.8% x $5,000 x 30)	$3,150 (1.8% x $5,000 x 35)
ATU CBA Age 62	$1,660 (34.1% of $4,866.67)	$2,433 (50.0% of $4,866.67)	$3,066 (63.0% of $4,866.67)	$3,553 (73.0% of $4,866.67)
PEPRA Age 62	$2,200 (2.0% x $5,000 x 22)	$2,300 (2.0% x $5,000 x 23)	$3,000 (2.0% x $5,000 x 30)	$3,500 (2.0% x $5,000 x 35)
ATU CBA Age 63	$1,786 (36.7% of $4,866.67)	$2,433 (50.0% of $4,866.67)	$3,066 (63.0% of $4,866.67)	$3,553 (73.0% of $4,866.67)
PEPRA Age 63	$2,310 (2.1% x $5,000 x 22)	$2,415 (2.1% x $5,000 x 23)	$3,150 (2.1% x $5,000 x 30)	$3,675 (2.1% x $5,000 x 35)
ATU CBA Age 65	$2,025 (41.6% of $4,866.67)	$2,433 (50.0% of $4,866.67)	$3,066 (63.0% of $4,866.67)	$3,553 (73.0% of $4,866.67)
PEPRA Age 65	$2,530 (2.3% x $5,000 x 22)	$2,645 (2.3% x $5,000 x 23)	$3,450 (2.3% x $5,000 x 30)	$4,025 (2.3% x $5,000 x 35)

ATU: ATU Ex. 6 at 2, 7 (1G1, 4A)(Pension = (percentage from table) x (final compensation - $133.33)); UTU Ex. 3 at 7, 20-21 (same).

PEPRA: AB340 at 18-20 (PEPRA 7522.20(a)) (Pension = (final compensation) x (percentage from table) x (years of service)).

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May 15, 2013

John Lund
Deputy Assistant Secretary
Office of Labor-Management Standards
U.S. Department of Labor
200 Constitution Avenue, N.W.
Room N-5112
Washington, D.C. 20210

Re: Los Angeles County Metropolitan Transportation Authority
FTA Grant Applications
CA-95-X042-02
CA-04-0232-01
CA-04-0261

Dear Mr. Lund:

We are writing on behalf of the Los Angeles County Metropolitan Transportation Authority (LACMTA) with regard to the Reply Brief of ATU Local 1277 in the above-referenced matter.

While we respect the process established by the Department in its March 28th briefing instructions and recognize that rebuttal to legal arguments made in Reply Briefs is not permitted, we believe it is critical to correct one blatant factual misrepresentation in the ATU Reply.

Specifically, on page 11, the ATU alleges that LACMTA has "unilaterally implemented" the provisions of PEPRA and states "[LACMTA's] failure and refusal to bargain with the local union demonstrates that it believes PEPRA impairs it from continuing to live up to its obligation under Section 13(c)". The statement that LACMTA has failed and refused to bargain is patently untrue. LACMTA has clearly, on more than one occasion, offered to bargain on these PEPRA related issues in both the 13(c) process and in collective bargaining. *See* Declaration of Don Ott, Executive Director for Employee and Labor Relations, set forth in Attachment A. In fact, it is the ATU that has refused to bargain over substantive pension issues. The ATU International has directed ATU locals in California to refuse to engage in discussions regarding PEPRA and to instead direct them to the International. *See* Attachment B, ATU International memorandum dated January 2, 2013. It is, of course, the obligation of the local to bargain in good faith. *See also* the ATU's January 23, 2013 letter to LACMTA stating that it would not waver from its position on

seeking an exemption from PEPRA and refusing a LACMTA requested extension of time to continue negotiations. Attachment C. The ATU's statement is without basis and is directly refuted by sworn statement herein provided.

This misrepresentation should not be permitted to stand as part of the administrative record in this proceeding and we ask that it be stricken from the record and not considered by the Department in its deliberations in this dispute.

Sincerely,

Thompson Coburn LLP

By 
G. Kent Woodman

GKW/blt

Attachments (3)

cc: Ann Comer, DOL
Douglas Marchant, DOL
Don Ott, LACMTA
Ron Stamm, LACMTA
Jane Sutter Starke, TC
Patricia Winchell, TC
Robert Molofsky, ATU
Daniel B. Smith, ATU

ATTACHMENT A

DECLARATION OF DON OTT

I, DON OTT, declare as follows:

1. I have personal knowledge of the following, and if called as a witness, I would and could testify competently to the following.

2. I am the Executive Director for Employee and Labor Relations at Los Angeles County Metropolitan Transportation Authority (LACMTA). I have held this position since August 2, 2012. Prior to that time, I was Executive Officer of Administration with responsibility for Human Resources, Training and Development and General Services at LACMTA.

3. As the Executive Director for Employee and Labor Relations, I am responsible for addressing employee relations matters for non-represented employees, for administering all collective bargaining agreements, and am the lead negotiator representing LACMTA in collective bargaining.

4. I have been involved in LACMTA's efforts to negotiate new pension plans with the ATU, UTU and TCU.

5. On January 4, 2013, LACMTA met with Amalgamated Transit Union Local 1277 (ATU), United Transportation Union (UTU) and Transportation Communication Union/IAM (TCU) to negotiate the effects of the Public Employees' Pension Reform Act of 2013 (PEPRA).

6. At the January 4, 2013 meeting, the ATU stated its belief that anything other than an exemption from PEPRA would violate Section 13(c) and refused to discuss and negotiate pension alternatives. Instead, the ATU proposed that LACMTA join the ATU in supporting and seeking the prompt enactment of an amendment to PEPRA that would exempt transit workers' pension plans from the provisions of PEPRA by sending a joint letter to State officials and also sending a joint letter to the California Transit Association.

7. At the January 4, 2013 meeting, LACMTA asked that the ATU consider other pension plan options permissible under PEPRA that would provide ATU members with benefits that would be the same as current benefits.

8. ATU refused to discuss these options, and to consider any substantive proposal other than an exemption from PEPRA.

9. On January 24, 2013, LACMTA staff met with the LACMTA board to present ATU's proposal. The LACMTA Board agreed to support a legislative exemption if the unions supported an interim certification of LACMTA grants.

10. On January 25, 2013, LACMTA proposed that LACMTA, ATU, UTU and TCU would co-sign letters to State officials and the California Transit Association supporting legislation that would exempt transit workers' pension plans from PEPRA and also would co-sign letters to the Department of Labor supporting interim certification of LACMTA's grant applications currently awaiting DOL certification, and interim certification of subsequent grants that LACMTA submits, pending the outcome of the legislative effort to exempt transit workers' pension plans from the scope of PEPRA.

11. On January 28, 2013, ATU rejected LACMTA's proposal. ATU refused to support an interim certification of LACMTA grants and reiterated that it would not consider any proposal other than a legislative exemption.

12. LACMTA has begun collective bargaining sessions with the ATU on the terms of a new collective bargaining agreement. LACMTA has been informed that the ATU International directed ATU Local 1277 not to discuss pension issues in bargaining.

13. Contrary to the ATU's allegation that LACMTA refused to bargain over pension issues, LACMTA has offered and attempted to bargain, and remains willing and able to bargain with the ATU regarding any and all pension matters.

I declare under penalty of perjury under laws of the United States that the foregoing is true and correct and this declaration was executed on this 14 day of May, 2013 at Los Angeles, California.

Signature page follows.

Don Ott

STATE OF CALIFORNIA)
) ss.
COUNTY OF LOS ANGELES)

Subscribed and sworn to before me on this 14th day of May, 2013, by Donald E. Ott, proved to me on the basis of satisfactory evidence to be the person who appeared before me.

Reginnia G. Kaping
Notary Public Signature

[Notary Public Seal]

REGINNIA G. KAPING
Commission # 1900433
Notary Public - California
Los Angeles County
My Comm. Expires Aug 20, 2014

ATTACHMENT B

Amalgamated Transit Union

5025 Wisconsin Ave., N.W., Washington, D.C. 20016-4139
202-537-1645 Fax 202-244-1726

Office of the International President

MEMORANDUM

TO: California ATU Local Union Officers, International Vice Presidents and International Representatives

FROM: Larry Hanley, ATU International President

DATE: January 2, 2013

RE: Section 13(c) and California Public Employees' Pension Reform Act

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I am writing with regard to the U.S. Department of Labor's Section 13(c) certifications processing in connection with FTA grants submitted by transit systems in California. As you may know, it is this office's longstanding policy that all Section 13(c) matters and correspondences with the U.S. Department of Labor be handled through the International's Legal Department.

Following the passage of the Public Employees' Pension Reform Act (PEPRA), we have filed a series of objections to the DOL's processing of Section 13(c) certifications in connection with various CA transit systems' pending grants. Please be advised that all correspondences and discussions related to PEPRA and Section 13(c) should be directed to either Robert Molofsky or Jessica Chu in the Legal Department. Should you or any local union officers be approached by management to engage in discussions regarding PEPRA and/or Section 13(c) matters, please direct them to our office to determine the most appropriate action.

I appreciate your cooperation.

yrc/3

ATTACHMENT C

January 28, 2013

VIA EMAIL

G. Kent Woodman, Esq.
Thompson Coburn, LLP
Suite 600
1909 K Street, NW
Washington, DC 20006

Dear Mr. Woodman:

Following our respective meetings on January 25, 2013, with LACMTA, and after careful consideration of LACMTA's proposal to the ATU, UTU and TCU, please be advised that the undersigned unions cannot accept your proposal.

While we certainly appreciate LACMTA's willingness to support an amendment to PEPRA exempting transit employees' pension plans, we believe there is no basis for the DOL to issue an "interim" provisional certification under 29 C.F.R. 215.3(h). Consistent with past DOL action, in instances where circumstances exists that are inconsistent with 49 U.S.C. § 5333(b), the Department withholds certification until such circumstances have been resolved. See attached September 13, 2012, DOL Ruling in connection with City of Kalamazoo Grant (MI-90-X651), at p. 2.

As you are aware, the DOL has already found that PEPRA presents circumstances that are inconsistent with 49 U.S.C. § 5333(b), as it removes mandatory and/or traditional subjects of bargaining. In sum, absent a legislative amendment exempting transit workers' pension plans from PEPRA, the DOL simply cannot issue any certification (whether interim/provisional or final) here.

Accordingly, because the parties have failed to reach an agreement concerning the principal issue here (i.e., the 49 U.S.C. § 53333(b)(2)(B) requirement to continue the collective bargaining rights of employees over mandatory subjects in light of PEPRA), we will be submitting our final proposal to the DOL today as required by the DOL's December 6, 2012, directive. Additionally, we are in

receipt of your request for an extension of time to continue negotiations. We decline, however, to accept your request because of the unions' position stated above.

Sincerely,

Jessica M. Chu
Counsel for ATU

Erika Diehl
Counsel for UTU

Carla Siegel
Counsel for TCU IAM

Attachment

c: W. Flynn
B. Lunch
J. Lindsay, ATU Local 1277
B. Broad
J. Lund, DOL
A. Comer, DOL
D. Marchant, DOL

Los Angeles County
Metropolitan Transportation Authority

One Gateway Plaza
Los Angeles, CA 90012-2952

213.922.9200 Tel
213.922.9201 Fax
metro.net

Metro

MAY 22, 2013

TO: BOARD OF DIRECTORS

THROUGH: ARTHUR T. LEAHY
CHIEF EXECUTIVE OFFICER

FROM: DON OTT
EXECUTIVE DIRECTOR, EMPLOYEE AND LABOR RELATIONS

SUBJECT: CALIFORNIA PUBLIC EMPLOYEES' PENSION REFORM ACT AND FEDERAL 13(C) AGREEMENT REQUIREMENTS

ISSUE

The Department of Labor (DOL) must certify that Federal Transit Administration (FTA) grantees are in compliance with federal 13(c) requirements before the FTA can award a grant. DOL has not certified any LACMTA grants since PEPRA passed in September 2012 because the ATU, UTU and TCU have objected to their certification, arguing that PEPRA conflicts with 13(c) requirements. DOL found that the unions' objections were sufficient and withheld certification. To date, the issue has not been resolved. Approximately $112.8 million in LACMTA grant funds are on hold (including those for bus purchases and bus and rail preventive maintenance), and a total of $417.2 million will be at risk by the end of calendar year 2013.

DISCUSSION

PEPRA does not affect the pension plans of LACMTA employees hired before January 1, 2013, but places limits on the defined benefit pensions of employees hired after that date. Among the significant changes are requirements that employees pay 50% of the normal cost of their pensions, that the normal defined benefit pension formula is 2% per year of service at age 62, and that the salary base for calculating employees' pensions is the average of the last three years of their salary. These changes require that LACMTA negotiate new defined benefit pension plan provisions for employees hired on or after January 1, 2013.

After the unions objected to DOL certification of LACMTA grants, staff and our attorneys argued to the DOL that while PEPRA places some limits on a defined benefit pension for new employees, PEPRA does not affect other retirement benefits, such as a defined contribution plan, and LACMTA was ready and willing to negotiate the effects of PEPRA. DOL did not agree with LACMTA's argument and in January 2013 directed th

unions to submit a pension proposal to LACMTA. The unions' proposal was for LACMTA to join them in supporting the passage of legislation that would exempt transit worker pension plans from PEPRA.

Staff brought the unions' proposal to the Board for consideration in January 2013. The Board agreed to support the proposed exemption if the unions supported an interim certification from the DOL while the proposed exemption works its way through the state legislative process. Staff presented the Board authorized proposal to the unions and offered to negotiate alternative pension proposals should the legislative exemption fail. The unions did not accept the LACMTA proposal, arguing that DOL would not grant an exemption under the current pension law, and refused to consider any alternative pension plan provisions.

In March 2013, the DOL gave the unions and LACMTA briefing instructions. Both sides submitted their opening briefs on April 19, 2013, and their reply briefs on April 29, 2013. The DOL is now considering these arguments and will make a decision.

AB160 could resolve the current impasse. When staff brought AB160 to the Board in January, the bill would have exempted from PEPRA the pension plans of all employees with 13(c) protections. Staff recommended, and the Board adopted, a "neutral –work with author" position. The bill has subsequently been amended. Instead of a blanket exemption for transit worker pension plans, it would now exempt transit employee pension plans from PEPRA if DOL determines that PEPRA conflicts with federal law. The bill is currently pending consideration in the Assembly Appropriations committee.

The impact of the PEPRA/13(c) issue is significant. The greatest is of decertification by DOL, which reviews all FTA grants. If projects are not under full funding grant agreement (FFGA) or other grant agreements, the FTA could re-direct new starts and other discretionary funds to other states. Failure to obtain FFGAs and other grant agreements delays projects and programs, which increases project and program costs, and may risk grant awards altogether, depending on funding availability at a later time. This is of special concern in light of the LACMTA's plans to apply for FFGAs soon for the Regional Connector and the Westside Subway Extension.

NEXT STEPS

The CEO will continue to update federal and state legislators on the status of this matter. Within the next several days, the CEO will send a letter to both the Los Angeles County Congressional Delegation and State Legislative Delegation providing them an update and urging them to encourage the U.S. Department of Labor to certify our grants. Concurrently, we have been in contact with the Governor's office to encourage them to favorably resolve this matter as it relates to PEPRA and 13C. At the same time, staff and LACMTA attorneys will continue to work with the DOL through the administrative process. It is our understanding that the DOL may render a decision on our grants prior to the end of May. Lastly, staff will closely monitor the progress of AB160.

THOMPSON COBURN LLP

G. Kent Woodman
202-585-6925
FAX 202-508-1029
kwoodman@
thompsoncoburn.com

May 23, 2013

Ann Comer
Chief, Division of Statutory Programs
U.S. Department of Labor
200 Constitution Avenue, N.W.
Room N-5112
Washington, D.C. 20210

Dear Ms. Comer:

In your May 14, 2013 letter to counsel for LACMTA and counsel for the ATU, you requested that the parties verify the accuracy of calculations performed by the Department to determine the monthly benefit of hypothetical retirees under the PEPRA formula and under the formula in the plan applicable to employees hired before January 1, 2013 (the "ATU CBA plan"). In addition to pointing out a single inaccuracy in the Department's table, the ATU letter of May 17, 2013 provides four pages of argument which contains at least four factual inaccuracies. This letter identifies the factual inaccuracies in the ATU's May 17 letter.

1. **The ATU CBA plan does not permit the inclusion of any form of compensation in final compensation that PEPRA would exclude. The definition of final compensation in PEPRA does not result in a reduction of the benefit amount an employee would receive when compared to benefits in the ATU CBA plan.**

The ATU states that PEPRA requires the exclusion of compensation in the calculation of final compensation that the ATU CBA plan would include. The ATU either misunderstands or misrepresents the ATU CBA plan. The ATU CBA plan does **not** permit the inclusion of any compensation that PEPRA would exclude.

PEPRA requires the exclusion of "payments for unused vacation, annual leave, personal leave, sick leave, or compensatory time off, however denominated." In other words, PEPRA requires the exclusion of cash-outs of unused vacation (as well as cash-outs of any other type of leave); it excludes one-time payments that can be used to "spike" compensation in a final year of service.

The ATU CBA plan also excludes such amounts. Contrary to the ATU assertion, the plan does not permit inclusion of "payouts" for vacation pay and other leaves. Section 1.E of the ATU CBA plan defines compensation as "compensation actually paid for straight time hours worked on a forty (40) hours per week basis, including vacation pay, sick leave pay, holiday pay, pay for bereavement leave and other similar payments for straight time hours . . ." In other words, if a

participant takes a paid vacation or sick leave during hours he or she otherwise would have worked on a straight time basis, that amount is included in compensation. Payments for unused vacation (or any other leave), however, are **not** included.

Both the ATU CBA plan and PEPRA permit compensation to be determined based on straight time pay, including paid vacation and leaves taken during a work week; neither permits final compensation to be based on payments for unused leave. The ATU's statement that a difference in the definition of compensation results in a reduction of benefits is based on a factual inaccuracy and is wrong.[1]

2. **The ATU's statement that half of the Department's calculations pertain to a tiny portion of the workforce is based on a misreading of the plan actuary's table. Contrary to the ATU's assertion, the table does not show that only 3.3% of the workforce chooses to work beyond 24 years; nor is it true that half the calculations made by the Department pertain to only 2% of current employees.**

The ATU, concerned that the Department's table reflects higher benefits under PEPRA than under the ATU CBA plan in many of the age/service combinations shown, argues that the Department should focus on retirements at 23 years of service. It is certainly true that under the "23 and out" formula with the significant increase in benefits once an employee crosses the 23 year threshold, few employees retire at 22 years of service. The PEPRA formula, however, does not encourage retirement at 23 years of service and it is unlikely that the plan will continue to see large numbers of retirements at 23 years of service. The ATU exaggerates the effects of PEPRA by focusing on retirements at 23 years of service, the one scenario where the ATU CBA plan and the PEPRA formula are most different.

Moreover, in encouraging this focus, the ATU misrepresents the actuary's "Distribution of Active Participants by Age, Service and Average Salary" table on page 17 of its Exhibit 13. The ATU states that the table shows that "only 3.3% of the workforce chooses to work beyond 24 years of service." The table shows no such thing. As its title indicates, the table reflects the age and service of current employees. All the table shows is that 68 of the current 2001 employees have more than 24 years of service. A current employee who is shown on the table as having 15 years of service may well choose to work another 15 years. (The PEPRA formula, of course,

[1] The ATU is correct that under PEPRA final compensation is based on compensation over a 36-month period and in the current ATU CBA plan it is based on compensation over a 12 month period. In a plan like the ATU CBA plan that precludes "spiking," the effect of this difference is minimal for most retirees since they are at the top of their pay scale.

will not apply to any of the employees reflected in the table because all were employed before January 1, 2013.)

3. **The table on page 4 of the ATU's letter purporting to compare the present value of benefits that would be received under the PEPRA formula with the present value of benefits that would be received under the ATU CBA plan indicates that an individual age 45 or 50 with 23 years of service is not eligible for benefits under PEPRA. This is false.**

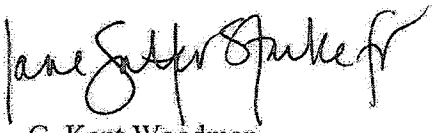
The ATU letter included a table showing the monthly benefits of retirees with 23 years of service at various ages and the present value of those benefits at the time of commencement under both the PEPRA formula and under the ATU CBA plan formula. The table suggests that employees who retire with 23 years of service at age 45 and age 50 receive nothing under the PEPRA formula. This is false. Employees who retire at age 45 and age 50 do not begin receiving their retirement benefit immediately under PEPRA; benefits, however, may commence at age 52 (or later if the employee so chooses). The ATU chart does not demonstrate a "massive, unilateral reduction" in retirement benefits. Rather it illustrates what the Department's original calculations showed -- that employees who retire at normal retirement age will receive a benefit under PEPRA nearly as great or greater than they would receive under the current plan -- and, in addition, the fact that an employee who "retires" at age 45 or 50 cannot begin drawing his or her pension immediately under the PEPRA formula.

4. **The ATU identifies an inaccuracy in the Department's calculations that results in a minor understatement of the benefits under the ATU CBA plan, but fails to identify a clear mistake in certain percentages used in the Department's table that results in an overstatement of benefits in the ATU CBA plan.**

The ATU indicates that except for the deduction of $133.33 from the monthly compensation of employees in the ATU CBA plan, the ATU found the Department's calculations to be accurate. LACMTA agrees that the $133.33 deduction resulting in the understatement of benefits under the ATU CBA plan should not have been made and so advised the Department in its letter dated May 17, 2013. As LACMTA also advised, however, incorrect percentages used in certain calculations resulted in an overstatement of the ATU CBA benefit in some instances. The ATU failed to note this inaccuracy.

Very truly yours,

Thompson Coburn LLP

By 
G. Kent Woodman

cc: Erika A. Diehl, UTU/SMART
Robert Molofsky, ATU
Dan Smith, ATU
Paul Knupp, Guerrieri, Clayman, Bartos & Parcelli; TCU
Michael L. Artz, AFSCME
Scheryl Portee, FTA
Leslie Rogers, FTA Region IX

Friday, June 14, 2013
130614-01

In this Issue:

Metro Transmits Letters to Members of Congress and State Legislators Regarding Status of Federal Grants

U.S. Senate Schedules Rail Safety Hearing for Next Week

Metro Transmits Letters to Members of Congress and State Legislators Regarding Status of Federal Grants

We are continuing our efforts to urge the United States Department of Labor to certify Metro's federal grants which have been pending certification due to the objections of labor unions representing public transit workers. As you aware, labor unions representing public transit workers in California have claimed that the Public Employee Pension Reform Act (PEPRA), enacted in California in 2012, violated federal law relating to transit workers' collective bargaining rights. This has caused the United States Department of Labor to withhold certification of grants to California transit agencies. Metro's Federal and State Advocacy teams are communicating with key decision makers in Washington D.C. and Sacramento regarding the fiscal impact of this issue and the urgent need for a resolution. Today, I transmitted a letter to our Congressional and State Legislative Delegations providing an update on the issue and reiterating the need for a resolution to this matter. We will continue to work closely with the Obama Administration, Governor Brown and legislative leaders in Congress and the State Legislature to achieve a favorable resolution. Staff will continue to keep the Board apprised of any developments on this issue. For your review, please find a sample of a letter that was sent to Federal and State Legislators in Los Angeles County.

U.S. Senate Schedules Rail Safety Hearing for Next Week

The U.S. Senate is scheduled to hold rail safety hearing next week. The U.S. Senate Committee on Commerce, Science and Transportation is slated to meet on Wednesday, June 19, 2013 for a hearing entitled "Staying on Track: Next Steps in Improving Passenger and Freight Rail Safety." Our agency has been very active on the issue of rail safety, specifically supporting the provisions in the Rail Safety Act of 2008 as it relates to Positive Train Control (PTC). We are opposed to efforts by some in the transportation industry to substitute alternative technology, in lieu of PTC, that does not offer the same safety benefits and is not interoperable with PTC. The meeting will be chaired by U.S. Senator Richard Blumenthal (D-CT), who is the newly appointed chair of the Subcommittee on Competitiveness, Innovation, and Export Promotion. The Senate hearing will be webcast at 7:00 a.m. PST next Wednesday via this link.

Los Angeles County Metropolitan Transportation Authority
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Los Angeles County
Metropolitan Transportation Authority

One Gateway Plaza
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Arthur T. Leahy
Chief Executive Officer
213.922.6888 Tel
213.922.7447 Fax
metro.net

June 14, 2013

Honorable Dianne Feinstein
U.S. Senate
331 Hart Senate Office Building
Washington, DC 20510

Dear Senator Feinstein:

I am writing to provide an update on a serious situation that is endangering the free flow of federal transportation grant funds to the Los Angeles County Metropolitan Transportation Authority (Metro) and other transportation agencies across the State of California.

Last year the California State Legislature adopted the California Public Employees' Pension Reform Act of 2013 (PEPRA), legislation that was signed into law by Governor Jerry Brown on September 12, 2012. A number of labor unions have objected to provisions of this new state law, arguing that it conflicts with federal transit law, Section 13(c). This provision in federal law requires that employee protections, commonly referred to as "protective arrangements" or "Section 13(c) arrangements" must be in place and certified by the U.S. Department of Labor (USDOL) before federal transit funds can be released to a mass transit agency, like Metro.

Since the adoption of PEPRA, some labor unions have objected to the certification of a number of federal grants designated to benefit Metro's mobility efforts in Los Angeles County. These labor unions have argued to the USDOL that PEPRA conflicts with 13(c) requirements. The USDOL has, to date, withheld certification of federal grants designated for our agency. Thus far, approximately $112 million in Metro grant funds are on hold due to this unresolved issue and a total of over $500 million will be at risk by the end of calendar year 2013.

It is Metro's position that PEPRA does not conflict with Metro's legal ability to comply with its 13(c) obligations. PEPRA does not affect the pension plans of our employees hired before January 1, 2013, but makes certain changes, prospectively and in accordance with the state's clear statutory authority to regulate public retirement systems, on the defined benefit pensions of employees hired after that date. Metro is prepared to negotiate over new defined benefit pension plan provisions for employees hired on or after January 1, 2013.

After the unions objected to the U.S. Department of Labor's certification of Metro grants, staff and our attorneys argued to the USDOL that while PEPRA places some limits on a defined benefit pension for new employees, PEPRA does not impact existing employees or affect other retirement benefits that may be provided to new employees. Metro has been ready and willing to negotiate the effects of PEPRA, including possible improvements to our defined contribution plans. The USDOL still accepted the union's objection and in January 2013 directed the parties to exchange proposals for addressing

these issues. Despite our efforts to negotiate the issues, the transit unions refused to negotiate and asked that we support their efforts to be exempted from PEPRA. The USDOL has received legal briefs from both parties on the issues in dispute, but has yet to make a final decision.

Legislation has been introduced, in the California State Legislature, AB 160 (Alejo) which would exempt, from PEPRA, the pension plans of all employees whose collective bargaining agreements fall under Section 13(c), should the USDOL determine that PEPRA conflicts with federal law. Metro's Board of Directors adopted a "neutral – work with author" position on this bill. As I mentioned earlier, we do not believe that PEPRA violates or conflicts with federal law but we ask that this potential conflict between state and federal law be resolved quickly.

The impact of the PEPRA/13(c) issue is significant. The immediate risk involves the potential delay in receiving federal preventative maintenance funds and potential delays in securing federal funds for our major new transit capital projects, including multi-billion dollar federal grant agreements we are seeking to conclude with the federal government for the Purple Line Extension and the Regional Connector later this year. For your review, I have attached a list of federal grants for LACMTA that are currently either on hold or being jeopardized by the current impasse.

Please know that we will keep you informed as this matter is further considered by the U.S. Department of Labor and the California State Legislature.

Sincerely,

Arthur T. Leahy
Chief Executive Officer

cc: Metro Board of Directors

Enclosure

LACMTA Fiscal Yr. & Calendar Yr. 2013 FTA Grant Applications for U.S. Dept. of Labor (DOL) Review

Grant	*Federal Amount*	*Type of Federal Funds*	*Project Description*	*Received Objection Letter(s)*
Submitted				
CA-95-X042-02	$8,633,000	CMAQ	Acquisition of up to 16 40-ft buses (part of 550 base order)	ATU, UTU
CA-04-0232-01	$10,000,000	Section 5309 State of Good Repair	Acquisition of up to 22 40-ft buses (part of 550 base order)	ATU, TCU
CA-04-0261	$10,000,000	Section 5309 Livability Initiative	Construction of underground pedestrian passage between MOL and North Hollywood MRL	ATU, TCU
CA-90-Y717-07	$5,111,239	FY12 Section 5307	FY2013 bus preventive maintenance	ATU, UTU, TCU, AFSCME
CA-90-Z054	$76,132,160	FY13 Section 5307	FY2013 bus preventive maintenance	UTU
CA-05-0273-02	$2,879,547	FY12 Section 5309	FY2013 rail preventive maintnenance	
Subtotal	$112,755,946			
To Be Submitted				
	$26,593,000	CMAQ	Operating assistance for Expo I	
	$80,132,224	FY13 Section 5307 (estimated)	FY2013 bus preventive maintenance	
	$50,000,000	FY13 Section 5309 New Starts (based on LRTP)	Westside Subway Extension	
	$31,000,000	FY13 Section 5309 New Starts (based on LRTP)	Regional Connector	
	$7,100,000	FY13 Section 5340 Growing States (estimated)	FY2013 rail preventive maintenance	
	$80,000,000	FY13 Section 5337 State of Good Repair (estimated)	FY2013 & FY2014 rail preventive maintenance	
	$15,000,000	FY13 Section 5339 Bus & Bus Facilities (estimated)	Bus capital projects	
	$766,524	FY11 Section 5307 (from other UZA's)	FY2013 bus preventive maintenance	
	$886,256	FY12 Section 5307 (from other UZA's)	FY2013 bus preventive maintenance	
	$1,010,000	CMAQ	LA Trade Tech College Pedestrian Enhancements	
	$1,986,000	CMAQ	LA City College Pedestrian Enhancements	
	$3,650,000	CMAQ	City of Glendale CNG Facility	
	$1,500,000	CMAQ	City of Glendale Acquisition of Buses	
	$1,941,000	CMAQ	City of Pasadena Acquisition of Buses	
	$2,400,000	FY12 Ferry Boat Discretionary	City of Avalon Cabrillo Mole Ferry Terminal Rehab	
	$160,000	CMAQ	City of Cerritos Transit Amenities	
	$257,000	RSTP	City of Malibu Bus Stop Improvements	
	$64,000,000	CMAQ	Regional Connector	
	$100,000,000	RSTP ($70 mil) & CMAQ ($30 mil)	LRV ($41.786 mil RSTP); Crenshaw ($28.214 mil RSTP); Crenshaw ($30mil CMAQ)	
Subtotal	$468,382,004			
Total Grants for DOL Review	**$581,137,950**			

Prepared by Regional Grants Management

Monthly Financial Update

CFSO Oral Report
Finance, Budget and Audit Committee
June 2013

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Headlines & Economic Overview

- Financial markets jittery about path of Federal Reserve policy
- Job growth modest in May
- Domestic expansion continues due to resilient consumer

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Economic Dashboard

Red: high downside risk; Yellow: neutral , minimal impact; Green: low risk to positive impact

	Since Last Month	
GDP Growth Forecast - Annual	2.0%	No change
LA County Unemployment – April	9.3%	
Inflation – Apr	1.1%	
Consumer Confidence – May	76.2	

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Economic Dashboard

Red: high downside risk; Yellow: neutral, minimal impact; Green: low risk to positive impact

	Since Last Month	
Fed Funds Rate	0.25%	No change
US Treasury 10 year	2.13%	

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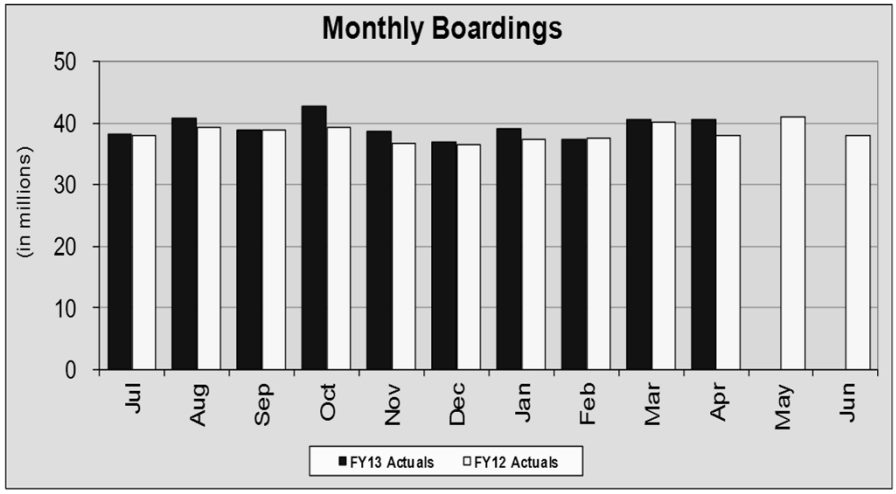
Boardings



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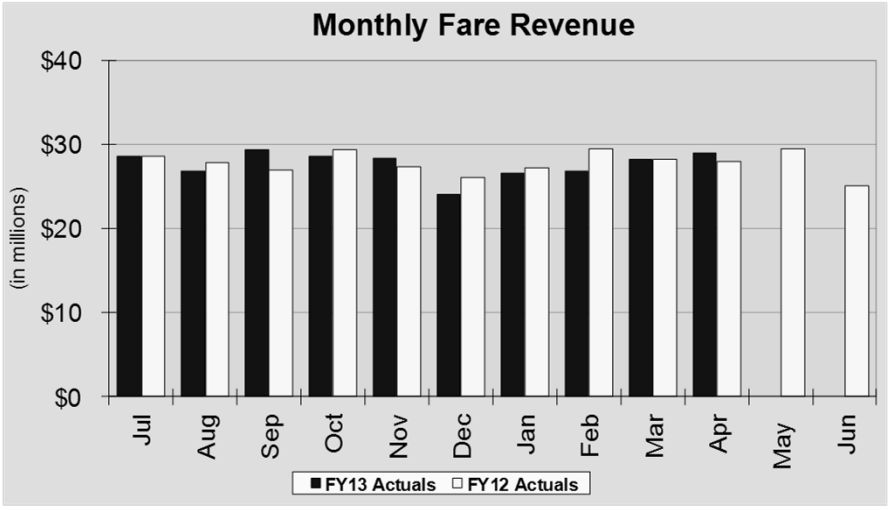
Fare Revenue



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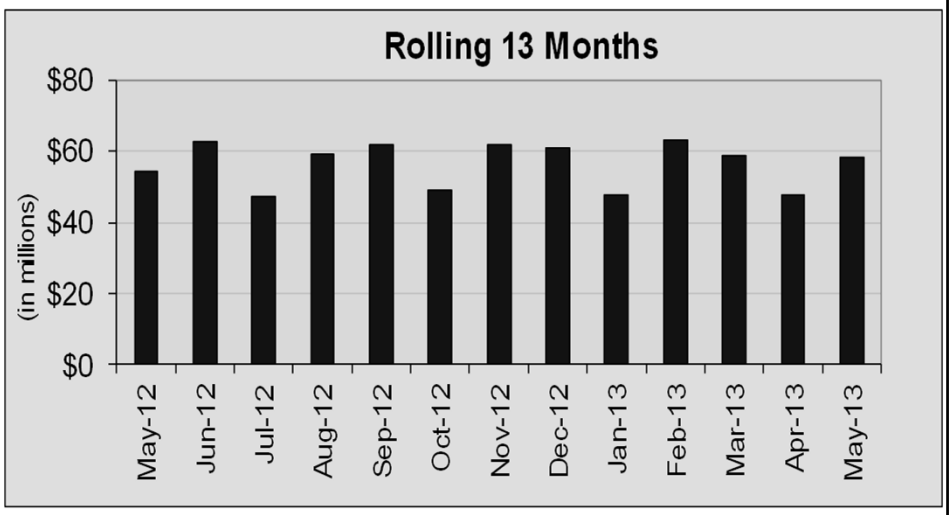
Prop A Sales Tax Receipts



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Since Last Update

- Reviewing responses to RFP for Financial Advisor bench
- Requested FTA consent to First Hawaiian lease modification to resolve Assured downgrade
- PEPRA/13(c) issue remains unresolved
- Conducted marketing of health plans covering Non-Contract and AFSCME employees and retirees

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Next Steps

- Recommend firms for Financial Advisor bench
- Continue weekly discussions with DOT and FTA re the Westside Subway and Regional Connector projects
- Develop health plan recommendation for 2014 open enrollment

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End Presentation

Discussion

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FINANCE, BUDGET AND AUDIT COMMITTEE
JULY 17, 2013

SUBJECT: PEPRA/13(c)

ACTION: RECEIVE AND FILE

RECOMMENDATION

Receive and file this report regarding PEPRA/13(c)

ISSUE

Due to objections made by our labor unions pursuant the Federal Transit Act, Section 13 (c), in December 2012 regarding the implementation of the Public Employee Pension Reform Act ("PEPRA") enacted by the State of California in October 2012, the U.S. Department of Labor ("DOL") has not certified MTA as an eligible recipient for federal grants since December 2012. Accordingly, the Federal Transit Administration has not processed any new grant applications since that time.

We currently have sufficient previously budgeted but undrawn Prop A formula allocation procedure ("FAP") monies to offset the FY13 operations cashflow deficit. However, a protracted delay, approximately 12 months, in our ability to access Federal operating grants will require future actions by the Board to address the continuing operating shortfalls by considering fare increases, services cuts and/or reprogramming of other local funding sources.

Without DOL certification in the near term, 3-6 months, the Regional Connector and Westside Subway Extension projects' full funding grant agreements and TIFIA loans will be delayed and the projects' start and completion dates will slip on a day-for-day basis. Other smaller capital projects dependent on federal funding, including rail vehicle and bus acquisition recommendations in this July Board cycle, may require the identification of alternative funding sources.

DISCUSSION

This report describes the impacts of the delay in the approval of new federal grants on Enterprise Fund operations and transit capital projects that were budgeted to receive federal funding in the MTA FY13 budget. The Enterprise Fund ("EF") accounts for bus and rail operating and capital revenues and expenditures.

Federal funds are received on a reimbursement basis under which we may only draw down grant funds after expenditures are made.

OPERATIONS

The FY13 budget for EF operating revenues included $271 million of federal grant proceeds, primarily federal formula funds used to support bus and rail "Preventive Maintenance" and Congestion Mitigation Air Quality ("CMAQ") operating assistance for the Orange and Expo lines. Of the budgeted federal funds, approximately $80 million was available from previously approved grants and the balance, $191 million, was expected to be from new grants anticipated to be executed during FY13.

Since our bus and rail operations have proceeded in accordance with budgeted levels and total operating expenses are estimated to be within 2% of budget, the absence of new grant funding is estimated to have a negative cashflow impact on the Enterprise Fund of $191 million for FY13.

CAPITAL

During FY13 capital projects proceeded by utilizing previously approved federal grants and other non-federal sources. To date, DOL has delayed certification of $28.6 million in grants submitted for capital projects, including bus acquisitions and the connection from the Metro Orange Line to the Metro Red Line.

Grant applications for an additional $272 million are currently awaiting submittal including grants for Regional Connector, Westside Subway Extension, bus acquisitions and other improvement projects.

NEXT STEPS

- Continue to work with the State of California, DOL, and the unions to achieve resolution.
- Regularly report on the programmatic and financial impacts of this delay of federal funding.

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Chief Executive Officer