

1 Bill Lann Lee (State Bar No. 108452)
2 blee@lewisfeinberg.com
3 Margo Hasselman (State Bar No. 228529)
4 mhasselman@lewisfeinberg.com
5 LEWIS, FEINBERG, LEE, RENAKER & JACKSON, P.C.
6 1330 Broadway, Suite 1800
7 Oakland, CA 94612
8 Telephone: (510) 839-6824
9 Facsimile: (510) 839-7839

10 Attorneys for Plaintiffs Sylvia Darensburg, Vivian Hain,
11 and the Proposed Class; and Plaintiff Communities for a
12 Better Environment

13 [Additional Plaintiffs' counsel listed on next page]

14 UNITED STATES DISTRICT COURT
15 NORTHERN DISTRICT OF CALIFORNIA

16 SYLVIA DARENSBURG, VIRGINIA
17 MARTINEZ, and VIVIAN HAIN,
18 individuals on behalf of themselves and all
19 others similarly situated;
20 AMALGAMATED TRANSIT UNION,
21 LOCAL 192, and COMMUNITIES FOR A
22 BETTER ENVIRONMENT,

23 Plaintiffs,

24 v.

25 METROPOLITAN TRANSPORTATION
26 COMMISSION,

27 Defendant.

Case No. C-05-1597-EDL

**EXPERT REPORT AND DECLARATION
OF THOMAS A. RUBIN**

1 Grant P. Fondo
2 Jessica Valenzuela Santamaria
3 Heather Dunn Navarro
4 COOLEY GODWARD KRONISH LLP
5 5 Palo Alto Square
6 3000 El Camino Real
7 Palo Alto, CA 94306
8 Telephone: (650) 843-5000
9 Facsimile: (650) 857-0663

10 *Attorneys for Plaintiffs Sylvia Darensburg,*
11 *Vivian Hain, and the Proposed Class*

12 Peter D. Nussbaum
13 Daniel T. Purtell
14 Linda Lye
15 ALTSHULER BERZON LLP
16 177 Post Street, Suite 300
17 San Francisco, CA 94108
18 Telephone: (415) 421-7151
19 Facsimile: (415) 362-8064

20 *Attorneys for Plaintiff Amalgamated Transit*
21 *Union Local 192*

22 Adrienne L. Bloch
23 COMMUNITIES FOR A BETTER
24 ENVIRONMENT
25 1440 Broadway, Suite 701
26 Oakland, CA 94612
27 Telephone: (510) 302-0430
28 Facsimile: (510) 302-0438

Attorneys for Plaintiff Communities for a
Better Environment

Richard Marcantonio
Guillermo Mayer
Elisabeth Voigt
Angelica K. Jongco
PUBLIC ADVOCATES, INC.
131 Steuart Street, Suite 300
San Francisco, CA 94105
Telephone: (415) 431-7430
Facsimile: (415) 431-1048

Attorneys for Plaintiffs Sylvia Darensburg,
Vivian Hain, and the Proposed Class

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1 transportation industry trade organizations, transit labor unions, and other governmental, private,
2 and not-for-profit transportation entities with a wide variety of consulting and audit projects. I
3 have directed major projects for almost all of the major transit operators in the San Francisco Bay
4 Area and for the Metropolitan Transportation Commission ("MTC") itself. I have prepared and
5 delivered well over 100 papers and oral presentations at professional and industry seminars and in
6 refereed periodicals and commissioned papers. I have testified before U.S. Congressional and
7 state legislative committees and commissions on several occasions on topics including the
8 comparative cost-effectiveness of selected public transportation modes, why the transportation
9 industry needs a dollar coin, proposed changes in formula funding for county transit agencies,
10 funding approval for major transit capital projects, and the underlying issues regarding a major
11 funding shortfall for one of the nation's largest metropolitan areas transit systems.

12 5. I have served as an expert consultant or expert witness in several legal matters,
13 including for the NAACP Legal Defense and Education Fund, Inc., plaintiff and class counsel in
14 the Federal Title VI class action, *Labor/Community Strategy Center, et al. v Los Angeles County*
15 *Metropolitan Transportation Authority*, ("MTA") *et al.* (Central District of California, No. 94-
16 5936 TJH [MCX]). That suit resulted in entry of a Consent Decree against MTA in October
17 1996, and I was extensively involved in monitoring MTA's compliance with that Consent Decree.
18 I also served as an expert for plaintiffs in *Bayview Hunters Point Community Advocates, et al. v*
19 *Metropolitan Transportation Commission, et al.* (Northern District of California, No. C-01-0750
20 TEH), where I submitted a declaration in support of plaintiff's motion for summary judgment on
21 remedies; that declaration included extensive analysis of the data in MTCs then-current (2001)
22 Regional Transportation Plan ("RTP")² and associated reports and source documents. I have also
23

24 ² MTCs Regional Transportation Plan is its "Long Range Transportation Plan" under federal law.
25 (23 U.S.C. §134(c)(1), 49 U.S.C. §5303(c)(1), GC §65080(a). MTC has defined the RTP as
26 follows: "**Regional Transportation Plan** – master plan to guide the region's transportation
27 investments for a 25-year period. Updated every three years, it is based on projections of growth
28 in population and jobs and the ensuing travel demand. Required by state and federal law, it
includes programs to better maintain, operate and expand transportation. The Bay Area's 2005
update of its long-range transportation plan, now under way, is known as Transportation 2030."
(MTC, "Glossary of Transportation Planning Acronyms and Terms," see:

1 served as an expert in several other lawsuits and arbitrations in various Federal and state
2 jurisdictions. I have not testified as an expert in Dep. or court in any case in the last four years.

3 6. I have prepared, assisted in the preparation of, or had executive responsibility for
4 the preparation of, several long-term capital/operating/financial plans or the elements thereof, and
5 financial models to prepare such plans for many public sector transit and transportation entities,
6 including MTC, the Los Angeles County Transportation Commission, Metro-Dade Transit
7 Agency (Miami), the Orange County Transportation Commission, the Orange County Transit
8 District, the Santa Clara County Transit District, and the Santa Clara County Transportation
9 Agency. I have also prepared technical analyses of several other long-range transportation plans
10 and project-specific plans, including those prepared by the Central Puget Sound Regional Transit
11 Authority (greater Seattle, Washington, dba "Sound Transit"), the City and County of Honolulu,
12 the Los Angeles County Metropolitan Transportation Authority, Capital Metro (Austin, Texas),
13 and Via Metropolitan Transit (San Antonio, Texas), among others.

14 7. I was the project partner to develop the detailed procedures for the Urban Mass
15 Transportation Administration (now Federal Transit Administration – "FTA") for implementation
16 of its original "Financial Capacity Policy" guidelines and the training of both Federal and grantee
17 personnel in their use. This policy, FTA Circular C 7008.1, "Financial Capacity Policy," March
18 30, 1987³ "... clarifies how the Urban Mass Transportation Administration (UMTA), when
19 making grants, will conduct its assessments of the financial capacity of applicants."

20 8. I was the engagement partner for financial and grant audits of the Alameda County
21 Transportation Authority, the San Francisco Bay Area Rapid Transit District ("BART"), and the
22 Santa Clara County Transit District (now known as the Santa Clara Valley Transportation
23 Authority ("VTA"). I served as the concurring review audit partner⁴ for the audits of MTC, as
24 well as the AC Transit; the Central Contra Costa Transit District; the Golden Gate Bridge,

25 <http://www.mtc.ca.gov/library/glossary.htm#RTP>. (Note: This definition was evidently not
26 updated after the adaptation of Transportation 2030).

27 ³ Since updated as FTA Circular C 7008.1A, January 30, 2002, same name, see
http://www.fta.dot.gov/laws/circulars/leg_reg_4122.html.

28 ⁴ At DH&S, the "concurring review audit partner" was responsible for performing an
independent review of the audit report as a quality management measure.

1 Highway and Transportation District; and dozens of other transit operators and MPO's
2 throughout California and the U.S. I have conducted performance audits of the San Francisco
3 Municipal Railway ("MUNI"), several other California transit operators and MPO's, and many
4 others in other states, including a recent project to review the finances of the four transit agencies
5 in the Greater Chicago area for the State of Illinois Office of the Auditor General that is being
6 used to help structure the plan to resolve the major funding shortfalls for these agencies. I have
7 been responsible for many other projects for local transit agencies and hundreds of other projects
8 for transit and transportation agencies outside of the San Francisco Bay Area.

9 9. I hold a B.S.B.A. in Accounting and Finance from the University of Nebraska,
10 Lincoln (1969) and a MBA in Finance from Indiana University, Bloomington (1973). I am a
11 Certified Public Accountant in the State of California and the District of Columbia (inactive) and
12 hold the following professional certifications: Certified Management Accountant, Certified
13 Management Consultant, Certified Internal Auditor, Certified Government Financial Manager,
14 and Certified in Financial Management.

15 10. The opinions stated in this declaration are based on my training, education, and
16 experience in the fields of public sector/transportation/transit policy finance, planning, and
17 operations. This includes my knowledge and experience regarding MTC and the Bay Area transit
18 operators (including AC Transit, BART and the Peninsula Corridor Joint Powers Board, dba
19 "Caltrain"⁵) and regarding transportation planning and related issues in the San Francisco Bay
20 Area. These opinions are based upon information of a kind that I and other professionals in these
21 fields consider to be reliable. A list of the documents on which I relied in forming these opinions
22 is attached as Exhibit B to this declaration and/or cited directly in this report.

23 11. The compensation for my testimony in this case is \$150 per hour, except \$330 per
24 hour for Dep. or court testimony, plus expenses.

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27 ⁵ Caltrain is a California joint powers authority with three member agencies, the San Mateo
28 County Transit District ("Samtrans"), which provides administrative and staff services for
Caltrain; the City and County of San Francisco; and the Santa Clara Valley Transportation
Authority ("VTA").

II. SUMMARY OF CONCLUSIONS

12. MTC prioritizes the capital needs of transit operators within its jurisdiction over their operating needs. That priority is manifested in a series of MTC policies that work together to starve AC Transit of operating revenues – policies that fund capital expansion (mostly of rail projects); that prioritize federal formula funds for the massive (and expanding) capital replacement needs of those rail operators, rather than making AC Transit’s operating needs for “preventive maintenance” a co-equal priority; that fund capital replacement shortfalls, but not operating shortfalls, out of “discretionary” RTP funds; and that tend to allocate new revenue sources in a manner that replicates existing distributional inequities, rather than proposing legislative solutions for AC Transit’s on-going shortage of operating revenue. The net result of these interwoven policy choices by MTC is that, in each of the last four long-range transportation plans, AC Transit has suffered a persistent shortfall in the revenues needed to operate its existing service. This forces AC Transit to make successive cuts in service, reflected in a shrinking “baseline” of existing service, at the same time that BART and Caltrain experience an expanding “baseline”.

13. MTC has created AC Transit’s operating shortfalls in two ways. *First*, its funding policies artificially limit the pool of funds available for operating costs in the Bay Area. Thus, the operating shortfalls identified in the initial stage of the RTP planning process are based on MTCs policy decisions to prevent otherwise available revenues (such as 49 U.S.C. §5307 Urbanized Area Formula Grants, administered by the FTA) from being used for operating purposes. *Second*, after the planning process identifies an operating shortfall, MTC chooses not to cover operating shortfalls and instead chooses to cover only capital shortfalls, though Federal requirements do not distinguish between the types of shortfalls that MPO’s must cover. Moreover, MTC chooses not to cover operating shortfalls, even though it could allocate funds to do so.

14. AC Transit’s persistent operating shortfalls, and consequent service cuts, must be seen against the backdrop of the substantial funding that MTC has devoted to the capital needs of BART and Caltrain. While MTC has refused to cover AC Transit’s operating shortfalls, it has

1 devoted billions of dollars covering the capital rehabilitation shortfalls of BART and Caltrain, and
2 billions more on capital expansion for BART and Caltrain. In the same period that AC Transit
3 was forced to reduce service by almost 10%, BART increased service by 48.2% and Caltrain by
4 80.4%. The inescapable conclusion is that MTC places great emphasis on expanding rail
5 infrastructure, and then replacing that expanded infrastructure as it wears out, but places a much
6 lower priority on maintenance of the existing bus services provided by AC Transit.

7 15. I summarize the key points and conclusions of my report below:

8 16. MTC is the MPO for the nine-county San Francisco Bay area. One of MTC's
9 most significant responsibilities as an MPO is developing the region's LRTP/RTP. Any
10 transportation project or program that MTC chooses not to include in its RTP is ineligible for
11 virtually every source of federal and state funding. *See* Section III-A-1.

12 17. ***MTC exercises substantial control over transportation funding in the Bay Area.***
13 It has direct programming and allocations authority over significant sources of transit funding and
14 sets policy with respect to these funds, often imposing additional limitations on the use of these
15 funds, beyond those found in statute. It also exerts strong indirect control over local funds that
16 fall within the direct purview of transit operators and local funding agencies such as county
17 transportation authorities. Because funds controlled directly, or influenced by, MTC are so
18 important to so getting so many transportation projects commenced or continued, such
19 organizations must cooperate with MTC or risk not receiving the funding they require for the
20 locally preferred projects and services. *See* Section III-A-2.

21 18. ***MTC has numerous policies that artificially limit the pool of funds that would***
22 ***otherwise be available for operating purposes.*** For example, a significant source of transit
23 funding in the Bay Area is federal funding under 49 U.S.C. §5307. As a statutory matter, these
24 §5307 "formula" funds can be used for both capital and certain significant operating costs, but
25 MTC (unlike many MPO's in large urbanized areas across the country) chooses, as a policy
26 matter, to restrict the use of these funds almost entirely to capital replacement costs. In addition,
27 MTC has broad authority to expand the pool of funds usable for operating purposes, directly or
28 indirectly, but forgoes these valuable opportunities. Finally, MTC strains the existing pool of

1 operating funds by emphasizing expansion of transit systems over operations of the existing
2 transit system components. The consistent theme is that MTC prioritizes capital over operating
3 needs. See Section III-D-1.

4 19. *MTC effectively controls the amount of service an operator is able to provide*
5 *through its control over transportation funding and the transportation planning process.* As
6 part of the long-range planning process, MTC devises revenue projections. These revenue
7 projections reflect MTC policy choices regarding the allocation among operators of significant
8 transit fund sources, as well as the purposes for which those funds may be used. MTC requires
9 transit operators to develop ten-year balanced budget plans that incorporate MTCs revenue
10 projections (and hence MTCs policy choices about the use and allocation of those fund sources).
11 An operator can only propose to provide in its ten-year balanced budget plan the level of transit
12 service that will fit within projected revenue available to it under MTCs funding policies. Should
13 those projected revenues be inadequate, it must reduce proposed expenditures, including by
14 cutting service, to bring its expenditures in line with those revenue projections. See Section III-
15 A-4.

16 20. *My analysis of the last four RTPs (1994, 1998, 2001 and 2005) reveals that MTC*
17 *prioritizes capital needs over operating needs, with the end result that it has consistently*
18 *prioritized the expansion of BART and Caltrain service over the preservation of existing AC*
19 *Transit service.* In each of the last four RTP's, MTC made initial calculations of the shortfalls
20 operators would face, given their operating and capital rehabilitation costs and MTCs revenue
21 projections, over the horizon of the RTP. AC Transit had an operating and capital shortfall in all
22 four RTPs. BART did not have an operating shortfall in any of the RTPs, and had capital
23 rehabilitation shortfalls in the most recent three RTPs. Caltrain had an operating shortfall in only
24 one RTP; unlike AC Transit's operating shortfalls, however, which are measured against a
25 baseline of shrinking service, Caltrain's one operating shortfall was measured against a baseline
26 of expanded service. Caltrain also had a capital rehabilitation shortfall in three Rap's. After
27 identifying these shortfalls, MTC chose to cover capital rehabilitation shortfalls, devoting the
28 overwhelming majority to BART and Caltrain, but did not cover any operating shortfalls. In

2003, as an example, AC Transit cut its service by 4% in June and an additional 14% in December; these cuts became part of its new “baseline” of existing service in the 2005 RTP, against which it still had an operating shortfall. In other words, MTC chose to devote available funding solely towards covering the capital rehabilitation shortfalls of BART and Caltrain, against their baselines of increased service levels, but chose not to cover the operating shortfalls for AC Transit to maintain even a sharply decreased baseline of service. In addition, MTC devoted billions to capital expansion (not just capital rehabilitation) for BART and Caltrain. These spending decisions reveal that MTC prioritizes capital over operating needs and BART and Caltrain service expansion over AC Transit service preservation. See Section III-C.

21. ***MTC creates the operating shortfalls in the RTP.*** First, it does so by artificially limiting the available pool of operating funds. The shortfalls in the RTP are calculated based on revenue projections that incorporate MTCs policy choices, including choices to limit available operating funds. MTC policies create operating shortfalls for AC Transit but not BART and Caltrain because BART and Caltrain both have substantial “outside” sources of funding that AC Transit does not. Second, MTC could use existing resources to cover the operating shortfalls it identifies in the RTP, but it chooses not to. See Section III-D.

22. ***The operating shortfalls created by MTC force AC Transit to cut service.*** An operator with a shortfall must do one or more of three things: raise revenue, cut costs, or increase productivity. Despite having made significant efforts that are within its power to increase revenues, AC Transit does not have feasible means available to it to raise enough revenue to operate a steady baseline of service, much less a baseline that grows to account for the growing need in its service area. And because AC Transit, as even MTC acknowledges, operates very efficiently compared to other Bay Area transit operators, its only other option for cutting costs is to reduce service. See Section III-E.

23. MTC’s funding policies and practices are inconsistent with well-established and widely-accepted transportation planning principles and the statutory and regulatory provisions that have formalized them. Those principles require an MPO to prioritize preservation of the

1 existing transportation system over its expansion, and to strike a balance in covering capital and
2 operating shortfalls. Where, as is the case with MTC, it has funds that could be used to cover
3 either type of shortfall, there is no justification for covering only capital but not operating
4 shortfalls. See Section III-B-1, III-B-3, III-C-5, III-D-2.

5
6 24. In short, MTC prioritizes capital over operating needs for existing transit service,
7 and prioritizes expansion of BART and Caltrain service over preservation of existing AC Transit
8 service. MTC creates AC Transit's operating shortfalls by artificially limiting the available pool
9 of operating funds, and choosing to cover only capital shortfalls in the RTP and not operating
10 shortfalls. The operating shortfalls that MTC creates in turn force AC Transit to reduce service.
11 The fare increases that are one of the few revenue increase tools available to AC Transit makes
12 the situation worse, driving away from transit many low-income peoples of color who have few
13 other transportation options.
14

15 **III. BACKGROUND AND BASIS OF CONCLUSIONS**

16 25. In Section III-A below I provide an overview of the regional transportation
17 planning process and transportation planning funding. Metropolitan planning organizations, such
18 as MTC, have substantial control over both. In Section III-B, I describe widely accepted
19 principles that govern the transportation planning process. Key among these is that MPOs are to
20 place priority on preservation of the existing system over transit system expansion. In addition,
21 transportation planning requires a balance. When the planning process reveals that projected
22 revenues are insufficient to meet projected needs, a shortfall occurs. Federal law, however,
23 requires MPOs in their long-range plans to cover *all* shortfalls, regardless of whether they are for
24 operating or capital needs. Where an MPO has funds that could be used to cover both operating
25 and capital shortfalls, there is no justification for covering only capital shortfalls. When an MPO
26 has determined that all that can reasonably be expected to be done in meetings needs through
27 developing new revenue sources and operating more effectively and productively, and not all
28 needs can be met, then it must set priorities and fund the most important components of the

1 transportation/transit system first, in line with statutory requirements and best planning practices.
2 In Section III-C, I analyze MTCs last four RTPs. These RTPs indicate that MTC prioritizes
3 capital over operating needs, and that MTC prioritizes expansion of BART and Caltrain service
4 over preservation of existing AC Transit service. AC Transit has experienced a persistent
5 operating shortfall in its last four RTPs. MTC has chosen not to cover AC Transit's RTP
6 operating shortfalls, but instead has devoted billions to covering capital rehabilitation shortfalls,
7 especially those of BART and Caltrain, and has devoted billions more to BART and Caltrain
8 capital expansion costs. During the same period covered by these four RTPs, AC Transit has cut
9 service by almost 10%, at the same time BART increased service by 48.2% and Caltrain by
10 80.4%. In Section III-D, I explain that MTC is responsible for creating the operating shortfalls
11 that appear in the RTP. It does so in two principal ways. It artificially limits the pool of funds
12 that would otherwise be available for operating purposes, and it fails to cover the operating
13 shortfalls identified in the RTP. Finally, in Section III-E, I explain why AC Transit's Operating
14 shortfalls force AC Transit to cut service.

15 **A. General Framework for Regional Transportation Planning and Funding**

16 **1. Metropolitan Planning Organizations (MPOs) and Regional**
17 **Transportation Plans (RTPs) Generally**

18 26. Federal law provides that "[t]o carry out the transportation planning process
19 required by this section, a metropolitan planning organization shall be designated for each
20 urbanized area with a population of more than 50,000 individuals." (23 U.S.C. § 134(d)(1) and
21 49 U.S.C. § 5305(d)(1)), for roads and transit, respectively. The Metropolitan Transportation
22 Commission is the MPO for the nine-county San Francisco Bay Area region. There are
23 approximately 22 to 24 transit systems within MTCs jurisdiction.

24 27. The federal Intermodal Surface Transportation Efficiency Act of 1991 (Public Law
25 102-240), known as "ISTEA," gave MPOs like MTC the primary responsibility for planning and
26 allocating transportation funding in metropolitan areas by providing funds directly to them.
27 Although MPOs have been in existence since the 1950s, ISTEA and the U.S. Department of
28 Transportation's implementing regulations made them more influential and gave them uniform

1 functions and responsibilities. ISTEA also broadened the membership of the policy-setting
2 boards of MPOs governing large areas, requiring that they include representatives from local
3 governments in the region, agencies operating major transportation systems, and State officials.
4 MTCs governing structure, however, was “grandfathered” in, and does not include
5 representatives of transit agencies.

6 28. The Transportation Equity Act for the 21st Century (Public Law 105-178), known
7 as TEA-21, superseded ISTEA in 1998.

8 29. These two statutes and their implementing regulations required MPOs to develop
9 20-year long-range plans outlining in detail the priorities, policies, and strategies for the region’s
10 transportation system. (23 U.S.C. § 134(g)(1). (“Each metropolitan planning organization shall
11 prepare, and update periodically, according to a schedule that the Secretary determines to be
12 appropriate, a long-range transportation plan for its metropolitan area in accordance with the
13 requirements of this subsection.”).)⁶

14 30. MTCs long-range plan is known as its Regional Transportation Plan (“RTP”).⁷
15 The Regional Transportation Plan is the “master plan to guide the region’s transportation
16 investments for a 25-year period. Updated approximately every three years, it is based on
17 projections of growth in population and jobs and the ensuing travel demand. Required by state
18 and federal law, it includes programs to better maintain, operate and expand transportation.”
19 (MTC, “Glossary of Transportation Planning Acronyms and Terms,” see:
20 <http://www.mtc.ca.gov/library/glossary.htm#RTP>). All MPO planning, funding and investment
21 decisions must be consistent with the RTP. 49 U.S.C. § 5309(c)(1)(A).⁸

23 ⁶ MPOs are also required to prepare, with community involvement, a Transportation
24 Improvement Program (TIP) listing the transportation projects that would be undertaken within
three years. (See 23 U.S.C. § 134(h).

25 ⁷ A Regional Transportation Plan, under California Gov. Code §65080, is the California
26 version of the long-term transportation plans required by 23 U.S.C. § 134.

27 ⁸ This is the citation for FTA 49 U.S.C. §5309 “Capital Investment Grants” grants; there are
28 comparable requirements for other FTA and FHWA grant programs. In many of the specific
regulatory requirements for such grants, the specific requirement is that the specific project that is
being proposed must be consistent with the TIP, rather than the LRTP (RTP for California).
However, this is a distinction without a difference, as 49 U.S.C. §5303(j)(3)(C) requires that,

1 31. In essence, the RTP is the document in which an MPO such as MTC projects the
2 total amount of revenue the region anticipates for transportation purposes over a 25-year horizon,
3 and then determines how to spend those revenues. If an MPO such as MTC does not include a
4 transportation project or program in the RTP, then it is not eligible for virtually any federal or
5 state funding.

6 32. Since the adoption of ISTEA in 1992, MTCs RTP has been subject to the
7 requirement of “fiscal constraint.” For financial plans that support metropolitan long-range
8 transportation plans, 23 CFR 450.322(b)(11)⁹ specifies that:

9 The estimated revenue by existing revenue source (local, State, Federal and
10 private) available for transportation projects shall be determined and any
11 shortfalls identified. Proposed new revenues and/or revenue sources to
12 cover shortfalls shall be identified, including strategies for ensuring their
availability for proposed investments. Existing and proposed revenues
shall cover all forecasted capital, operating, and maintenance costs.

13 This regulation has been in effect, unchanged, since at least 1997, and thus has governed the
14 RTPs MTC adopted in 1998, 2001 and 2005. “The basic question to be answered [in the fiscally-
15 constrained RTP] is ‘Will the revenues . . . identified in the [RTP] cover the anticipated costs of
16 the projects included in this [RTP], along with operation and maintenance of the existing
17 system?’” (McMillan Mar. 26, 2007 Dep., Ex. 10 at MTCP062961).

18 33. Both ISTEA and TEA-21 established planning criteria for MPOs to consider as
19 they review their transportation programs. These criteria went beyond specific transportation
20 elements to include a wide range of issues where transportation projects affect other aspects of
21 metropolitan development. The fiscally-constrained long-range plan, or RTP, is expected, among
22

23 “Each project [in the TIP] shall be consistent with the long-range transportation plan developed
24 under subsection (i) for the area.”

25 ⁹ See “FHWA-FTA Fiscal Constraint Guidance – Talking Points,” (See McMillan Mar. 26,
2007 Dep., Ex. 10 at MTCP062966).

26 Further documentation of the “all-inclusive” Federal and State of California approach to
27 the concept of “shortfall” can be found at California Department of Transportation; Federal
28 Highway Administration, California Division; Federal Transit Administration, Region IX, “A
Guide to Federal and State Financial Planning Requirements” (Final Draft), February 18, 2004
(Id. at Ex. 11), “State Regional Transportation Plan (RTP) Guidelines, Id. at MTCP004441) and,
in the same document, “Financial Planning Checklist – RTP,” Id. at 12 (MTCP004442).

1 other things, to be sensitive to equity issues. 49 U.S.C. § 5332(b). While the long-range plan (or
2 RTP) may include projects that *expand* existing transportation capacity and infrastructure,
3 “emphasi[s]” is required to be placed on “the preservation of the existing transportation system.”
4 49 U.S.C. § 5303(b)(1).

5 34. Federal and State law and regulations impose requirements that long-range
6 transportation plans (like MTCs Regional Transportation Plan) exhibit “fiscal constraint.” A Plan
7 is fiscally-constrained if “... the revenues (Federal, State, local, and private) identified in the
8 TIP¹⁰, STIP¹¹, or metropolitan long-range transportation plan cover the anticipated costs of the
9 projects included in this TIP, STIP, or metropolitan long-range transportation plan, along with the
10 operation and maintenance of the existing system.” (*FHWA-FTA Fiscal Constraint Guidance –*
11 *Planning – HEP – FHWA*, (McMillan Mar. 26, 2007 Dep., Ex 10 at MTCP062960-61)¹² Greatly
12 simplifying, long-range public sector transportation financial planning generally includes three
13 key steps to work towards the demonstration of fiscal constraint:

14 a. Identifying and costing out desirable transportation system elements,
15 including both continuation of pre-existing transportation system elements and transportation
16 system expansion projects.

17 b. Determining available revenues and revenues reasonably expected to be
18 available.

19 c. Matching of costs and benefits – if the desirable transportation system
20 elements have costs that exceed the revenues (which is the normal condition, at least in the early
21 stages of plan development), the result is a “shortfall” – the amount in which desired expenditures
22 exceed revenues believed to be available. Before the plan can be adopted, the shortfall must be
23

24 ¹⁰ Transportation Improvement Plan.

25 ¹¹ State Transportation Improvement Plan.

26 ¹² The statutory underpinning of this can be found at 23 U.S.C. § 450.322(a)(11) [“Existing
27 and proposed revenues shall cover all forecasted capital, operating, and maintenance costs.”] and
28 CA GC §65080(b)(3)(A) [“The regional transportation plan shall include all of the following: ...
A financial element that summaries the cost of plan implementation constrained by a realistic
projection of available revenues.”] See also 23 CFR 450.324(e), which requires that the Federal
TIP be fiscal constrained by year).

1 eliminated by finding additional revenues, reducing costs, using available resources more wisely,
2 and/or variations on these themes.

3 35. To ensure fiscal constraint in long-range planning, state and federal law require
4 MPO's to adopt a long-range transportation plan ("LRTP") (in California, an RTP) that limits
5 expenditures to the amount of available funding – that is, an MPO must eliminate any
6 "shortfalls," i.e., gaps between costs and revenues from the RTP, whether for operating or capital
7 costs. The requirement to eliminate shortfalls is discussed below. See Section III-B-3.

8 **2. Types of Transit Revenues and Expenses and MPO Control Over** 9 **Funds**

10 36. **Transit expenditures** – For our current purposes, there are three main
11 components of transit expenditures:

12 a. Transit Operations: this includes costs such as the wages and benefits of
13 bus and train operators and mechanics, diesel fuel for buses, electric power for rail vehicles, and
14 parts for regularly scheduled and breakdown maintenance of vehicles and non-vehicle assets.
15 These expenses are necessary to operate the *existing* system.

16 b. Capital Renewal and Replacement: also known as "capital rehabilitation,"
17 this component of expenditures relates to the capital needs of the *existing* transportation
18 infrastructure, including replacement of buses and rail cars at the end of their useful lives, and
19 non-vehicle infrastructure (from office supplies to maintenance facilities).

20 c. Capital Expansion: Whereas the cost of transit operations and transit
21 capital replacement relate to the operation and maintenance of the *existing* transit system, this
22 third component of expenditures relates to the capital cost of *expanding* the existing
23 transportation system, such as expanding the size of bus or rail car fleets, extending rail lines, and
24 adding new stations to serve new areas and transit riders.

25 37. **Transit revenues** – Some revenue sources, such as farebox revenue, can generally
26 be utilized for any legal and authorized activity of the transit agency. On top of the fare revenues
27 paid by transit passengers, a wide variety of subsidies are available for various transit uses. Many
28

1 sources of transit funding have significant statutory, regulatory, and/or contractual restrictions¹³
2 on the purposes for which they can be expended. Certain sources may be primarily for *transit*
3 *operations*, subject to various statutory and regulatory restrictions, such as Alameda County
4 Measure B (2000) funds allocated, by the terms of the ballot measure for "... maintenance of
5 transit services, restoration of service cuts, expansion of transit services, and passenger safety and
6 security." (Alameda County Transportation Improvement Authority, *Alameda County's 20-Year*
7 *Transportation Expenditure Plan*, July 2000, Appendix A, "Mass Transit," page Ai, and County
8 of Alameda Measure B, 2000 General Election, Section 14., "Use of Proceeds"). A wide range
9 of other sources may be utilized for transit *operations* or *capital replacement* at the option of the
10 transit operator and/or other designated entities, often subject to compliance with statutory,
11 regulatory, and/or contractual requirements¹⁴ for such use; some examples are Transportation
12 Development Act funds (PUC §98200 *et seq.*), State Transit Assistance (PUC §§99313.6(a) and
13 99315(a)), and 49 U.S.C. §5307 "Formula" funds. Significantly, as explained further below,
14 MTC does not count §5307 formula funds as among its "flexible" funds for purposes of RTP fund
15 allocation. Other sources may only be used for capital purposes such as State Propositions 108
16 and 116 (1990) and 49 U.S.C. §5309 "Bus Capital" funds, some of which, such 49 U.S.C. §5309
17 "New Starts" funds, may be used only for *capital expansion* projects that are specified in the
18 grant application process, award, and contract. For example, these Section 5309 revenues funded
19 a major portion of the cost of building the BART extension to SFO/Millbrae.

20 38. Where statutory and other restrictions permit multiple uses of funds, MPOs like
21 MTC are empowered to adopt and implement policies limiting and/or prioritizing among the
22 statutorily-authorized purposes for which those funds may be used. In other words, MPOs like
23

24 ¹³ There are many types of contractual restrictions on uses of funds, but most fall into three
25 general categories: (a) Those included in contracts for governmental grants, such as the lengthy
26 "boilerplate" included in FTA and Federal Highway Administration ("FHWA") grant contracts;
27 (b) Those related to funding received from private, non-governmental parties; and (c) Those
related to agency debt, such as requirements that a specified amount of funds from specifically
identified funding sources be deposited to the order of the trustee at times certain.

28 ¹⁴ The term "flexible" has a second and unrelated sense when it refers to CMAQ and STP
funds, which are flexible as between highway and transit uses.

1 MTC are authorized to impose additional limitations, beyond those contained in statute, on the
2 use of funds. As described in greater detail in section III-D-1 below, MTC sets policy with
3 respect to the use of significant sources of transit funding; for instance, it uses Federal “formula”
4 funds under 49 U.S.C. § 5307 (which by statute can be used for both capital *and* certain
5 significant operating costs) virtually entirely for ***capital replacement, rather than statutorily-***
6 ***authorized operating costs.*** There are many other examples in which MTC chooses, as a matter
7 of policy or practice, not to use funds for operating purposes, even though, as a matter of statute,
8 the funds could so be used.

9 39. MTC also has indirect control over funding sources that are within the direct
10 purview of others (such as transit fares, which are directly controlled by the transit operators that
11 collect them) and the substantial revenues collected pursuant to county sales tax measures (which
12 are governed by expenditure plans). This includes, for instance, sales tax measures adopted by
13 county voters. (McMillan, Nov. 15, 2007 Dep. at 590-94 [“Given the fact that the sales tax
14 money does not fully fund those projects, they have to be partners with us in delivering the
15 project.” “There’s a combination of fund sources...some of which are regional discretionary and
16 some of which are not our discretion. However,...even if there’s local money, like a county sales
17 tax involved, if it doesn’t fully fund the project, we’re talking about a partnership that’s going to
18 be required to bring any of these projects.” “[P]art of the consensus is that if MTC brings some
19 of its discretionary money to the table, you the local bring yours.” “That’s the level of consensus
20 that needs to be reached for a majority of these projects.” “...you need a compendium of many
21 different types of funding to bring these projects home.”]). In addition, for example, MTC can
22 and often does impose “matching” requirements: It will agree to provide MTC-controlled
23 discretionary funds but only if an operator brings the remaining money to the table, thus
24 effectively requiring the operator to use its theoretically independent funding sources for a
25 particular project designated by MTC. In addition, MTC can and does choose *not* to provide
26 funds for an element of an operator’s budget, thus forcing the operator to use other funds within
27 the operator’s control to cover those costs (or to eliminate those costs). There are other ways in
28 which MTC exerts indirect control over funding sources.

1 40. Thus, in spite of the various eligibility restrictions that apply to some of these
2 funding sources, MTC has significant control, direct and indirect, over how most of them are
3 allocated. I have personally prepared a summary of the main federal, state and local funding
4 sources available for transit use in the Bay Area, and the extent of MTCs control over each. I am
5 attaching my summary as Exhibit C to this report and incorporating the contents of my summary
6 into this report.

7 **3. MTCs RTP Process**

8 41. MTC has adopted four RTPs under the ISTEA/TEA-21 regimen of fiscal
9 constraint: in 1994, 1998, 2001 and 2005. For each of these RTPs, MTC has described the
10 following process by which it determines the operating and capital revenues, needs and shortfalls
11 for its RTP:

12 42. **First**, MTC identifies the inventory of funds that will be reasonably available from
13 all sources (federal, state, regional and local), and projects them out over 25 years. (McMillan
14 Mar. 26, 2007 Dep. at 138-39.) “For the revenues side, MTC staff prepares financial estimates
15 for all transportation-related funding sources, including fund sources for transit, and assigns these
16 dollars to transit properties based on current laws, policy, or historic funding levels, as
17 applicable.” (MTCs Resp. to Plaintiffs’ Third Set of Interrogatories, Interrog. 41, at 9-10.) MTC
18 issues 25-year revenue projections for the RTP. (Bockelman Nov. 27, 2007 Dep. at 81-84; *see*,
19 e.g., Bockelman Aug. 15, 2007 Dep., Ex. 11A at MTCP062476-509).

20 43. **Second**, MTC assesses the needs or costs of preserving, in other words,
21 maintaining and operating, the existing transportation system over that same period.¹⁴ (McMillan
22 Mar. 26, 2007 Dep. at 138-39.)¹⁵ The costs of maintaining and operating the existing
23

24 ¹⁴ MTC refers to “the existing transportation system” as the “baseline.” In terms of transit, the
25 “[b]aseline includes only those services in operation, under construction, or that have full funding
26 commitments.” (Bockelman July 13, 2007 Dep., Ex. 1 at MTCP003296, footnote [2005 RTP
27 Project Notebook]; *See* also MTCP121882, footnote [2001 RTP Project Notebook]) (McMillan
28 Mar. 26, 2007 Dep. at 135) The cost of the existing system includes both the cost of operating
baseline transit service and the cost of capital replacement. (Id. at 138; 210).

¹⁵ Broadly speaking, the “transportation system” over which MTC has jurisdiction involves two
broad categories – roads and highways and also public transit, plus interfaces with other modes,
such ground-side access to airports and intermodal freight coordination. The focus of my analysis

1 transportation system involve the first two types of transit expenditures mentioned above – transit
2 operations as well as capital renewal and replacement. As discussed in greater detail below, MTC
3 requires each of the transit systems within its jurisdiction to prepare a “Short Range
4 Transportation Plan.” “For the expense side, MTC generally relies on data from the Short Range
5 Transit Plans [prepared by each transit operator] for the first 10-years and uses standard
6 escalating assumptions for operating or life cycles for capital for the remaining years of the long-
7 range plan.” (MTCs Resp. to Plaintiffs’ Third Set of Interrogatories, Interrog. 41, at 9-10). MTC
8 projects the costs of maintaining and operating the transportation system separately for each
9 transit operator. For each individual operator, operating costs are projected separately from the
10 capital rehabilitation expenditures. (McMillan Mar. 26, 2007 Dep. at 208-09). As I discuss
11 below in more detail, preserving the existing system requires a proper balance of expenditures for
12 both of these purposes – operations and capital rehabilitation.

13 44. The starting point for MTCs 25-year cost projections for a particular transit
14 operator's operating costs is the operator's ten-year projections in its most recent short-range
15 transit plan (“SRTP”). MTC then projects that out for an additional 15 years, subject to asking
16 questions in those circumstances where the operators may have in their SRTPs assumptions of
17 major service expansion or assumptions that are inconsistent with those in their adopted SRTPs.
18 (Id. at 209-210; Bockelman, Jul. 13, 2006 Dep. at 60) MTC issues a “call for data” to the transit
19 operators, requesting year-by-year projections over 25 years of operating costs and local
20 operating revenues (in year of expenditure dollars), and an explanation of the assumptions on
21 which these projections were based.

22 45. *Third*, MTC assigns revenues to existing system operations and maintenance
23 needs, allocating funding sources based on (1) their statutory eligibility and (2) MTC
24 Commission policies. (McMillan Mar. 26, 2007 Dep. at 138-39.) As explained above, many
25 sources of funds have statutory or other limitations on the purposes for which they may be spent;
26

27 _____
28 is public transit, defined to include the utilization of “flexible” funds that can be used for both
roads and transit..

1 while MTC is responsible for ensuring that funds are allocated consistent with these statutory
2 limitations, MTC also adopts its own policies governing the allocation of funds, which place
3 further constraints on how funds are to be allocated, above and beyond statutory limitations. “For
4 the 1998 RTP, the 2001 RTP, and the Transportation 2030 plan [the 2005 RTP], assignment of
5 regional transportation plan revenues were consistent with MTC policies current at the respective
6 time those plans were prepared, and provided the basis for projecting those revenue assignments
7 forward into the future. MTC policies were assumed to be consistent throughout the respective
8 25-year period encompassing each plan.” (MTCs Resp. to Plaintiffs’ Third Set of Interrogatories,
9 Interrog. 43, at 13). “With respect to operating-only revenues, policies related to operating
10 revenues were applied and limited to operating purposes. For purposes of the regional
11 transportation plans, it was assumed that flexible funds, which could be applied to either
12 operating or capital purposes, would first be applied against any remaining operating needs after
13 all operating-only revenues were assigned. As for residual flexible funds, if there were any, such
14 funds would be applied to outstanding capital needs remaining after capital-only revenues were
15 assigned.” (Id.). (It is very significant here that MTC does not include among the “flexible”
16 funds that could be applied to either operating or capital its large share of federal formula funds
17 under § 5307. These funds are eligible for operations under the “preventive maintenance”
18 provision in federal law, yet MTC allocates them according to its Transit Capital Priorities
19 process, which ensures that the vast majority of these funds are spent for capital rehabilitation
20 purposes. This is discussed in more detail in section III-D-1-a below). For the 2005 RTP, MTC
21 input each operator’s share of regional revenues, using current policy or law to determine its
22 share of each. It then determined the preliminary costs/revenues by year, and any operating
23 shortfalls or surpluses. (Bockelman Jul. 13, 2007 Dep. At 86-88).

24 46. In each of its RTPs since 1994, MTC has included a chart showing, for each
25 “major” transit operator¹⁶ its total projected operating revenues, costs and any shortfalls and,
26 similarly, total projected revenues, costs and any shortfalls on the capital rehabilitation side.
27 (Bockelman Dep., Ex. 1). Transit operations and capital rehabilitation – the expenditures

28 ¹⁶ AC Transit, BART and Caltrain are among the “major” transit operators.

1 associated with, respectively, the operating and capital shortfalls identified in MTCs RTPs –
2 which both relate to maintenance and operation of the existing system. Generally speaking, the
3 “capital shortfalls” identified in MTCs RTPs and discussed in this report relate to expenditures
4 for capital rehabilitation and *not* capital expansion. The limited exception is that the operating
5 and capital needs of expansion projects are included as part of the “baseline” if those expansion
6 projects are “under construction or have full funding commitments” at the time of the RTP. (Id.,
7 footnote). In the 2005 RTP, BART to SFO/Millbrae, and Caltrain’s “Baby Bullet” express
8 service were among the expansion projects that had their operating and capital rehabilitation
9 needs included in the “baseline” of “existing” service).

10 47. If one operator has more operating funds than it needs, and another has less, MTC
11 does not assign the excess operating funding to the operator that needs it, but treats each operator
12 as a stand-alone silo. (Bockelman Aug. 1, 2007 Dep., Ex. 7 at F MTCP027881) (“Funding is
13 operator specific and, therefore, surpluses for one operator cannot offset another operator’s
14 shortfall”).

15 48. *Fourth*, it is MTCs policy to assign funding according to the following order of
16 priority: with the “envelope” of revenues beyond what has been assigned to maintaining and
17 sustaining the existing system, MTC (a) first funds “prior commitments” to existing projects
18 (projects already included in a prior RTP or TIP), and then (b) with any remaining funds, MTC
19 funds “new projects.” (McMillan Mar. 26, 2007 Dep. At 138:8-139:25). This stage of MTCs
20 RTP process involves the third type of transit expenditure mentioned above – capital expansion.

21 4. MTCs SRTP Process

22 49. Based on its policy decisions about how funds should be spent, MTC prepares
23 revenue projections for each operator and requires each operator to prepare a balanced budget,
24 including proposed service levels, that conforms to the revenues that are assigned to that operator
25 by MTC policy. If an operator cannot continue to provide its existing level of service within
26 those revenue limitations, the budget it submits to MTC must include cuts in service or new
27 sources of revenue. (See MTCs 1992 SRTP Guidelines, MTCP221254 (“If a balanced budget
28 requires significant cuts in services currently provided or precludes new services justified by the

1 analysis from being provides, the consequences thereof and proposed or possible solutions should
2 be addressed in the financial plan section.”); MTCs 2000 SRTP Guidelines, MTCP121697
3 (“Where reductions in service levels are required in order to achieve a balanced operating budget,
4 the SRTP shall document how the reductions are to be made and assess the impacts of the cuts on
5 the communities involved.”); MTCs 2004 SRTP Guidelines, MTCP123429 (“Where reductions
6 in service levels are required in order to achieve a balanced operating budget, describe the
7 reductions and assess their impact on the affected service areas and communities.”).

8 50. The role of the SRTP in MTC’s process of projecting RTP transit operating costs
9 has already been mentioned. MTC has described the process by which SRTPs were prepared by
10 transit operators in its region as follows:¹⁷

11 51. **First**, MTC prepares SRTP guidelines, and requires each transit operator to
12 prepare an SRTP according to those MTC-prepared guidelines. MTC conditions transit
13 operators’ receipt of federal funds on preparation of an SRTP according to MTC guidelines. In
14 particular, MTC enters into a contract with each transit operator to prepare an SRTP, pursuant to
15 which it passes through federal funds to the operator; the contracts either attach or refer to MTCs
16 SRTP Guidelines. (Bockelman Jul. 13, 2007 Dep. At 65:11-74:20). Because federal funds are a
17 major source of funding for transit operators, and no transit operator can realistically forego
18 federal funds, MTCs contracts in effect require operators to prepare an SRTP according to its
19 guidelines.

20 52. **Second**, MTC issues 10-year revenue projections for each transit operator. These
21 revenue projections cover federal, state, and some local funds such as Transit Development Act
22 (“TDA”) funds where MTC has some allocation or programming authority. (See McMillan Nov.
23 27, 2007 Dep., Exs. 16-18) The assumptions MTC uses to allocate revenues to operators in these
24 10-year revenue projections is consistent with those it uses in the 25-year revenue projections
25
26

27 ¹⁷ Bockelman testified to this process being in effect for the 2006 SRTP cycle (Bockelman Nov.
28 27, 2007 Dep. at 69), and Rentschler testified that the process was essentially the same for
previous SRTPs. (Rentschler Dec. 11, 2007 Dep. at 367:14-368:21).

1 described above in connection with the RTP process.¹⁸ (Rentschler Dec. 11, 2007 Dep. At 397:1-
2 23). Thus, MTCs revenue projections for each operator reflect not only statutory eligibility
3 criteria for each fund source but also MTC policies governing each fund source.

4 53. MTC requires the transit operators to use its revenue projections, which are based
5 in part on MTC funding policies, as part of their short-range transit plans. (Bockelman Novemger
6 27, 2007 Dep. at. 73; McMillan Mar. 26, 2007 Dep. at 159).¹⁹

7 54. **Third**, each operator prepares a draft SRTP, setting forth the transit service that the
8 operator proposes to provide over the 10-year horizon of the SRTP. The draft SRTP may include
9 multiple financial scenarios, but one of which must show a balanced budget based on MTCs
10 revenue projections. Under the balanced budget scenario, an operator cannot expand service, or
11 even maintain existing service, if the cost of doing so would exceed revenue projections. Thus,
12 an operator must propose to cut existing service in its SRTP balanced budget scenario if the cost
13 of continuing to provide that service would exceed revenue projections. MTC then relies on each
14 operator's SRTP balanced budget scenario as the basis for the RTP. (McMillan Mar. 26, 2007
15 Dep. at 204; Bockelman Jul. 13, 2007 Dep. at 70-73).

16 55. In sum, MTC provides each operator with a revenue projection. MTCs revenue
17 projections reflect not only statutory eligibility criteria for fund sources but also MTC policies
18 governing the allocation of those funds. These MTC policies restrict the permissible uses for
19 which the funds may be spent, above and beyond those restrictions contained in statute. MTC
20 requires each operator to prepare an SRTP that includes a balanced budget based on the amount
21 of revenue that MTC has determined to assign that operator in MTCs revenue projection. MTCs
22 SRTP guidelines governing the balanced budget scenario mean that an operator can only propose
23 in its SRTP to provide such service that falls within projected revenues, and must propose to cut
24 existing service if necessary to ensure that projected costs do not exceed projected revenues over

25 ¹⁸ The actual numbers may differ, however, because the two sets of projections are prepared
26 at different times, based on the then most current projection of the total amount of funding that
27 will be available from each source.

28 ¹⁹ Operators also make projections as to local funds not in MTCs purview, such as fare
revenues, and MTC takes those projections as the basis for its long-range plan. (McMillan Dep.
Tr.

1 the 10-year horizon of the SRTP. MTC then develops and adopts the RTP based on the balanced
2 budget scenario in each operator's SRTP. The combined effect of MTCs SRTP and RTP process
3 is that MTC determines, through its revenue projections, the amount of money each transit
4 operator will receive from critical funding sources and requires transit operators to live within
5 those revenue projections, including by cutting service to achieve a balanced budget. Through
6 MTCs control over transportation funding and the transportation planning process, MTC can
7 effectively control the amount of service an operator provides.

8 **B. Generally-Accepted Transportation Industry/MPO Norms**

9 **1. Ensuring the Preservation of the Existing Transportation System**

10 56. Federal law makes it very clear to the transit industry, and to MPOs like MTC, that
11 preserving existing transit operations is the highest priority of transit planning and transit funding.

12 While this does not mean that no existing transit service should ever be eliminated – for example,
13 if a new form of transit can provide faster and better service to an existing service population, or
14 do it more cost-effectively, than eliminating the pre-existing service and replacing it with the new
15 service can very often be justified – it does mean that, under Federal law, preserving existing
16 transit service is a higher priority than expanding transit service, if a choice must be made.
17 Indeed, MTC appears to agree with this prioritization because its own planning process claims to
18 assign preservation of the existing system priority over expansion. (McMillan Mar. 27, 2007
19 Dep. at 150).

20 57. Both federal statute and federal agency regulations and guidelines make clear that
21 preservation (i.e., operation and maintenance) of the existing system is to be accorded the highest
22 priority.

23 58. The overarching principles of transit planning are found in 49 U.S.C. §5303(b)(1),
24 which govern the process and substantive standards that are applicable to MPOs when they adopt
25 the long-range plan (or RTP) that federal law requires:

26 “(b) Scope of Planning Process. –

27 (1) In general. - The metropolitan transportation planning process for a
28 metropolitan area under this section shall provide for consideration of projects and
strategies that will –

- 1 (A) support the economic vitality of the metropolitan area, especially by
2 enabling global competitiveness, productivity, and efficiency;
- 3 (B) increase the safety and security of the transportation system for motorized and
4 nonmotorized users;
- 5 (C) increase the accessibility and mobility options available to people and for freight;
- 6 (D) protect and enhance the environment, promote energy conservation, and improve
7 quality of life;
- 8 (E) enhance the integration and connectivity of the transportation system, across and
9 between modes, for people and freight;
- 10 (F) promote efficient system management and operation; and
- 11 (G) *emphasize the preservation of the existing transportation system.*” (Emphasis
added).

12 59. The introductory verbs for the first six of the above lettered subsections –
13 “support,” “increase,” “increase,” “protect,” “enhance,” and “promote” – are all “action” verbs
14 that convey, in this context, the importance of “provid[ing] for consideration of projects and
15 strategies that will” address these respective goals in the planning process. The introductory verb
16 for the seventh and last – “emphasize” – is clearly different: among all of these goals, “the
17 preservation of the existing transportation system” is the only one that is to be given “emphasis”
18 in the event of conflict among these seven principles²⁰.

19 60. This same principle is reflected in the federal regulations. For instance, 23 CFR §
20 450.306, entitled “Scope of the metropolitan transportation planning process,” provides in
21 subdivision (a), as follows:

22 “(a) The metropolitan transportation planning process shall be
23 continuous, cooperative, and comprehensive, and provide for consideration and
24 implementation of projects, strategies, and services that will address the following
factors ...

25 (8) Emphasize the preservation of the existing transportation system”

26
27 ²⁰ A very similar list of planning principles for road planning can be found at 23 U.S.C.
28 §134(h)(1), right down to the exclusive use of the verb, “emphasize,” in the final principle, “(H)
emphasize the preservation of the existing transportation system.” And it is found, as well, in the
implementing regulations, at 23 CFR 450.306(a)(8).

1 61. In addition, federal agency guidance also emphasizes the paramount importance of
2 preserving the existing system. During the late 1980's, while I was the National Transit Services
3 Director for DH&S, we were engaged by UMTA (now FTA) for a project involving the then
4 newly-issued UMTA Circular C 7008.1, "Urban Mass Transportation Financial Capacity Policy,"
5 March 30, 1987. "Financial Capacity" refers to the Federal statutory requirement that, prior to a
6 UMTA/FTA grant being made to a grantee, there must be a finding that the grantee "... has or
7 will have the legal, *financial*, and technical capacity (emphasis added) to carry out the project,
8 satisfactory continuing control over the use of equipment or facilities, and the capability to
9 maintain the equipment or facilities; ..." [49 CFR 5309(d)(1), for §5309 discretionary capital
10 grants; similar provisions apply to other FTA grant programs].

11 62. Specifically, our assignment was to develop and document a specific process and
12 procedures for evaluating Financial Capacity and conduct a series of training seminars for UMTA
13 employees, MPO and transit operator employees, and other interested parties. I was the
14 engagement partner and had the lead responsibility for both the development of the technical
15 materials and for the conduct of the seminars.

16 63. Attached as Exhibit D is a true and correct copy of a chart entitled "Framework for
17 the Analysis of Financial Capacity." This flow chart was personally prepared by me, under the
18 direct supervision of the UMTA Office of Policy, which had been the principal authoring
19 organization of the Financial Capacity Circular and served as the description of the overall
20 framework of testing for Financial Capacity. This graphic shows the three phases of the Financial
21 Capacity Analysis process for a system expansion grant, (1) Base System Operations, (2) Base
22 System Replacement and Rehabilitation (Recapitalization), and (3) System Expansion, which
23 have testing applied in this order. At each phase, there must be a balancing of costs and revenues
24 for the test to be passed. As the flow chart clearly shows, before the phase 2 analysis can be
25 performed, the phase 1 testing must be passed, and, before the phase 3 analysis can be performed,
26 the phases 1 and 2 testing must be passed.

27 64. In other words, being able to operate the existing level of transit service is an
28 affirmative requirement that must be met in any sound financial capacity analysis prior to

1 providing for its recapitalization (what I have been referring to as capital renewal and
2 replacement or rehabilitation of existing infrastructure). And sound financial capacity analysis
3 further requires that the financial needs for both operation and recapitalization of existing transit
4 service be met prior to beginning a system expansion. (While there are certainly many funding
5 sources that are restricted at their source by law, regulation, and/or contract to specific purposes
6 and uses, including dedications for or restrictions against operating or capital purposes, there are
7 large sums of money, from multiple sources, that can be utilized for either operating or capital
8 purposes at the election of local agencies (including as MTC and/or individual transit operators)
9 and that, by careful planning within the legal/ regulatory/contractual bounds of use, MTC and
10 other transportation agencies in the San Francisco Bay Area have great freedom to shift funds
11 from operations to capital and from capital to operations).

12 65. MTC itself incorporates this hierarchy of priorities for funding, with maintaining
13 the existing system at the top. For example, MTC's Deputy Executive Director, Policy, Therese
14 McMillan, testified in this case on March 26, 2007 at 135-36) as follows:

15 "We have a process that systematically addressed these points,²¹ which
16 is to say that we do develop an inventory of existing funds that we believe
17 will reasonably continue to be available over the period of the [long-range]
18 plan. We then look at the existing system in terms of transit, highways,
19 local streets and roads – the bicycle network has recently been added – to
20 make an estimate first of what it will take to *maintain and operate* that
21 system, and again, looking at eligible fund sources available for that
22 particular purpose.

23 "And then once that is done, then we determine what is left
24 over, if you will, for new – for quote, new investments into the
25 system which could be projects or programs. And then we match
26 with – for financial constraint what those projects would be. That is
27 a very abbreviated description of a very complex process."

28 66. MTC has also acknowledged this fundamental principle in many other contexts,
among them the following:

29 * "How is that accessibility is better for disadvantaged populations . . . ? First, the location
of low-income and minority communities in the urban core must be considered in

21 Referring to the analogous requirements in regard to ensuring fiscal constraint in the RTP.

1 relationship to the regional transportation system and the regional employment and
2 activity centers. When evaluating for access by different modes, improvements are best in
3 areas already served by the mass transit and the existing highway system Further,
4 when *MTC places a policy of maintaining and sustaining the existing system before*
5 *expanding the system*, it becomes clear that those in the urban core benefit most from this
6 policy. . . . Finally, MTC invests a significantly higher amount of resources into transit
7 than its share of the transportation market partly to ensure there is a safety net for transit
8 dependent people and partly to offer an option for those who can use a car.” (2001 RTP
9 Equity Analysis, at 1-5, MTCP0008629, emphasis added.)

10 * “[P]reservation and maintenance of the existing system-including local roads and transit-
11 remains essential. Therefore, it will be key component among the many objectives to be
12 achieved in programming federal discretionary funds. In particular, flexible funds will be
13 used to address maintenance and rehabilitation shortfalls that cannot be satisfied from
14 other federal, state, regional, or local funding sources.... Expansion will be considered as
15 part of the federal flexible program only after it is determined that outstanding
16 maintenance and management needs as outlined above are addressed... . Any investments
17 made in capacity expansion with federal flexible funds should focus on the most cost-
18 effective strategies available, given the limited resources available in the program.” (Res.
19 3053 (2-25-98), Att. A at 2, pars. D-E principles for programming federal flexible funds
20 under ISTEA reauthorization (i.e., TEA-21), MTCP225509)

21 * “Only after these needs [maintenance and preservation of the existing system, including
22 transit and local streets and roads] have been adequately met will any flexible funds be
23 considered for additional expansion.” (MTCP225527 (Dahms letter of 3-5-98):
24 MTCP225541-2 letter to CTC, March 25, 1998)

25 * “Assignment of available revenues for expansion transit purposes--bus or rail--must be
26 balanced by other investment needs, including baseline requirements to maintain and
27 sustain the existing system, and "lifeline" services for transit dependent populations.” Res.
28 3357 (4/25/01) (MTCP151097).

67. It is hardly surprising that federal statutory law, federal agency guidance, and
MTCs own planning process emphasize the importance of preserving the existing system. Doing
so makes basic transportation planning sense. First, it promotes a cost-effective use of finite
transportation funds. And second, expansion of the transportation system actually jeopardizes
preservation of the existing system by placing a strain on the pool of funds available to operate
the existing system. It does so not just for an individual operator that is expanding its own service
(such as BART or Caltrain), but potentially for other transit operators as well, as explained below.

68. In almost all situations, it is more expensive, on a subsidy per rider basis, to attract
new passengers than to continue to carry existing ones – and in many cases, particularly with new

1 rail lines and rail system extensions, the difference can be a multiple of the subsidy to carry
2 existing riders. To operate existing service is therefore more cost-effective per person than to
3 expand service.

4 69. It is also not at all uncommon for new capital projects to have final capital costs
5 far higher than originally anticipated; for their operating costs to be higher than planned; and for
6 ridership to be lower than what was anticipated when the decision to proceed with the project was
7 made. For example, the BART extension from Colma Station to SFO/Millbrae was originally
8 anticipated to have a capital cost of \$1,110.00 million (FTA, *Report on Funding Levels and*
9 *Allocation of Funds For Transit New Starts [FY 1997]*, but the actual cost was \$1,552.23 million
10 (FTA *Proposed Allocation for Funds for Fiscal Year 2005 – Annual Report on New Starts*). In
11 addition, there was a year-and-one-half delay in starting service (Michael Cabanatuan, *San*
12 *Francisco Chronicle*, “BART to Link to SFO June 22 – After Many Delays, Latest Date is Firm,
13 Transit Officials Say,” April 18, 2003). Finally, the ridership on this line was far less than
14 projected, which meant that fare revenues were also significantly less than anticipated. Because
15 the financial plan prepared to justify this extension assumed that the operations would be break-
16 even – operating expenses would be covered by fare revenues -- this, in turn has caused
17 significant problems between the San Mateo County Transit District (“Samtrans”) and BART in
18 funding the operating subsidies for this line: BART had to reduce service on this line (Michael
19 Cabanatuan, *San Francisco Chronicle*, SFGate.com, “BART’s Directors Approve Plan to Trim
20 Service to S.F. Airport,” August 12, 2005) and SamTrans had to reduce bus service in order to
21 make additional, unanticipated payments to BART to operate the line (Edward Carpenter, *San*
22 *Francisco Examiner*, “SamTrans Struggles with Fiscal Woes,” July 27, 2006).

23 70. There were similar construction cost escalations on the BART extension to Dublin
24 Pleasanton, which the 1986 Alameda County Measure B Transportation Sales Tax was to fund:
25 “The 1986 Expenditure Plan included a commitment to BART for two extensions: The
26 Dublin/Pleasanton Extension (DPX) ..., and the Warm Springs Extension (WSX) ... The entire
27
28

1 Measure B²² commitment has been spent on the DPX. The WSX project is also included in the
2 new Measure B Expenditure Plan approved in 2000” (to be paid from the new sales tax presented
3 to and passed by the voters). (Alameda County Transportation Improvement Authority,
4 Memorandum from Christine Monsen, Executive Director, et al., to Work Program Committee
5 Members, *Approval of the Final 2006-07 Strategic Plan Update And Cashflow*, June 2, 2006.)
6 In other words, the original 1986 Alameda County transportation sales tax was to fund the BART
7 extensions to both Dublin/Pleasanton and Warm Springs, but when it was time to pay the bills,
8 there was only sufficient funding for the former – so the Warm Springs extension was brought
9 back to the voters to fund with the new 2000 sales tax.

10 71. When major system expansion projects such as these turn out to have higher
11 capital costs than originally anticipated and/or operating subsidies that are higher than anticipated,
12 the resulting financial shortfalls must be financed somehow – generally out of existing operating
13 funds or by foregoing other capital expenditures, such as capital renewal and replacement of the
14 pre-existing transit system, and often leaving transit operators no choice but to reduce the level of
15 pre-existing transit service and/or to impose fare increases.

16 72. System expansions can have a negative impact on the existing service not only of
17 the operator that expanded service, but also on other transit operators in the region. Inevitably,
18 cost overruns on major guideway transit projects, such as those on the BART SFO/Millbrae and
19 Dublin/Pleasanton extensions, produce shifts in funding that work against the preservation of the
20 existing systems, such as Samtrans and AC Transit bus service. In the case of the former,
21 because Samtrans is both the administrator of the local transportation sales tax and the bus transit
22 operator, the relationship is beyond question; funds that must be found to finance major
23 unexpected expenditures must come out of somewhere, and that is usually going to mean that
24 funds intended for some other purpose must be shifted. The relationship in the East Bay is more
25

26 ²² Both the original Alameda County surface transportation sales tax in 1986 and the 2000
27 extension were “Measure B” on the ballots. The original 1986 Measure B is administered by the
28 Alameda County Transportation Authority (ACTA), the 2000 Measure B is administered by the
Alameda County Transportation Improvement Authority (ACTIA). These two agencies are
almost identical, except that the ACTIA has two extra members of its governing board.

1 complex; but, it is certainly legitimate to reason that, if the funding from the “second” Measure B
2 (and its other funding sources) was not required for the Warm Springs BART extension, some
3 additional funding may have been available for AC Transit bus operations.

4 73. The Federal Financial Capacity Policy issued by FTA, FTA Circular C 7008.1
5 discussed above, recognizes this harmful dynamic, by which new service has often jeopardized
6 existing service, and thus makes clear the importance of prioritizing preservation of the existing
7 system over expansion. The “Background” (¶6., page 3) in this Circular states, “Serious
8 problems can result when financial planning is not adequately performed. Cases include the
9 many ‘New Start’²³ cities which have been forced to reduce *overall service levels* (emphasis
10 added) in order to afford putting new lines into service and, as been the case far too often, rail
11 lines originally intended to save operating funds but which increased the cost.”

12 2. Achieving “bang for the taxpayer buck”

13 74. Federal and state law and guidance, as well as industry “best practices” and
14 common sense, require that MPOs allocate transportation funds in the manner that will achieve
15 the greatest “bang for the taxpayer buck” – in other words, the greatest efficiency, cost-
16 effectiveness, and economy. This is a matter of common sense and of statute.

17 75. The California Public Utilities Code (“PUC”) §99246(b), for example, requires
18 that all recipients of specified State funding undergo a performance audit at least once every three
19 years, and mandates that the audit “shall evaluate the efficiency, effectiveness, and economy of
20 the operation of the entity being audited and shall be conducted in accordance with the efficiency,
21 economy, and program results portions of the Comptroller General’s ‘Standards for Audit of
22

23 ²³ “New start” is the popular transit industry term for a “new fixed guideway capital
24 project,” the “minimum operable segment of a capital project for a new fixed guideway system or
25 extension to an existing fixed guideway system” under 49 U.S.C. §5309, the definition quoted
26 above is from 49 U.S.C. §5309(a)(3). “The term ‘fixed guideway’ means a public transportation
27 facility - (A) using and occupying a separate right-of-way or rail for the exclusive use of public
transportation and other high occupancy vehicles; or (B) using a fixed catenary system and a
right-of-way usable by other forms of transportation.” (49 U.S.C. §5302(a)(4)).

28 Thus, “fixed guideway” transit modes include all types of rail transit; internal combustion
powered buses operating on exclusive or restricted rights-of-way; and electric bus such as
operated by MUNI.

1 Governmental Organizations, Programs, Activities, and Functions.’” PUC 99246 sets forth a
2 clear legislative intent that efficiency, effectiveness, and economy of transit service are extremely
3 important considerations in transit operations and, therefore, in transit planning and transit
4 funding decisions.

5 76. MTC itself acknowledges the importance of cost-effectiveness: “Any investments
6 made in capacity expansion with federal flexible funds should focus on the most cost-effective
7 strategies available, given the limited resources available in the program.” (Res. 3053 (2-25-98),
8 Att. A at 2E principles for programming federal flexible funds under ISTEA reauthorization (i.e.,
9 TEA-21), MTCP225509).

10 3. Covering Identified Shortfalls

11 77. Federal law also requires MPOs, in developing financially constrained plans, to
12 eliminate “shortfalls.” A “shortfall,” quite simply, is the difference between the revenues and the
13 expenditures. (McMillan Mar. 26, 2007 Dep. at 215-16.)

14 78. As a practical matter, in preparing all types of governmental road, transit, and
15 other surface transportation plans, ranging from annual budgets to long-term transportation plans,
16 it is virtually unheard of for there to be sufficient resources, chiefly funding, available to allow all
17 identified needs to be met. (See McMillan Nov. 15, 2007 Dep. At 773). Generally, very early in
18 the process, the needs are listed and the costs to provide them calculated and totaled and
19 compared to the expected revenues – and, inevitably, the costs exceed the revenues, producing a
20 “shortfall.” (See McMillan Mar. 26, 2007 Dep. at 138-39 & Ex. 11 at 18-19.)

21 79. However, as I have already indicated, federal statute and regulations require the
22 adopted plan to be “fiscally constrained,” which means that projected revenues are sufficient to
23 cover all projected costs. This means, quite simply, that there cannot be shortfalls in the final
24 plans. 23 U.S.C. §134(g)(2)(B) and 49 U.S.C. §5303(f)(B) state that the metropolitan long-range
25 transportation plan must include “a financial plan that demonstrates how the long-range
26 transportation plan can be implemented, indicates resources from public and private sources that
27 are reasonably expected to be made available to carry out the plan, and recommends any
28 additional financing strategies for needed projects and programs.” The implementing regulations

1 (23 C.F.R. section 450.322(b)(11)) (McMillian Dep. Exhibit 10, Bates Number MTCP062966)
2 specify that “The estimated revenue by existing revenue source (local, State, Federal and private)
3 available for transportation projects shall be determined and any shortfalls identified. Proposed
4 new revenues and/or revenue sources to cover shortfalls shall be identified, including strategies
5 for ensuring their availability for proposed investments. Existing and proposed revenues shall
6 cover ***all forecasted capital, operating, and maintenance costs.***” (Emphasis added) There are
7 numerous similar provisions in State statute and Federal and State of California regulations and
8 guidance.

9 80. Therefore, while there are virtually always “shortfalls” in the original and
10 subsequent working drafts of the financial component of long-range plans like MTCs RTPs, they
11 must be eliminated in the final, adopted version, which must be fiscally constrained. This almost
12 always requires MPOs to make hard choices by pursuing a combination of two strategies:
13 reducing operating and/or capital expenditures by eliminating lower-priority projects and
14 programs and/or finding additional sources of revenues.

15 81. As discussed in greater detail below (see Section III-C-1, MTC differentiates
16 between “operating” and “capital rehabilitation” shortfalls, and MTCs practice is to cover capital
17 but not operating shortfalls. Federal law, however, does not distinguish between the types of
18 shortfalls that an MPO is required to cover in its financially constrained plans, and instead
19 requires *both* operating and capital shortfalls to be covered. As just noted, 23 CFR
20 450.322(b)(11) states that “Existing and proposed revenues ***shall cover all forecasted capital,***
21 ***operating, and maintenance costs.***” (emphasis added) This regulation not only does not
22 differentiate shortfalls as “operating” and “capital,” but specifically commingles into a single,
23 unified “shortfall” concept, requiring all shortfalls, whether for operating or capital purposes, to
24 be covered.

25 82. Moreover, federal law emphasizes the paramount importance of preserving the
26 existing system, and operating expenses are no less necessary to preserving the existing system
27 than are capital rehabilitation needs. Indeed, while federal law does not distinguish between the
28 types of shortfalls that an MPO is required to cover in its long-range plan, the principle of

1 prioritizing preservation of the existing transportation system would, if anything, prioritize
2 operating shortfalls over capital rehabilitation shortfalls. This is so because operating shortfalls
3 more immediately jeopardize the existing system, while capital rehabilitation shortfalls do not:

4 a. If there is not enough funding for capital rehabilitation, there may not be
5 significant impact on current levels of operations for some time. As MTC itself acknowledges, a
6 shortfall for transit capital replacement simply means deferred maintenance, not that unsafe
7 transit vehicles are being operated.²⁴ (McMillan Nov. 15, 2007 Dep. at 792-93.) It is hardly
8 uncommon in the transit industry to operate transit vehicles beyond their ideal life-span, and there
9 are actually times when deferring capital rehabilitation costs for a few years may be the best
10 available option.

11 b. However, if an operator faces a shortfall in its operations funding, the
12 standard result is an immediate reduction in transit service operated. Transit agencies operate on
13 the basis of balanced annual budgets, where revenues must not be less than operating expenses;
14 when there is not sufficient funding to operate the desired level of service and there is limited or
15 no opportunity to increase revenues, the only available option to balance the budget is to reduce
16 expenses.²⁵ MTC acknowledges that transit operating shortfalls can require an operator to reduce
17 service. (McMillan Mar. 26, 2007 Dep. 211-212, 384-385; McMillan Nov. 15, 2007 Dep., Ex. 32
18 at MTCP103504). I discuss below the reasons why operating shortfalls cause service reductions.
19 (See Section III-E).

20 83. Thus, unrelieved capital rehabilitation shortfalls are unlikely to have an immediate
21 significant impact on the existing system, whereas unrelieved operating shortfalls pose serious
22 and immediate threats to the existing system in the form of service cuts, fare increases, and other
23 impacts on the quantity and quality of transit services provided. None of this is to say that capital
24 rehabilitation shortfalls can or should be completely ignored, but simply that long-term
25 transportation requires a balance. Operating shortfalls cannot be subordinated wholesale to

26
27 ²⁴ Assuming that this is not a regular pattern, but a one-time or temporary condition that is
corrected prior to the passage of too much time.

28 ²⁵ In unusual circumstances, it is possible, and sometimes inevitable, to operate at a “loss”
for some period of time; but this cannot be sustained indefinitely.

1 capital rehabilitation shortfalls without jeopardizing the existing system in the very short term.
2 Conversely, capital rehabilitation shortfalls cannot be entirely ignored without long-term
3 consequences to the existing system. The federal requirement that *all* shortfalls be eliminated in
4 an MPO's long-range plan – without regard to whether they are capital or operating shortfalls –
5 combined with the prioritization of preserving the existing system, means that it is critically
6 important to balance efforts to relieve capital rehabilitation shortfalls *and* operating shortfalls in a
7 comprehensive and coordinated manner with capital and operating issues and solutions
8 considered together, as part of a consolidated whole, not as separate and only marginally related
9 concepts. Where funding is available to address both capital rehabilitation and operating
10 shortfalls, there is simply no justification – either in federal law or basic transportation planning
11 principles – for distinguishing between capital rehabilitation and operating shortfalls, and then
12 covering one but not the other.

13 **4. Allowing the Use of Section 5307 Funding for Preventive Maintenance** 14 **as a Substitute for Loss of Federal Operating Assistance**

15 84. The federal government is a major source of funding for transit, and the 49 U.S.C.
16 § 5307 Formula grant program is the largest individual federal transit grant program. Consistent
17 with the priority federal law places on preservation of the existing system and the attendant
18 importance of operating funds to preserve and maintain that system, Congress allows Section
19 5307 funds to be used for certain types of operating purposes and most MPOs in the country use
20 Section 5307 funds for those operating purposes.

21 85. Federal urbanized area funds create a large fund of money, over which MTC has
22 discretion to allocate among transit operators within its jurisdiction that qualify for the funds.
23 The Federal FY06 Allocations to the MTC UZA's are²⁶:

24
25 ²⁶ FTA, FTA Fiscal Year 2006 Apportionments and Allocations Notice (Number 70 FR
26 75647, 12-20-05), Table 4, Section 5307 and Section 5340 ("Growing and High Density States,"
27 a new program) Urbanized Area Apportionments. Consistent with the enabling legislation, FTA
28 combines these two programs in its notices of allocations. Allocations for UZA's from 50,000 to
199,999 population (those designated "*") are apportioned to State Governors and then, by each
state, to the individual smaller UZA's. See :

http://www.fta.dot.gov/grant_programs/2930_17945_ENG_HTML.htm

1	Antioch	\$ 5,387,415
2	Concord	18,197,263
3	Fairfield*	1,977,968
4	Gilroy-Morgan Hill*	1,007,466
5	Livermore	1,172,831
6	Napa	1,468,247
7	Petaluma*	878,388
8	San Francisco-Oakland	117,252,329
9	San Jose	34,438,912
10	Santa Rosa	3,320,307
11	Vacaville*	1,531,742
12	Vallejo*	<u>3,733,567</u>
13	Total	<u>\$190,366,435</u>

14 The FY07 allocations were approximately equal to the FY06 , which were significantly higher
15 than those of FY05, because FY06 was the first year of a new surface transportation authorization
16 act with a higher overall funding level.

17 86. Although Section 5307 funds appear on their face to be restricted for “capital”
18 purposes, Congress broadly defined the “capital” purposes for which these funds may be used to
19 include “associated capital maintenance items” –costs that are considered operating expenses for
20 all purposes other than this “capital” funding program. Thus, certain kinds of operating expenses
21 are a statutorily permissible use of federal Section 5307 funds. The relevant statutory provisions
22 of 49 U.S.C. §5307 provide that such funds may be used for transit “capital projects and
23 associated capital maintenance items.” § 5307(b)(1)(A). Associated capital maintenance items
includes equipment, tires, tubes, and materials, and reconstruction of such equipment and
materials. 5307(a)(1). These associated capital maintenance items are generally referred to as
“preventive maintenance.”

24 87. Funds under the predecessor to section 5307, known as FTA Section 9, and
25 previously Section 5, were eligible for operating expenses for all transit operators since the 1974
26 reauthorization act. During the 1980’s the use of Federal funds for operating assistance for transit
27 operators in larger urbanized areas was steadily decreased and, by the early 1990’s, when ISTEA
28 went into effect, “operating assistance,” as such, was eliminated for large urbanized areas.

1 However, to make up for the loss in Federal operating assistance, Congress specifically allowed §
2 5307 funds –to be used for preventive maintenance, which is ordinarily classified as an operating
3 expense even in FTA’s own National Transit Database financial reporting system.

4 88. It is the standard practice for many MPOs to allow § 5307 funds to be used for
5 preventive maintenance, i.e., operating expenses, as Congress intended. The use of § 5307 funds
6 for operations is authorized by the MPOs in such major cities such as Atlanta, Cincinnati,
7 Columbus, Detroit, Honolulu, Houston, Indianapolis, Los Angeles, Miami, Minneapolis/Saint
8 Paul, Phoenix, Philadelphia, Pittsburgh, Sacramento, Saint Louis, Salt Lake City, San Diego, and
9 Washington, D.C.

10 89. In 2003, AC Transit’s projected annual preventive maintenance costs were over
11 \$43 million annually. (Bockelman Aug. 15, 2007 Dep., Ex. 14 at MTCP108621.)

12 **C. Analysis of MTCs RTP Planning and Funding Policies and Practices**

13 90. Having set forth MTCs responsibilities as an MPO and its planning process, as
14 well as the industry norms that govern transportation planning, I now turn to an analysis of MTCs
15 last four RTPs, and the observed consequences of those practices in terms of the service levels
16 provided to transit riders by the region’s three largest single-mode operators -- AC Transit, BART
17 and Caltrain.

18 91. To summarize, MTCs funding choices in these RTPs reveals that it prioritizes
19 capital over operating needs. MTCs RTPs consistently reflect shortfalls for AC Transit to operate
20 its existing service. BART or Caltrain did not experience similar operating shortfalls. In the
21 course of the RTP process, MTC chose to cover capital shortfalls, directing the lion’s share to
22 BART and Caltrain, but did not dedicate any resources to covering identified operating shortfalls.
23 The end result was that MTC chose to cover the capital shortfalls of BART and Caltrain, but not
24 the operating shortfalls of AC Transit. During the period covered by these RTPs, AC Transit
25 experienced a 9.6% decline in service levels, while BART and Caltrain dramatically increased
26 service by 48.2% and 80.4%, respectively. Thus, MTC refused to cover AC Transit’s shortfall in
27 revenues to operate a baseline of *decreasing service*, while it devoted billions to covering the
28 capital rehabilitation shortfalls for BART and Caltrain associated with an *increasing* baseline of

1 service. Furthermore, MTC also devoted billions of dollars to capital expansion for BART and
2 Caltrain, in addition to the billions spent on capital rehabilitation for these two operators. My
3 analysis of these four RTPs leads me to conclude that that MTC prioritizes the expansion of
4 BART and Caltrain service over the preservation of AC Transit service.

5 **1. MTCs Treatment of Shortfalls For Operating and Capital**
6 **Rehabilitation Purposes**

7 92. MTCs last four RTPs contained operating shortfalls reflecting insufficient revenue
8 to allow AC Transit to operate its then-existing service levels. BART and Caltrain did not suffer
9 similar shortfalls in the revenue necessary to operate existing service. At the same time, these
10 RTPs also reflect capital rehabilitation shortfalls for each of the three operators. MTC chose *not*
11 to cover AC Transit's operating shortfalls and instead covered capital rehabilitation shortfalls,
12 directing a major share of RTP funds to cover the capital rehabilitation shortfalls of BART and
13 Caltrain. At the same time, MTC directed the lion's share of its federal formula funds under §
14 5307 to meet operators' capital replacement needs, as opposed to their operating needs.

15 93. In the four RTPs that MTC has adopted since 1994, MTCs initial calculations
16 showed the certain "shortfalls" for AC Transit, BART, and Caltrain, prior to the application of
17 funds that MTC assigns in the RTP process, and refers to variously as "RTP discretionary funds"
18 and "Track 1 Funds."²⁷ The following tables show the operating and capital shortfalls reflected
19 for AC Transit, BART and Caltrain in the initial shortfalls calculations made for MTCs Regional
20 Transportation Plans of 1994, 1998, 2001 and 2005:

21 **Initial Shortfall Calculations Prior to Application of Track 1²⁸ Funds:**
22

23 ²⁷ The format of the four MTC RTP's adopted since the Intermodal Surface Transportation
24 Efficiency Act of 1991 ("ISTEA") produced the basic legal and regulatory planning provisions
25 now in effect into being has varied significantly.

26 Of the four RTP's adopted since then (1994, 1998, 2001, 2005), two -- the 1994 and 1998
27 RTPs -- were 20-year plans, while the two most recent ones (the 2001 and 2005 plans)
comprehended a 25-year planning horizon.

28 ²⁸ This is the current term for what were titled, "RTP discretionary funds," in prior RTP's.
For simplicity's sake, the term "Track 1" will be used in discussing all RTP's in this section.

Agency	(Millions) Operating Shortfall	Capital Shortfall	(Percentage shares)		
			Operating	Capital	Total
1994 RTP					
AC Transit	\$ 360.5	\$ 125.0	100.0%	100.0%	100.0%
BART	-0-	-0-	-0-	-0-	-0-
Caltrain	-0-	-0-	-0-	-0-	-0-
Total	\$ 360.5	\$ 125.0	100.0%	100.0%	100.0%
1998 RTP (initial calculation)					
AC Transit	\$ 136.151	\$ 205.909	100.0%	14.5%	22.0%
BART	-0-	797.772	-0-	56.2%	51.3%
Caltrain	-0-	416.076	-0-	29.3%	26.7%
Total	\$ 136.151	\$1,419.757	100.0%	100.0%	100.0%
2001 RTP (initial calculation)					
AC Transit	\$ 27.300	\$ 188.400 ²⁹	100.0%	23.4%	26.0%
BART	-0-	472.000	-0-	58.7%	56.7%
Caltrain	-0-	143.700	-0-	17.9%	17.3%
Total	\$ 27.300	\$ 804.100	100.0%	100.0%	100.0%
2005 RTP (initial calculation)					
AC Transit	\$ 64.355	\$ 458.474 ³⁰	73.8%	13.3%	14.8%
BART	-0-	2,460.594	-0-	71.7%	69.9%
Caltrain	22.868 ³¹	515.545	26.2%	15.0%	15.3%
Total	\$ 87.223	\$3,434.613	100.0%	100.0%	100.0%

²⁹ For all three operators, the following note was shown: "Baseline includes only those services in operation, under construction or that have full funding commitments (e.g. BART/SFO, ...). Potential Regional Transit Expansion Program projects (e.g., BART/San Jose, ...) are not included in the Baseline costs and revenues."

³⁰ "Baseline includes only those services in operation, under construction or that have full funding commitments (e.g. BART/SFO, ...). Potential Regional Transit Expansion Program projects (e.g., BART/San Jose, ... Caltrain Downtown Extension and AC rapid bus projects) are not included in the Baseline costs and revenues."

³¹ As explained more fully below, this operating shortfall was not a deficiency in the funding required to operate the existing level of service, but rather a deficiency in funding to operate the expanded "Baby Bullet" train service. (Bockelman Aug. 1, 2007 Dep. at 235-40, 449-50, & 2005 RTP Project Notebook at 2.1-9)

(Data Sources: Bockelman Jul. 13, 2007 Dep., Ex. 1; 1994 – MTC, *1994 Regional Transportation Plan*, “RTP Transit Capital Replacement: 20-Year Costs, Revenues and Shortfalls” and “RTP Transit Operation: 20-Year Costs, Revenues, and Shortfalls,” at B-5, (MTCP008554); 1998 – MTC, *Draft 1998 Regional Transportation Plan for the San Francisco Bay Area – Project Notebook*, August 1998, “1998 Regional Transportation Plan 20-year Baseline Transit Operator Summary; Capital and Operating Surplus/(Deficit),” at 1-5, (MTCP008260); 2001 – MTC, *Draft 2001 Regional Transportation Plan – Project Notebook*, August 2001, “2001 Regional Transportation Plan 25-Year Baseline Transit Operator Summary; Capital and Operating Surplus/(Deficit),” at 1-5, (MTCP001882); 2005 – MTC, *Transportation 2030 Plan – Project Notebook*, March 2005, “Transportation 2030 25-Year Baseline Transit Operator Summary; Capital and Operating Surplus/(Deficit),” at 2.1-2, (MTCP003296)

94. Note that in the initial calculations of the last four RTPs:

a. AC Transit has both an operating and a capital shortfall in all four RTPs.

b. BART does not have an operating shortfall in any of the RTPs, and has a capital shortfall in the three most recent RTPs. BART’s \$2.5 billion capital shortfall in the most recent RTP comprises nearly 70% of the total for the three operators.

c. Caltrain has an operating shortfall only in the 2005 RTP. Caltrain’s 2005 RTP operating shortfall, however, unlike AC Transit’s, does not reflect an inability to operate its existing level of service. Rather, it is due to the additional cost of operating the “Baby Bullet” train service *expansion*, and – unlike AC Transit – its operating shortfall does not represent a shortfall in funding to operate its pre-existing service. (Bockelman Dec. 4, 2007 Dep. at 450; 2005 RTP Project Notebook at 2.1-9) As noted earlier, when assessing the costs of maintaining the “existing transportation” system in the RTP and, in turn, identifying “shortfalls”, MTC uses a “baseline” for the “existing” system that is defined as “those services in operation, under construction, or that have full funding commitments.” (Bockelman Jul. 13, 2007 Dep., Ex. 1 at (MTCP003296), footnote [2005 RTP Notebook]; MTCP121882, footnote [2001 RTP Notebook]; McMillan Mar. 26, 2007 Dep. at 135.) Thus, an operating shortfall that appears in its RTP can represent a shortfall in revenue to operate existing service (“those services in operation”) or *expanded service* (“under construction” or with “full funding commitments”).

d. Caltrain has a capital shortfall in three of the four RTPs.

95. After making the initial shortfall calculations shown in the charts above, MTC assigned “regional discretionary funding” (also referred to as “Track 1 funding”) to cover certain

capital shortfalls, but no operating shortfalls. Following the application of this discretionary revenue, the shortfalls in the final 1998, 2001 and 2005 RTPs were left as follows:

MTCs Assignment of Track 1 Funding to Cover Shortfalls

Agency	Capital		Percent Track 1	Operating		Percent Covered	% Operating +Capital Covered
	Millions			Millions			
	Shortfall	Covered		Shortfall	Covered		
1998 RTP							
AC Transit	\$205.909	\$154.400	14.5%	\$136.151	-0-	0.0%	45.1%
BART	797.772	598.300	56.2%	-0-	-0-	0.0%	75.0%
Caltrain	416.076	312.100	29.3%	-0-	-0-	0.0%	75.0%
Total	\$1,419.757	\$1,064.800	100.0%	\$136.151	-0-	0.0%	68.4%
2001 RTP							
AC Transit	\$188.400	\$188.400	23.4%	\$36.700	-0-	0.0%	83.7%
BART	472.800	472.800	58.7%	-0-	-0-	0.0%	100.0%
Caltrain	143.800	143.800	17.9%	-0-	-0-	0.0%	100.0%
Total	\$805.000	\$805.000	100.0%	\$36.700	-0-	0.0%	95.6%
2005 RTP							
AC Transit	\$458.474	143.386	\$11.8%	\$64.355	-0-	0.0%	27.4%
BART	2,460.594	1,073.005	88.2%	-0-	-0-	0.0%	43.6%
Caltrain	515.545	-0-	0.0%	22.868	-0-	0.0%	0.0%
Total	\$3,434.613	\$1,216.391	100.0%	\$87.223	-0-	0.0%	34.5%

96. In its RTP process since 1994, MTC has never covered what it refers to as “operating” shortfalls, but it has regularly covered part or all of the capital rehabilitation shortfalls.

97. In sum, the RTPs discussed above indicate the following: AC Transit consistently suffers shortfalls in revenues to operating its existing service. BART and Caltrain have not suffered similar shortfalls in revenue to operate their existing service. MTC has chosen to cover capital rehabilitation shortfalls, but not operating shortfalls, and of the funds it has devoted to covering capital shortfalls, it has devoted far more funding to the capital rehabilitation shortfalls of BART and Caltrain than of AC Transit and to BART and Caltrain capital expansion projects.

For instance, in the 2005 RTP, 88% of the Track 1 funds MTC assigned to the three operators went to BART; in 2001, Caltrain received nearly as much as AC Transit (17.9% for Caltrain, compared to 23.4% for AC Transit), though AC Transit service produced 70.8 million boardings in FY01 – over seven times the 9.9 million carried by Caltrain (National Transit Database). In short, while MTC has consistently devoted substantial resources to covering the substantial capital rehabilitation shortfalls of BART and Caltrain, it has declined to cover the far more modest operating shortfalls of AC Transit.

2. Capital Expansion

98. The expenditures (and shortfalls) discussed above for operations and capital rehabilitation relate to the “existing” system. A major portion of the RTP process also involves capital expansion. In its RTP’s, MTC has spent billions of dollars in capital expansion (plus the additional operating and capital rehabilitation costs that capital expansion brings with it) for new BART and Caltrain service, while its capital expansion costs for AC Transit have been minimal in comparison.

99. In Exhibit G, I provide my calculations of the Capital Expansion costs for each of the three operators in the MTCs 2005 RTP (all data from “Appendix One – Projects by County”)³², which I summarize below:

Agency(Millions of 2004 Dollars)		Percentages	
	Fiscally Constrained	“Vision” Element	Fiscally Constrained	“Vision” Element
AC Transit	\$512.0	430.4	3.8%	6.8%
BART	9,720.9	5,048.1	72.6%	79.8%
Caltrain	3,164.2	846.6	23.6%	13.4%
Totals	\$13,397.1	\$6,325.1	100.0%	100.0%

Obviously, MTCs vision for capital expansion of these three transit operators is very different, with BART getting almost three quarters of the “fiscally constrained” capital expansion funding for all three operators, Caltrain getting almost one-quarter – and AC transit getting less than one dollar out of each twenty. Interestingly, the \$9.7 billion of capital expansion funding for BART

³² The MTC *Transportation 2030* detail listing of projects intermixes the capital expansion costs and the costs of operating for many of these capital expansion projects.

1 in the 2005 RTP – in the “fiscally constrained” version, which means that this funding has a high
2 expectation of actually being provided – is approximately 150 times the \$64 million operating
3 shortfall for AC Transit that is not funded³³.

4 **3. Changes in Service Levels**

5 100. During this same period when MTC identified and failed to cover AC Transit’s
6 significant operating shortfalls; devoted substantial resources to covering capital shortfalls,
7 especially those of Caltrain and BART; and (as described in Section III-C-4, below) devoted
8 billions of dollars to capital expansion of BART and Caltrain, AC Transit riders experienced
9 precipitous declines in service levels while BART and Caltrain riders enjoyed increased service
10 levels.

11 101. From fiscal years 1993 to 2006³⁴, while AC Transit reduced the amount of service
12 that it operated for the benefit of its riders, both BART and Caltrain significantly increased the
13 amounts of service they operated for their riders.

14 102. In my opinion, the most meaningful measure of the amount of service that a transit
15 agency provides to transit riders is “Vehicle Revenue Miles” (“VRMi”). People ride public
16 transit to get from one place to another, not to find ways to spend time, and so the metric that
17 captures the distance traveled more closely reflects the purpose for which public transit exists
18 (transit users board buses and trains to ride X miles, not to ride for Y minutes). (FTA, in its
19 National Transit Database (“NTD”) Glossary, defines VRMi as, “The miles that vehicles ...
20 actually travel while in revenue service,” excluding “deadhead” between operating yards and the
21 beginning and the ends of transit lines and other miles not in service to the public, such as
22 maintenance test miles, and excluding locomotives, operated by commuter rail operators such as
23 Caltrain, that do not carry passengers. A train with six passenger cars in service to the public
24

25 ³³ However, as is discussed below, this operating shortfall may be understated because of
26 various assumptions made by MTC that very significantly reduced the shortfall submitted by AC
27 Transit.

28 ³⁴ MTC, like virtually every other California governmental and related entity, is on a July 1
to June 30 fiscal year. For ease of reference, I refer, for example, to the fiscal year that runs from
July 1, 2007 to June 30, 2008, sometimes referred to as “fiscal year 2007-2008,” as “FY08.”

traveling one mile would produce six VRMi. A bus traveling one mile would produce one VRMi.

103. Between FY93 and FY06, the VRMi operated by AC Transit, BART, and Caltrain changed as follows:

<u>Operator</u>	<u>FY93 VRMi</u>	<u>FY06 VRMi</u>	<u>% Change</u>
AC Transit	23,460,309	21,198,605	(9.6%)
BART	41,893,212	62,088,502	48.2%
Caltrain	3,445,358	6,215,464	80.4%

(See Exhibit E, which I prepared, "Annual Revenue Vehicle Miles," presented in graphic and tabular formats, for more details).

a. **Elements of BART and Caltrain Service Expansion**

104. BART's 48% increase in service was due, among other things, to the extensions of its pre-1993 71.5-mile, 33-station system to add new stations at North Concord/Martinez (December 1995), Colma (February 1996), Pittsburg/Bay Point (December 1996), Dublin/Pleasanton (May 1997), and San Francisco International Airport ("SFO")/Millbrae (June 2003), producing the current 104-mile, 43-station system. (See BART document entitled "BART Chronology January 1947-June 2005"). BART also significantly reduced its "headways" (the time between trains) during the FY93-FY06 period, particularly during the peak morning and afternoon working weekday commuter hours through the Transbay "tube" between Oakland and San Francisco, thereby operating significantly more service on its pre-existing tracks, up from approximately 18 trains per hour (peak hour, peak direction) to 23 currently³⁵. BART has several other major extensions and capital improvements in various stages of planning, design, and construction, including the e-Bart extension to Eastern Contra Costa County; the Warm Springs extension and BART to San Jose; BART Headquarters Building Replacement; an Oakland Airport Connector that would replace existing shuttle bus service between the Airport and the

³⁵ BART, "QuickPlanner," West Oakland Station to Embarcadero Station, December 28, 2007, between 7:20 and 8:16 a.m. See : <http://www.bart.gov/>.

1 Coliseum BART station; the West Dublin/Pleasanton Station (*see* BART document entitled
2 “BART projects”); and the West Contra Costa extension (including possible eventual extension to
3 Solano County)³⁶.

4 105. The 80% increase in Caltrain service over the same period has resulted primarily
5 from the introduction of its “Baby Bullet” train service, which significantly reduced the scheduled
6 time between downtown San Jose and San Francisco, and other increases in the number of trains
7 operated. Total weekday service has increased from 60 daily trains in FY93 to 96 daily trains
8 today. This service expansion was made possible by major fleet expansion of the fleet and a
9 significant upgrade of the signaling system and passing tracks. (The extension of Caltrain service
10 from San Jose to Gilroy occurred on July 1, 1992, the first day of FY93 and, therefore, was not a
11 cause for the service increase from FY93 to FY06). (Caltrans document entitled, “Baby Bullet
12 Information” and “History – Caltrain Milestones”). Caltrain has plans, in various levels of
13 development, for commuter rail service across the Dumbarton Bridge, service extension to
14 Salinas in Monterey County, extension of service to the new TransBay Terminal in the San
15 Francisco Business District, and electrification of its service between San Jose and San Francisco
16 and later to Gilroy.

17 **b. Reduction in AC Transit Service**

18 106. During the period FY93-FY06, as the population and transit needs of its service
19 area increased by approximately 11.3%³⁷, and as the VRMi operated by BART and Caltrain
20 increased substantially, AC Transit’s VRMi decreased. The reason for this decrease is that AC
21 Transit did not have sufficient operating funds to maintain the desired level of service, leading to
22 reductions in services offered to the public. By contrast, BART and Caltrain did have, and
23 continue to have, sufficient operating funding, not only for their then-existing service, but also for
24 their significant service expansions over this same period.

25
26
27 ³⁶ BART document entitled “I-80/West Contra Costa County Corridor,”
http://www.bart.gov/docs/planning/I80_WEST_CONTRA_COSTA.pdf.

28 ³⁷ I calculated this based on information for incorporated cities served by AC Transit from
State of California Department of Finance Demographic Research Unit data. *See* Exhibit F.

107. The reductions in AC Transit service have had major negative impacts on its riders. In Using Public Transportation to Reduce the Economic, Social and Human Aspects of Personal Immobility (Transportation Research Board, 1998), in the case study, AC Transit District's Service Reductions, which reviewed the response to a \$ 2.3 million shortfall in a \$114.5 million budget for FY95, and a projected \$11 million shortfall in the FY96, the annual "benefit" to AC Transit (in the form of cost savings from reductions in service) was \$4.8 million (the District had implemented various other measures to avoid service reductions where possible, including fare increases, elimination of vacant positions, deferring employee raises, deferring pension fund contributions, pursuing grants and other private-sector donations, and working with schools to modify schedules), while the added costs to riders was \$48.1 million, mostly from the \$30.7 million of added travel expenses by other modes. According to a 1993 on-board survey, 76% of AC Transit riders were members of protected groups (48% African-American, 11% Asian, 10% Hispanic, and 6% other [does not add due to rounding]) and 24% White.

4. The RTPs Understate The Full Extent Of AC Transit's Shortfalls

108. It bears emphasis that the RTPs understate the full extent of AC Transit's Shortfalls, for at least two reasons:³⁸

a. First, because AC Transit has had consistent long-range operating shortfalls in each of the RTPs, it has been forced to reduce the level of service it provides, thus establishing ever-lower levels of service as the new baseline level for the next RTP. For instance, AC Transit's "baseline" of existing service in the 2005 RTP already included two service

³⁸ In the 2005 RTP, there appears to have been yet a third reason: in the case of "asking questions" about AC Transit's response to MTCs call for 25-year operating data, AC Transit's projection of costs to operate the existing "baseline" of service over the period of the RTP, and its operating shortfall, were significantly reduced. AC Transit provided expense data in response to MTCs "call for operating data" with information that showed a projected 25-year operating shortfall of just under \$2.9 billion; MTC requested dramatic changes to that data, primarily questioning AC Transit's assumptions about health care costs, with the result that the operating shortfall fell by approximately \$2 billion, to about \$870 million. (Bockelman Aug. 29, 2007 Dep. at 427-428; Ex. 20). (Ultimately, AC Transit's operating shortfall was shown as only \$224 million, and additional revenues adopted by the voters in late 2004 reduced it further to \$64 million. Bockelman Aug. 21, 2007 Dep. at 213-15; Ex. 1).

1 reductions of 4% and 14% in June and December 2003, respectively. (Bockelman Aug. 1, 2007
2 Dep. at 248-50; *id.* Aug. 29, 2007 at 422-27; Ex. 20, & 2005 RTP Project Notebook at 2.1-5).
3 Conversely, both BART and Caltrain have been significantly *increasing* the levels of service they
4 provide over time, thereby increasing the baseline level of service for the next round. (See
5 Section III-C-2 above comparing the service levels of these three operators). The more accurate
6 way of looking at these historical trend lines is that AC Transit is showing operating shortfalls
7 against lower trending levels of service, while BART and Caltrain are increasing the levels of
8 service they provide. As noted above, for example, Caltrain's "baseline" in the 2005 RTP
9 included *new* "Baby Bullet" service. In addition, BART's "baseline" of service in these RTPs
10 also accounted for service expansions, such as BART to SFO/Millbrae

11 b. Second, the baseline of service on which an RTP operating shortfall for AC
12 Transit is predicated is not even the same as the lower baseline that results from the preceding
13 RTP operating shortfall; rather, it is even lower than that. The reason is that the operating
14 shortfall in each RTP is based on the level of service that AC Transit can operate assuming a
15 balanced budget scenario from the SRTP that is constrained by MTCs revenue allocation policies
16 as reflected in its SRTP revenue projections. MTCs SRTP Guidelines require AC Transit to
17 propose a balanced budget scenario based on MTCs revenue projections. To the extent MTCs
18 revenue projections are not sufficient for an operator to propose continuing to run its existing
19 service levels, it must bring costs into line with revenues, generally by reducing service. (See
20 MTCs 1992 SRTP Guidelines, MTCP221254 ("If a balanced budget requires significant cuts in
21 services currently provided or precludes new services justified by the analysis from being
22 provides, the consequences thereof and proposed or possible solutions should be addressed in the
23 financial plan section."); MTCs 2000 SRTP Guidelines, MTCP121697 ("Where reductions in
24 service levels are required in order to achieve a balanced operating budget, the SRTP shall
25 document how the reductions are to be made and assess the impacts of the cuts on the
26 communities involved."); MTCs 2004 SRTP Guidelines, MTCP123429 ("Where reductions in
27 service levels are required in order to achieve a balanced operating budget, describe the
28 reductions and assess their impact on the affected service areas and communities.").

1 c. As previously described, MTCs calculation of the RTP shortfalls is based
2 on the level of service included in the operator's SRTP. That level of service, however, is not
3 necessarily the level of service that an operator is actually running – which is what federal
4 requirements mean when they talk about preserving the “existing” system – but the amount that
5 can be sustained with the revenue MTC allots. (McMillan Mar. 26, 2007 Dep. at 204) ³⁹.

6 **5. MTC Prioritizes Expansion Of BART and Caltrain Service Over**
7 **Preservation Of AC Transit Service**

8 109. While AC Transit has consistently suffered operating and capital shortfalls against
9 *decreasing* levels of “baseline” service in the RTP, MTC has devoted enormous resources to
10 expanding BART and Caltrain service. MTCs RTPs reveal that it prioritizes expansion of BART
11 and Caltrain service over preservation of existing AC Transit service.

12 110. First, it is important to repeat MTCs definition of the “baseline” existing system.
13 MTC defines the “baseline” existing system to include existing service as well as, in some cases,
14 what is tantamount to expanded service (i.e., where the service is “under construction” or already
15 has “full funding commitments”). (Bockelman July 13, 2007 Dep., Ex. 1 at MTCP003296,
16 footnote [2005 RTP Notebook] and MTCP121882, footnote [2001 RTP Notebook]; McMillan
17 Mar. 26, 2007 Dep. at 135). As a result, a portion of the funds in MTCs RTPs for operation and
18 maintenance of the so-called “existing” system,” actually involve operation and maintenance of
19 an *expanded* system.

20 111. Capital rehabilitation is normally an expenditure associated with operation and
21 maintenance of the existing system. But the capital rehabilitation shortfalls for BART and
22 Caltrain discussed above were predicated on a baseline that included service *expansions*, such as
23 BART to SFO/Millbrae and the Caltrain Baby Bullet service. (Bockelman Dec. 4, 2007 Dep. at
24 448-50; 2005 RTP Project Notebook at 2.1-7, 2.1-9.) At the same time, AC Transit's operating
25 shortfalls were based on existing and indeed successively decreasing levels of service (e.g.,
26

27 ³⁹ In fact, it appears that MTC does not know, and has not asked operators to tell it, their
28 existing baseline of service in terms of vehicle revenue miles or hours. (Bockelman Aug. 1, 2007
Dep. at 226, 230-33; MTC Response to Plaintiffs' Fifth Set of Interrogatories, Nos. 45, 46, 47).

1 Bockelman Dep. at 425-27, 2005 RTP Project Notebook at 2.1-5), and MTC chose not to cover
2 these operating shortfalls.

3 112. By covering the capital rehabilitation shortfalls of BART and Caltrain attributable
4 to service *expansions*, but not the operating shortfalls of AC Transit attributable to its *existing*
5 service, MTC has actually prioritized service expansion for BART and Caltrain, and at the
6 expense of preserving AC Transit service. This is directly contrary to the widely-embraced
7 principle, which MTC nominally acknowledges, that preservation of the existing system must be
8 prioritized over expansion. (See Section III-B-1).

9 113. Second, MTC has spent billions of dollars in capital expansion (plus additional
10 operating and capital rehabilitation) for new BART and Caltrain service, and comparatively
11 minimal amounts on AC Transit capital expansion. In the “fiscally constrained” portion of the
12 2005 RTP, for example, MTC devoted a total of \$13.4 billion to capital expansion for AC Transit,
13 BART, and Caltrain, and each operator’s relative shares of that amount, respectively, were 3.8%,
14 72.6% and 23.6%. (See Section III-C-4.)

15 **D. MTC Is Responsible for Creating AC Transit’s Operating Shortfalls**

16 114. It is apparent from the RTPs that AC Transit consistently suffers operating
17 shortfalls. MTCs role in these shortfalls is not simply to report their existence in its RTPs; rather,
18 MTC actually *creates* AC Transit’s operating shortfalls. MTC creates these shortfalls in two
19 principal fashions: (1) by artificially limiting the pool of operating funds available to transit
20 operators and (2) by failing to cover operating shortfalls once they are identified.

21 **1. MTC artificially limits the pool of funds available to transit**
22 **systems for operating purposes**

23 115. MTCs funding policies and practices prioritize capital over operating needs and
24 thereby artificially limit the pool of funds available to transit operators for operating purposes,
25 thereby creating operating shortfalls. To summarize, although funds often have restrictions on the
26 purposes for which they may be used, MTC imposes *additional* limitations on the use of those
27 funds – beyond the constraints created by statute. In doing so, MTC actually chooses to make
28 unavailable for operating purposes funds that could so be used. In addition, MTC has broad

1 authority to expand the pool of funds eligible for operating purposes, but forgoes these valuable
2 opportunities. Finally, MTC strains the existing pool of operating funds by emphasizing
3 expansion. I describe below several examples of the ways in which MTCs funding policies and
4 practices artificially limit the pool of operating funds that would otherwise be available. The
5 consistent theme is that MTC prioritizes capital over operating needs.

6 116. MTCs funding policies, which artificially limit the pool of operating funds, in turn
7 create the operating shortfalls for AC Transit that consistently appear in MTCs RTPs. This is so
8 because the revenue projections – against which the RTP operating shortfalls are calculated – are
9 based on these MTC funding policies.

10 **a. MTCs policies essentially preclude the use of Section 5307**
11 **funds for preventive maintenance.**

12 117. The Federal government’s largest dollar value transit grant program is the 49
13 U.S.C. §5307 “formula” grant program, which allocates funding to urbanized areas – where the
14 funding is allocated by the MPO’s. Although the details of how the funding can be utilized at the
15 option of the local decision-makers are extremely complex for reasons that we need not concern
16 ourselves with here, the basic choice that is to be made is to use the funding for capital purposes
17 or operating subsidies, or some mixture thereof, subject to restrictions in that section. The
18 Federal government does not wish to concern itself with the decisions as to how the funds are to
19 be utilized, as long as the laws and regulations are complied with and the planning practices are
20 reasonable – thus leaving the decision on how formula funds are to be used to the governing
21 board of the MPO (potentially also subject to state statute and regulation). For example, even in a
22 region as large as the San Francisco Bay Area with two dozen transit operators, the decisions both
23 as to the recipients of such funding and its uses are those of the MPO, with the FTA oversight
24 limited to tests for consistency with the applicable laws, regulations, and contract terms. If MTC
25 so wished, it could “legally” allocate the entire allocation for each UZA (there are several in the
26 nine-county Bay Area, the two largest being “San Francisco-Oakland” and San Jose) to a single
27 operator each year – again, assuming that there were no violations of legal restrictions.

118. The chief “legal” limiting factor is that formula funds utilized for operating subsidies cannot exceed the amount of “associated capital maintenance items,” or preventive maintenance. As a practical matter, all, or almost all, of AC Transit’s operating shortfalls could be eliminated if §5307 funding was utilized for its associated capital maintenance purposes. AC Transit’s annual needs are approximately \$43 million per year (Bockelman Ex.14 at MTCP108621) The most that AC Transit has actually received from MTC in §5307 funding for operating subsidies was \$19,99 million in FY04, or less than half of the current allowed maximum. Over the four years, FY04-FY07, the average was \$16,88 million, or slightly under 40% of the allowable allocation⁴⁰ – and these years, in total, were extraordinarily highly funded, well in excess of the MTC restrictions on use for Section 5307 funds for operations.

119. Once of MTCs most significant policies that artificially limits the pool of funds available to fund operating expenses is its Transit Capital Priorities (“TCP”) process, which MTC uses to determine how to program Section 5307 funds among large urbanized areas within the Bay Area region. Congress intended that 5307 funds be usable to fund preventive maintenance as a way to compensate for the elimination of federal operating assistance, and numerous MPOs in major urbanized areas nationally program and allocate 5307 for preventive maintenance consistent with this intent. However, unlike many MPO’s, MTCs policies and practices with respect to allocating and programming 5307 funds essentially preclude operators from using section 5307 funds for preventive maintenance, i.e., an operating expense, even though such use is expressly permitted, and even encouraged, by the federal government.

120. MTC recognizes that Section 5307 funds may be used for preventive maintenance. (McMillan, Dec. 19, 2007, 381:14-24). MTC also acknowledges that there is no dollar cap on the amount of 5307 funds that may be used for preventive maintenance purposes, provided that the statutory requirements are satisfied. (McMillan, Dec. 19, 2007, 381:25-382:13).

⁴⁰ FY2003-2004, \$19,808,093 Proposed, MTC Res 3515 Att A at 7 (MTCP101883); FY 2004-2005, \$ FY 2005-2006, \$13,776,000*, Res 3714, Revised (MTCP101247); FY 2006-2007, \$17,525,305, Res. 3714, Revised (MTCP101249)

*(exchanging bus replacement totaling \$13,776,000)

1 121. MTC programs funds for which it is the designated recipient⁴¹ under Section 5307
2 (and Section 5309 fixed guideway) under its Transit Capital Priorities (“TCP”) policies.
3 (McMillan, Dec. 19, 2007, 392:7-13) MTCs goal through its TCP process is “to be able to
4 prioritize the highest need capital replacement requirements within the region ... through a
5 scoring system that has been a longstanding process negotiated with the operators in terms of how
6 the scores are set.” (McMillan, Dec. 19, 2007, 384:2-12). The TCP process has been in effect
7 since the mid 1980’s, and has been modified regularly since then to the present. (McMillan, Dec.
8 19, 2007, 384:13-24). Although MTC seeks operator input regarding modifications to the TCP
9 policies, MTC retains the ultimate authority to decide what TCP policies to adopt. (McMillan,
10 Dec. 19, 2007, 386:10-13). MTCs current TCP policies are set forth in Exhibit A to Resolution
11 No. 3688 (Bates No. PL023919-023949, Ex. 56 to McMillan Dep., Dec. 19, 2007). MTC may
12 revise its TCP policies at any time and has done so in the past to respond to changing economic
13 conditions. (McMillan, Dec. 19, 2007, 404: 20-405:12)

14 122. The TCP process generally works as follows:

15 a. The TCP policy identifies various categories of projects for which MTC
16 has determined that 5307 funds may be programmed. These include projects such as revenue
17 vehicle replacement, revenue vehicle rehabilitation, fixed guideway replacement and
18 rehabilitation, Translink and non-Translink fare collection equipment, non-revenue and service
19 vehicle rehabilitation and replacement, office equipment, preventive maintenance and expansion.
20 Each project category is assigned a score based on MTCs priorities. Projects such as revenue
21 vehicle replacement and rehabilitation, fixed guideway replacement and rehabilitation, and
22
23

24 ⁴¹ MTC is the designated recipient for funds that the federal government appropriates to each of
25 the large urbanized areas within its jurisdiction. Urbanized areas are considered “large” if they
26 have a population exceeding 200,000 based on the last U.S. Census. (McMillan, Dec. 19, 2007,
27 389:2-389:5) AC Transit’s service area is within the San Francisco/Oakland urbanized area,
28 which has a population exceeding 200,000. Thus, MTC is the designated recipient for Section
5307 funds for which AC Transit may be eligible. Funds appropriated to one urbanized area by
the federal government may only be used by operators within that urbanized area. (McMillan,
Dec. 19, 2007, 390:17-391:2).

1 Translink are assigned a score of 16—the highest score assigned to any project category in the
2 TCP.⁴² Preventive maintenance is assigned a score of 9—the second-lowest score assigned.

3 b. Transit operators submit their requests for funding for projects for the
4 applicable time period, and MTC assigns a score to each project based on the TCP scoring
5 system. (McMillan, Dec. 19, 2007, 392:14-393:8).

6 c. Within each large urbanized area, MTC then programs 5307 funds in score
7 order, programming the highest scoring projects, i.e., score 16, first, and then, to the extent any
8 funds remain programming score 15 projects, and so on down the line. This is subject to any
9 applicable caps that may apply.⁴³

10 d. If there are more projects submitted for funding than funds available, MTC
11 rolls some projects over to be programmed in subsequent years, and works out other issues with
12 operators. (McMillan, December 19, 2007, 429:12-430:18).

13 123. Because of the number of capital projects submitted to MTC for funding under the
14 TCP, and the limited amount of money available to fund those projects, MTCs TCP policies
15 essentially preclude preventive maintenance from being programmed for any operator in the San
16 Francisco/Oakland urbanized area, including AC Transit, even though preventive maintenance is
17 an eligible use of §5307 funds. MTC acknowledges that, in the San Francisco/Oakland urbanized
18 area, there are only sufficient funds available to program projects that score a 16 or higher under
19 the TCP. (McMillan, December 19, 2007, 393:5-8). As a result, requests for preventive
20 maintenance in the San Francisco/Oakland urbanized area (which score only 9) do not receive
21 funding as a matter of course.

24 ⁴² It is possible for a project to receive a score of 17 if it was among the highest scoring projects
25 in an earlier programming period and its funding was deferred to the next period. In other words,
26 projects that were deferred from a prior period receive funding first.

27 ⁴³ There are caps on the total amount of funds an operator may receive under certain project
28 categories, even high priority score 16 projects. For example, the current TCP policy places a
\$20 million cap per operator on revenue vehicle replacement projects, a \$30 million cap per
operator on rail or ferry replacement or rehabilitation. Thus, under the TCP scoring process,
MTC will first program the highest scoring projects up to the applicable cap amounts.

1 124. MTC has made limited exceptions to its TCP policies to allow for funding for
2 preventive maintenance notwithstanding the existence of higher scoring capital project.
3 Nonetheless, these limited “exceptions” to MTCs otherwise strict policy demonstrate (1) that
4 MTC acknowledges §5307 funds are available for operating purposes as preventive maintenance;
5 and (2) that MTC can change its policies prohibiting the usage of 5307 funds as preventive
6 maintenance if it wants to – in order to address operating shortfalls.

7 125. For example, in 1999, MTC significantly overestimated the amount of AB 1107
8 funds that would be available to AC Transit and Muni. MTCs overestimation resulted in a \$7.2
9 million shortfall for both AC Transit and Muni -- a \$14.4 million total shortfall. (McMillan,
10 December 4, 2007, 187:15-188:25) MTC then had to come up with an additional \$7 million in
11 funds for each of AC Transit and Muni. To “backfill” the shortage of \$7.2 million in operating
12 funds for AC Transit that resulted from the overestimation of AB 1107 funds, MTC programmed
13 5307 funds to AC Transit for preventive maintenance so that AC Transit could use the funds for
14 operating.⁴⁴ (McMillan, December 4, 2007, 189:22-191:4, and Resolution No. 3225 [Ex. 28]).
15 This was an exception to MTCs TCP policies. (McMillan, December 4, 2007, 191:5-14). In
16 finding a solution for the \$7.2 million shortage, MTC demonstrates that it has the ability to cover
17 existing shortfalls if it wants to. In fact, MTC admitted as much. (McMillan, December 4, 2007,
18 194:24-195:4 [“The point being they had both had a 7.2 (million dollar) shortfall and we [MTC]
19 came up with a deal to deal with both of them with an eligible source of funds. The
20 distinctions—there is no policy distinction, quite frankly, I think, there. The important thing is
21 that we did it.”]) Allowing AC Transit to use §5307 funds for preventive maintenance in 1999
22 was the first time MTC had made an exception to its TCP policies to allow preventive
23 maintenance in the San Francisco/Oakland urbanized area to be funded over higher scoring
24 capital projects.⁴⁵ (McMillan, December 19, 2007, 414:3-23).

25
26 ⁴⁴ To backfill the \$7.2 million shortage in operating funds for Muni, MTC allocated a portion of
27 unanticipated CMAQ “windfall” funds that became available to the region. (McMillan,
December 4, 2007, 193:1-194:2).

28 ⁴⁵ In the San Jose urbanized area, MTC had programmed 5307 funds for preventive maintenance
because the San Jose urbanized area had sufficient funds allocated to it to fund all higher scoring

1 126. Since 1999, MTC revised its TCP policies on three occasions to provide 5307
2 funds for preventive maintenance in limited circumstances. (McMillan, December 19, 2007,
3 416:18-417:3). MTC suspended its TCP policies for fiscal year 2003-04 to allow operators to use
4 § 5307 for whatever eligible purpose the operators wanted, including preventive maintenance.
5 (McMillan, December 19, 2007, 417:4-418:6). MTC suspended its policies during that time
6 because of the economic downturn, to respond to a substantial decrease in sales tax base revenue.

7 127. In FY 2004-05, MTC allowed § 5307 funds to be used for preventive maintenance
8 for three operators: AC Transit, Golden Gate and VTA. That exception to the TCP policies is set
9 forth in MTC Resolution No. 3580. (McMillan, December 19, 2007, 418:15-24).

10 128. The most recent revision that MTC has made to its TCP policy to allow operators
11 to use §5307 funds for preventive maintenance notwithstanding higher scoring capital projects is
12 embodied in MTCs current TCP policy. (McMillan, December 19, 2007, 418:25-419:16, Exs. 56
13 and 57). The current TCP policy only allows § 5307 funds to be used for preventive maintenance
14 in limited circumstances.

15 129. First, in order for § 5307 funds to be used for preventive maintenance in place of
16 higher scoring capital projects, MTC must first make a finding that a fiscal need exists. To satisfy
17 this condition, an operator must demonstrate that an operating shortfall exists; must demonstrate
18 all reasonable cost control and revenue general strategies have been implemented, and that the
19 operating shortfall, if not addressed, “would result in a significant service reduction.” (Ex. 56,
20 Attachment A at p. 23 of 31). In other words, MTCs policy seems to preclude use of preventive
21 maintenance funds to avoid service reductions that MTC does not consider “significant.” MTC
22 has no definition or guideline as to what “significant service reduction” means. (McMillan,
23 December 19, 2007, 426:5-10). Whether an operator satisfies the fiscal need condition is entirely
24 within MTCs discretion. (McMillan, December 19, 2007, 424:1-13).

25 130. Second, MTC requires the following for an operator to be eligible for preventive
26 maintenance:

27 _____
28 capital projects, so preventive maintenance was programmed consistent with the TCP policies in
that urbanized area. (McMillan, December 19, 2007, 414:24-415:6).

1 a. Operators must successfully show a board approved bridging strategy that
2 will sustain financial recovery beyond the year for which preventive maintenance is requested.

3 b. The bridging strategy should not rely on future preventive maintenance
4 funding to achieve a balanced budget. In other words, should a service adjustment be required to
5 balance the budget over the long run, preventive maintenance should not be invoked as a stopgap
6 to inevitable service reductions.

7 c. Funds programmed to preventive maintenance should not be considered as
8 a mechanism to sustain or replenish operating reserves.

9 d. Operators requesting FTA formula funds to meet operating shortfalls will
10 be limited to two years preventive maintenance funding within a 12-year period. (Ex. 56,
11 Attachment A at p. 23 of 31).

12 131. In fiscal years 2006-07 and 2007-08, there was an unanticipated “surplus” of §
13 5307 funds that were available in the Bay Area region in the amount of approximately \$210
14 million. Instead of following its TCP policies, which would have allowed MTC to program lower
15 scoring projects that are not traditionally funded because of a shortage of funds (that could have
16 included preventive maintenance), or used the windfall funds to specifically address operating
17 shortfalls, MTC developed new policies that applied specifically to the surplus funds. (McMillan,
18 December 19, 2007, 435:13-437:1; Ex. 56, Attachment A at p. 25 of 31). It allocated \$1 million
19 off the top to itself for a transit capital inventory project. It increased the caps applicable to
20 Caltrain for fixed guideway projects, resulting in an increased \$11 million for Caltrain. It then
21 allocated \$39 million for specific high scoring capital projects that did not include preventive
22 maintenance. It then allocated the remaining (approximately \$162 million) according to its 10%
23 flexible set-aside formula, under which operators can use § 5307 funds for whatever purpose they
24 want, including preventive maintenance. (McMillan, December 19, 2007, 434:13-435:12).
25 However, the ability of four operators, including AC Transit, to use the surplus funds as it sees fit
26
27
28

1 is restricted. Specifically, AC Transit is required to fund all score 16 projects that is has first.
2 (Ex. 56, Attachment A, p. 26 or 31).⁴⁶

3 132. Although MTC clearly understands that § 5307 funds are eligible for preventive
4 maintenance, and MTC has the ability to revise its TCP policies to fund preventive maintenance
5 to a far greater extent than it has in the past, MTC refuses to do so. Instead, over the past ten
6 years, MTC has funded preventive maintenance in the San Francisco/Oakland urbanized area in
7 only limited circumstances, most recently limiting the use of preventive maintenance funds to two
8 years out of a twelve-year period, regardless of the extent of operating shortfalls or attendant
9 service cuts that operators may face. MTC refuses to prioritize operating expenses in
10 programming § 5307 funds even though it can fund capital projects first with other eligible
11 funds, such as STP and CMAQ. Even though MTC acknowledges that it can do this, it continues
12 to prioritize capital rehabilitation and replacement with § 5307 funds, instead of funding eligible
13 operating needs first. (McMillan, December 19, 2007, 399:9-400:22).

14 **b. MTC fails to utilize fund swaps or fund exchanges to free up**
15 **capital funds for operating expenses**

16 133. MTC has wide-ranging authority to “swap” or “exchange” funds that would
17 effectively allow it to free up funds, nominally designated for capital purposes, for operating
18 expenses.

19 **i. MTC could, but does not, transfer federal highway funds for transit**
20 **purposes in a way that could address operating shortfalls.**

21 134. MTC has the authority to “transfer” federal highway funds to transit funds and,
22 once transferred, these funds could be used , directly and indirectly, to reduce operating shortfalls.
23 MTC, however, does not exercise this authority and thus foregoes existing opportunities to
24 expand the pool of funds available for operating expenses.

27 ⁴⁶ This also illustrates a more general issue: MTC often says that the issue is not
28 reallocating funds among operators, but rather “growing the pie.” When it comes upon new
money, however, it tends to allocate it in the same way as it allocates the old money.

1 135. Surface Transportation Program (“STP”) and Congestion Mitigation and Air
2 Quality Program (“CMAQ”) funds are known as federal flexible funds because they can be used
3 to fund various modes of transportation such as transit or highway. (McMillan, December 7,
4 2007, 336:18-337:14). CMAQ funds are generally eligible for capital projects that enhance air
5 quality or reduce emissions. They may be used to fund operations only for the first three years of
6 a new service. (McMillan, December 7, 2007, 337:20-338:15). CMAQ funds are not eligible for
7 maintenance or rehabilitation. (McMillan, December 7, 2007, 339:12-340:16). STP funds are
8 limited to capital projects, but may be used for almost any capital need, including rehabilitation or
9 expansion, for any mode of surface transportation. (McMillan, December 7, 2007, 359:9-
10 359:25). STP and CMAQ funds are considered by MTC to be “regional discretionary funds”
11 because MTC makes the programming decision about where and how to spend those funds.
12 (Bockelman, December 7, 2007, 29:24-30:11).

13 136. By federal statute, highway funds under both STP and CMAQ are eligible to be
14 “transferred” for transit projects. 23 U.S.C. § 104(k). CMAQ funds transferred from highway to
15 transit may be used for, among other purposes, “New transit vehicles ... to expand the fleet or
16 replace existing vehicles,” for “operating assistance to introduce new transit service or expand
17 existing transit service .. for a maximum of three years,” and for transit fare subsidies under
18 specified conditions. (FHWA, *The Congestion Mitigation and Air Quality Improvement Program*
19 *under the Safe, Accountable, Flexible, Efficient Transportation Equity Act: A Legacy for Users –*
20 *Interim Program Guidance*, October 31, 2006, Section VII.D.5., “Project Eligibility Provisions –
21 Eligible Projects and Programs – Transit Improvements, sections b., d. and e., pp. 17-18).

22 137. CMAQ funds can thus be utilized for transit operations purposes in at least two
23 ways: (a) directly, for the first three years of new service, and (b) indirectly, by using CMAQ for
24 the Federal share of the replacement cost of vehicles, rather than using §5307 funds, thus freeing
25 up §5307 funds for preventive maintenance uses.

26 138. Although operators in the Bay Area request such transfer of funds through
27 Caltrans, in order for a transfer to occur, MTC both has to concur in a transfer and include a
28

1 project in its Transportation Improvement Plan (“TIP”). (Bockelman, November 27, 2007,
2 17:19-18:18). Thus, a transfer cannot occur unless MTC allows it to happen.

3 139. MTC does not generally program STP funds for preventive maintenance, even
4 though such use is permissible. (Bockelman, December 5, 2007, 119:5-17). However, MTC did
5 make an exception for BART in Resolution No. 3738. (Bockelman, December 5, 2007, Ex. 15).
6 In the 2005 RTP, there was a significant capital replacement shortfall—approximately \$2
7 billion—for BART as a result of a BART car replacement project slated to begin in the year
8 2013. To fund BART’s future car replacement needs, MTC agreed to provide BART with current
9 STP funds for preventive maintenance and, in exchange, BART would deposit an equal amount
10 of local funds into an account for future car replacement needs. The program was beneficial to
11 BART because the local funds do not have a time limit on when they must be used, as opposed to
12 STP funds. Thus, MTC could not currently have otherwise programmed STP funds to be used for
13 BART car replacement in 2013. (Bockelman, December 5, 2007, 113:16-117:6). The local funds
14 deposited by BART into the account will earn interest, that will also be available to BART to use
15 for car replacement. (Bockelman, December 5, 2007, 129:13-130:1). In addition to being
16 programmed STP funds that could otherwise fund other capital or operating (through preventive
17 maintenance) needs, BART is also receiving the additional benefit of interest accruing on those
18 funds—interest that MTC conceivably could use for other needs.

19 **c. MTC uses for other purposes funds that could be used for**
20 **transit operating purposes.**

21 140. MTC also artificially limits the pool of funds available for operating purposes by
22 using funds that would otherwise available to operators for operating expenses, for other
23 purposes. By using these operating-eligible funds for other purposes, MTC shrinks the universe
24 of funds that would otherwise be available to operators for operating expenses. As discussed in
25 Exhibit C, “Analysis Of MTC-Controllable Funds,” these funds include (including funds that are
26 currently used, in part, for operating subsidies, but where there is the ability to increase the
27 allocation to operations, and excluding funding sources already discussed above):

28 a. 49 U.S.C. Section 5303 Metropolitan Planning Program

- b. Federal Highway Administration Metropolitan Planning Grants
- c. Transportation Development Act
- d. State Transit Assistance (Revenue- and Population-Based)
- e. Regional Transportation Improvement Program
- f. S.B. 916/Regional Measure 2 (RM 2)

Transportation Congestion Relief Act (A.B. 2928/S.B. 406) funds were also available for use for transit operations by MTC action, but there was a specified time period for such actions, which has passed.

i. STP Reimbursement Exchange Program

141. MTCs “STP Reimbursement Exchange” program set forth in Resolution No. 3018 is one example of using funds that are eligible for operating purposes for capital purposes. (See Bockelman, November 27, 2007, Ex. 9). The STP Reimbursement Exchange program was created in 1994 when MTC allocated \$19.32 million in STP to the Santa Clara Traffic Authority. The Santa Clara Traffic Authority was then required to “repay” the STP funds in “clean” local dollars—in other words, in local dollars that did not have any federal or other restrictions on them. (Bockelman, November 27, 2007, 72:10-73:2). The money that was repaid was deposited into an account and earned interest. MTC had full discretion over how to use the “clean” local dollars that were deposited into the STP reimbursement account. (Bockelman, November 27, 2007, 73:7-11).

142. Although MTC could have used these “clean” funds for operating expenses, specifically to address operating shortfalls, it chose not to do so. Instead, it passed Resolution No. 3018, which required that the funds in the STP Reimbursement Exchange program be used only for projects that could have used STP funds but, generally, where it was beneficial for some reason to circumvent the federal administrative process. (Bockelman, November 27, 2007, 73:12-74:1). The interest that accrued on the principal funds deposited in the STP Reimbursement Exchange account were allocated by MTC according to the same policies as the

1 principal funds. (Bockelman, November 27, 2007, 99:1-13). The effect of MTCs Resolution No.
2 3018 is to limit "clean" funds -- that could be used for any purpose -- for capital purposes.

3 143. Even though the STP Reimbursement Exchange Program will cease when the
4 repaid funds, and interests thereon, have been depleted, MTC either has or is planning on entering
5 into similar agreements with Sonoma County (Bockelman, December 5, 2007, Ex. 17 [Resolution
6 No. 3731]) and Marin County to program STP funds in exchange for a repayment of "clean" local
7 funds. MTC will either deposit those funds into the same STP Reimbursement Exchange
8 Account, or create a new exchange account, out of which MTC will allocate funds based on the
9 same policies as Resolution No. 3018. (Bockelman, November 27, 2007, 96:5-98:25).

10 144. The STP Reimbursement Exchange Program thus illustrates that (1) MTC has the
11 ability to *expand* the pool of funds available for operating purposes -- by providing other entities
12 with federal funds and seeking in exchange repayment of "clean" local funds; but (2) MTC
13 chooses to funds -- such as the "clean" funds obtained through its STP Reimbursement Exchange
14 Program -- that are eligible for operating purposes instead for capital purposes.

15 **ii. MTC allocates STA funds -- eligible for operating**
16 **purposes -- to itself**

17 145. MTC further limits the pool of funds that would otherwise be available to
18 operators for operating purposes by providing *itself* generous allocations.

19 146. State Transit Assistance ("STA") funds are primarily derived from sales taxes on
20 gasoline. STA funds are divided into two separate "pots" of money--revenue-based funds and
21 population-based funds. Statewide, 50% of funds are revenue-based, and 50% are population-
22 based. Revenue-based funds are allocated directly by formula to transit operators, based on the
23 amount of qualifying revenues that the transit operator generates. Population-based funds, also
24 referred to by MTC as STA discretionary funds (McMillan, November 21, 2007, 142:8-143:8),
25 are allocated to MTC for the entire Bay Area region based on a formula. (McMillan, November
26 21, 2007, 143:24-144:10). The two pots of funds can be used for the same statutory purposes.
27 The only difference is the manner in which they are allocated to operators.

1 147. MTC has complete discretion to allocate STA population-based funds in "any way
2 we want for any purpose in transit." (McMillan, December 4, 2007, 202:2-203:18). To guide its
3 discretion, MTC promulgated Resolution No. 2310, its current policy with respect to allocating
4 STA funds. (McMillan, December 4, 2007, Ex. 21, 195:23-196:14). MTC's policy is "no direct
5 subvention to large transit operators" including AC Transit. (McMillan, December 4, 2007, Ex.
6 29, 207:8-209:9). In practice, MTC allocates to itself the majority of STA discretionary funds.
7 MTC first allocates a portion to northern counties (for which AC Transit is not eligible). It then
8 allocates a portion of the discretionary funds to small operators (for which AC Transit is not
9 eligible). Funds are next allocated for paratransit purposes, for which AC is indirectly eligible as
10 a participant in the East Bay Paratransit Consortium. (McMillan, December 4, 2007, 198:20-
11 200:23). The remaining discretionary funds are allocated to "Regional Coordination Programs,"
12 largely consisting of MTC's own projects: Translink and the 511 Traveler Information System
13 program.⁴⁷ (McMillan, December 4, 2007, 203:23-204:25). MTC is in the process of revising its
14 STA discretionary allocation policies to incorporate Proposition 42 and Proposition 1B transit
15 funds, to be allocated in the same manner as STA population-based funds. (McMillan, December
16 4, 2007, 219:14-222:2).⁴⁸ For FY07, MTC received allocations of \$44.5 million for STA-
17 Revenue and \$15.7 million for STA-Population. (MTC, *Resolution 3727*, Appendix A, pp. 11-
18 12)

21
22 ⁴⁷ Regional Coordination Programs also includes the Lifeline program. However, the Lifeline
23 program was not allocated any STA Discretionary funds until fiscal year 2005-2006, in which
24 year it was allocated \$5,569,862 out of \$12,296,539 allocated for that year. Notably, the balance
of STA discretionary funds remaining was \$11,885,639. MTC Resolution No. 3696,
MTCP243263-271, Attachment A at 1]

25 ⁴⁸ When Proposition 42 funds first flowed in to the Bay Area region, MTC did not have a policy
26 determining how to allocate the funds. Instead of allocating the funds to operators with the
27 greatest need, i.e., addressing operating shortfalls, MTC instead did nothing with the funds,
28 holding them in reserve. (McMillan, December 4, 2007, 223:16-226:14, Ex. 32) Proposition 42
funds held in reserve in fiscal year 2005-06 totaled \$4 million. Proposition 42 funds held in
reserve in fiscal year 2006-07 totaled \$7 million. (McMillan, Ex. 32).

1 148. Under its "Regional Discretionary Program," MTC has consistently allocated to
2 itself far more funds than those allocated to any other operator in any fiscal year since at least
3 1996-1997:

- 4 • In 1996-1997, out of 22 projects funded, MTC was the recipient of funds for all but two,
5 allocating to itself \$ 3,699,696 out of a total of \$ 3,824,196 [MTCP220629-645 at
6 Attachment B, at 1-2].
- 7 • In 1997-1998, out of 19 projects funded, MTC was the recipient of funds for all but two,
8 allocating to itself \$ 5,353,357 out of a total of \$5,470,052 [MTCP220921-926 at
9 Attachment B at 1].
- 10 • In 1998-1999, out of 14 projects, MTC was the recipient of funds for at least a portion of
11 all but one project, allocating to itself up to \$ 1,915,281 out of a total of \$2,102,859
12 [MTCP178009-014 at Attachment B at 1].
- 13 • In 1999-2000, out of 15 projects, MTC was the recipient of funds for 11 projects, and a
14 portion of one other, allocating to itself at least \$ 1,414,851 out of a total of \$ 1,915,994
15 [MTCP178009-014 at Attachment B at 2].
- 16 • In 2000-2001, out of 13 projects, MTC was the recipient of funds for 11 projects, and a
17 large portion of one other, allocating to itself \$ 3,530,143 out of a total of \$ 3,739,050
18 [MTCP187855-861 at Attachment B at 1].
- 19 • In 2001-2002, out of nine projects, MTC was the recipient of funds for seven projects, and
20 a large portion of one other, allocating to itself \$ 1,880,804 out of a total of \$2,088,742
21 [MTCP187855-861 at Attachment B at 2].
- 22 • In 2004-2005, out of six projects, MTC was the recipient of funds for at least three
23 projects, with the claimant of \$1 million in LIFT program funds remaining "to be
24 determined." MTC allocated to itself at least \$ 1,185,000 out of a total of \$ 2,649,109
25 [MTC Resolution No. 3637, MTCP242097-2103, Attachment A at 1].
- 26 • In 2005-2006, out of 15 projects, MTC was the recipient of funds for at least nine projects,
27 allocating to itself \$ 3,289,677 out of a total of \$ 12,296,539. The recipient of funds for 5
28 projects, totaling \$8,999,862 are "to be determined." [MTC Resolution No. 3696,
MTCP243263-271, Attachment A at 1].
- In 2006-2007, out of 18 projects, MTC was the recipient of funds for 12 projects,
allocating to itself at least \$ 14,752,000 out of a total of \$25,429,000. [MTC Resolution
No. 3761, MTCP244146-155, Attachment A at 1].

149. From what I can determine, in all the fiscal years set out above, AC Transit was
allocated STA Discretionary Funds in only fiscal year 2006-2007 in the amount of \$175,000.

1 150. Ostensibly as part of its “Regional Coordination Programs,” MTC has also
2 allocated to itself STA discretionary funds as “contingency” funds, in the event that MTCs
3 operating costs exceeded their budget. (McMillan, December 4, 2007, Ex. 36, 239:19-240:13).
4 In fiscal year 2005-06, MTC allocated to itself \$302,000 as an operating contingency. [Res. No.
5 3693, Attachment A, p.1] In fiscal year 2006-07, MTC allocated to itself \$483,000 as an
6 operating contingency [Res. No. 3761, Attachment A, p. 1] MTC never expected to use the
7 contingency funds. (McMillan, December 4, 2007 Dep. at 240:14-240:21). Although MTC
8 allocates funds to itself in the event it is faced with an operating shortfall, MTC has never
9 allocated STA discretionary funds to an operator expressly as a contingency fund to help cover
10 any operating shortfalls that an operator may experience. (McMillan Dec. 7, 2007 Dep. at
11 280:11-281:2).

12 **d. MTC uses funds for capital expansion that could be used for capital**
13 **renewal and replacement or for operations.**

14 151. Let us examine how two major capital expansion projects are being funded.
15 BART to San Jose is shown with a \$4.7 billion capital cost (Santa Clara County Transportation
16 Authority, *BART to Silicon Valley – Funding*). Of this, 68% is shown to be coming for local sales
17 taxes – much of which could be utilized for other purposes, and have been used for other
18 purposes. Another 16% is expected from Federal grants, meaning primarily 49 U.S.C. §5309
19 “new starts” – which cannot be used for any purpose but the specific capital project that they are
20 granted for and, therefore, I will not discuss further other than to observe that it may be a lot
21 easier to get \$50 million of “new start” funds for a Bus Rapid Transit project than \$750 million
22 for this particular heavy rail project proposed by this particular agency.. Another 14% is from the
23 State Transportation Congestion Relief Program, which could have been 100% shifted to other
24 purposes, including operating costs, by the actions of VTA and MTC. (The last 2% is also State
25 funding, but I’ll pass on discussion due to the relatively small amount – only about \$94 million.)

26 152. BART to Warm Springs is shown with a \$678 million total capital cost (BART,
27 Final Environmental Impact Statement, Volume 1, June 2006, Table 7-5, “WSX Alternative
28 Funding,” page 7-8. \$195 million of this is from Alameda County 2000 Measure A sales tax

1 funds, which can be shifted to other purposes. \$58 million is from the Alameda County
2 Transportation Improvement Program, which is also shiftable. \$111 million is from the
3 Transportation Congestion Relief Program, which could have been shifted to other purposes,
4 including operations, by action of these parties on a timely basis. \$84 million is from Samtrans
5 (basically, part of the Samtrans buy-in to BART to get the SFO/Millbrae extension approved),
6 which was a matter of negotiation between Samtrans and the East Bay counties, Alameda County
7 for these funds. The rest comes from RM1 (\$84 million) and RM2 (\$85 million) bridge tolls, the
8 uses of which were established by the California Legislature – in response, to a very great extent,
9 to what MTC asked for. RM2 funds are now being utilized for the Regional Express Bus
10 program, which shows the existing flexibility of at least some of the toll funds that MTC controls.
11 There is reason to believe that, if MTC asked for changes to the allowed uses, they would receive
12 consideration. Such changes might include, for example, more funds for buying buses and
13 operating buses on the bridges.

14 153. As these two examples show, the funding for the major capital expansion varies
15 widely, and I will not attempt to show the funding for each major project now in process or
16 planned. My point is, if only part of the long and difficult work to get billions and billions of
17 dollars for building rail extensions – and the funds to operate them, although, in some cases, the
18 lines are built *without* a valid operating funding plan – had gone into trying to find a few tens of
19 millions a year for AC Transit operations, or even to use a small fractions of funds going for rail
20 extensions that could have gone for other purposes, there would be no need for this declaration.

21 **e. MTC further strains the pool of operating funds by prioritizing**
22 **expansion over preservation**

23 154. In addition, MTCs practice of prioritizing transit expansion (see Section III-C-5)
24 strains the existing pool of operating funds by placing further demands on that pool. Transit
25 expansion by any one operator can jeopardize existing service, not only of that operator but also
26 other operators. When new expansion projects have higher than anticipated capital or operating
27 costs, those unanticipated costs are generally met out of existing operating funds or by foregoing
28 other capital rehabilitation expenditures for the pre-existing system. FTA Circular C 7008.1

1 acknowledges as much. And I have described examples in the past where a BART expansion
2 project caused reductions in bus service for another operator (Samtrans) and potentially reduced
3 the pool of operating funds for AC Transit as well. (See Section III-B-1). MTC acknowledges
4 that “[w]hen you increase your fleet, you increase your future capital replacement costs.”
5 (McMillan Nov. 15, 2007 Dep. at 794.) The logical corollary is that you also increase your
6 operating costs to operate that new service.

7 155. MTCs policies exacerbate this strain. MTC has funded rail expansion for BART
8 and Caltrain riders over the years, creating an *increasing* baseline of the “existing” system with
9 increasing capital rehabilitation needs. In the last three RTPs, MTC devoted \$2.6 billion to cover
10 the capital rehabilitation shortfalls of BART and Caltrain, using its discretionary “Track 1”
11 funding. Its first line of funding to cover capital shortfalls in the RTP is §5307 which, it chooses
12 not to use for operating costs. MTCs policy of expansion creates growing capital needs. When
13 these growing capital needs are combined with MTCs restrictive funding policies limiting the use
14 of funds for operating purposes, the combined effect is a further shrinking of the pool of funds
15 that could otherwise be used to cover operating shortfalls for operators such as AC Transit.

16 156. While transit expansion projects place a strain on the pool of operating funds for
17 all operators, MTC “silos” operators and will not apply one operator’s surplus to offset another’s
18 shortfall. (Bockelman Aug. 1, 2007 Dep. at 201-02; Ex. 7, attachment F (“funding is operator
19 specific and therefore surpluses for one operator cannot offset another operator’s shortfall”)).

20 **f. The RTP Shortfalls Are Based on MTC Policies Which Artificially**
21 **Limit Operating Funds**

22 157. MTCs funding policies, which as described above artificially limit the pool of
23 operating funds, create the operating shortfalls that appear in MTCs RTPs.

24 158. I have described above the process by which operating shortfalls are calculated in
25 the RTP. To summarize, MTC identifies costs for operating existing service (defined not as the
26 actual level of service currently operated, but as the level that can be operated in a balanced
27 budget constrained by MTCs revenue projections), and also assigns projected revenues to meet
28 those needs; where costs exceed revenues, a shortfall exists. Critically, MTCs projections

1 regarding the revenues it assigns in the RTPs, and against which shortfalls are calculated, are
2 based on MTC policies. (McMillan Mar. 26, 2007 Dep. at 138-39, MTCs Resp. to Plaintiffs'
3 Third Set of Interrogatories, Interrog. 43, at 13.) In other words, the shortfalls in the RTP are
4 calculated based on MTC policies that artificially limit the revenue that would otherwise be
5 available for operating needs. Because MTC has policies that artificially limit the pool of funds
6 available for operating needs, and because the revenue projections against which the operating
7 shortfalls in the RTP are calculated reflect MTC policies, MTC is responsible for the existence of
8 the operating shortfalls that appear in the RTP.

9 **g. BART and Caltrain do not experience shortfalls in revenues needed to**
10 **operate their existing service**

11 159. MTCs policies of artificially limiting the pool of operating funds has the result of
12 creating persistent shortfalls in the revenue needed for AC Transit, but not BART or Caltrain, to
13 operate its existing service. (See Section III-C-1.) Both BART and Caltrain have substantial
14 sources of funding for their operating needs outside of MTC. AC Transit lacks comparable
15 "outside" sources, unaffected by MTC policies, to fund its operating needs.

16 160. When AC Transit was originally chartered by the California Legislature, it had an
17 extremely strong tax base; it was granted the ability to levy property taxes, with its elected Board
18 given the power to set the ad valorem rate to be applied. (PUC §§25891-904) However, after the
19 enactment of Proposition 13 by the California electorate in 1978, and the overall limitation on
20 property tax rates it imposed (California Constitution Article 13A), a power that Proposition 13
21 "severely limited." (AC Transit document entitled, "Public Ownership Introduced") Since then,
22 this lack of a significant dedicated local funding source with some degree of control by the AC
23 Transit Board has posed significant problems in establishing a stable long-term financial base for
24 its operations and capital needs.

25 161. Interestingly, just prior to Proposition 13, BART was having extensive financial
26 problems. The original projections, both of capital costs and operating costs and revenues, turned
27 out to be highly optimistic, leaving BART without the financial resources to operate the original
28 71.5-mile, four-line system and to provide for capital requirements. The response was an

1 intensive lobbying effort in Sacramento, by BART with the extensive assistance of MTC, that
2 produced AB1107/AB3785, the one-half cent sales tax in Alameda and Contra Costa Counties
3 and the City and County of San Francisco. The proceeds from this one-half cent sales tax are
4 generally referred to as “AB 1107” funds. While it is true that part of AB 1107 can be allocated
5 to AC Transit and Muni, and generally is, BART is guaranteed by statute at least three-quarters of
6 the total receipts, three times as much as AC Transit and BART combined. (PUC §29142.2).
7 These AB 1107 funds provide BART with a substantial and stable source of revenue to meet its
8 operating needs and much of its capital needs.

9 162. Caltrain is a creature of three counties and receives funding through them.

10 2. MTC fails to cover operating shortfalls

11 163. In addition to creating the operating shortfalls in the RTP by artificially limiting
12 the pool of operating funds, MTC also creates operating shortfalls in a second way. MTC
13 distinguishes between the operating and capital shortfalls that are identified in the initial
14 calculation of RTP shortfalls, and then chooses to cover only capital shortfalls and not to cover
15 operating shortfalls. Because MTC could cover the operating shortfalls it identifies in the initial
16 RTP shortfall calculations, as Federal requirements mandate, but then adopts a final version of the
17 RTP that leaves these operating shortfalls unrelieved, AC Transit’s operating shortfalls in the
18 RTP are created by MTC.

19 164. As discussed above, AC Transit experienced substantial operating shortfalls in the
20 1994, 1998, 2001 and 2005 RTP’s and in each of those RTP’s, MTC covered *only* capital but not
21 operating shortfalls. (See Section III-C-1.)⁴⁹ MTC’s distinction between operating and capital
22 shortfalls finds no basis in Federal law or State statute, which specifically refer to a combined,
23 all-inclusive concept of “shortfall,” not to separate operating and capital shortfalls. MTC’s choice
24 to cover only capital, but not operating, shortfalls runs counter to the federal requirements that
25 MPO’s like MTC address the totality of the capital *and operating* shortfalls in their adopted long
26

27 ⁴⁹ MTC acknowledges that it did not take or consider taking “any steps or actions to cover
28 AC Transit’s RTP transit operating shortfall at any time since the adoption of the 1994 RTP.”
(Response to Plaintiffs’ Sixth Set of Interrogatories, Interrogatory No. 54, at 5-6).

1 range transportation plans. See 23 CFR 450.322(b)(11). Notably, the baseline of “existing”
2 service for BART and Caltrain reflects *expanded* service whereas the baseline of “existing”
3 service for AC Transit in the RTP’s has not only not increased, but has declined. By covering
4 capital shortfalls for BART and Caltrain associated with *expanded* service, and not covering
5 operating shortfalls for AC Transit measured against existing service, MTC has effectively
6 prioritized expansion over preservation of the existing system. (See Section III-C-5). This runs
7 counter to the federal requirement (which MTC claims to have integrated into its RTP process) of
8 prioritizing preservation of the existing system over expansion. Failure to follow this basic
9 principle of emphasizing the preservation of the existing system led to the failure of many
10 expensive, capital-heavy transit system expansion plans to increase ridership, which is why the
11 “Financial Capacity Policy” (FTA Circular C 7008.1) was promulgated. (See Section III-B-1).

12 165. Significantly, MTC does have the ability/flexibility/control to cover operating
13 shortfalls. I analyzed the details of MTCs 2001 RTP to determine that there were significant
14 sums of funding under MTCs control that MTC used for capital purposes that it could instead
15 have used for operating purposes. See Declaration of Thomas A. Rubin in Support of Plaintiffs’
16 Motion for Summary Judgment on Remedies, filed in *Bayview Hunters Point Community*
17 *Advocates, et al. v. MTC, et al.* (Northern Dist. Cal. Case No. C-01-0750 TEH). There, my
18 analysis conservatively concluded that from four funding sources, “there is between one and two
19 billion dollars that MTC could shift to operating purposes over the 25-year term of the RTP.”
20 (*Id.*, ¶ 66.)

21 166. In particular, I determined that: For federal FY02, the §5307 allocation to the San
22 Francisco-Oakland Urbanized Area (UZA) was \$126.7 million See FTA, “Section 5307
23 Urbanized Formula Area Formula Apportionments – Areas With Population 200,000 And Over,”
24 available at <http://www.fta.dot.gov/office/program/2002/s5307.html>. If MTC were to use these
25 funds for transit operating subsidies at the national average rate for large UZA’s of 19.5%, then
26 an additional \$24.7 million would be available for transit operations subsidies [on an annual
27 basis]. (*Id.*, ¶ 62.) I also pointed out that providing this additional operating assistance would
28 lead, very conservatively, to a 10% increase in fare revenues. (*Id.*)

1 167. I also concluded that, over 25 years, CMAQ funds for operations “could easily be
2 well into tens of millions of dollars”; that “\$48.7 million of STA Revenue-based allocated to
3 Caltrain, and \$9.6 million of STA Population allocated to the Small Operators for capital
4 purposes could be utilized for funding transit operations (see RTP Project Notebook at 1-6)”; and
5 that “\$1.8 billion [in TDA funding] is allocated to capital projects for CCCTA, LAVTA,
6 SamTrans, Vallejo, VTA, and the Bay Area small operators. A significant portion of these funds
7 could be utilized for transit operations.”

8 168. I have attempted to make an analogous analysis of funds in MTCs 2005 RTP. I
9 have reached conclusions as to some of these funding sources, but have been unable to reach
10 conclusions as to all of them because MTC does not report the details of funding source for
11 specific major capital projects in the 2005 RTP that is needed to conduct that analysis (I assume
12 that MTC has this detail data of funding source by project; without this data, it is difficult to
13 determine how a long range transportation plan/regional transportation plan could be produced
14 that would satisfy the requirements that the projects in the plan could be funded in compliance
15 with the restrictions on use attached to almost all transit/transportation funding programs) . The
16 conclusions I have been able to reach, based on the data provided in the 2005 RTP, are as
17 follows:

18 a. The conclusions I drew in regard to the MTC 2001 RTP are still valid, both
19 for the 2001 RTP and for MTCs general approach to programming of funds in the 2005 RTP.

20 b. Because MTC has a very policy of strongly discouraging the use of 49
21 U.S.C. §5307 “formula” funds for operating subsidies (“associated capital maintenance items”), it
22 appears very reason to assume that only a very small portion of these funds in the 2005 RTP, if
23 any, were programmed for operating subsidies and, therefore, there is a dead lock certainty that a
24 substantial portion of the total funding from this source could be used for transit operations and,
25 specifically, AC Transit operating subsidies. Because there is \$4.623 billion of funding from this
26 source in the 2005 RTP (MTC, *Transportation 2030 Plan Project Notebook*, March 2005, page
27 1.2-6), and about 60% of the Bay Area total has generally be allocated to the San Francisco-
28 Oakland UZA where AC Transit operates, this source alone is likely more than sufficient to cover

1 all likely AC Transit operating shortfalls. (Interestingly, the title of this program in the *Project*
2 *Notebook* is “Urbanized Area Formula (Capital),” with no acknowledgment that these funds can
3 be used for transit operations and are being so utilized in major metropolitan areas from coast to
4 coast.

5 c. On the Federal funding side, there are also \$1.489 billion of STP and
6 \$1.312 billion of CMAQ funds shown in the plan (*op. cite.*). While these funds are limited in the
7 use for operating costs (simplifying, CMAQ can be utilized to cover the first three years of
8 operating costs of most new transit services), these funds can be easily shifted to be used for
9 transit capital purposes, including the replacement of vehicles and other transit physical assets
10 that have reached the ends of their useful lives, thereby freeing up funds that are commonly
11 utilized for operating assistance, such as §5307 Formula funds and Transportation Development
12 Act funds, for operating purposes.

13 d. I could easily go on, listing other funds that can be utilized for operating
14 purposes, but those I have already listed are far more than is required.

15 169. In total, just between these three sources, there are, very conservatively, over \$2
16 billion in funds over the 25-year life of the 2005 RTP that MTC could have shifted from capital to
17 operating purposes.

18 **F. AC Transit’s Operating Shortfalls Force AC Transit To Cut Service**

19 170. As discussed above, MTC creates the operating shortfalls reflected in the RTP for
20 AC Transit. And these operating shortfalls, that is, the insufficiency of revenues needed to
21 maintain its pre-existing service, cause AC Transit to cut service.

22 171. MTC asserts that operating shortfalls require one of two things: reducing costs or
23 increasing revenues. It states that costs can be reduced not only by cutting service, but also by
24 operating more efficiently. (McMillan Nov. 15, 2007 Dep., Ex.32 at MTCP103504
25 (“Acknowledging that we are dealing with projections, the long-range plan must still anticipate
26 options for addressing these operating shortfalls, should they become evident in the future. These
27 include: a) increases in local revenue under the control of the operator – in most cases, this will be
28 fare revenue increases. b) reductions in costs that do not result in decreased service delivery: i.e.

1 increased operating efficiencies. c) reductions in costs through service reductions. D) increases
2 in federal, state or regional operating subsidies.”)). And the primary means within a transit
3 operator’s control of increasing revenues is to raise fares. For the reasons that follow, neither
4 increasing efficiency nor raising fares is warranted.

5 172. **Efficiency:** AC Transit already operates very efficiently – more efficiently on a
6 number of measures than BART and Caltrain –as MTC itself acknowledges. Reviewing the
7 comparative performance of the Bay Area transit operators on the operating performance
8 measures that MTC reports in *Statistical Summary of Bay Area Transit Operators – Fiscal Years*
9 *2001-02 through 2005-06* (“*Statistical Summary*”), Mar. 2007, at 8-10⁴⁸, my professional opinion
10 is that, taking all the indicators in total, AC Transit ranks well above average.

11 a. Referring to the graphs found on pp. 8-10, in “Total Operating Cost by
12 Operator, FY 2005-06,” AC Transit is fourth highest, but in “Total Passengers by Operator,
13 FY2005-06” (both page 8), AC Transit is third highest, indicating that AC Transit is providing
14 good “bang for the buck,” relative to the other Bay Area transit operators.

15 b. In “Farebox Recovery Ratio, FY2005-06 [*Fare Revenues/Cost*]” (page 9),
16 AC Transit is 11th highest of the 23 Bay Area transit operators, but, at slightly below 20%, is
17 somewhat below the average of 23.8%.

18 c. In “Service Effectiveness, FY 2005-06 [*Passenger/Revenue Vehicle*
19 *Hour*]” (page 9), AC Transit is fifth highest. The four operators that have higher statistics –
20 Alameda Ferry, Muni, BART, and Caltrain – all operate vehicles that have far higher capacities
21 than AC Transit’s buses which are obviously designed to be operated with higher numbers of
22 passengers on board. (MUNI does operate buses, but it also has an extensive light rail network).

23 d. In “Cost Effectiveness by Operator, FY 2005-06 [*Cost/Passenger*] (page
24 10), AC Transit is the third lowest (lower is better on this metric).

25 e. In “Cost Efficiency by Operator, FY 2005-06 [*Cost/Revenue Vehicle*
26 *Hour*]” (page 10), AC Transit was ninth highest, but well below the average (lower is better on
27 this metric).

28 ⁴⁸ Available at: <http://www.mtc.ca.gov/library/statsum/StatSummary06.pdf>

1 173. This performance is particularly impressive considering that none of these metrics
2 include any recognition of *capital* costs, where AC Transit, as an all-bus system, has far lower
3 requirements than the Bay Area rail and other fixed guideway transit operators (Altamont
4 Commuter Express [“ACE”], BART, and Caltrain are solely or almost solely fixed guideway
5 transit operators; the San Francisco Municipal Railway [“MUNI”] and the Santa Clara Valley
6 Transit Authority [“VTA”] operate both bus and fixed guideway transit). If capital cost were
7 included in the appropriate measures, rather than just operating cost, AC Transit’s level of
8 performance would be significantly higher still relative to the rail operators, including BART and
9 Caltrain.

10 174. In this context, this finding means that, compared to other Bay Area transit
11 operators as a whole, AC Transit is doing a good job of producing “value for money,” that is,
12 effectively utilizing taxpayer subsidies to produce transit services.

13 175. While AC Transit operates very efficiently, it has attempted virtually every
14 reasonable step to increase revenues. These measures included placing parcel tax measures
15 before the electorate (including Measure AA, November 2002 election and Measure BB,
16 November 2004 election), fare increases (most recently effective September 1, 2003 and
17 September 6, 2005), and innovative financial transactions such as a “lease-to-service” agreement
18 in fiscal year 2003-04).

19 176. Because AC Transit already operates very efficiently and is not in a position to
20 raise revenues, a shortfall in its revenues to operate existing service forces AC Transit to cut
21 service. In my opinion, that is exactly what has occurred over the last several RTPs. MTC has
22 created operating shortfalls for AC Transit to operate its existing service and as a consequence of
23 those shortfalls, AC Transit has been forced to cut its existing service.

24 177. **Raising fares:** Raising fares is not an attractive or feasible option for AC Transit
25 to raise revenues, in light of the lower relative income level of its riders. According to MTCs
26 2006 Transit Operator Demographic Survey (MTCP256316-8), incomes of AC Transit, BART
27 and Caltrain riders compare as follows:

28 Household Annual Incomes Under \$15,000:

1	AC Transit "local" riders:	19.5%
2	AC Transit "transbay" riders:	20.7%
3	BART:	7.0%
4	Caltrain:	7.8%
5	Household Annual Incomes Under \$25,000:	
6	AC Transit "local" riders:	37.7%
7	AC Transit "transbay" riders:	33.7%
8	BART:	12.6%
9	Caltrain:	15.6%
10	Household Annual Incomes Under \$25,000:	
11	AC Transit "local" riders:	37.7%
12	AC Transit "transbay" riders:	33.7%
13	BART:	12.6%
14	Caltrain:	15.6%
15	Household Annual Incomes Over \$100,000:	
16	AC Transit "local" riders:	5.2%
17	AC Transit "transbay" riders:	12.4%
18	BART:	18.0%
19	Caltrain:	34.0%

178. An operating shortfall measures the extent to which a transit operator is unable to deliver the baseline of service against which that shortfall is measured. As discussed above, MTCs RTPs reflect persistent operating shortfalls for AC Transit against a decreasing baseline of service, but reflect no operating shortfalls for BART or Caltrain, except for Caltrain in one year, against an increasing baseline of service. In my professional opinion, because MTCs efficiency analysis shows that AC Transit already operates more efficiently than BART and Caltrain, and does not have feasible means within its control to raise revenues, MTCs operating shortfalls for AC Transit in the RTP cause AC Transit to cut service.

MTC has taken the position that operating shortfalls in the RTP are not particularly meaningful figures, stating that "[t]he operating shortfalls projected in the RTP in any year and for any transit operator, including AC Transit, are based on the difference between projected revenues and projected costs. These projections are intended to be merely planning tools used to forecast possible scenarios. They are not based on actual budget data on the revenue side or on the cost side, but rather on 'projections' for such data." (Response to Plaintiffs' Sixth Set of Interrogatories at 8-9.) The assertion that RTP shortfalls "are intended to be merely planning

1 tools used to forecast possible scenarios” is an incomplete and misleading statement of the
2 statutory purpose of the RTP’s financial plan, and also ignores the significant funding decisions
3 which MTC makes on the basis of these projections.

4 179. The assertion that “These projections are intended to be merely planning tools
5 used to forecast possible scenarios” is disingenuous; these projections are the core foundation for
6 all planning *decisions* made by MTC in Bay Area governmental surface transportation matters.

7 180. While this assertion attempts to draw a hard and fast distinction between
8 “projections” and “actual budget data,” in reality, the distinction is only one of degree, of time
9 frame, and of degree of uncertainty. Because an RTP is required to be financially-constrained,
10 MPOs are required in their long-range planning to identify shortfalls, and to cover them.
11 “Existing and proposed revenues shall cover all forecasted capital, operating, and maintenance
12 costs. . . .” (23 C.F.R. § 450.322 (b) (11)).

13 181. MTC itself believes that the data on which it bases the operating shortfall
14 projections of its RTP is “critical” (Bockelman Aug. 8, 2007 Dep. at 173, 178-79; Exhibit 6), and
15 relies on that data as the basis for very significant decisions about how it allocates funding.
16 Among other things, MTC used the transit operating shortfall projections in order to calculate
17 capital shortfalls (*id.* at 179), which it then used as a central input into its decision-making about
18 how to assign billions of dollars in RTP funding as between transit capital shortfalls and local
19 streets and roads shortfalls. For instance, in the 2005 RTP, MTC assigned nearly \$9 billion in
20 what it refers to as “discretionary” or “Track 1” funding – funding which was assigned by
21 Commission policy in the RTP itself, as a part of the financially-constrained element.⁴⁹
22 (Bockelman Dec. 4, 2007 Dep. at 524-36; Ex. 28 [Res. 3609]). MTC also relied on these shortfall
23 projections in deciding how to divide up the transit portion of that funding among transit
24 operators. For instance, it relied on the projected capital shortfalls for transit in making a decision
25 in the 2005 RTP that, rather than fully funding the transit capital shortfall, as had been
26

27 ⁴⁹ “Financially Constrained Element refers to programmed local, regional, state, federal
28 funds as well as discretionary state and federal funds anticipated to be available over the long
term of the Transportation 2030 Plan.” (2005 RTP at 80, n.1).

1 Commission policy in the 1998 and 2001 RTPs, it would fund only “Score 16” transit capital
2 replacement needs. (Bockelman Jul. 13, 2007 Dep. at 93-94; *id.* at Aug. 1, 2007 Dep. at 204-11;
3 Ex. 7). MTC also relied on this data in determining how much of this approximately \$9 billion
4 would be assigned to expansion purposes, as opposed to being used to sustain the existing
5 transportation system. (Bockelman Aug. 1, 2007 Dep. at 206-07; Ex. 28 [Res. 3609]).

6 182. MTC also used the RTP shortfall projections as a basis for making representations
7 about the “Vision Element” of its 2005 RTP.⁵⁰ (See Bockelman Aug. 15, 2007 Dep. at 275-76).
8 For instance, MTC made the following assertion in its 2004 Annual Report to the San Francisco
9 Bay Area State Legislative Delegation, (PL 011197): “While Bay Area transit has expanded
10 dramatically over the last 30 years, including new BART, bus and light-rail service, no
11 corresponding operating funds have materialized. During the recent recession, Bay Area transit
12 agencies have been forced to raise fares and cut service substantially. MTCs long-range plan
13 projects a transit operating shortfall totaling \$1.6 billion over 25 years that will need to be
14 addressed with similar fare and service changes absent a new source of operating funds.”

15 CONCLUSION

16 183. In my opinion, the transit service operating and capital funding policies and
17 practices of the MTC, the MPO for the nine-county San Francisco Bay Area, have contributed
18 significantly to the persistent operating shortfalls that AC Transit has experienced since 1994, and
19 indeed much earlier⁵¹. Those same policies and practices have ensured that BART and Caltrain
20 do not experience operating shortfalls to maintain their existing service levels, but instead have
21 allowed those rail operators to significantly expand their service, while giving them a major share
22 of total Bay Area transit funding for Capital Renewal and Replacement and Capital Expansion.

23
24 ⁵⁰ “Vision Element refers to new local, regional, state and federal funds that may become
25 available over the near to mid-term of the Transportation 2030 Plan through voter approval or
legislative authorization.” (2005 RTP at 80, n.2).

26 ⁵¹ Actually, AC Transit RVMi had been decreasing long before FY93. From the highest
27 level of service, in FY86, of 31,073,860, RVMi dropped almost 25% to 23,460,309 RVMi in
28 FY93 – and both BART and Caltrain had shown significant increases in RVMi in the years prior
to FY93. (Exhibit E). I have chosen 1993 as the starting point for my analysis simply because it
corresponds with the period during which MTC was required to adopt fiscally-constrained RTPs
and to cover shortfalls it identified in those RTPs.

1 Meanwhile, AC Transit's persistent operating shortfalls have led directly to its inability to expand
2 transit service and, more significantly, have caused substantial reductions in its pre-existing level
3 of transit service.

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1 Executed under penalty of perjury this 11th day of January, 2008, at Los Angeles, California.
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Thomas A. Rubin