



U.S. Department  
of Transportation

**Federal Railroad  
Administration**

1200 New Jersey Avenue, SE  
Washington, DC 20590

May 16, 2019

Brian Kelly (via certified mail)  
California High-Speed Rail Authority  
770 L Street, Suite 620  
Sacramento, California 95814

Subject: Termination of Cooperative Agreement No. FR-HSR-0118-12-01-01

Dear Mr. Kelly:

This letter provides a final decision to the California High-Speed Rail Authority (CHSRA) that the Federal Railroad Administration (FRA) has, effective today, terminated Cooperative Agreement No. FR-HSR-0118-12-01-01 (FY10 Agreement) pursuant to its authority under the FY10 Agreement and applicable regulations. Ex. A. FRA will also deobligate the \$928,620,000 in funding obligated by the FY10 Agreement. FRA's decision follows its February 19, 2019, notice to CHSRA of FRA's intent to terminate the FY10 Agreement (Notice). Ex. B.

## **I. Summary**

Based on CHSRA's repeated failure to submit critical required deliverables and its failure to make sufficient progress to complete the Project (as defined in Attachment 2, Section 1h, of the FY10 Agreement) by the close of the performance period, and after careful consideration of the information presented by CHSRA in its March 4, 2019, letters to me and to Ms. Jamie Rennett (CHSRA Response) (included as Ex. C and Ex. D, respectively), FRA has determined that CHSRA has violated the terms of the FY10 Agreement and has failed to make reasonable progress on the Project.<sup>1</sup>

CHSRA consistently and repeatedly failed in its management and delivery of the Project, and in meeting the terms and conditions of the FY10 Agreement, all of which constitute violations of the FY10 Agreement. Despite extensive guidance from FRA, CHSRA was unable to prepare and submit fundamental Project delivery documents (e.g., budgets, Funding Contribution Plans

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<sup>1</sup> On May 1, 2019, CHSRA submitted a Project Update Report (2019 PUR) to the California State Legislature, as required by State law. Although the 2019 PUR was not submitted in response to FRA's Notice, FRA has reviewed it in full and will address certain aspects of it in this decision. See Ex. E (California High-Speed Rail Authority, *Delivering High-Speed Rail to Californians: Project Update Report to the California State Legislature* (May 1, 2019)).

(FCPs), and Project Management Plans (PMPs)). CHSRA's inability to track and report near-term milestones, as described further below, shows that CHSRA is likewise unable to forecast accurately a long-term schedule and costs for the Project. Further, after almost a decade, CHSRA has not demonstrated the ability to complete the Project, let alone to deliver it by the end of 2022, as the FY10 Agreement requires. As described further below, CHSRA is chronically behind in Project construction activities and has not been able to correct or mitigate its deficiencies. Overall, such critical failures completely undermine FRA's confidence in CHSRA's ability to manage the Project effectively.

## **II. Background**

### **A. Cooperative Agreements Between FRA and CHSRA**

CHSRA applied for, and received, funding from FRA's High-Speed Intercity Passenger Rail (HSIPR) Program.<sup>2</sup> The HSIPR Program was primarily funded through two appropriations. First, Congress appropriated \$8 billion for the HSIPR Program in the American Recovery and Reinvestment Act of 2009 (ARRA) (Pub. L. 111-5). FRA published a Notice of Funding Availability (NOFA) and Interim Guidance on June 23, 2009, to solicit applications for eligible projects.<sup>3</sup> In total, FRA awarded CHSRA approximately \$2.55 billion in ARRA funds. Second, Congress appropriated an additional \$2.5 billion for the HSIPR Program in the Consolidated Appropriations Act, 2010 (Pub. L. 111-117) (FY10 Appropriation). In connection with the FY10 Appropriation, FRA published a NOFA seeking applications for eligible projects (2010 NOFA).<sup>4</sup> In response to the 2010 NOFA, CHSRA submitted four applications to FRA. FRA selected two of the applications for funding. In total, FRA awarded CHSRA \$928,620,000 in FY10 Appropriation funds.

FRA and CHSRA entered into two separate agreements. The first, Cooperative Agreement No. FR-HSR-0009-10-01-00, as amended, was for ARRA funds and was executed in September 2010 (the ARRA Agreement). The ARRA Agreement provides a Federal award of \$2,552,556,231 and requires CHSRA to provide a matching contribution of at least \$2,505,771,231, and to spend any additional funds necessary to complete the ARRA Agreement's scope of work. The ARRA Agreement funds: (1) preliminary engineering and environmental reviews necessary for Phase 1 of the California High-Speed Rail (HSR) System (identified in the ARRA Agreement as Tasks 1 through 4)<sup>5</sup>; and (2) final design and construction of the First Construction Section (FCS)

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<sup>2</sup> The HSIPR Program consolidated several programs authorized by the Passenger Rail Investment and Improvement Act of 2008 (PRIIA) (Pub. L. 110-432). The programs included the High-Speed Rail Corridor Development program authorized under section 501 of PRIIA, the Intercity Passenger Rail Service Corridor Capital Assistance program authorized under section 301, and the Congestion Grants program authorized under section 302.

<sup>3</sup> 74 FR 29900 (June 23, 2009).

<sup>4</sup> 75 FR 38344 (July 1, 2010).

<sup>5</sup> Phase 1 consists of eight independent sections between San Francisco in the north and Los Angeles and Anaheim in the south.

(identified in the ARRA Agreement as Tasks 5 through 10). The FCS is located in California's Central Valley, between Madera, in the north, and Poplar Avenue, in the south. CHSRA has fully expended and been reimbursed for all ARRA Federal funds. Under the ARRA Agreement, CHSRA must commit all State funds necessary to complete the ARRA Agreement's scope of work. The period of performance for the ARRA Agreement ends on December 31, 2022.

The second agreement between FRA and CHSRA, the FY10 Agreement, was executed in November 2011. The FY10 Agreement provided for a total Federal award of \$928,620,000, with a State matching contribution of at least \$359,805,000 to complete the Project.<sup>6</sup> The FY10 Agreement provided additional funds for the same final design and construction activities funded by the ARRA Agreement (i.e., Tasks 5 through 10 identified in the ARRA Agreement), but not the preliminary engineering and environmental reviews that were funded by the ARRA Agreement. CHSRA committed to contribute the full State-matching contribution to the ARRA Agreement (including any overages) before being eligible to request reimbursement from FRA under the FY10 Agreement. Ex. A at A0042. To date, CHSRA has not completed all of the necessary State matching contributions required under the ARRA Agreement, and hence, it has not been eligible to receive any reimbursement under the FY10 Agreement. The period of performance for the FY10 Agreement also ends on December 31, 2022.

The FRA awards to CHSRA under ARRA and the FY10 Appropriation were intended as an investment in a much larger California HSR System that extended well beyond the Central Valley. As originally proposed by CHSRA, the California HSR System was intended to be fully grade-separated from road vehicle traffic and to operate on separate, dedicated tracks with a top speed of up to 220 mph. See Ex. F at F0019–F0020; Ex. A at A0040. As proposed, the 800-mile, statewide system, which was to be constructed in two phases, would provide reliable, high-speed, electrified, passenger train service connecting the Bay Area, the Central Valley, Sacramento, and Southern California. *Id.* The first phase, as CHSRA described in its applications for Federal financial assistance, involved the construction of approximately 520 miles between San Francisco and Anaheim, connecting two metropolitan regions and more than 25 million people. *Id.* Accordingly, the contribution of Federal funding in the ARRA and FY10 Agreements that CHSRA sought, and which FRA awarded to CHSRA, was intended to support California's overall plans to construct the entire HSR System.<sup>7</sup>

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<sup>6</sup> As with the ARRA Agreement, the FY10 Agreement required CHSRA to commit any additional funds to complete the Project. Ex. A at A0005.

<sup>7</sup> One of the 2010 NOFA project selection criteria was an "assess[ment of] how the proposed project would complement previous State investments in high-speed intercity passenger rail." As such, when making project selections in connection with this NOFA, FRA considered the relevant capital investment programs (i.e., the California HSR System). 75 FR 38344, 38354.

## B. FRA's Oversight and Monitoring Program

Since entering into and obligating funds under the FY10 Agreement, FRA worked closely with CHSRA, providing many hours of technical assistance, monitoring, and oversight. As the primary steward of Federal funds for the Project, FRA followed comprehensive financial and programmatic monitoring procedures that focused on routine compliance monitoring and scheduled monitoring reviews. This project monitoring is necessary to verify that grantees, like CHSRA: (1) comply with all Federal requirements; (2) identify and address instances of fraud, waste, and abuse; (3) administer programs in a manner consistent with the stated implementation plan; and (4) identify any problems or successes in program execution. Monitoring also provides an opportunity for FRA to communicate to the grantee, formally and informally (through advice, technical assistance, or training), instances of the grantee's non-compliance with an agreement and any FRA concerns with the project's progress.

Routine monitoring includes periodic reviews conducted after obligation of a grant. The focus of this monitoring is to review grantee compliance with the FRA grant agreement(s) (including the approved budget and schedule), highlight potential areas of concern, and identify opportunities for training and technical assistance. Much of the routine monitoring is handled through face-to-face meetings, conference calls, and webinars, so that FRA can share information to help grantees improve project delivery, project management, internal controls, planning, engineering, and administrative processes.

Scheduled monitoring includes a comprehensive review of all project progress, compliance, and financial information, utilizing a series of FRA-developed checklists. For FRA's major grants, such as the CHSRA grants, that are unique in magnitude, complexity, and risk, FRA may also conduct on-site reviews. In this case, FRA conducted scheduled monitoring with full on-site reviews each year since the Project's inception. FRA's site monitoring reviews covered each of the tasks required by the ARRA and FY10 Agreements and provided critical opportunities for CHSRA personnel to discuss the Project and its progress directly with their counterparts at FRA.

## III. Discussion

### A. Authority to Terminate

FRA's termination of the FY10 Agreement is authorized by applicable law and the express terms of the FY10 Agreement. Congress authorized the Secretary of Transportation to impose "terms, conditions, requirements, and provisions the Secretary decides are necessary or appropriate" for HSIPR grants.<sup>8</sup> Pursuant to that statutory authority, the FY10 Agreement includes a termination clause, at Attachment 2, Section 23(a):

Upon written notice, the Grantee agrees that FRA may suspend or terminate all or part of the financial assistance provided herein if the Grantee has violated the terms

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<sup>8</sup> 49 U.S.C. § 24402(a)(2); *see also* 49 CFR § 1.89 (delegating authority to the Federal Railroad Administrator).

of this Agreement, or if FRA determines that the purposes of the statute under which the Project is authorized would not be adequately served by continuation of Federal financial assistance for the Project. Any failure to make reasonable progress on the Project or other violation of this Agreement that significantly endangers substantial performance of the Project shall provide sufficient grounds for FRA to terminate this Agreement.

Ex. A at A0034.

The termination provision in Section 23(a) also follows applicable DOT regulations, which authorize DOT to terminate a Federal award if the grantee “materially fails to comply with any term of an award, whether stated in a Federal statute or regulation, an assurance, in a State plan or application, a notice of award, or elsewhere.”<sup>9</sup> 49 CFR § 18.43(a). Section 23(a) is also consistent with the Office of Management and Budget’s current regulations applicable to Federal Grants: the Uniform Administrative Requirements for Grants and Cooperative Agreements to State and Local Governments (also known as the Common Grant Rule). 2 CFR Part 200.

#### B. CHSRA’s Violations of the FY10 Agreement

CHSRA has repeatedly violated the terms of the FY10 Agreement. The FY10 Agreement required CHSRA to submit certain deliverables on a quarterly basis, and others on an annual basis, which CHSRA repeatedly failed to do. These deliverables served two important, related purposes: (1) to ensure that CHSRA maintained an ongoing framework and plan for successful management and delivery of the Project; and (2) as a vital tool for FRA’s oversight and monitoring of the Project and CHSRA’s progress on Project delivery.

Over the past decade, FRA frequently communicated to CHSRA that it was critical for the State to provide more timely and complete deliverables. The FY10 Agreement also underscores the importance of these deliverables: “Failure to satisfy the deliverables within the prescribed timeframes may result in FRA withholding grant payments or any other action consistent with the terms of the [Agreement] and Federal law.” Ex. A at 0050.<sup>10</sup> As described in the Notice and set out below, CHSRA repeatedly fell short of meeting its obligations under the FY10 Agreement.

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<sup>9</sup> The FY10 Agreement was obligated before the effective date of 2 CFR Part 200 and is therefore governed by 49 CFR Part 18.

<sup>10</sup> The CHSRA Response suggests CHSRA failed to deliver only four deliverables to FRA, and that those four deliverables were delayed only because of the government shutdown in December 2018 and January 2019. As discussed below, that representation is inaccurate. Moreover, it is unclear why the government shutdown would prevent CHSRA from submitting deliverables to FRA in electronic format, as has been CHSRA’s standard practice. The CHSRA Response regarding the volume of deliverables submitted over the past decade neglects to differentiate between the deliverables that were complete, timely, and accurate and the deliverables that were incomplete, late, deficient, or never even submitted.

CHSRA was required to submit quarterly deliverables, which provide critical information to FRA relating to CHSRA's performance and compliance with grant terms and conditions. FRA relies upon these deliverables to oversee CHSRA's performance, and thus, it is vital for CHSRA to provide accurate reporting and forecasting of work activities and expenditures, so that FRA can track CHSRA's progress on project delivery and compliance with the FY10 Agreement to ensure that Federal funds were being expended responsibly. Collectively, the quarterly deliverables also allow FRA and CHSRA to quantify shortcomings and to identify the appropriate mitigation to ensure successful delivery of the Project. The annual deliverables were generally informed by the quarterly submissions and were intended to track CHSRA's progress on Project delivery and grant compliance and to serve as another important monitoring and oversight tool for FRA to receive further detail on CHSRA's progress.

The FY10 Agreement established a process for deliverable submission and review. The required deliverables and submission dates are included in Exhibit A of the FY10 Agreement.<sup>11</sup> *Id.* at A0051. If and when CHSRA submitted a deliverable, it was subject to an internal FRA review for completeness, accuracy, and sufficiency. This review was conducted by FRA's technical staff, supported by FRA's Monitoring and Technical Assistance Program (MTAP) consultant team. When FRA completed its review, the agency responded to CHSRA and provided comments in writing, as appropriate. Through this review process, FRA provided technical assistance to help CHSRA improve the quality of deliverables so that they were useful and usable in monitoring and forecasting CHSRA's progress and performance. The review process also allowed FRA to ask clarifying questions as part of its oversight of this major Federal investment. Importantly, CHSRA's timely and complete responses to FRA's comments were a critical component to effective delivery of the Project.

However, CHSRA failed to submit numerous critical deliverables. For example, in the fourth quarter of 2018 alone, CHSRA failed to submit an Updated Service Development Plan, an Infrastructure Maintenance Plan, a Rolling Stock Maintenance Plan, and final design packages, as required by the FY10 Agreement. Moreover, even when CHSRA did submit required deliverables, the submissions consistently lacked sufficient content and specificity to demonstrate that CHSRA was: (1) meeting its obligations; (2) advancing the Project; and (3) addressing fundamental issues of Project oversight and management. CHSRA's failure to submit critical deliverables and its submission of deficient deliverables demonstrate CHSRA's fundamental inability to manage and deliver the Project effectively.

As described further below, through its monitoring and oversight, FRA identified numerous and persistent deficiencies in CHSRA's compliance with the terms of the FY10 Agreement that constitute violations of the FY10 Agreement. CHSRA failed to take the appropriate corrective action to resolve these deficiencies and address FRA's concerns. As a result, CHSRA failed to mitigate the significant risks to the delivery of the Project, and FRA has developed significant

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<sup>11</sup> The FY10 Agreement provided a process through which CHSRA could update Exhibit A, with FRA's approval.

concerns about, and ultimately has lost confidence in, CHSRA's ability to deliver the Project. In addition, CHSRA's failures have also materially compromised FRA's ability to exercise Project oversight.

*1. CHSRA Failed to Correct Deficiencies in Its Quarterly Deliverables, Despite FRA's Substantial Technical Assistance*

Despite FRA's assistance and feedback, CHSRA continued to submit critically flawed quarterly deliverables. In the hopes of developing a collaborative relationship that would result in improved Project delivery, FRA provided CHSRA with constructive feedback following submission of each deliverable. However, despite this feedback, CHSRA repeatedly failed to correct these documents critical to demonstrating that CHSRA was effectively managing the Project. FRA raised its concerns with CHSRA at every quarterly executive meeting since 2015, and during on-site monitoring over the last three years.<sup>12</sup> Rather than addressing FRA's mounting concerns, CHSRA frustrated FRA's oversight efforts by omitting required documentation.

Specifically, on a quarterly basis, CHSRA was obligated to submit a Funding Contribution Plan (FCP) and a Detailed Quarterly Budget.<sup>13</sup> The FCP is a summary of CHSRA's planned expenditures necessary to complete the Project, aligned by funding source, including State contributions. The FCP is a critical and important tool that FRA used to: (1) track CHSRA's expenditures toward completion of the Project; (2) forecast upcoming expenditures; and (3) monitor CHSRA's progress toward completion of the Project. Similarly, the Detailed Quarterly Budget is also a critical and important tool to provide estimated cost breakdowns for the entire Project, organized by task and subtasks, which is necessary for effective Project and cost management. Ex. A at A0016, A0049. Although these two deliverables provided different information, they are complementary, and were necessary components of CHSRA's successful delivery of the Project and necessary to ensure that FRA's Project oversight was effective.

Under the FY10 Agreement, CHSRA was required to submit the FCPs on a quarterly basis for FRA's approval. In 2016, FRA found that CHSRA's quarterly submissions were deficient, and FRA provided comments and identified the deficiencies to assist CHSRA in remedying them. Despite FRA's efforts to obtain the needed corrective action by CHSRA, CHSRA consistently failed to address those deficiencies. For example, on January 30, 2017, following FRA's numerous prior communications critical of CHSRA's documents and materials, CHSRA

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<sup>12</sup> FRA completed its latest on-site review in November 2018. As a result of that review, FRA identified three significant findings, all of which FRA first identified as areas of interest following the 2017 site monitoring but were not satisfactorily addressed by CHSRA. Specifically, FRA identified CHSRA's failure to: (1) maintain its delivery schedule; (2) develop an adequate and realistic budget; and (3) develop a project management plan that aligns the revised schedule and budget. In addition, FRA identified four areas of interest relating to: (1) scope; (2) staff capacity; (3) contractor and sub-contractor oversight; and (4) internal program/project management and controls.

<sup>13</sup> Attachment 3 of the FY10 Agreement included a high-level, task-based schedule. Ex. A at A0048. CHSRA is required to provide FRA with a detailed Project Schedule on a quarterly basis. However, CHSRA did not provide FRA with a satisfactory schedule at the level of detail that FRA believed was necessary to manage a project of this size.

submitted yet another deficient FCP to FRA. *See* Ex. G at G0001.<sup>14</sup> FRA responded in a February 28, 2017, email and identified two significant discrepancies between the interrelated fourth quarter FCP and Detailed Project Budget, both submitted to FRA on the same day. *Id.* at G0034. These discrepancies were not insignificant. They occurred over 23 different subtask lines, and totaled over \$28 million. *Id.* FRA sought a prompt explanation of these serious accounting issues.

CHSRA responded in a March 24, 2017, memorandum, contending that these discrepancies arose from mere “updating” issues and fluid circumstances. *Id.* at G0037. Nonetheless, it conceded that there was a separate significant issue with the January 30, 2017, submission—CHSRA had erroneously applied \$56 million in additional State funds to one of the tasks in the PCM Budget. *Id.* at G0037-G0039. This further discrepancy led FRA to respond in a March 30, 2017, email to CHSRA asking that it resubmit corrected versions of both documents. *Id.* at G0040-G0041.

In light of the many problems with CHSRA’s submission, FRA admonished CHSRA: “Please also ensure that a quality check is completed prior to re-submittal to avoid any future incorrect reporting.” *Id.* Despite FRA’s admonition to CHSRA for greater care and improvement in key submissions, deficiencies and errors continued in 2017 and 2018 with CHSRA’s Budget and FCP documents. *See e.g.*, Ex. H at H0205 and Ex. G at G0269. Indeed, as described further below, the deficiencies in CHSRA’s first quarter 2019 deliverables, submitted to FRA on April 30, 2019—more than two months after receiving the Notice—reflect similar deficiencies and errors. Such deficiencies and errors demonstrate CHSRA’s inability to deliver the very basics of project management, even for near term milestones (i.e., the upcoming quarter). These failures with respect to near-term milestones were strong indications that CHSRA likely was unable to forecast a long-term schedule and costs accurately, resulting in fundamental and critical mismanagement of the Project. After spending almost a decade on the Project, CHSRA’s continued failures in connection with the very basics of Project delivery indicate that CHSRA has not, and will not, effectively manage and deliver the Project.<sup>15</sup>

## *2. CHSRA’s Detailed Quarterly Budget Submissions Continued to Contain Material Errors and Consistently Lacked the Required Information*

FRA has rejected each Detailed Quarterly Budget that CHSRA submitted since the fourth quarter of 2016, even after first providing CHSRA an opportunity to correct identified deficiencies. For

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<sup>14</sup> CHSRA’s Detailed Quarterly Budget, also submitted on January 30, 2017, was similarly flawed. *See* Ex. H at 0001. FRA provided responses to the Detailed Quarterly Budget on March 2, 2017, asking clarifying questions related to budget increases and inconsistencies with the FCP. *Id.* at H0034. CHSRA responded, in part, by stating that additional state budget funds were “incorrectly reported.” *Id.* at H0037.

<sup>15</sup> Chapter 5 of the 2019 PUR describes organizational and project management changes CHSRA has implemented in recent years. *See* Ex. E at E0087–E0094. However, many of these changes have not led to substantial systemic improvements. For example, the Business Oversight and Project Delivery Committees were formed as far back as 2017 and have not resulted in the type of systemic changes clearly necessary to improve performance. Similarly, the proposed improvements to risk management and contract management issues described in the 2019 PUR are not new and have not resulted in improved performance.



example, less than a month after CHSRA submitted its 2017 second quarter deliverables on July 31, 2017, FRA sent CHSRA a detailed email that identified deficiencies and errors and requested resubmission of the second quarter budget. Ex. H at H0131-H0132. Specifically, FRA stated that it was:

unable to approve the 6/30/17 'Q2' Budget until further information that better acknowledges and details the full cost-to-complete. FRA requests resubmittal of the 6/30/17 Budget. The re-submitted budget shall address the comments above and be based on detailed estimates completed, not awaiting a time that the work is contracted. *Please submit the response to these comments to FRA by Friday, September 7, 2017.*

*Id.* (emphasis in original).

CHSRA responded nearly one week later with an answer that was still inadequate. *Id.* at H0161-H0163. FRA responded by email dated September 21, 2017, stating unequivocally that:

FRA is unable to approve—and therefore rejects—the 6/30/17 Budget. The documents submitted do not correlate with observed levels of CHSRA achievable performance and are inconsistent with information reported to the public and the CHSRA Board via the Finance and Audit Committee. Information provided to FRA to date does not sufficiently support the timing and level of expenditure shown in the 6/30/17 Budget.

*Id.* at H0164.

CHSRA never responded to FRA's September 21, 2017, email rejecting the second quarter 2017 Detailed Quarterly Budget and did not submit an acceptable second quarter 2017 Detailed Quarterly Budget. The next quarter (i.e., third quarter 2017), CHSRA submitted the required Detailed Quarterly Budget, but that Detailed Quarterly Budget was also rejected by FRA. *Id.* at H0205. As with the second quarter 2017 Detailed Quarterly Budget, CHSRA failed to submit an acceptable third quarter 2017 Detailed Quarterly Budget.

Over the course of the next two years, CHSRA's Detailed Quarterly Budget submissions followed the same course: CHSRA would submit a budget, receive detailed comments from FRA, and follow up with an unsatisfactory response, thereby leading FRA to reject the submission. As reflected in Table 1 below, since the 2016 third quarter Detailed Quarterly Budget, CHSRA has failed to address FRA comments satisfactorily, FRA has rejected CHSRA's Detailed Quarterly Budget submissions, or both. FRA's most recent rejection of CHSRA's Detailed Quarterly Budget was on January 30, 2019, and applied to CHSRA's submission for the period ending September 30, 2018. *Id.* at H0456.

**DETAILED QUARTERLY BUDGET**

**TABLE 1**

<b>Delivery Date</b>	<b>Review Status</b>
3 <sup>rd</sup> Quarter 2016	CHSRA failed to address FRA's comments satisfactorily
4 <sup>th</sup> Quarter 2016	CHSRA failed to address FRA's comments satisfactorily
1 <sup>st</sup> Quarter 2017	CHSRA failed to address FRA's comments satisfactorily
2 <sup>nd</sup> Quarter 2017	Rejected
3 <sup>rd</sup> Quarter 2017	Rejected
4 <sup>th</sup> Quarter 2017	Rejected
1 <sup>st</sup> Quarter 2018	Rejected
2 <sup>nd</sup> Quarter 2018	Rejected
3 <sup>rd</sup> Quarter 2018	Rejected

FRA communicated the importance of the Detailed Quarterly Budget to CHSRA on numerous occasions. This document was essential to track incoming funding and outgoing expenses, and was therefore necessary to ensure CHSRA had sufficient funds to complete the Project. Even after receiving the Notice, which identified the consistent deficiency of CHSRA's deliverables as a basis for FRA's intent to terminate the FY10 Agreement, CHSRA failed to take the appropriate corrective action and improve its Detailed Quarterly Budget. CHSRA's first quarter 2019 Detailed Quarterly Budget, recently submitted to FRA, does not include the \$1.8 billion budget increase reflected in the 2019 PUR, issued just one day after the quarterly submissions were received. Ex. H at H0501. Instead, the submission reflects an outdated and unrealistic budget of \$10.6 billion. *Id.* at H0506. Based on this omission alone, it is therefore difficult to find the submission as anything but deficient and inconsistent with CHSRA's obligations under the FY10 Agreement to submit an *updated* and accurate project budget. *See* Ex. A. at A0049. CHSRA's failure to develop, let alone adhere to, a sufficient Detailed Quarterly Budget demonstrated that it could not prepare adequate financial documents that were a fundamental requirement for successful management of a large, complex, transportation project, such as this Project. These failures were violations of the FY10 Agreement and evidence of CHSRA's failure to make reasonable progress on the Project.

3. *CHSRA's Quarterly FCPs Lacked Key Information and were Inconsistent with Observed Expenditures and Trends*

CHSRA's quarterly FCPs fared no better than the deficient budget submissions previously detailed. For example, after CHSRA submitted its second quarter 2017 FCP to FRA on July 31, 2017, FRA provided detailed comments on August 24, 2017, requesting more information, clarification, and explanation to help FRA evaluate the submittal. Ex. G at G0193-G0194.<sup>16</sup> In a September 13, 2017, memorandum, CHSRA attempted to explain away the various inconsistencies and inaccuracies that FRA identified in its August 24 email. *Id.* at G0199-G0201.

FRA found CHSRA's response to be unsatisfactory and rejected the submission by email on September 20, 2017:

FRA is unable to approve—and therefore rejects—the 6/30/17 FCP. The document submitted does not correlate with observed levels of CHSRA achievable performance and is inconsistent with information reported to the public and the CHSRA Board via the Finance and Audit Committee. Information provided to FRA to date does not sufficiently support the timing and level of expenditure shown in the 6/30/17 FCP.

*Id.* at G0197.

FRA outlined what revisions a “complete and approvable FCP” must include, specifically noting that it looked “forward to receiving a revised FCP that reflects a level of expenditure and schedule supported by: observed levels of CHSRA achievable performance, and a detailed cost and schedule analysis. FRA will continue to reject quarterly submittals that do not meet these criteria. Successful grant compliance is considered when evaluating ongoing and future Federal funding.” *Id.*

However, CHSRA's performance did not improve, nor did the quality or accuracy of the information that it provided to FRA. As reflected in Table 2 below, FRA received and rejected the FCPs submitted by CHSRA for the remaining two quarters of 2017 and for the first three quarters of 2018. In some cases, FRA rejected CHSRA's submission because “there was no significant change from the prior quarter's submission to address FRA's comments.” Ex. G at G0269. Following FRA's rejection, CHSRA never provided updated and corrected FCPs. Instead CHSRA waited until the following quarter and submitted a new FCP, which was also

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<sup>16</sup> In its August 24, 2017, comments, FRA requested “insight as to the structures and corresponding construction start dates planned for the 2017 Calendar year for CP1, CP2-3, and CP4.... This will help FRA track grant construction progress as it relates to financial deliverables. In past submissions, quarterly documents have shown an imminent ramping up of construction starting just beyond the time period of the quarterly submittal to FRA, but may not have occurred as projected in the deliverables. Additional information to support the response would be appreciated to understand the likelihood of construction progress in the coming time period....” These are the same comments that FRA submitted on the first quarter 2017 FCP, which CHSRA never addressed. Ex. G at G0193.

rejected after FRA determined there was still “no significant change from the prior quarter’s submission to address FRA’s comments.” *Id.* at G0339.

<b>QUARTERLY FUNDING CONTRIBUTION PLAN</b>	
<b>TABLE 2</b>	
<b>Delivery Date</b>	<b>Review Status</b>
4 <sup>th</sup> Quarter 2016	CHSRA failed to address FRA’s comments satisfactorily
1 <sup>st</sup> Quarter 2017	CHSRA failed to address FRA’s comments satisfactorily
2 <sup>nd</sup> Quarter 2017	Rejected
3 <sup>rd</sup> Quarter 2017	Rejected
4 <sup>th</sup> Quarter 2017	Rejected
1 <sup>st</sup> Quarter 2018	Rejected
2 <sup>nd</sup> Quarter 2018	Rejected
3 <sup>rd</sup> Quarter 2018	Rejected

Even CHSRA’s first quarter 2019 FCP, submitted on April 30, 2019, further demonstrates that CHSRA is not effectively managing the Project and has not sufficiently advanced Project construction. For example, compared against the fourth quarter 2018 FCP, CHSRA continues to fail to meet its planned monthly expenditures. According to its recent submission, in January, February, and March 2019, CHSRA expended \$41.1 million, \$41.1 million, and \$80.7 million, respectively, for a total of \$163.0 million. Ex. G at G0642. However, the fourth quarter 2018 FCP projected expenditures of \$90.5 million in January, \$93.2 million in February, and \$110.0 million in February for a total of \$292.9 million. *Id.* at G0583. A comparison between the fourth quarter 2018 and first quarter 2019 FCPs shows an approximate rate of error of 45%, which is in line with CHSRA’s other rates of error based on comparisons of past FCPs. CHSRA’s inability accurately to forecast and manage its expenditures over this recent three-month period confirms FRA’s conclusion that CHSRA is unable to manage a Project that requires accurate forecasting and management of expenditures.

As described above, the FCP details past and future expenditures, by funding source, through the end of the Project’s period of performance. Understanding this rate of expenditure is an essential

element of project delivery for a project of this size because it provides the tools, not only to track Project funding, but also to understand and manage construction progress. CHSRA's failure to forecast its expenditures accurately—and to meet its forecast—indicated a critical lack of Project management and an inability to develop and maintain a construction schedule. Such shortfalls in critical project management are unacceptable and constitute a violation of the terms of the FY10 Agreement, and serve as further evidence of CHSRA's lack of sufficient progress on the Project.

*4. Annual Deliverables Related to Project Delivery Were Insufficient and Unacceptable*

In addition to extensive and persistent problems with its quarterly submissions, CHSRA also violated the FY10 Agreement when submitting important annual deliverables, such as the Program Management Plan (PMP), the Annual Work Plan (AWP), and the Central Valley Project Financial Plan (CVPFP). As reflected in Table 3 below, since 2016, CHSRA has consistently failed to address satisfactorily FRA's comments on its annual deliverables, or the submissions were so deficient that FRA rejected the submissions. CHSRA's failure to provide FRA with these deliverables underscores CHSRA's systematic inability to manage the Project. It also deprived FRA of tools essential to its oversight of the Project.

**ANNUAL DELIVERABLES****TABLE 3**

<b>Deliverables</b>	<b>Delivery Date</b>	<b>Review Status</b>
Program Management Plans	2016	CHSRA failed to address FRA's comments satisfactorily
	2017	Rejected
	2018	Rejected
Annual Work Plans	2016	CHSRA failed to address FRA's comments satisfactorily
	2017	CHSRA failed to address FRA's comments satisfactorily
	2018	CHSRA failed to address FRA's comments satisfactorily
Central Valley Project Financial Plan	2016	CHSRA failed to address FRA's comments satisfactorily
	2017	Rejected
	2018	Rejected

## Program Management Plan

With respect to the PMP, as set forth in FRA's 2010 NOFA, pursuant to which CHSRA sought funding that led to the FY10 Agreement, a PMP is:

[A] formal integrated document that serves as an overview of the applicant's approach toward the planning, monitoring, and implementation of a project. This documentation establishes the who, what, when, where, why, and how of the project. While elements of the PMP may draw information from outputs of the project development process (such as scope and design specifications, cost estimates, and project schedules), the PMP serves as FRA's primary source of information related to an applicant's plan for implementing the project .... In accordance with 49 U.S.C. 24403(a), the PMP must, at a minimum, address the following topics: (1) Adequate recipient staff organization with well-defined reporting relationships, statements of functional responsibilities, job descriptions, and job qualifications of key personnel and positions; (2) A budget covering the project management organization, appropriate consultants, property acquisition, utility relocation, systems demonstration staff, audits, and miscellaneous payments the recipient may be prepared to justify; (3) A construction schedule for the project; (4) A document control procedure and recordkeeping system; (5) A change order procedure that includes a documented, systematic approach to handling the construction change orders; (6) organizational structures, management skills, and staffing levels required throughout the construction phase; (7) Quality control and quality assurance functions, procedures, and responsibilities for construction, system installation, and integration of system components; (8) Material testing policies and procedures; (9) Internal plan implementation and reporting requirements; (10) Criteria and procedures to be used for testing the operational system or its major components; (11) Periodic updates of the plan, especially related to project budget and project schedule, financing, and ridership estimates ...."

75 FR 38344, 38350-28351 (July 1, 2010).

In 2015 and 2016, FRA provided numerous comments to CHSRA to assist CHSRA in developing a satisfactory PMP. FRA went further still, holding a workshop in 2016 for CHSRA that included a section entitled "Program Management Plan Deep Dive." *See* Ex. I at I0204-I0209. FRA held the workshop to make clear its expectations for annual deliverables, reiterate some of the concerns it had raised in past reviews, and assist CHSRA in correcting its deficiencies. Contrary to the assertion in the CHSRA Response, FRA did not change its guidance relating to PMPs; instead, FRA strove to help CHSRA develop and submit a complete, sufficient, and usable PMP, but to no avail.

Despite FRA's efforts, CHSRA failed to produce an acceptable PMP for both 2015 and 2016. Both of its submissions for those two years were rejected by FRA. Similarly, the 2017 PMP that CHSRA submitted to FRA on March 30, 2018, was so deficient that FRA also rejected that submission. FRA observed in a May 4, 2018, email to CHSRA that the 2017 updated PMP:

[D]oes not include specifics to illustrate how CHSRA will deliver the Grants' SOW in budget and on schedule. Without a better understanding of project delivery specifics, the PMP is similar to past versions in that it doesn't articulate what CHSRA will do, or do differently, to effectively manage scope, schedule, budget and risk...The schedule and budget in the updated PMP do not correlate with observed levels of CHSRA achievable performance...Therefore, FRA is unable to approve—and therefore rejects—the 2017 PMP (submitted March 2018). For FRA to be able to approve the next iteration of the PMP, CHSRA must include a schedule and budget that aligns with observed levels of performance and also provide project delivery specifics noted above as well as those covered in attached memorandum.

*Id.* at I0399-I0402.

Indeed, since 2014, CHSRA has not submitted a single satisfactory and acceptable PMP.

#### **Annual Work Plan**

The purpose of the AWP was for CHSRA to demonstrate how it planned to stay on target with Project scope, schedule, and budget on an annual basis. *See* Ex. J at J0140. The AWP was to be a more detailed subset of the PMP and was intended to provide a comprehensive overview of CHSRA's plans to deliver the Project over the covered year. In 2017, FRA provided two rounds of detailed comments on CHSRA's 2016/2017 AWP, going so far as to provide a suggested template for a revised AWP. *Id.* at J0068 and J0140. Instead of continuing to work with FRA to address FRA's comments, CHSRA decided "not to spend valuable time reworking the report again and instead addressing the recent comments (and possible (sic) unforeseen at this time future refinements) in the next report." *Id.* at J0219.

#### **Central Valley Project Financial Plan**

CHSRA followed the same pattern for the CVPFP, which should have described CHSRA's financial approach to delivering the FCS, including CHSRA's plan for interim use. *See* Ex. K at K0120. The CVPFP was also intended to explain how CHSRA developed its cost estimates and how CHSRA prepared its budget and FCP. Again, FRA provided extensive comments on CHSRA's 2016/2017 CVPFP submission, to which CHSRA failed adequately to respond. FRA also provided substantive comments and rejected CHSRA's 2017/2018 and 2018/2019 CVPFPs, finding numerous deficiencies and that the drafts "[did] not address FRA's past comments." Ex. K at K0193 and K0255.



5. CHSRA Failed to Submit Other Required Deliverables

CHSRA’s record of unsatisfactory submissions was compounded by CHSRA’s repeated failures to submit to FRA numerous other critical Project documents in non-compliance with the FY10 Agreement, as shown in this Table:

<b>OTHER REQUIRED DELIVERABLES NOT SUBMITTED</b>	
<b>TABLE 4</b>	
<b>Deliverable</b>	<b>Due Date</b>
Concept of Operations for Central Valley construction and any other segments	4 <sup>th</sup> Quarter 2018
Updated Service Development Plan	4 <sup>th</sup> Quarter 2018
Infrastructure Maintenance Plan	4 <sup>th</sup> Quarter 2018
Rolling Stock Maintenance Plan	4 <sup>th</sup> Quarter 2018
Station Area Plans	4 <sup>th</sup> Quarter 2018
Central Valley Construction Contingency Plan	4 <sup>th</sup> Quarter 2016
Detailed construction cost estimate, construction sequence, and schedule	Upon any contract change
Construction Package 1: 60% Design	3 <sup>rd</sup> Quarter 2018
Construction Package 1: 90% Design	4 <sup>th</sup> Quarter 2018
Construction Package 1: Ready for Construction	4 <sup>th</sup> Quarter 2018
Construction Package 4: 90% Design	4 <sup>th</sup> Quarter 2018

The CHSRA Response argued that CHSRA could not have breached the FY10 Agreement by failing to submit deliverables prior to September 2017 because FRA paid invoices under the ARRA Agreement until September 2017. That contention is not only incorrect, but it also fails to address the deliverables never submitted after September 2017, as detailed in the chart above. CHSRA ignored Attachment 2, Section 7(d) of the ARRA Agreement, which states that, “[t]he

Grantee agrees that payment of any costs under the ‘Payment by FRA,’ part of this Agreement does not constitute a final FRA decision about the allowability of that cost and does not constitute a waiver of any violation by the Grantee of the terms of this Agreement.”<sup>17</sup> In any event, FRA’s payment of invoices under the ARRA Agreement did not waive FRA’s right and responsibility to hold CHSRA accountable for its violations of the terms of the separate FY10 Agreement, which include CHSRA’s failure to submit required quarterly and annual deliverables.

### C. CHSRA Has Failed to Make Reasonable Progress Delivering the Project

The FY10 Agreement identified the tasks CHSRA was obligated to complete, as well as a schedule for their completion. FRA’s monitoring and oversight confirmed that CHSRA is far behind schedule and has not sufficiently advanced Project construction to complete it within the period of performance ending December 31, 2022. Pursuant to Section 23(a), CHSRA’s failure to make reasonable progress on the Project has “significantly endanger[ed] substantial performance of the Project” and warrants termination of the FY10 Agreement. CHSRA’s lack of progress and inability to achieve substantial performance within the performance period is a basis for termination separate and apart from CHSRA’s failure to submit deliverables as required. Moreover, CHSRA’s lack of progress underscores the seriousness of CHSRA’s deficient deliverable submissions and why CHSRA’s failure to deliver was so significant.

#### 1. *CHSRA Will Not Complete the Project by 2022*

Based on FRA’s independent assessment, including its risk analyses, FRA has determined that CHSRA will not complete the Project by December 31, 2022, the end of the FY10 Agreement’s period of performance. The CHSRA Response suggested a delay in completion of the Project would not amount to a material breach or grounds for termination of the FY10 Agreement. That suggestion is not tenable.<sup>18</sup> At CHSRA’s request, FRA has extended the period of performance by four years, from 2018 to 2022, and FRA made clear that it expected CHSRA to manage the Project to ensure completion by the end of the extended period of performance. As described below, FRA’s analysis instead shows that CHSRA will miss that deadline, mostly because of CHSRA’s own mismanagement.<sup>19</sup>

FRA conducts a quarterly risk analysis for the Project as part of its oversight and monitoring activities. Risk analysis is an oversight tool, allowing FRA to identify areas where additional focus and risk mitigation strategies are needed to ensure successful project delivery. FRA’s

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<sup>17</sup> The FY10 Agreement contains the same language. Ex. A at A0024.

<sup>18</sup> The lack of a “time is of the essence clause” in the FY10 Agreement did not relieve CHSRA of its responsibilities to deliver on time and does not mean FRA must allow CHSRA to waste further taxpayer resources while CHSRA fails to deliver the Project that it originally committed to completing by a date certain.

<sup>19</sup> The 2019 PUR repeatedly references what CHSRA describes as FRA’s “disengagement” in the environmental reviews for Phase I. Contrary to any suggestion that FRA is somehow responsible for CHSRA’s mismanagement and delayed delivery of the Project, FRA has completed the environmental reviews necessary to advance and complete the construction of the FCS.

project manager oversees the risk analysis, with technical assistance and subject matter expertise provided by FRA's MTAP. FRA shares the results of its risk analysis during quarterly meetings with CHSRA leadership. During these meetings, FRA provides an overview of its findings to help CHSRA identify measures to mitigate pervasive project delivery issues and also reports to CHSRA leadership the schedule slippage and cost increases observed by FRA and identified through its risk analysis. FRA provides CHSRA with an opportunity to comment and share any information to inform FRA's risk analysis.

Based on such risk analysis, FRA has determined that CHSRA is too far behind its construction schedule, did not implement the appropriate mitigation strategies to advance construction, and will therefore not complete the Project by 2022. For example, a comparison of the funds expended for each of the four design/build construction packages (CPs) currently underway and the time remaining until the contractual completion date, indicates how far behind CHSRA is in construction.<sup>20</sup> While this metric is only one of several methods FRA uses to evaluate Project progress, this analysis is supported by CHSRA's November and December 2018 Program Delivery Status Reports, which showed most of the Project's contractors will not complete construction until after 2022.<sup>21</sup>

Importantly, these estimates covered only the work currently under contract. CHSRA has not yet issued a final request for proposals (RFP) for CP 5, which included essential track work on the civil infrastructure built in CPs 1, 2-3, and 4. On May 10, 2019, CHSRA issued a notice requesting industry comment on a draft RFP for track and signal work. According to the May 10th notice, CHSRA anticipates releasing the final RFP, containing the FCS track work necessary to complete the Project, sometime in Fall 2019. However, while the draft RFP appears to anticipate provisional acceptance for the "plain line" track work by June 2022,<sup>22</sup> it is clear such a date is not possible based on the lack of progress on the underlying civil infrastructure and FRA's review of past documentation relating to the timeline for the required track work.

Based on the fourth quarter 2018 Summary Schedule, CHSRA intended to issue the CP 5 request for proposal (RFP) on January 21, 2019, and to complete the work by December 2022. However, CHSRA has not yet issued the final RFP for CP 5, which FRA is required to review and approve prior to its release. The failure to issue this RFP on the intended schedule means that CHSRA will not complete CP 5 in a timely manner, because each month of procurement delay would

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<sup>20</sup> CP 1 contractor had spent 58.4% of the contract funds, while 88% of the time had elapsed until contract completion. Similarly, the CP 2-3 contractor had spent 43.6% of the contract funds with 71.2% of the time elapsed until contract completion.

<sup>21</sup> Only the CP 4 contractor had forecast a completion date before December 2022 (August 2021).

<sup>22</sup> The plain line track work is described as "rail infrastructure System from Madera to Poplar Avenue, (CP1-4 geographic limits) to allow temporary operations of one non-electric train-per-hour, per-direction." See Draft Track and Signals Agreement, Part B-1 Functional and Technical Requirements, 15 available at [http://hsr.ca.gov/docs/programs/track/Part\\_B-1\\_TS-1\\_Industry\\_Draft\\_Functional\\_and\\_Technical\\_Requirements.pdf](http://hsr.ca.gov/docs/programs/track/Part_B-1_TS-1_Industry_Draft_Functional_and_Technical_Requirements.pdf).

likely result in a delay of at least another month to the overall Project, and therefore CP 5 would not be completed until sometime substantially after December 2022.

Furthermore, CHSRA's 2018 Program Management Plan (PMP), submitted to FRA on October 30, 2018, contradicts CHSRA's representations that it would complete all work by December 2022. CHSRA's 2018 PMP shows that CHSRA anticipated a substantial completion date of December 2023, a full year after the FY10 Agreement's period of performance. Even that delayed completion date was based on a plan to issue the final track work (CP 5) RFP in January 2019. Therefore, the draft RFP's provisional acceptance date of June 2022 lacks credibility. It seems highly unlikely that a June 2022 provisional acceptance could be accomplished when the issuance of the final RFP for CP 5 is going to be delayed by at least eight months. Rather, the schedule in CHSRA's 2018 PMP, which showed completion of the CP 5 work in December 2023, will likely get extended out even further beyond a full year after the end of the FY10 Agreement's period of performance.

In addition, the quarterly schedule CHSRA submitted to FRA on April 30, 2019, shows that the CP 5 contractor will begin design and construction work in January 2021, leaving only 24 months to complete the last construction package by the end of the FY10 Agreement's period of performance in December 2022. *See Ex. L.* However, upon closer review, the draft RFP allocates 18 months for the contractor to complete all design,<sup>23</sup> leaving only the last six months of the period of performance for the contractor to acquire all materials and complete track installation on over 100 miles of civil infrastructure (assuming the civil construction is even complete). This schedule is simply not feasible and CHSRA's claim that it will complete the Project by the end of the period of performance in December 2022 strains credulity.

CHSRA's own metrics further confirm its inability to make reasonable and necessary progress to complete the Project. In its August 2018 and February 2019 Finance and Audit Committee Operations Reports, CHSRA's Schedule Performance Index (SPI) shows a slowdown in construction activities.<sup>24</sup> For example:

- The CP 1 contractor performance trended downward from 84% to 67%, indicating construction was not occurring at its projected levels and, by CHSRA's own measure, was actually slowing. This slowdown indicated that the contractor would not meet its contractual completion date of August 2019.
- The CP 2-3 contractor performance trended downward from 57% to 49%, indicating construction was not occurring at its projected levels and was actually slowing. The metrics presented, along with historical performance, indicated that the contractor was not accelerating construction as necessary to meet its current contractual completion date of May 2020.

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<sup>23</sup> Draft Track and Signals Agreement, Part B-1 Functional and Technical Requirements, Table 3.2.

<sup>24</sup> Schedule Performance Index (SPI) is the earned value (actual expenditures) compared to planned value (planned expenditures). Any result less than 100% indicates that performance is less than expected and quantifies the failure to meet planned performance levels in percentages.

- The CP 4 contractor performance trended downward from 35% to 28%, indicating construction was not occurring at its projected levels and was actually slowing. The metrics presented indicated that the contractor was not accelerating construction as necessary to meet its current contractual completion date of June 2019.

While the CHSRA Response cited 24 “active or completed” construction sites and 44 miles of “active or completed” embankment, it failed to mention that construction is complete on only a modest proportion of the overall Project, and it failed to acknowledge the significance of the work not yet in progress or completed.<sup>25</sup> FRA’s 2018 site monitoring review confirmed the slow pace of Project progress for each of the CPs. As of November 2018, CHSRA had completed construction on only 22 of 95 structures and only 21 of the 118 miles of guideway/roadbed necessary to complete the Project.<sup>26</sup>

*2. Even as Cost Overruns Have Soared, CHSRA Has Not Achieved the Necessary State Contribution Rates*

CHSRA was plainly unable, and, even if it were able, appeared unwilling, to comply with the required amounts and timelines for the State contribution required by the ARRA Agreement and the FCP. This failure was another example of CHSRA’s lack of reasonable progress. In addition, CHSRA’s continual increase of the Project budget, due to cost overruns, demonstrated its inability to control costs, undermining any suggestion that CHSRA was effectively and responsibly managing the Project.

In terms of CHSRA’s State contribution, to date FRA has accepted, as eligible expenditures, only \$476 million of the State-match expenditures submitted by CHSRA, which represents approximately 19% of CHSRA’s required State-match under the ARRA Agreement. FRA has rejected hundreds of millions of dollars in State-match expenditures due to: (1) the prevalence of expenditures ineligible for reimbursement (and therefore ineligible to count as state contribution);<sup>27</sup> or (2) insufficient documentation. For those reasons, in July 2018, FRA rejected a

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<sup>25</sup> CHSRA’s report entitled “F&A Committee Action Items from January 2019 Meeting” presented at the February 2019 Finance and Audit Committee directly contradicted the information provided in Section II of the CHSRA Response. The report indicated that, on average, CHSRA is 60 percent complete with designs across the CPs versus the 90 percent completion cited in the CHSRA Response.

<sup>26</sup> For CP 1, only 15 of 33 structures and 4 of 32 miles of guideway/roadbed were underway; for CP 2-3, only 5 of 50 structures and 14 of 65 miles of guideway/roadbed were underway; and for CP 4, only 2 of 12 structures and 3 of 21 miles of guideway/roadbed were underway. Chapter 7 of CHSRA’s 2019 PUR summarizes Project progress that is generally consistent with these estimates. Ex. E at E0117–E0122. However, according to the 2019 PUR, it appears CHSRA has actually made less progress than initially reported to FRA during its 2018 site monitoring report on the construction of essential structures. *Id.* This failure is particularly troubling as these are generally critical path, long-lead construction activities that are necessary for timely delivery of the Project and are indicators of slow, or slowing progress.

<sup>27</sup> For example, FRA found the following ineligible expenditures: (1) bonuses paid to a CHSRA consultant for achieving ARRA expenditure goals; (2) office space for CHSRA staff, passed through a design/build contractor’s

\$643 million in proposed State-match expenditures. While CHSRA has resubmitted a portion of those funds, based on past performance, and even with accelerated monthly expenditures, CHSRA has not shown it could make up this contribution deficit. For example, according to its fourth quarter 2018 FCP, CHSRA intends to complete its State-match expenditures by May 2019. *See* Ex. G. at G0583. To do this, it would have needed to make \$511.7 million in expenditures per month, and there is no evidence that CHSRA has done so. In fact, according to its first quarter 2019 FCP, CHSRA now intends to complete its State-match expenditures by July 2019. *See* Ex. G at G0643. This would now require CHSRA to make over \$600 million in expenditures per month. However, CHSRA's average monthly expenditure rate from January 2018 through March 2019 was only \$71 million. Based on past performance, it is inconceivable that CHSRA could increase its monthly expenditures by over 800 percent to meet this ambitious expenditure rate. There is no indication and no reasonable basis to forecast that CHSRA could or would do so.

To finish the Project by December 2022, CHSRA would have to increase the pace of construction to expend \$173 million per month, slightly more than doubling its current pace of \$75 million. This analysis was supported by California's own auditor, who similarly found that CHSRA would have to double its construction pace to complete the Project by the end of period of performance.<sup>28</sup> As described above, CHSRA's past performance did not support CHSRA's assertion that it could sufficiently accelerate the pace of construction, and therefore the rate of expenditures. For example, CHSRA only had two months last year in which it exceeded \$100 million, underscoring that it was highly unlikely that it could sustain the necessary pace of construction and corresponding expenditures needed to double its expenditures. In addition, based on the current pace of CHSRA's expenditures, CHSRA would complete the Project in October 2027—almost five years after the end of the period of performance.

FRA also disagrees with CHSRA's suggestion that the FCP was a non-binding expenditure projection that somehow did not need to be complete and accurate. The FCP was CHSRA's representation of what CHSRA would contribute to the Project on a monthly basis. The FCP must be realistic in terms of time and cost, and must accurately reflect Project activity, including past expenditures. However, an analysis of the FCPs submitted between fourth quarter 2017 and fourth quarter 2018 (totaling 15 months) show that CHSRA consistently failed to meet its monthly State contributions. These FCPs show that CHSRA failed to meet its State-match expenditure projections by 58 percent during that 15-month period—failing to provide roughly \$1.9 billion in State contributions—a staggering average monthly shortfall of more than \$125 million.

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invoices; (3) legal costs for matters unrelated to the FRA-funded project; and (4) expenses related to a consultant's name change.

<sup>28</sup> Auditor of the State of California, *California High-Speed Rail Authority: Its Flawed Decision Making and Poor Contract Management Have Contributed to Billions in Cost Overruns and Delays in the System's Construction* (Nov. 2018) available at <https://www.bsa.ca.gov/pdfs/reports/2018-108.pdf>.

Furthermore, CHSRA’s representation that it committed an additional \$3.1 billion in State funding toward the Project is misleading. See Ex. D at D0004. While its second quarter 2018 FCP suggested that CHSRA planned to contribute \$3.1 billion in additional State funds, those funds were necessary to cover the Project’s significant and ever-growing cost overruns, so they would not enable California to contribute “more than its fair share” under the Project, as CHSRA contended. See Ex. G at G0416. In 2012, CHSRA’s budget was \$6.35 billion; however, between 2015 and 2018, CHSRA increased its budget six times—from \$6.56 to \$10.67 billion, an increase of 61 percent in three years. As noted above, the 2019 PUR paints an even bleaker picture by estimating the total cost to deliver the FCS at approximately \$12.4 billion. See Ex. E at E0042. CHSRA’s obligations to cover future cost overruns was a requirement of both the ARRA and FY10 Agreements, so the additional \$3.1 billion in State funding to cover cost overruns was not an indication that CHSRA was committing timely and complete contributions of matching funds. On the contrary, CHSRA’s mismanagement and the resulting ballooning of costs evidenced the State’s noncompliance with the FY10 Agreement’s State contribution requirement.

D. California’s Retreat from the Foreseeable Delivery of a Statewide High-Speed Rail System

The two CHSRA applications that FRA selected for Federal funding included final design and construction activities in the Merced to Fresno and the Fresno to Bakersfield sections. While these applications helped define the scope of work of the FY10 Agreement, they also described and proposed the individual sections in the context of the overall 520-mile California HSR System. CHSRA clearly sought Federal financial assistance for these sections because they were “essential component[s] of the statewide HSR system.” Ex. K. at K0020. For example, when describing the potential long-term transportation and environmental benefits expected from the Project, CHSRA’s applications generally focused on the benefits of the larger California HSR System, not solely the benefits from construction of each individual project section.<sup>29</sup> See *id.* at K0025-K0027.

Unfortunately, after spending more than \$2.5 billion in Federal funds, California has scaled back its vision, all but abandoning any foreseeable plan to construct the statewide HSR System. During his February 12, 2019, State-of-the-State address, California Governor Gavin Newsom announced a renewed focus on completing the Merced to Bakersfield portion of the HSR system, but also stated that there “simply isn’t a path” to get “from San Francisco to L.A.”<sup>30</sup> Similarly, CHSRA’s March 4, 2019, letters underscore CHSRA’s intent to pursue only a truncated, and less transformative, version of the statewide HSR System than was presented in its applications for grant funding. CHSRA has confirmed what Governor Newsom said earlier this year that, over the next decade, the State’s sole focus will be on the construction of, and operation over, HSR

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<sup>29</sup> While the applications described the possibility that CHSRA would allow the Amtrak San Joaquin service to use the infrastructure, such use would only be in the context of the delayed implementation of the California HSR System. It was not proposed as a credible standalone California HSR Project.

<sup>30</sup> Governor Gavin Newsom, State-of-the-State Address (February 12, 2019).

infrastructure between the Central Valley cities of Merced and Bakersfield. However, even assuming CHSRA has identified and can commit the additional funds necessary to connect Merced and Bakersfield (itself a significant assumption based on the uncertainties inherent in the State funding sources), that is far less than the HSR System that California proposed to build when it sought Federal funding. It is now clear that California has no foreseeable plans, nor the capability, to pursue that statewide HSR System as originally proposed.<sup>31</sup>

While the 2019 PUR still forecasts some distant point in the future where California could pursue construction beyond the Central Valley, it does not provide any concrete plans, much less identify the funding sources necessary to complete the HSR System. Instead, in summarizing CHSRA's prior Business Plans, the 2019 PUR further highlights the State's continued retreat from its overall vision for its HSR System. See Ex. E at E0018–E0022. The 2019 PUR does not provide a schedule for the connection of the Central Valley to Silicon Valley, let alone the full completion of Phase 1 of the HSR System. While the CHSRA Response contains a vague description of CHSRA's "ultimate goal" of the larger high-speed rail system, and the suggestion that operations between Merced and Bakersfield would "encourage extension to the San Francisco Bay area and then to the Los Angeles Basin," the 2019 PUR did not provide a plan of any specificity or identify a source of funding for such an extension. At best, CHSRA only plans to connect existing passenger rail lines, north and south of the high-speed rail section, until further funding and State commitments materialize.

Although the State's retreat from a foreseeable statewide HSR system may not, standing alone, constitute a violation of the FY10 Agreement, it is nonetheless a relevant consideration in FRA's termination decision, given FRA's understanding of the State's intention to construct a "800-mile, statewide...high-speed electrified train service between the Bay Area, the Central Valley, Sacramento, and Southern California," Ex. A at A0038, and the agency's responsibility to oversee the HSIPR Program.

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<sup>31</sup> The May 10th draft RFP suggests the future procurement will cover track and signal infrastructure connecting to San Francisco but, like the 2019 PUR, the draft RFP does not explain how that work would be completed.



#### IV. Conclusion

As described above, FRA has determined that CHSRA has violated the terms of the FY10 Agreement and consistently failed to make reasonable progress on the Project. Despite FRA's identification of Project issues, and the ample time provided to CHSRA to take appropriate remedial actions, CHSRA instead chose delay and inaction. In FRA's view, there is nothing in FRA's long working relationship with CHSRA to suggest that CHSRA would likely be able to initiate and complete the necessary corrective actions, if given yet another opportunity. Finally, the dramatically reduced scope of California's current plan for its HSR System is simply not consistent with the Project as CHSRA proposed in its applications for Federal financial assistance on the Project. For these reasons, and those set forth in this decision, FRA has determined to terminate the FY10 Agreement, effective today, and will deobligate the associated funds.<sup>32</sup>

Sincerely,



Ronald L. Batory  
Administrator

Enclosure

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<sup>32</sup> These deobligated FY10 Appropriation funds remain available until expended for the originally authorized purpose, intercity passenger rail. Historically, FRA's competitive grant programs are oversubscribed, with applicants seeking more funding than FRA has available. FRA may solicit new applications for these funds to pursue eligible intercity passenger rail projects.