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**IN THE SUPREME COURT OF THE STATE OF OKLAHOMA**

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**No. 120619**

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**IN THE MATTER OF THE APPLICATION OF THE  
OKLAHOMA TURNPIKE AUTHORITY FOR  
APPROVAL OF NOT TO EXCEED \$500,000,000  
OKLAHOMA TURNPIKE SYSTEM SECOND  
SENIOR LIEN REVENUE BONDS, SERIES 2022**

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**REPLY BRIEF OF PIKE OFF OTA, INC., AMY CERATO,  
MIKE LEARY, VINCE DOUGHERTY, TERRIE CLUB,  
MIKE CLUB, TWYLA SMITH, CALI COWARD, KAREN  
POWELL, MIKE POWELL, CEDRIC LEBLANC, DARLA  
LEBLANC, CLAUDETTE WISPE, MARK DOOLING, NATE  
PIEL, KARA PIEL, NIKKI WHITSON, JOHN WHITSON,  
ROBERT WALLACE, CHELSEA WALLACE, ROBIN  
STEAD, ANNA OLSON, TASSIE HIRSCHFELD, ICE BLAST  
LLC AND JANETTE WARD TO SHOW CAUSE RESPONSE  
OF THE OKLAHOMA TURNPIKE AUTHORITY**

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ATTORNEYS FOR PIKE OFF OTA PROTESTANTS

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July 12, 2023

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## SUMMARY OF THE ARGUMENT

The Turnpike Enabling Act is not carte blanche for the Oklahoma Turnpike Authority to build turnpikes wherever it wants and however it wants. The bond validation statute is not carte blanche for the OTA to run roughshod over the due process rights of citizens, or to evade all legitimate judicial and regulatory oversight. In its show cause response brief, the OTA is in effect claiming that it has precisely such carte blanche.

It does not. The Turnpike Enabling Act enables the OTA to construct turnpikes, but only at locations the Oklahoma legislature has specifically authorized in 69 O.S. § 1705(e). This mandate of explicit legislative authorization is a key state law guardrail on the OTA's turnpike building authority. This guardrail, along with the mandatory bonding and building restrictions in 69 O.S. § 1705(f) for the Oklahoma City Outer Loop, constitute the two key guardrails restricting the OTA in this bond validation case. In its show cause response brief, the OTA once again misconstrues these statutes and this Court's precedent in an unlawful attempt to break through these guardrails.

The OTA has now, of course, run up against new barriers – barriers of its own making. The United States Bureau of Reclamation is not going to let the OTA build the South Extension along the “right up against Lake Thunderbird” route the OTA purposely chose and hastily submitted to this Court for validation. The Bureau may also deny the OTA the right to build the South Extension and the East-West Connector over the Bureau's flowage easement parcels around Lake Thunderbird. To top it all off, the OTA purposely let its “conditional” authorization from the Council of Bond Oversight expire. All of this has left the Court making serious show cause inquiries about whether the Court can even continue to consider the OTA's bond validation petition.

The OTA's answer to the Court's inquiries is basically "hurry up and validate our bond request for these new alignments, even though it is undisputed that we cannot build the South Extension along the route corridor we submitted to the Court. We have no idea where any of these routes may have to go in the end, but that is not a concern for this Court or the Council of Bond Oversight."

This is an unacceptable recipe for a violation of due process. If the Court validates bonds for routes which have to be materially moved to some yet to be determined place, citizens who were comfortably outside of the route corridors submitted to this Court may at some point in the future get the unpleasant surprise of finding themselves squarely in the crosshairs of a new route drawn up well after the fact. They would not have been on inquiry notice of these routes, nor would they have been on inquiry notice of any need to appear in the bond validation case.

Moreover, these citizens would probably be deprived of any right to contest the surprise new route in any subsequent eminent domain or other proceeding. This is so because of the "super-res judicata" provisions of 69 O.S. § 1718, which make the Court's decision to grant an OTA bond validation application incontestable in any subsequent proceeding in the courts of this state. The tradeoff for the OTA's special right to come directly to this Court for legal validation of its routes, and the special right not to have to defend those routes in subsequent eminent domain proceedings, has to be a meaningful notice to potentially impacted citizens of where those routes are actually going to be.

The OTA's position in its response brief is also a recipe for evading all meaningful oversight from this Court and the Council of Bond Oversight. The OTA's purposeful "cart before the horse" strategy is to push bond validation through this Court without any meaningful

new route alignment questions being answered. The OTA then makes no bones about what would come next. The OTA has made it clear that it would then submit this Court's "drive by" validation to the Council of Bond Oversight as conclusive proof that the conditions of an expired conditional authorization had been "satisfied," and that an unconditional authorization from the Council must necessarily follow, again without any meaningful questions being answered. This willful, *fait accompli* strategy to avoid all meaningful oversight is unacceptable for a public trust of the State of Oklahoma.

Ultimately, the answer to whether this Court can validate bonds for the OTA's new turnpike alignments is a resounding no, but not primarily because of due process concerns or route alignment uncertainty. While these are serious, unresolved concerns, it does not matter whether the OTA tries to move the South Extension "westward," or add new curves, to avoid federal lands. It does not matter whether the OTA tries to move the East-West Connector north, or otherwise add new curves, to avoid federal easements. It does not matter what the OTA may try to do to "work with" the Bureau of Reclamation or the State Bond Advisor. The OTA has run itself into a federal lands problem with the South Extension and the East-West Connector, but the OTA's problem is first and foremost a Turnpike Enabling Act problem.

The OTA cannot just curve its way around the lack of legislative authorization for the South Extension. The OTA cannot just curve its way around the one bond issue, four turnpike bundling mandate of § 1705(f). These insurmountable barriers to the proposed new alignments in ACCESS Oklahoma are Turnpike Enabling Act barriers. The Turnpike Enabling Act simply does not allow the OTA to build the South Extension, the East-West Connector, or the Tri-City Connector. Period. Full stop.

## ARGUMENT AND AUTHORITY

### I. THE OTA CANNOT LAWFULLY BUILD THE NEW ALIGNMENTS IN ACCESS OKLAHOMA REGARDLESS OF ANY ROUTE ADJUSTMENTS IT MAY MAKE TO AVOID FEDERAL LANDS.

#### A. The OTA Cannot Lawfully Build The South Extension Regardless Of Any Route Adjustments It May Make To Avoid Federal Lands.

In its show cause response, the OTA devotes a substantial amount of time to re-arguing that its proposed South Extension route is legislatively authorized. To do so, the OTA has to keep misconstruing the Turnpike Enabling Act.

69 O.S. § 1705(e)(28), the statute upon which the OTA pins the South Extension, authorizes the following:

A new turnpike and bridge or any parts thereof from a point in the vicinity of the city of Mustang *southerly* across the South Canadian River *to the H.E. Bailey Turnpike* in the vicinity of the city of Tuttle; and then *easterly across the South Canadian River to a point in the vicinity of the city of Norman*.

69 O.S. § 1705(e)(28) (emphasis added). Thus, once it meets up with the H.E. Bailey Turnpike, “easterly” is the only authorized direction the Section 28 turnpike may go.

The OTA’s key contention about the South Extension in its show cause response brief is the following:

Upon validation of the Bonds by the Court, the Authority will resume discussions with Reclamation to adjust the alignment of the South Extension Turnpike, which may necessitate movement of the alignment westward to avoid Reclamation’s fee title land. The intent of the South Extension is to connect the East-West Connector to I-35, providing an alternative route to alleviate congestion along the I-35 corridor and provide access to the south, east, and northeast side of Oklahoma City. Regardless of any design modifications to the proposed alignment, the South Extension will still provide for the easterly crossing of the South Canadian River *turning north* to connect with the East-West Connector in the Norman City limits *as required by* § 1705(e)(28).

*See* OTA Show Cause Response Brief, p. 13 (emphasis added).

As it has throughout this case, the OTA has clearly misconstrued the statute. There is *no* part of § 1705(e)(28) which even remotely authorizes, much less requires, any “turning

north,” either before, during, or after the “easterly crossing of the South Canadian River.” This is especially so in the way the OTA proposes “turning north” with the South Extension.

The only part of the OTA’s proposed South Extension which would be an “easterly crossing of the South Canadian River” is a tiny part of the route that crosses easterly from a point at State Highway 74 all the way down in the city limits of Purcell. *See* Pike Off Appx., Exh. P, Purcell City Limits Map; Exh. Q, South Extension Map. The route then immediately starts “turning north,” and stays “turning north,” for almost the entirety of the nineteen-mile South Extension route, until it reaches the East-West Connector at the City of Norman’s northern border with the City of Moore.<sup>1</sup>

This is a made-up route, cut wholly out of whole cloth. There is no authorization for it anywhere in the Turnpike Enabling Act. Nothing in §1705(e)(28) allows the OTA to build a *northerly* route from the city limits of Purcell all the way to the border of the city of Norman and the city of Moore.

Furthermore, it does not matter if the OTA tries to move the route alignment “westward” to avoid federal lands. It does not even matter if the OTA tries to move the route “eastward,” to the other side of Lake Thunderbird, to avoid federal lands. Section 28 simply does not allow the OTA to build the South Extension.

In its show cause response brief, the OTA points out that it historically has to make common sense “curves” or “route adjustments” to avoid some “unforeseen circumstance” or “obstacles” such as a cemetery, a park, a wetlands site, or general topography. *See* OTA Show

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<sup>1</sup> To the point of this minor “easterly” leg of the route, the statute clearly requires that the “easterly” leg commence at “the H.E. Bailey Turnpike in the vicinity of the city of Tuttle.” *See* 69 O.S. § 1705(e)(28). This small, “easterly” part of the South Extension begins nowhere near the H.E. Bailey Turnpike, and nowhere near the vicinity of Tuttle.



Cause Response Brief, pp. 8-9. The almost exclusively “turning north” South Extension is not, however, some common sense “curve” or necessary “route adjustment.” For all intents and purposes, the “turning north” part *is* the South Extension route.

Things just get worse if one indulges the OTA in its hypothesis that the South Extension is something that picks up where the H.E. Bailey Norman Spur leaves off. This hypothesis requires the OTA to take a significant, southerly “ghost route” dip from the Spur all the way down to Purcell. This significant southerly dip would have to occur somewhere in the process of a route which is authorized to move “easterly” – and only easterly – from the H.E. Bailey Turnpike to a terminal point in the vicinity of Norman.

Section 28 does not, however, allow for some southerly dip which would dwarf the easterly authorization. The only “southerly” authorization in the statute is the first leg: the one which allows the OTA to build a route from the vicinity of Mustang *to* the H.E. Bailey Turnpike in the vicinity of Tuttle. Upon reaching the H.E. Bailey Turnpike, the “southerly” authorization for a section 28 turnpike comes to an end.

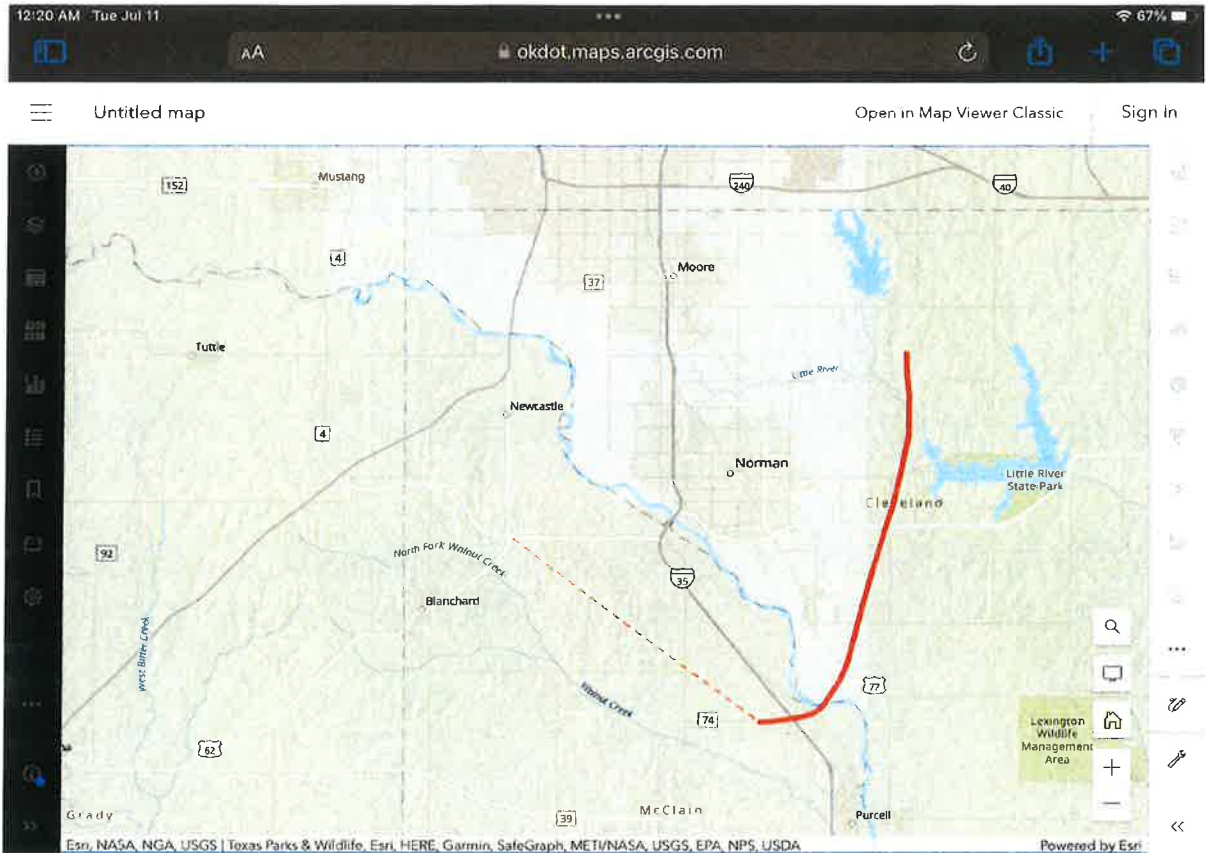
Section 28 is actually a simple route which authorizes a two-stage, “L” shaped turnpike from the vicinity of Mustang to the vicinity of Norman. The first stage is a southerly route from Mustang to the H.E. Bailey Turnpike in the vicinity of Tuttle. The second stage is an easterly route from the H.E. Bailey Turnpike to a point in the vicinity of Norman.<sup>2</sup>

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<sup>2</sup> As the OTA itself has pointed out previously, the OTA in effect turned over this first leg to ODOT in the form of State Highway 4, which traverses from Mustang to the H.E. Bailey Turnpike. Likewise, with the exception of the H.E. Bailey Norman Spur, the OTA turned over much of the easterly second leg to ODOT in the form of a widened State Highway 9.

Section 28 does not authorize, somewhere in the second stage, a very large “V” shaped detour that would plunge southerly to Purcell, and then sweep back up in a northerly direction until it reaches the very northern border of the City of Norman.

In sum, Section 28 does not allow anything like this:



For the South Extension to be legislatively authorized, Section 28 would have to include two additional directional authorizations, and one additional city waypoint, that simply do not exist in the statute.<sup>3</sup>

<sup>3</sup> The legislature has shown in many places in § 1705(e), including Section 28, that it knows how to use multiple directional authorizations, and multiple “vicinity of a city” waypoints, to guide and limit the OTA. *E.g.*, 69 O.S. § 1705(e)(7), (10), (11), (15), (20), (21), (28). In Section 28, the legislature guided and limited the OTA to directional limits of southerly only in the first leg, and easterly only in the second leg. The legislature further guided and limited the OTA to city waypoints only in or to the vicinity of Mustang, Tuttle, or Norman. The legislature did not provide for a waypoint to the vicinity of Purcell.

“[A]n agency created by statute may exercise only those powers granted and may not expand those powers by its own authority.” *City of Hugo v. State ex rel. Pub. Emps. Rels. Bd.*, 1994 OK 134, ¶ 15, 886 P.2d 485, 492; Okla. Att’y Gen. Op. No. 05-42 (Dec. 5, 2005) (holding that the OTA lacks the legal authority to enter into “swap” or “derivative financial product” agreements). For the OTA to claim that Section 28 allows the proposed South Extension, the OTA has to engage in a tortured statutory construction which bends logic, reason, and the plain meaning of words to a clear breaking point. It is a quintessential case of government overreach. As such, the OTA is not entitled to bond validation for the South Extension, regardless of whether it may attempt to “adjust” the route “westward,” or any other way, in response to the Bureau of Reclamation’s recent decision.

**B. The OTA Cannot Lawfully Build The East-West Connector Regardless Of Any Route Adjustments It May Make To Avoid Federal Lands.**

In the case of the East-West Connector, the OTA’s response brief correctly brings up a related problem. The East-West Connector route submitted to the Court would cross a substantial number of Lake Thunderbird federal flowage easements, approximately 140 acres of them according to the Bureau of Reclamation. *See* Pike Off Third Supplemental Appendix, Bureau’s Use Authorization Compatibility Evaluation, Oklahoma Turnpike Authority East-West Connector and South Extension, pp. 2, 9 (map with flowage easements).<sup>4</sup>

The nature and purpose of these easements are described in the Use Authorization Compatibility Evaluation. *See* Third Supplemental Appendix, pp. 4-5. The easements are not fee title land of the Bureau. However, building structures, changing the topography of the

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<sup>4</sup> This is also available at [https://www.usbr.gov/gp/otao/use\\_auth\\_comp\\_%20OTA.pdf](https://www.usbr.gov/gp/otao/use_auth_comp_%20OTA.pdf).

land, or other development upon flowage easements is strictly curtailed, cannot interfere with easement purposes, and requires Bureau permission.

It is not clear why the OTA still has not sought the Bureau's permission to cross these flowage easements, even though the OTA intends to build the East-West Connector several years before building the South Extension. What is clear is that the OTA's right to run the East-West Connector through these flowage easements is still in serious doubt. The Bureau is still clearly reserving judgment on the issue. The OTA may well run into the same barrier which caused this Court to issue a Show Cause Order on the South Extension.

The OTA casts a debatably reassuring tone with the Court about its prospects for getting Bureau permission to cross flowage easements, but again, it is not the first and foremost concern for this Court. This is not a case where the OTA is presenting a lawful turnpike alignment to this Court, and the OTA would be merely exercising its discretion to make minor route adjustments to avoid "unforeseen circumstances" in the future. As Pike Off has previously shown the Court, the bonding and building restrictions of 69 O.S. § 1705(f) simply do not allow the OTA to build the East-West Connector. *See* 9-9-2022 Protest Brief of Pike Off OTA, Inc., *et al*; 11-18-2022 Supplemental Protest Brief of Pike Off OTA, Inc., *et al*. As such, the OTA is not entitled to bond validation for the proposed East-West Connector Turnpike.

## **II. VALIDATING BONDS FOR NEW ALIGNMENTS REQUIRING UNKNOWN, SIGNIFICANT FUTURE ROUTE REVISIONS WOULD VIOLATE DUE PROCESS.**

The 14th Amendment to the U.S. Constitution and Article 2, Section 7, of the Oklahoma Constitution "forbid the state from depriving any person of life, liberty, or property without due process of law." *Bebout v. Ewell*, 2017 OK 22, ¶ 13, 392 P.3d 699, 703; *Booth v.*

*McKnight*, 2003 OK 49, ¶ 18, 70 P.3d 855, 862. Beyond the bare fact of formally providing some sort of hearing notice, the critical inquiry is whether a person to be affected was fairly and timely apprised of what interests are sought to be reached by the triggered process. *Booth*, 70 P.3d at 862; *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 314, 70 S. Ct. 652, 657, 94 L. Ed. 865 (1950). “Notice and opportunity to be heard must be provided in such a way that a person can intelligently decide in advance whether to appear at the hearing and contest the matters in issue or acquiesce in their *in absentia* resolution and assume the risk from consequences attendant upon a default.” *Booth*, 70 P.3d at 862 (citing *Mullane*, 70 S. Ct. at 657).

There is now an inescapable, indisputable fact relevant to this due process inquiry. The OTA is not going to be able to build a South Extension route materially consistent with the route corridor the OTA has presented to this Court. The OTA is literally asking this Court to validate bonds for a route that, even if it were statutorily authorized, would have to be materially changed from that route corridor. The route corridors filed in the record in this case at least put citizens and property owners on notice that they may be affected if they are in that proposed route corridor. However, the proverbial inquiry notice fails to hold, and fails to be effective at all, when it becomes clear that the OTA is going to have to build a route materially outside of the route corridor presented to the court for consideration.

This is presumably why the Court issued its show cause order to the OTA, but the OTA stubbornly refuses to answer the serious questions the Court is asking. In what manner, and to what extent, is the OTA going to have to change the South Extension and East-West Connector routes? The scale indicator on the Bureau’s map shows that significant parts of the South

Extension will have to be moved, at a very minimum, at least a mile to the West. *See* Third Supplemental Appendix, p. 9.

Will these changes also require material changes to the East-West Connector route? If the OTA fails to get permission from the Bureau for the routes to cross flowage easements, how substantial of a route change will this cause? The scale of the Bureau map indicates that the OTA would have to move significant parts of the South Extension at least 2.5 miles to the west, and significant parts of the East-West Connector at least 1.5 miles to the north. These would be extraordinary changes indeed, and in the case of the East-West Connector, may call into question whether the changed route still even falls within the confines of 69 O.S. § 1705(e)(20).

The unique provisions of the bond validation petition statute amplify the dire due process problems that future, material, but as yet unknown OTA route adjustments would cause. The statute provides that

The decision of the Court shall be a judicial determination of the validity of the bonds, shall be conclusive as to the Authority, its officers and agents, and thereafter the bonds so approved and the revenues pledged to their payment shall be incontestable in any court in the State of Oklahoma.

*See* 69 O.S. § 1718.

Ordinarily, principles of *res judicata* and collateral estoppel do not apply to persons who were not joined in a case, did not receive actual notice, and thus did not appear to protect their interests. Section 1718, however, creates a special “super-*res judicata*” regime for bond validation cases. In most, if not all, scenarios, anyone and everyone will likely be precluded from ever relitigating the issues or otherwise contesting the validity of the Court’s decision to validate bonds for a particular new turnpike alignment.

Citizens who have owned homes or land comfortably outside of the routes presented to this Court, but who are now within the zone of a potentially new route, would have been justified in believing they were in the clear, and that they had no need to file a protest or otherwise protect their rights. They literally would not have been fairly and timely apprised of any legally protected interests or rights which might have been affected by the bond validation process the OTA has triggered. Now, their rights may very well be in danger, but it is too late for them if the Court grants the OTA's bond validation petition. The unjust consequences are potentially widespread, and would be even more widespread, if the Bureau does not permit the OTA to cross the Bureau's flowage easements.

These due process concerns are an additional, alternative ground for denying the OTA's petition for bond validation for any new turnpike alignments. If this Court is inclined in any way to hold that the new turnpike alignments are legislatively authorized, the Court would still have to send the OTA back to the drawing board to do its due diligence, seek appropriate federally required permissions, and present substantially certain route alignments that take into account what the Bureau of Reclamation has and will decide. Otherwise, there would be far too many uncertainties, and far too many questions that the OTA has failed to even start to answer, for the Court to validate any bonds for any new turnpike alignments.

### **III. THE OTA IS ATTEMPTING TO UNLAWFULLY EVADE OVERSIGHT WITH ITS PURPOSEFUL DECISION TO LET THE COUNCIL OF BOND OVERSIGHT'S CONDITIONAL APPROVAL EXPIRE.**

Pursuant to the Oklahoma Bond Oversight and Reform Act, the Council of Bond Oversight is responsible for fulfilling the legislative mandate of "providing systematic oversight of debt issuances by State Governmental Entities." *See* OAC 90:1-1-1; 62 O.S. § 695.3. The OTA is

a state government entity subject to the systematic oversight of the Council. 62 O.S. § 695.3(2)(g).

The Act provides that the Council of Bond Oversight *shall* (1) determine whether the proposed purpose of the state entity’s debt obligations is a proper public function or purpose, and (2) review proposed issuance of debt by state governmental entities for compliance with any applicable provisions of federal, state or other laws. 62 O.S. § 695.8; *In re Application of Oklahoma Dep't of Transp.*, 2003 OK 105, ¶ 13, 82 P.3d 1000, 1004. Authorized public functions or purposes include functions or purposes which are authorized by law. OAC 90:1-1-3(b). Council regulations further provide that State governmental entities will be limited to the authority given them by the State Constitution or state statutes. *Id.*

This Court has noted that in approving proposed obligations, “the Council undoubtedly exercises enforcement power.” *In re Application of Oklahoma Dep't of Transp.*, 82 P.3d at 1004. The Council thus clearly must exercise systematic oversight. It is not to provide mere “rubber stamp” approval, nor should it have its systematic oversight processes eviscerated by state agency maneuvers and machinations. The OTA is, however, trying to maneuver this Court and the Council into a double dose of “see no evil, hear no evil, speak no evil” that would ultimately amount to both bodies’ abdication of their oversight responsibilities.<sup>5</sup>

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<sup>5</sup> The OTA wants to have it both ways when it comes to the Council. On the one hand, the OTA typically makes much ado about having gotten the Council’s “pre-approval” of its proposed bond issue prior to coming to this Court with a bond validation petition. See 8-10-2022 Brief of Petitioner, p. 7; *In re Application of Oklahoma Turnpike Authority*, 2016 OK 124, 389 P.3d 318 (Sup. Ct. No. O-115345, 9-13-2016 Brief of Petitioner, p. 5). On the other hand, now that it perceives strategic advantage in doing so, the OTA feigns that Council approval of a bond issue prior to seeking this Court’s bond validation is unnecessary and of no consequence. This shifting position about the Council’s role is symptomatic of the OTA’s systematic effort to avoid meaningful oversight of its projects.



The OTA's purposeful decision to allow the Council's conditional approval to expire must be viewed in light of its overall strategy before this Court. This strategy has included (1) misconstruing the Turnpike Enabling Act and this Court's precedent in order to improperly claim that the OTA has the "sole discretion" to determine the location of a route, (2) presuming to admonish this Court in oral argument not to interject itself into the OTA's affairs, and now, (3) evading any questions or concerns arising from having to materially alter the routes submitted to this Court for approval. The OTA literally posits that this Court must validate a half billion-dollar bond issue without the OTA having to answer any of the hard questions that meaningful oversight and scrutiny of a proposed bond issue would entail.

The OTA has made it clear that it intends to return to the Council with such a perfunctory validation in hand. The OTA would no doubt then claim that it had conclusively fulfilled the Council's conditions for approval, and with that logical sleight of hand, completely avoid the legislature's mandate of meaningful, systematic Council oversight, both before and after coming to this Court.<sup>6</sup>

The OTA is, however, trying to evade meaningful oversight from this Court and the Council of Bond Oversight precisely because its proposed new alignments cannot legally withstand scrutiny. The Bureau of Reclamation has properly fulfilled its oversight obligations, and now this Court must do the same. It is time for the Court to deny the OTA's application for the validation of any bonds for the South Extension, the East-West Connector, and the Tri-City Connector.

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<sup>6</sup> The ultimate condition to the Council of Bond Oversight's Approval was bond validation by this Court.

## CONCLUSION

The problems with the new alignments in the OTA's ACCESS Oklahoma plan continue to mount. In light of the OTA's federal lands problems, we now have no idea where these routes may end up having to go, even if they were legislatively authorized.

Of course, therein lies the rub. The Turnpike Enabling Act does not allow the OTA to build these routes. The OTA is headed down a road of violating due process and evading mandatory oversight, and these are good enough reasons for denying the OTA's bond validation petition. In the final analysis, however, it is simply unlawful for the OTA to issue bonds for or build any of these new turnpikes.

The Pike Off OTA Protestants therefore respectfully request that this Court deny the OTA's request for validation of bonds for the East-West Connector, the Tri-City Connector, and the South Extension turnpikes.

Respectfully submitted,



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**CERTIFICATE OF SERVICE**

I hereby certify that on the 12th day of July, 2023, a true and correct copy of the above and foregoing was emailed and mailed, first class, postage prepaid, to the following:

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