

**OBJECTION TO THE OKLAHOMA TURNPIKE AUTHORITY'S
AUGUST 11, 2023 APPLICATION FOR PROVISIONAL APPROVAL OF BONDS**

TO: Oklahoma Council of Bond Oversight

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INTRODUCTION

This Council is charged with the solemn task of providing independent, systematic oversight of an unprecedented expansion of the Oklahoma turnpike system, which is already the largest system in the nation. This expansion is fraught with profound problems which remain unresolved and continue to mount.

I represent Pike Off OTA, Inc. d/b/a Oklahomans for Responsible Transportation. This memorandum addresses the OTA's latest application for provisional approval of \$500,000,000 in bonds, which the OTA intends to use for all projects in its proposed ACCESS Oklahoma Plan, including three new turnpikes.

This is the third time the OTA has sought this Council's approval of a bond or debt issue relating to ACCESS Oklahoma. The first time, the Council prohibited the OTA from using any proceeds of a \$200,000,000 line of credit for the three new ACCESS alignments. The second time, the Council conditioned approval on, among other things, (1) the final resolution of then pending litigation in the OTA's favor, and (2) the completion and receipt of a Final Official Statement. In this third application, the OTA states that "[t]he undersigned applicant ("Applicant") hereby

requests the Council of Bond Oversight to grant **provisional** approval of the following described proposed obligation of the Applicant.” *See* OTA Application, p. 1 (emphasis added).

This memorandum will show that the OTA’s current application for provisional approval, even if granted, must be conditioned upon several key things:

- First, there are still three cases of unresolved, pending ACCESS Oklahoma litigation, one of which the OTA has not mentioned in its application or supporting materials;
- Second, the OTA is currently subject to an investigative audit from the State Auditor and Inspector arising from concerns the Oklahoma Attorney General has raised concerning potential OTA wrongdoing and noncompliance with the law;
- Third, and to the second point, the OTA is statutorily required to use the Attorney General as legal counsel for all bond issues, and the OTA has not done so;
- Fourth, the OTA has still materially failed to perform and complete the necessary due diligence required by the Council’s regulations and the OTA’s Trust Indenture.

Consistent with the precedent of this Council, the Council cannot allow the OTA to put the cart before the horse and issue bonds while all these matters are still unresolved. The Council must continue to condition any kind of approval on full and final resolution of these matters in a manner favorable to the OTA’s issuing the bonds. Above all, the core systematic oversight obligation of the Council mandates that the Council cannot provide any unconditional or final approval to the OTA for any proposed ACCESS Oklahoma bond issue.

I. THE OTA CANNOT POSSIBLY COMPLY WITH THE REQUIREMENT OF NO PENDING LITIGATION RELATING TO OUTSTANDING OR PROPOSED BOND OBLIGATIONS.

A. The Council Must Provide Systematic Oversight of the OTA’s Application.

This Council is responsible for providing systematic oversight of debt issuances by State Governmental Entities, including the OTA. *See* OAC 90:1-1-1; 62 O.S. § 695.3. The legislature has declared that “such oversight is essential to protect the public welfare of the State of Oklahoma.” 62 O.S. § 695.2.

Thus, the Council **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. In determining “public purpose”, the Council “**shall** review the end sought to be reached and the means to be used in reaching that end in order to promote the public health, safety, morals, security, prosperity and general welfare and contentment of all citizens.” OAC 90:1-1-3(a) (emphasis added).

Council regulations further provide the following about provisional and final approvals:

Some complex transactions may involve multi-stage processes. Information available to an issuer may be general at the beginning of the process and become more specific as the transaction progresses. For this reason, application approval may occur in two steps: provisional approval and final approval.

See OAC 90:10-3-1(b). In any required application for final approval, an applicant must, among many other things, “list and explain any material changes from the information provided on the issuer’s Provisional Approval form that have taken place since the date of provisional approval.” OAC 90:10-3-1(b).

Thus, this Council does not exist as a mere rubber-stamp pass-through for the OTA. It is a body mandated to provide broad and thorough oversight. “Even with the Court’s approval of the bonds in this matter, the OTA must comply with the separate requirements outlined in the Oklahoma Bond Oversight and Reform Act, 62 O.S.2021, §§ 695.1-695.11A, before the OTA can

issue turnpike revenue bonds.” *In re Okla. Tpk. Auth.*, 2023 OK 84, fn. 3 (majority opinion dated Aug. 1, 2023).¹

B. Council Regulations Do Not Allow for Unconditional or Final Approval of An OTA Application When There Is Pending Litigation.

Council regulations require a state entity applying for final approval of a bond issue to include the following “no pending or threatened litigation” certification:

Letter from issuer's attorney or bond counsel stating that there is no litigation pending or threatened **relating to outstanding or proposed obligations** or the issuer's authority to enter into any agreements necessary to complete the proposed transaction.

See OAC 90:10-3-4 (a)(3)(I) (emphasis added).

The requirement is simple, straightforward, and broad. There must be **no** litigation pending **relating to** a proposed bond obligation. This is not an excuse to put together some sort of “workaround” letter. Moreover, it is inherent in this certification requirement that the statement be true, correct, and complete. The certification requirement would be useless and dangerous to the public welfare if it allowed agencies to make incorrect statements, or to omit pending, existing litigation.

In the litigation letter attached to its current application for provisional approval, the OTA fully acknowledges there are two cases of pending litigation which would preclude any unconditional or final approval of a bond issue. Specifically, the Bond Validation case and the Open Meetings Act case are still pending. Moreover, there is a third pending litigation that has been on file since January 9, 2023. All of this pending litigation precludes any unconditional or final approval of any OTA bond issue.

¹ “The Legislature has set up two separate approval processes to construct and finance turnpike projects.” *Matter of Okla. Tpk. Auth.*, 2023 OK 84, fn. 3.

C. There Are Still Three Cases of Pending Litigation Relating to the OTA’s Proposed ACCESS Bond Issue, One of Which the OTA Has Omitted.

1. *Qui Tam* Litigation: *Tortorello et al on behalf of the Oklahoma Turnpike Authority v. Poe and Associates, Inc. et al*, Cleveland County Case No. CV-2023-64.

The OTA did not advise the Council of this case in its pending litigation letter. It is clearly pending litigation relating to outstanding or proposed obligations of the OTA.

In this case, hundreds of citizens allege that the OTA has paid out over \$42,000,000 in funds to contractors based on unlawful, invalid contracts between the OTA and the contractors for work on ACCESS Oklahoma turnpike projects. *See* 1-9-23 *Qui Tam* Petition, ¶¶ 60 (F)(G), 71. The citizens further allege that the OTA has entered into approximately \$145,000,000 in unlawful and invalid contracts for work on ACCESS Oklahoma projects. *Qui Tam* Petition, ¶¶ 41, 64, 66.²

The OTA governing board members, executive director, and deputy director are named defendants in the lawsuit, both in their official and individual capacities. *See Qui Tam* Petition Case Style. This group of defendants refers to itself in the lawsuit as “the OTA defendants,” and as public officers of the OTA. *E.g.*, 2-3-23 Motion to Dismiss, pp. 1, 5. The OTA defendants acknowledge that the millions of dollars of funds at issue in the case would consist of both tolls and/or **future bond issue** (i.e., ACCESS Oklahoma) proceeds. *E.g.*, 2-3-23 Motion to Dismiss, p. 6. The citizen plaintiffs have pointed out that while some issues in the Open Meetings Act case and the *Qui Tam* case may sound alike, the issues are not the same. *See* Response to 2-3-23 Motion to Dismiss, p. 14.

² The Petition and all other filings are available at: <https://www.oscn.net/dockets/GetCaseInformation.aspx?db=cleveland&number=CV-2023-64&cmid=2425176>.

The defendants in the *Qui Tam* case have filed various motions for transfer of venue, procedural motions to dismiss, and motions to disqualify the district judge assigned to the case. The motions to disqualify the judge have been assigned to a special judge for that particular purpose. There have been no final rulings on any of these preliminary motions.

2. Bond Validation Case: In re Oklahoma Turnpike Authority, Case No. O-120619.

As the OTA advises, a majority of the Oklahoma Supreme Court has issued an opinion validating the OTA's proposed \$500,000,000 bond issue. However, three Justices dissented, and two of them issued strong, persuasive, and compelling dissenting opinions. *See* 8-01-23 Dissenting Opinions.³

The Pike Off OTA Protestants filed a Petition for Rehearing on August 21, 2023. In the Petition, Pike Off asserts that the majority opinion is replete with errors and omissions which warrant rehearing and disapproval of any bonds for the South Extension, the East-West Connector, and the Tri-City Connector turnpikes. The Petition for Rehearing remains pending.

3. Open Meetings Act Case, *Hirschfield et al v. OTA et al*, Cleveland County Dist. Ct. Case No. CV-2022-1905 and Okla. S. Ct. Case No. SD-120981.

A five-justice majority of the Oklahoma Supreme Court has issued an opinion reversing the District Court's finding that the OTA willfully violated the Open Meetings Act in its unveiling of ACCESS Oklahoma. Once again, however, three Justices have persuasively dissented. *See* 5-31-23 Dissenting Opinion.⁴

³ *See* <https://www.oscn.net/dockets/GetCaseInformation.aspx?db=appellate&number=O-120619&cmid=133432> .

⁴ *See* <https://www.oscn.net/dockets/GetCaseInformation.aspx?db=appellate&number=SD-120981&cmid=134434> .

The Plaintiffs filed a Petition for Rehearing with the Oklahoma Supreme Court on June 16, 2023. A one justice shift would effectively result in the reinstatement of the district court's judgment against the OTA. That Petition remains pending.

II. ANY APPROVAL OF THE OTA'S APPLICATION MUST BE CONDITIONED UPON THE SATISFACTORY CONCLUSION OF THE STATE AUDITOR'S INVESTIGATIVE AUDIT.

On March 15, 2023, Attorney General Gentner Drummond directed that State Auditor and Inspector Cyndy Byrd conduct an investigative audit of the OTA. In his request, the Attorney General listed concerns that "include but are not limited to improper transfers between the OTA and the Department of Transportation; improper contracting and purchasing practices; and inadequate internal financial controls." In the Attorney General's own words, "the OTA's blatant disregard for openness and transparency suggests to me a willingness to engage in any manner of unlawful conduct." See March 15, 2023 Audit Request Letter; also available at <https://www.oag.ok.gov/articles/drummond-requests-investigative-audit-oklahoma-turnpike-authority>.⁵

In more recent announcements about the investigative audit, the Attorney General had this to say about the OTA's decision to stop work associated with Access Oklahoma due to uncertainties over future bond funding and legal challenges to the plan:

I am aware of the Turnpike Authority's announcement to stop all work on toll road construction and improvements. This is a concerning development that causes me to question the leadership and cash flow management of this critical agency. While it is unclear what the future holds for OTA, I am certain that the investigative audit I have ordered is needed now more than ever.

See <https://journalrecord.com/2023/04/13/drummond-comments-on-ota-work-stoppage/>.

⁵ Specific instances of relevant, recent, and current OTA violations of statutes and the OTA's Master Trust Agreement Indenture are being detailed in separate presentations to the Council from Members of Oklahomans for Responsible Transportation.

Like the litigation against the OTA, that investigative audit is still pending. The Attorney General has raised profound, material concerns about the lawfulness of the OTA's current conduct and its financial management practices. The pending investigative audit thus raises profound concerns about the OTA's overall soundness and suitability to "promote the public health, safety, morals, security, prosperity and general welfare and contentment of all citizens" in its unprecedented quest to issue some **five billion** dollars in bonds for ACCESS Oklahoma. *See* OAC 90:1-1-3(a). These are not just general grievances about the merits of a state agency project.

To the contrary, this is unprecedented. A state agency is literally in a headlong rush to issue the first half billion dollars of five billion dollars in revenue bonds amidst an Attorney General mandated investigative audit over the lawfulness and financial soundness of its practices. Council regulations mandate that the "Council **needs** sufficient information to make **informed** decisions regarding the nature, purpose, necessity and legality of proposed financing and they **need** access to any other information required for decisions in special circumstances." OAC 90:10-3-1 (emphasis added). The OTA has certainly not provided this information. However, the Council can be confident that the State Auditor and Inspector will.

Given the provisional nature of the OTA's application, the Council need not pause too long over any assertions or speculation about how this investigative audit may turn out. As the Attorney General has stated in other recent comments on the pending investigative audit, "There may be deficiencies that were simply procedural and we can learn from that and improve for the future ..." or, "there may be errors that were substantive...that the OTA has a burden to sustain if it wants to continue doing what it's doing." *See* https://www.fox23.com/news/local/exclusive-drummond-says-fox23-investigation-judge-s-ruling-key-in-call-for-ota-audit/article_de999d76-cd93-11ed-8e82-fbf08f3d37e3.html .

There is no great rush or urgency to issue these bonds or to start building new turnpikes. ACCESS Oklahoma is not some sort of grave national security priority. As the OTA is fond of saying, ACCESS is a fifteen-year, long term infrastructure project. This Council's mandate of systematic oversight requires that any approval of the OTA's proposed bond issue be conditioned upon satisfactory conclusion of the investigative audit of the OTA, with a conclusion from the State Auditor and Inspector that the bond issue would be legally and financially appropriate.

III. THE OTA HAS IGNORED THE SPECIFIC STATUTORY MANDATE TO USE THE ATTORNEY GENERAL AS BOND COUNSEL FOR ITS BOND ISSUES.

The Council cannot simply "blow by" the concerns and directives of the State's highest elected law enforcement official as if they didn't exist. This is especially so because a specific provision of the Turnpike Enabling Act requires the OTA to use the Attorney General as bond counsel whenever possible. *See* 69 O.S. § 1728 (it is further the intent of the Legislature that in regard to bonds hereafter issued, so far as possible ... the service of the Attorney General be utilized as legal counsel for the Authority). The statutes clearly "establish the following: In regard to bond issues, the Authority must use the Attorney General as legal counsel, so far as possible." *In re: Question Submitted by Chief Engineer Manager, Oklahoma Turnpike Authority, 1987 OK AG 60, ¶4.*

In other words, the legislature has declared that the Attorney General is to act as the OTA's bond counsel to ensure that proposed revenue bond issues do not go forward without Attorney General oversight and approval. The OTA has not used the services of the Attorney General as bond counsel for this proposed bond issue, nor has it shown that the use of the Attorney General would not be possible. With the Attorney General placing such importance on the investigative audit, this means that the OTA is **literally in a legal conflict** with its statutorily mandated bond counsel. A showing that the OTA has used the Attorney General's office as legal counsel for

oversight and approval of its bond issue, or at the very least, a showing from the Attorney General that this is not possible, must be a condition of this Council's approval of any proposed OTA bond issue.

IV. THE OTA HAS NOT COMPLIED WITH THE BOND COUNCIL REQUIREMENT THAT DUE DILIGENCE HAS ACTUALLY BEEN COMPLETED.

A state agency application to the Council for approval of a bond issue must include a “[l]etter from issuer certifying that due diligence has been completed.” See OAC 90:10-3-4 (a)(3)(B). This is a mandate to state agencies to have their “i’s dotted and t’s crossed” before the Council can approve a proposed bond issue. At a minimum, an issuer of municipal bonds has a due diligence responsibility to ensure the accuracy and completeness of the information presented in the issuer’s Official Statement for prospective investors. This is especially critical in the case of a revenue bond issue, such as a turnpike, where the bonds must be repaid from the revenue generated from a fully completed and operating project.

As the OTA’s own ACCESS Oklahoma materials explain, the OTA’s due diligence for a revenue bond turnpike project would include, in addition to the usual matters contained in an Official Statement, substantial environmental studies and revenue bond feasibility studies. Indeed, as the OTA’s Finance Director Wendy Smith explicitly advised the entire OTA Board just a few months prior to the unveiling of ACCESS Oklahoma, a thorough “investment grade study or comprehensive Traffic & Revenue Study of the Authority’s toll revenues” is required “[i]n order to borrow any new money.” See OTA Minutes of Finance Committee Meeting, May 25, 2021, p. 2, Item 799.⁶

This due diligence completion requirement keeps state agencies such as the OTA from issuing financially unsound bonds. It also keeps state agencies such as the OTA from issuing

⁶ Available at <https://www.pikepass.com/pdf/May25-2021-AuthorityMeetingMinutes.pdf>

bonds for substantial capital projects prior to completing needed due diligence, and then discovering, after bonds are already out to investors, that a significant barrier exists to accomplishing the project.

In its due diligence letter, the OTA explicitly admits that its due diligence is still materially unfinished. It has not completed the required investment grade, comprehensive financial feasibility study. It has not even remotely completed any required environmental studies.

To the extent it has done any due diligence, this has not boded well for the feasibility of the OTA's proposed new turnpike alignments. The federal Bureau of Reclamation has already denied the OTA the right to build the South Extension along the "right up against Lake Thunderbird" route the OTA purposely chose as the purportedly most feasible route. 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. *See Bureau Use Authorization Compatibility Evaluation, Oklahoma Turnpike Authority East-West Connector and South Extension, https://www.usbr.gov/gp/otao/use_auth_comp_%20OTA.pdf.*

It is not clear why the OTA still has not sought the Bureau's permission to cross these federal 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. Moreover, in light of the OTA's now serious federal lands problems, we now have no idea where these routes may end up having to go. We therefore have no idea whatsoever whether these routes may be financially, environmentally, or otherwise feasible at all.

CONCLUSION

There remain profound and unresolved concerns about the OTA's legal authority to issue bonds for ACCESS Oklahoma. Given all these unresolved concerns, it is profoundly curious why the OTA is seeking "provisional approval" for a half billion-dollar bond issue at such a clearly premature point in time. Arguably, the Council can issue some kind of rudimentary, "provisional approval" for most any proposed state agency bond issue. In this case, however, the Council must condition even provisional approval upon satisfactory resolution of all the major concerns set forth in this memorandum. Above all, the Council cannot issue any final approval until all these conditions are fully and finally resolved.

Respectfully submitted,



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