

**OBJECTION TO THE OKLAHOMA TURNPIKE AUTHORITY'S REQUEST TO
ISSUE UP TO \$1,175,860,725 SECOND SENIOR REVENUE BONDS, SERIES 2025A**

TO: Oklahoma Council of Bond Oversight

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INTRODUCTION

I represent Pike Off OTA, Inc. d/b/a Oklahomans for Responsible Transportation.

This Council is charged with the task of providing independent, systematic oversight of proposed state agency bond issues, including those proposed by the Oklahoma Turnpike Authority. This memorandum will show that the Authority's proposal to issue over one billion dollars in additional bonds for the ACCESS Oklahoma Program is not in compliance with Oklahoma law or the Authority's Master Trust Indenture Agreement.

Specifically, the OTA's request for approval to issue bonds is not appropriate for the following reasons:

- First, the OTA has not and cannot legitimately comply with Section 715(a)(1) of the Authority's Master Trust Agreement. This Section prohibits the OTA from issuing Second Senior Revenue Bonds for any Turnpike Project, or even building the Turnpike Project in the first place, unless the OTA can legitimately estimate that in the fifth complete bond year following completion of construction of the Project, the annual revenues from the Turnpike Project will at least be equivalent to the annual expenses and reserve maintenance fund deposits required for the Project. In other words, the OTA has to show that a Turnpike

Project will not end up being a long-term money loser. The evidence shows that the OTA has not made this showing, and that it cannot make this showing, in the current highly inflated highway construction cost environment. Indeed, given the OTA's recent revelations that the costs of ACCESS Oklahoma are now estimated to skyrocket from \$5 billion to \$8.5 billion, financial analysis of the three new ACCESS Oklahoma Turnpikes shows that these turnpikes cannot be financed or constructed in compliance with the Master Trust Agreement.¹

- Second, the OTA remains subject to an investigative audit from the State Auditor and Inspector arising from concerns the Oklahoma Attorney General has raised concerning potential OTA wrongdoing, fiscal mismanagement, and noncompliance with the law. These concerns have become amplified in light of the recent revelations of multi-billion dollar cost overruns for ACCESS Oklahoma.
- 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 failed to comply with the “par formula” pricing requirements for its bond issues set forth in 69 O.S. § 1709.
- Fifth, the Oklahoma Supreme Court's 2023 split decision validating the OTA's initial ACCESS Oklahoma bond issue was based upon a “deference to the agency” rationale that the United States Supreme Court correctly discarded in June of 2024. See *Loper Bright Enterprises v. Raimondo*, 144 S. Ct. 2244 (2024). Deference to agency decisions and

¹ The multi-billion dollar cost increases have been well documented in the press. See <https://kfor.com/news/local/ota-blames-inflation-on-3-2-billion-access-oklahoma-overrun/>; https://www.oudaily.com/news/ota-announces-3-billion-budget-increase-for-access-oklahoma-project-council-members-react/article_f320f4a4-a16a-11ef-a4ad-ab6e424bf7b7.html

construction of laws is no longer in order. Courts and oversight bodies such as this Council must exercise full, non-deferential oversight of proposed agency actions.

It is becoming more and more apparent that ACCESS Oklahoma, as currently conceived, is unfeasible and unsustainable. The core systematic oversight obligation of this Council mandates that it cannot provide any provisional or final approval to the OTA for its proposed ACCESS Oklahoma bond issue.²

**THE COUNCIL MUST PROVIDE SYSTEMATIC
OVERSIGHT OF THE OTA’S REQUEST**

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, 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. As the Oklahoma Supreme Court noted in its most recent bond validation decision, “[e]ven 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). Thus, “[t]he Legislature has set up two separate approval processes to construct and finance turnpike projects.” *Matter of Okla. Tpk. Auth.*, 2023 OK 84, fn. 3. The 2023 decision of

² Pike Off does not know at this time whether and what the OTA has actually submitted to the Council in the way of a provisional or final application. Pike Off volunteers have made Open Records Requests for an Application and supporting material over the past couple of weeks, but have not yet received any response or fulfillment to the Requests.

the Oklahoma Supreme Court thus does not provide unlimited *carte blanche* to the OTA for all future ACCESS Oklahoma bond issues.

To the contrary, the Bond Oversight and Reform Act independently mandates that this 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).

I. THE OTA HAS NOT AND CANNOT COMPLY WITH THE REQUIREMENTS OF SECTION 715(A)(1) OF THE OTA'S MASTER TRUST AGREEMENT.

The OTA will no doubt readily acknowledge that all of its bond issues must comply with its own 1989 Master Trust Indenture Agreement. Section 715(a)(1) of the Master Trust Agreement is a bedrock provision. It is clearly designed to protect the state and its citizens from the risk and potentially grave consequences of a financially failing Turnpike System.

Section 715(a)(1) provides in relevant part that

The Authority covenants that it will not incur any Second Senior Indebtedness ... in respect of any Turnpike Project ... unless the Authority can, in addition to satisfying the conditions to the issuance of such Indebtedness contained in Section 209, and it will not otherwise include as part of the Oklahoma Turnpike System any Turnpike Project, unless the Authority can, estimate that the revenues of such Turnpike Project in the fifth complete bond year following the completion of construction or the acquisition of such Turnpike Project and in each bond year thereafter will be not less than the Current Expenses and the deposits to the Reserve Maintenance Fund for such Turnpike Project for each such bond year.

Section 715(a)(1) (emphasis added).

In other words, the OTA must be able to legitimately show that any new Turnpike Project will not be a financial loser in the long term.

In this instance, the OTA has not made, and cannot legitimately make, that required showing. Included with this objection is a memorandum of Cheryl Pierce, a long-term Finance Division and Business Manager of the Oklahoma City Department of Airports. The memorandum of Ms. Pierce outlines the OTA's noncompliance with 715(a)(1) in detail.

The memorandum and supporting spreadsheet also show that in light of the extraordinary, \$3.5 billion cost increases the OTA is now admittedly facing for ACCESS Oklahoma, the OTA cannot comply with the requirements of Section 715(a)(1) for either the East-West Connector, the Tri-City Connector, or the South Extension Turnpike Projects proposed in ACCESS Oklahoma. The Council cannot, consistent with its systematic oversight obligations, approve a request for any turnpike bonds which would provide bond revenue for these three new Turnpike Projects.

It is time for this Council to put up a stop sign up to the OTA. Its increasingly exorbitant plans for ACCESS Oklahoma have become unfeasible. The OTA's current, hasty request for a billion plus dollars in new bonds is clearly a reflex reaction along the lines of "well, if costs have gone up so much, we just need to issue a lot more bonds."

But Section 715(a)(1) forbids this approach. The Master Trust Agreement guards against the OTA merely borrowing its way out of a money losing hole. If revenues aren't enough to pay debt and other expenses, the answer is not to take on more debt expense. Pursuant to the Master Trust Agreement, the answer is not only not to issue any more second senior revenue bonds, but also **not to do the new Projects at all**. If the OTA refuses to look in the mirror and make that decision, this Council must make that decision for it.

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> .

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. Pike Off acknowledges that this Council previously deemed the audit as a matter for disclosure rather than denial, but circumstances have materially changed. The projected costs of ACCESS Oklahoma have ballooned profoundly, and this makes a far more compelling case for this body to hit the pause button on a billion-dollar bond issue request, a pause that would last until such time as the investigative audit is completed.

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). There is no great rush or urgency to issue these bonds. 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 further bond issues 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 PAR FORMULA BOND PRICING REQUIREMENTS OF 69 O.S. § 1709.

69 O.S. 1709(D)(4) provides that turnpike bonds may

Bear interest at a rate or rates that may vary as permitted pursuant to a par formula and for such period or periods of time, all as may be determined by the Authority;

69 O.S. § 1709 (E)(2) defines “par formula” as follows:

"Par formula" means any provision or formula adopted by the Authority to provide for the adjustment, from time to time, of the interest rate or rates borne by any such bonds so that the purchase price of such bonds in the open market would be as close to par as possible.

When construed together, the intent of the provisions is to place some guardrails on the Authority’s pricing of its bonds. The OTA clearly has some discretion in pricing, but the par formula requirement keeps the OTA from pricing its bonds too high, and thus incurring too much long-term interest expense on the payback of its bonds.

Once again, the memorandum of Cheryl Pierce explains in detail how the OTA can and has violated this par formula requirement, both in the recent past, and in the case of its current bond issue request. The OTA’s current request proposes that the bonds may be sold for as much as 140% of the par amount of the bonds. The OTA has not justified how this much of a pricing markup over par would comply with the par formula requirements of 69 O.S. § 1709. This is particularly so now that the costs of ACCESS Oklahoma have skyrocketed, and reigning in interest expenses is even more vital to the long-term sustainability of the OTA’s Turnpike System.

The truth is that the OTA’s proposal does not comply with the par formula requirements of the statute. As such, this Council cannot approve the OTA’s request.

CONCLUSION

The OTA’s proposed bond issue violates the Oklahoma statutes and the OTA’s own Master Trust Agreement in a myriad of ways. This Council cannot approve this bond issue until and unless the OTA submits a proposal that is fully in compliance with the law.

Respectfully submitted,



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