SENATOR JEFF WENTWORTH
SENATE DISTRICT 25

AUSTIN
Capitol Building, Room 1E.9
P. O. Box 12068
Austin, Texas 78711
(512) 463-0125
Toll-Free (888) 824-6984
FAX (512) 463-7794
Dial 711 for Relay Calls

INTERNET E-MAIL
jeff.wentworth@senate.state.tx.us

SAN ANTONIO
1250 N. E. Loop 410, Suite 925
San Antonio, Texas 78209
(210) 826-7800
FAX (210) 826-0571

The Senate of
The State of Texas

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SOUTHERN LEGISLATIVE CONFERENCE
2008 - 2009

PRESIDENT PRO TEM
OF THE TEXAS SENATE
2004 - 2005

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SENATE DISTRICT 25

Bexar (north)	Hays
Comal	Kendall
Guadalupe	Travis (south)

October 19, 2010

The Honorable Greg Abbott
Office of the Attorney General
Attn: Opinion Committee
Post Office Box 12548
Austin, Texas 78711-2548

FILE # ML-46607-10
I.D. # 46607
RQ-0925-GA

RE: Whether the sources of revenue into State Highway Fund 006 for the Texas Department of Transportation (TxDOT), as listed in the General Appropriations Bill for the 2010 – 2011 Biennium (Senate Bill 1), constitute "enacted revenue measures" within the meaning of the language set forth in Article IX, Section 17.10 of Senate Bill 1.

Dear General Abbott:

As chairman of the Select Committee on Veterans Health, I respectfully request an opinion on whether the sources of revenue into State Highway Fund 006 listed in Senate Bill 1, which was passed by the 81st Legislature, signed by the Governor, and made effective September 1, 2009, constitute "enacted revenue measures" within the meaning of the language set forth in Article IX, Section 17.10 of Senate Bill 1.

The 81st Legislature acted to fund rail relocation and improvement efforts in order to help meet one important component of the state's transportation infrastructure needs. The fund was to be set aside out of an existing revenue stream of transportation funding dependent upon a finding of fact by the Texas Comptroller of Public Accounts (Comptroller) that certain accounting thresholds within TxDOT's budget were met. The three-part test for the finding of fact by the Comptroller is contained in Article IX, Section 17.10 of Senate Bill 1.

Over the past 18 months, there has been a lengthy discussion among TxDOT, the Comptroller, several legislators and rail transportation advocates regarding whether the required thresholds have been met. It is my understanding that the issue of whether the Comptroller is able to issue the required finding of fact has come down to the legal interpretation of the term "enacted revenue measures" as it relates to the provisions of Article IX, Section 17.10.

I believe it is clear that the term refers to measures passed by the Legislature that place revenue into State Highway Fund 006, regardless of when such measures were enacted. A review of the legislative history also supports this conclusion. The language in Section 17.10 originated from Senate Bill 1923, as filed by Senator Watson last session, and it is significant to point out that although Senate Bill 1923 required the revenue measures "be enacted by the 81st Legislature" this language was specifically omitted from Section 17.10.

There are several reasons the qualification was removed, the most significant of which, in my opinion, was that the Legislature anticipated declining gas taxes. It seems reasonable to me to take declining gas tax revenues into consideration in calculating the net number generated by the three-part test set forth in Section 17.10, as the intent of this provision was to provide a set aside for rail funding, if, and only if, highway funding had at least the same amount of funding as in the previous biennium. Hence, the requirement that the net calculation required by the test meet the threshold of $182 million dollars, the amount appropriated for rail.

The consideration of the gas tax in this situation is significant for the interpretation of the term "enacted revenue measures." Clearly the gas tax was a revenue measure enacted many years ago by the Legislature, and no increase or decrease in the revenue from the tax would be taken into consideration if the provision's language applied only to "newly" enacted revenue measures, i.e., those enacted by the 81st Legislature. Further bolstering this argument is the fact that the language of Section 17.10 itself qualifies the term "enacted revenue measures" by specifically excluding funds dedicated by a provision of the Texas Constitution enacted in 1946.

I believe that the Legislature's clear and straightforward intent was to set aside money to begin funding the state's rail needs. The merits for beginning this funding process are overwhelming and include increased rail safety, cleaner air,

significant economic savings and substantial positive economic impact. Moreover, Texas voters made a decision in 2005 to create the Rail Relocation and Improvement Fund, and Article IX, Section 17.10 of Senate Bill 1 represents the first time that the Legislature has honored its commitment to the voters to begin addressing this need.

In sum, I believe the plain reading of the words "enacted revenue measures," as well as a reasonable interpretation of the legislative history of this provision, support the conclusion I have reached, which is that the net impact of enacted revenue measures on Fund 006 during the current biennium far exceeds the $182 million dollars referenced in Section 17.10.

I am attaching a supporting letter brief sent to the Comptroller in July by Mr. Tullos Wells of the Lone Star Rail District. I am also attaching the Comptroller's response to that letter. What I believe to be an accurate calculation of the net impact under Section 17.10 is explained in detail in Mr. Wells' letter brief on page two. The letter brief provides further detail on my position and offers additional background on the provisions of Section 17.10 that you may find helpful as you consider my request.

It is my hope that an opinion on the appropriate legal interpretation of the term "enacted revenue measures" will bring to a conclusion the debate over the Comptroller's ability to issue the finding of fact required by Section 17.10, as well as give guidance to the 82nd Legislature when, as is likely, this issue is considered again next session.

I respectfully request an opinion on the foregoing issue. Thank you for your assistance in this matter.

Sincerely,

Jeff Wentworth
Chairman
Senate Committee on Veterans Health, Select

JW/kko

Lone Star Rail District
PO Box 1618
San Marcos, TX 78667

T 512-558-7360
F 512-558-7365
www.LoneStarRail.com

July 7, 2010

The Honorable Susan Combs
Texas Comptroller of Public Accounts
Lyndon B. Johnson State Office Building
111 East 17th Street
Austin, Texas 78774

Re: Finding of Fact Regarding Article IX, Section 17.10 – Allocation of funding for Rail Relocation and Improvement Fund

Dear Comptroller Combs:

Thank you for your continuing efforts and patience in working through the various questions that have arisen relative to whether your office should issue the finding of fact for the allocation of money to the Rail Relocation and Improvement Fund requested pursuant to Section 17.10 in Art. IX-70 of the General Appropriations Bill (S.B. 1) adopted by the Texas Legislature for the 2010 – 2011 Biennium (August 14, 2009 printing). I appreciate your meeting with me several days ago to discuss this issue. Since that time, I have taken a fresh look at the questions surrounding the interpretation of the rider, and considered them in light of applicable law, the legislature's actions and legal analysis that I thought relevant and helpful.

Please consider this the Lone Star Rail District's response to your letter of June 4, 2010. Further review of the language of the rider and the legislative history of its development has led us to request that you consider the following two issues that we respectfully raise in the more detailed brief that follows:

1. The appropriations to HHSC and to TWC are substantively different both in form and in substance from the DMV appropriation that was the subject of the Attorney General's opinion in GAO – 0776. The elimination of the Fund 006 appropriations to these two state agencies in the current biennial budget is precisely and exactly the type of reduction in appropriations from Fund 006 that Section 17.10 (b)(2) intended to capture.

2. A plain reading of Section 17.10(b)(1) should, in our view, result in a determination that the "net impact of enacted revenue measures on incoming revenue of the State Highway Fund" that is not constitutionally dedicated is approximately $1,093,614,158. This number has been left entirely out of previous calculations, and once included, pushes the net increase for the 2010-2011 biennium well over the required $182 million.

Origin and Intent of the Rider

The rider was based on language originally developed by TxDOT, Senator Watson, and Legislative Council, in the preparation of S.B. 1923 which was filed by Senator Watson during the last legislative session. In fact, James Bass from TxDOT testified on C.S.S.B. 1923 before the Senate Committee on Transportation and Homeland Security on March 30, 2009, and that testimony, along with the author's explanation and related questions is consistent with the suggested interpretations of the rider that we are providing, both with respect to diversions from Fund 006 and the net impact of enacted revenue measures to the highway fund. The most pertinent part of Bass' testimony is that the three-part test in C.S.S.B. 1923 is "fair and balanced, bringing in all the parts and funding to the department."

Advocates for rail funding subsequently took the wording from Section 24 of C.S.S.B. 1923 and drafted it in the form of an appropriations bill rider. One substantive change was made to the three-part test set forth in that section. That change was to delete the requirement in the bill that it apply only to "items enacted by the 81st legislature." The draft was then provided to Rep. Ruth Jones McClendon who turned it over to the LBB for their review and preparation of a proposed rider to S.B. 1 when it was debated on the House Floor. LBB made a number of minor changes to the rider on the evening that the House voted to adopt the rider, for the explicit purpose of making sure that the rider was clear and straightforward in its intent, and that the finding of fact test contained in the rider could be easily applied by your office. LBB and TxDOT recommended some further changes to the language after it was adopted in the House version of S.B. 1 that were presented and ultimately adopted by the S.B. 1 Conference Committee.

Rail advocates pursued the strategy and approach contained in the rider because they believed this approach was generally perceived by TxDOT to be a good way to pursue rail funding. We also thought it was easy for a majority of the legislature to understand and support the basic concept behind the rider: the Rail Relocation and Improvement Fund would receive $182 million only after your office issued a finding of fact that there was a net increase of at least that amount available to TxDOT in the 2010-2011 biennium versus the previous budget cycle.

Increased funding for TxDOT provided by the 81st Legislature

There is no dispute that TxDOT received many hundreds of millions of dollars more than the $182 million referenced in the rider when comparing the current biennium to the immediate past biennium. The net amount of additional revenue that is evident in Fund 006 on the face of the appropriations bills for the two respective biennia is a positive $699 million as indicated in the chart below:

	FY 2008-2009			FY 2010-2011			
Other Funds	2008	2009	Total	2010	2011	Total	Difference
State Hwy Fund No. 006, estimated	$2,709,113,559.00	$2,545,320,254.00	$5,248,433,813.00	$2,487,196,960.00	$2,266,926,087.00	$4,754,123,047.00	($494,310,766.00)
State Hwy Fund No. 006 - Medicaid Match, estimated	$41,958,639.00	$0.00	$41,958,639.00				($41,958,639.00)
State Hwy Fund No. 006 - Workforce Client Trans., est.	$6,829,352.00	$0.00	$6,829,352.00				($6,829,352.00)
State Hwy Fund No. 006 -Toll Revenue, estimated	$0.00	$0.00	$0.00	$390,523,564.00	$651,185,148.00	$1,041,708,712.00	$1,041,708,712.00
State Hwy Fund No. 006 - Concession Fees, estimated	$0.00	$0.00	$0.00	$5,000,000.00	$2,000,000.00	$7,000,000.00	$7,000,000.00
Bond Proceeds - State Highway Fund, estimated	$785,293,819.00	$785,232,094.00	$1,570,525,853.00	$766,896,318.00	$456,776,316.00	$1,223,172,634.00	($347,353,219.00)
State Hwy Fund No. 006 - Debt Service, estimated	$125,036,111.00	$205,632,464.00	$330,668,575.00	$350,559,384.00	$481,205,847.00	$831,765,231.00	$501,096,656.00
Totals	$3,672,231,480.00	$3,536,184,752.00	$7,158,416,232.00	$3,999,676,226.00	$3,858,093,398.00	$7,857,769,624.00	$699,353,392.00

Beyond these dollars, the legislature appropriated an additional $1,587,800,000 from the American Recovery and Reinvestment Act for highway and bridge construction (Art. XII-7). All of this money is new money, over and above the dollars that were available in Fund 006 for these precise purposes in the previous biennium. From a very common sense and simple analysis, it is factually true that TxDOT received nearly $2.3 billion ($1,587,800,000 + 699,000,000 = $2,286,800,000) more for highway construction in the current biennium than in the previous one.

This fact alone led almost everyone involved in the debate over the rail funding rider in Section 17.10 to believe that the calculation of the provisions in the rider would meet the test required for the finding of fact. Simply put, the issue for policymakers as they considered their vote on this matter was whether to allocate the next $182 million that was available for highway construction to the rail fund, using the 2009-2010 biennium as the baseline. Certainly every one of the legislators that served on the S.B. 1 Conference Committee appeared to believe that if the rider were included in the final bill, and not redlined by the Governor, that the Rail Relocation and Improvement Fund would receive this $182 million.

Net Impact Determination

Of course, we recognize that the rider specifically includes and excludes some of the revenue flowing into Fund 006, and into TxDOT, and requires a "net impact" determination in accordance with its provisions. There is no provision, for example, that would appear to include the more than $1.5 billion flowing to TxDOT for highways through the American Recovery and Reinvestment Act. And, we certainly acknowledge that your office is bound by the provisions contained in the rider, not the simple, common sense analysis set forth above.

But we respectfully submit that the legislature's intent and understanding of this issue does have value, especially as your office seeks to determine the meaning of the words in Section 17.10, if you believe there is a close call or other ambiguity contained therein. This is especially true, we believe, in a situation authorizing an allocation of funds that have already been appropriated, and that will be spent regardless, versus a situation where the question is whether to authorize the expenditure or appropriation of funds at all.

Turning to the actual words and the interpretation of those words in Section 17.10, you are very familiar with the three-part test set forth in the rider. These provisions are found in Section (b) of the rider, and there is language in part (b) that has been regularly omitted from the summary worksheets that have served as the basis for our discussions. The omitted language refers to excluding constitutionally dedicated funds from the calculations required by the test, and it is meaningful because it makes it clear that the legislature gave some specific consideration to what should be included and excluded from the calculation.

Initially, our own worksheets and those of the comptroller's office staff with whom we visited exceeded the $182 million threshold required for certification. We did not challenge the underlying calculations at this time since we believed that the result was sufficient for the issuance of a finding of fact in support of the rider. In particular, we did not challenge the assumption that there were no "enacted revenue measures" affecting the calculation of part one of the test found in Section 17.10(b)(1). We simply did not focus on this at the time because we assumed that it would be irrelevant to the outcome.

Department of Motor Vehicles

Subsequently, we learned that your office felt that it was unclear whether the transfer of funds to the Department of Motor Vehicles (DMV) should be treated as a reduction in appropriations to TxDOT from Fund 006 under part (b)(2) of the rider. Ultimately this matter was resolved by the Attorney General in GA-0776, which concluded that the transfers to DMV did not constitute an appropriation to DMV. His decision was correct in our opinion for several reasons, and resulted in the return of approximately $75 million to the plus side of the net impact calculation pushing the net number back over $182 million once again.

HHSC/TWC

We then were informed that your office had reversed its earlier conclusion that two other items (HHSC and TWC) met the definition of a "reduction in appropriations made from the State Highway Fund to state agencies other than the Department of Transportation". (This again, is the test set forth in (b)(2) of the rider, which was the focus of most of our discussions up to this point.) HHSC received $73.9 million and TWC received $6.8 million from Fund 006 in the 2008-2009 biennium, but did not receive these amounts from Fund 006 in the current biennium. We respectfully ask that your office support its original conclusion as reflected in the worksheet you shared with us when we met with you in your office on August 26, 2009, for the following reasons:

1. *Excluding the HHSC and TWC items as gains under (b)(2) is inconsistent with the substance over form interpretation you have applied to all of the other provisions of the rider.* Aside from the legal question of whether these dollars were appropriated to TxDOT or to the respective agencies, it is obvious and not in dispute that the riders to HHSC and TWC were diversions from Fund 006 of exactly and precisely the nature that has attracted so much attention over the past many years. These dollars were not available to TxDOT in the 2008-2009 biennium, and they were used for purposes that would not have been funded by TxDOT or through Fund 006. These dollars are now available to TxDOT. The underlying programs are now being paid for by General Revenue and Medicaid matching funds through the HHSC and TWC budget patterns. *These two items are precisely and exactly the types of reductions in appropriations from Fund 006 that the legislature intended to capture with the language of (b)(2).*

2. A very literal reading of Section 17.10 would be necessary to reach a contrary conclusion. If the same form over substance and literal analysis was applied to other parts of the rider, it would be necessary, for example, to conclude that since the primary operative word in (b)(1) is "net impact", in (b)(2) is "gain" and in (b)(3) is "loss", we should then consider, for example, only gains under (b)(2) and only losses under (b)(3). Instead, everyone involved has calculated the *net impact* of reductions in appropriations under (b)(2) and would presumably include increases in appropriations under (b)(3). In fact, on the worksheet your staff shared with us most recently, there are several items that are included as *losses* under (b)(2) as the result of increases in appropriations to state agencies other than TxDOT – not just *gains from reductions in appropriations* as stated in the rider.

3. If we were to eliminate the losses to TxDOT that are reflected as negative numbers under part (b)(2) of the test, that would limit the calculation to the gains made from a reduction in appropriations, just like the rider says. Such an approach makes no sense, and we are not recommending it; although we would note that there would never have been any opportunity for dispute over the transfer of money from TxDOT to DMV under a literal reading of part (b)(2) of the rider. We believe that the entire point of the rider is to determine on a net basis whether TxDOT has more money for highways in this biennium than in the previous one. Substance over form and giving the legislature's language its intended meaning is the better approach.

4. *Furthermore, there is a clear distinction between the HHSC/TWC items, and the transfer of duties and funds to the DMV.* The HHSC and TWC appropriations were made effective immediately upon the effective date of the appropriations act, and the funds were appropriated to the two agencies at the start of the state fiscal biennium. No part of the funding provided to HHSC/TWC by the 2008-2009 rider was related to functions or personnel that TxDOT was previously providing or paying for. These were new expenditures, required by new legislation, for services not previously paid for by the state or through Fund 006.

5. In contrast, the DMV funding was found by the Attorney General to be an appropriation of funds to TxDOT, followed by a later transfer of funds to DMV, assuming that certain conditions were met, approved by the LBB, and that the personnel and functions associated with the funding was also transferred at the same time. Our conclusion is that the HHSC and TWC items should be treated as a gain under part (b)(2) of the test both as a matter of substance over form, and because of actual and significant differences between these items and the DMV transfer.

Net Impact of Enacted Revenue Measures

It may, however, be unnecessary to revisit your decision on the HHSC and TWC expenditures. We believe the answer as to whether you should make a finding of fact regarding the $182 million may best be determined by focusing on the meaning of part (1) of the test set forth in Section 17.10(b). Stated differently, the key question is what portion of the almost $2.3 billion of additional funding (net) received by TxDOT counts toward the net impact calculation required by the Section 17.10 rider. The specific language of Section (b)(1) is:

"the net impact of enacted revenue measures on incoming revenue of the State Highway Fund that is not dedicated under Article 8, Section 7-a of the Texas Constitution".

We offer the following observations about this language:

Net Impact

1. The term "net impact" would appear to mean that both gains and losses to the State Highway Fund are to be taken into consideration. As noted above, Section (b)(2) specifies that it applies to a "gain", and Section (b)(3) specifies that it applies to a "loss", but everyone is interpreting them to mean net impact. Since (b)(1) actually says net impact, the logical conclusion is that (b)(1) applies to both gains and losses.

2. The term "net impact" is clearly intended to require a comparison of incoming revenue to Fund 006 between the 2008-2009 biennium and the 2010-2011 biennium.

Enacted Revenue Measures

3. The next and most obvious question is what is an "enacted revenue measure"? Nothing in Texas statutes, case law or Attorney General opinions appears to clarify this term, so we are left with the plain meaning of the words. Our conclusion is that an enacted revenue measure is a provision passed by the legislature which becomes law, and results in the deposit of revenue into Fund 006.

4. The provision does not specify "newly" enacted revenue measures, and we therefore conclude that it means enacted revenue measures that result in increases or decreases of funds into Fund 006, regardless of when such measures were enacted. We can find no legislative intent or other basis to impute words restricting this provision to newly enacted measures. Further supporting this conclusion is the specific omission of language from S.B. 1923 that would have limited revenue measures to those "enacted by the 81st Legislature."

5. Indeed, the legislature does qualify the term "enacted revenue measure" by specifically excluding money that is dedicated for particular purposes by Article 8, Section 7-a of the Constitution. Section 17.10(d) restates and broadens this provision, stating that no money should be included in the calculation that is "dedicated for particular purposes by the constitution of this state." Article 8, Section 7-a, refers to motor vehicle registration fees, and taxes on motor fuels and lubricants. This section was added to the constitution on November 5, 1946. It is certainly not "newly" enacted, but is purposefully excluded from the calculation.

Incoming Revenue

6. The exclusion of specific enacted revenue measures (those dedicated by the constitution) can only mean that all other enacted revenue measures that are not dedicated by the constitution are to be included in the calculation of incoming revenue required by part (b)(1) of the test.

7. Determining the net impact of enacted revenue measures is consistent with the concept of the rider, and with the specific language in parts (2) and (3) of section (b). The whole point of the rider is to determine if TxDOT has more or less money available for highway construction (i.e. for the dedicated funding purposes of Fund 006) from Fund 006 and other sources provided to it such as General Revenue between the 2008-2009 biennium and the 2010-2011 biennium.

8. The exclusion of constitutionally dedicated revenue is also consistent with the fact that the money to be transferred by the rider is for rail, a purpose that has generally been considered not to fall within the permissible uses of constitutional provisions dedicating certain Fund 006 dollars to highway construction, maintenance and safety.

9. The provision is also consistent with the underlying concept of SB 1923 by Watson, filed during the 2009 legislative session, which served as a starting point for the construction of Section

17.10. That legislation sought to transfer the non-constitutionally dedicated revenue that was deposited into Fund 006 to the Rail Relocation and Improvement Fund. The amount of these non-constitutionally dedicated revenue measures was estimated to be about $91 million per year, and that is where the $182 million amount in Section 17.10 came from.

10. Again, the whole point of the legislation, and of the rider, was to provide $182 million to fund rail from certain enacted revenue measures (the non-constitutionally dedicated ones), if TxDOT would have at least the same amount of money for highways as in the previous biennium, after funding the rider. It was TxDOT itself, working with Sen. Watson that came up with this approach. The rider is not identical to the legislation. Most notably the legislation would have created a permanent funding stream for the Rail Relocation and Improvement Fund, rather than a one-time transfer of money as with S.B. 1, but there is a relationship between the legislation and the rider which is helpful in understanding the language of the rider as noted above.

Net Impact on Incoming Revenue Excluding Constitutionally Dedicated Revenue

11. The exclusion of constitutionally dedicated funds from the calculation means that the net impact of 27 enacted revenue measures must be taken into consideration in determining net impact between biennia. A list of these measures found in S.B. 1923 is included in Appendix A. The total of these non-constitutionally dedicated dollars flowing into Fund 006 appears to be included in the appropriations bill under Method of Financing, Other Funds, State Highway Fund No. 006, estimated (page VII-21).

12. Several other items listed under Other Funds on page VII-21 of S.B. 1 are the result of enacted revenue measures. These are summarized in the chart on page 2 of this letter, along with the net impact between the last and current biennia. Excluding line 1 of the chart, which consists primarily of constitutionally dedicated funds, results in a net increase of funds from enacted revenue measures between biennia of $1,093,614,158. This number would have to be reduced or increased by the gain or loss in non-constitutionally dedicated funds listed in Appendix A that appear to be included in line 1 of the Other Funds estimate for Fund 006.

13. The general appropriations act for the 2010-2011 biennium, Section VII-21, which is itself an "enacted revenue measure" makes specific reference in the first five items of appropriation that these funds are for Fund 006. There can be no question that the Legislature appropriated these funds to Fund 006.

14. By way of example, Transportation Code Section 228.005 provides that "toll revenue or other revenue" from a toll project or system that is collected or received by the department "shall be deposited in the state highway fund." This provision is an "enacted revenue measure" within the meaning of Section 17.10, is not excluded as being constitutionally dedicated, and totals an estimated $1,041,708,712 for the current biennium.

15. This more than one billion dollar net increase for TxDOT from all of the funding sources required to be included in the Section 17.10 calculation obviously does not include the almost $1.6 billion

of additional dollars that TxDOT received from the American Recovery and Reinvestment Act, as the inclusion of those dollars does not appear to be contemplated by any language in the rider.

If your office concludes that the various line items resulting in revenue being deposited into Fund 006 do not constitute "enacted revenue measures", we would respectfully ask you to allow us to further brief that specific point, or to seek guidance from the Attorney General through the opinion process. Many arguments might be raised on this matter, but we believe they can be readily dismissed.

Throughout this process you and your staff have been very open and transparent, working collaboratively with interested parties to determine whether you should issue a finding of fact. In that spirit, we would further request that you provide an opportunity to explain our argument in more detail if you disagree with the points we have outlined above, or have other questions. The legislature's decision to include this rider in the final appropriations bill was a major victory for dozens of communities throughout Texas where rail expenditures are critically important to safety, cleaner air and more efficient transportation.

Policymakers in the legislature and at TxDOT recognize that rail is an integral component of the state's transportation infrastructure. Allocating $182 million out of the more than $16 billion appropriated to TxDOT in the current biennium is a small but very important step for expanding rail funding, and it is consistent with the voters' approval of the Rail Relocation and Improvement Fund in 2005. The legislature's intent to fund this rider under certain conditions was met many times over and a plain reading of the words in Section 17.10 are sufficient to interpret the rider consistent with that legislative intent.

Thank you again for your consideration.

Sincerely yours,

Lone Star Rail District

By: _____
J. Tullos Wells

cc: Senator Jeff Wentworth
Senator John Carona
Senator Wendy Davis
Senator Kirk Watson
Representative Ruth Jones McClendon
Mr. Sid Covington

Appendix A

Revenue Measures Deposited into Fund 006 that are not Constitutionally Dedicated

Transportation Code:	SUB SECTION
SECTION 3. Subsection (d), Section 501.097	APPLICATION FOR NONREPAIRABLE VEHICLE TITLE OR SALVAGE VEHICLE TITLE
SECTION 4. Subsection (e), Section 501.100	APPLICATION FOR REGULAR CERTIFICATE OF TITLE FOR SALVAGE VEHICLE
SECTION 5. Subsection (a), Section 501.134	LOST OR DESTROYED CERTIFICATE OF TITLE
SECTION 6. Subsection (c), Section 501.138	COLLECTION AND DISPOSITION OF FEES
SECTION 7. Section 502.008	RELEASE OF INFORMATION IN VEHICLE REGISTRATION RECORDS
SECTION 8. Subsection (b), Section 502.179	DUPLICATE REGISTRATION RECEIPT
SECTION 9. Subsection (d), Section 503.007	FEES FOR GENERAL DISTINGUISHING NUMBER
SECTION 9. Subsection (d), Section 503.007	FEES FOR GENERAL DISTINGUISHING NUMBER
SECTION 9. Subsection (d), Section 503.007	FEES FOR GENERAL DISTINGUISHING NUMBER
SECTION 10. Subsection (d), Section 503.008	FEES FOR LICENSE PLATES
SECTION 10. Subsection (d), Section 503.008	FEES FOR LICENSE PLATES
SECTION 10. Subsection (d), Section 503.008	FEES FOR LICENSE PLATES
SECTION 11. Subsection (f), Section 503.0615	PERSONALIZED PRESTIGE DEALER'S LICENSE PLATES
SECTION 11. Subsection (f), Section 503.0615	PERSONALIZED PRESTIGE DEALER'S LICENSE PLATES
SECTION 12. Subsection (a), Section 621.353	DISTRIBUTION OF FEE FOR PERMIT FOR EXCESS WEIGHT
SECTION 13. Subsection (c), Section 623.0111	ADDITIONAL FEE FOR OPERATION OF VEHICLE UNDER PERMIT
SECTION 14. Subsections (a-1) and (c), Section 623.076	PERMIT FEE
SECTION 14. Subsections (a-1) and (c), Section 623.076	PERMIT FEE
SECTION 14. Subsections (a-1) and (c), Section 623.076	PERMIT FEE
SECTION 14. Subsections (a-1) and (c), Section 623.076	PERMIT FEE
SECTION 14. Subsections (a-1) and (c), Section 623.076	PERMIT FEE
SECTION 15. Subsection (b), Section 623.077	HIGHWAY MAINTENANCE FEE
SECTION 16. Subsection (a), Section 623.096	PERMIT FEE
SECTION 17. Subsection (b), Section 623.124	FEE
SECTION 18. Section 623.147	DEPOSIT OF FEE IN STATE HIGHWAY FUND
Occupations Code	
SECTION 19. Section 2301.156	DEPOSIT OF REVENUE
SECTION 20. Subsection (d), Section 2301.264	LICENSE FEES

TEXAS COMPTROLLER *of* PUBLIC ACCOUNTS

SUSAN COMBS

July 28, 2010

Mr. J. Tullos Wells
Lone Star Rail District
P.O. Box 1618
San Marcos, Texas 78667-1618

Dear Mr. Wells:

Thank you for your letter dated July 7, 2010, in which you make additional arguments regarding the finding of fact authorized by Section 17.10 of the General Appropriations Act for the 2010-2011 biennium. [Section 17.10, Art. IX, Senate Bill 1, 81st Legislature R.S.] My June 4, 2010, letter to William Bingham concluded that my office cannot make the finding of fact because the required conditions have not occurred. Significantly, in reaching this conclusion, my office determined that funds provided to the Health and Human Services Commission (HHSC) and to the Texas Workforce Commission (TWC) were not appropriations.

Your letter raises two arguments in urging that my office reconsider its position on the finding of fact. First, you assert that the HHSC and TWC funds are different both in form and in substance from the Department of Motor Vehicles (DMV) appropriation that was the subject of Attorney General's Opinion GA-0776 (2010) such that these appropriations may be treated differently for purposes of Section 17.10. Second, you claim that a plain reading of the text of Section 17.10(b)(1) that calculates the "net impact of enacted revenue measures on incoming revenue of the State Highway Fund" should include the increase in appropriations to the Texas Department of Transportation (TxDOT) from fiscal 2008-2009 to fiscal 2010-2011 resulting in a total impact of $1,093,614,158 under Section 17.10(b)(1).

As to your first argument that appropriations to HHSC and to the TWC are different from the DMV appropriation, we find nothing in your additional arguments that dissuades us from our initial conclusion that the HHSC and TWC riders were in all material respect the same as the DMV rider; i.e., if the DMV rider was not an appropriation, there was no way to conclude that the HHSC and TWC transfers were appropriations under Section 17.10. You argue that the HHSC and TWC riders are clearly distinguishable from the transfer of duties and funds to DMV. In finding a distinction, you argue that the "HHSC and TWC appropriations were made effective immediately upon the effective date of the appropriations act and that the funds were appropriated to the two agencies at the start of the fiscal biennium." You add that no part of the funding provided to HHSC/TWC by the 2008-2009 rider was related to functions or personnel that TxDOT was previously providing or paying for. You go on to argue that "in contrast, the DMV funding was found by the Attorney General to be an appropriation of funds to TxDOT, followed by a later transfer of funds to DMV, assuming that certain conditions were met, approved by the LBB, and that the personnel and functions associated with the funding was also transferred at the same time."

Assuming these matters are true, there is no indication from the plain language of the rider that these factual distinctions are relevant in deciding how any particular transfer of funds should be evaluated under Section 17.10(b)(2). What is significant to our evaluation of this issue is the fact that the HHSC and TWC transfer riders read very similarly to the DMV transfer rider; consequently we have concluded that they should be treated consistently. To consider other extraneous facts regarding the actual transfer of funds or personnel goes beyond the plain language of the rider.

In the second argument in your letter, you claim that the reference in Section 17.10(b)(1) to "the net impact of enacted revenue measures on incoming revenue of the State Highway Fund" should somehow include the increase in appropriation levels reflected in the TxDOT Method of Finance for "Other Funds" from fiscal 2008-2009 to fiscal 2010-2011. In our analysis of Section 17.10(b)(1), in construing the "net impact of enacted revenue measures," we actually tried to determine whether there was any legislation that either created or increased a tax or fee which resulted in additional revenues to TxDOT.

The phrase "revenue measures" has been used in court opinions and Attorney General's opinions to refer to legislative enactments that generally create or increase a fee or tax for the purpose of raising revenue and not for a regulatory purpose. (*Hurt v. Cooper*, 110 S.W.2d 896 (Tex. 1937); *Center for Auto Safety v. Athey*, 37 F.3d 139 (4th Cir. 1994); Op. Tex. Att'y Gen. Nos. JC-93 (1999), M-370 (1969), M-443 (1969), WW-1482(1962), WW-714 (1959), WW-694 (1959)). We construed the phrase "enacted revenue measures" consistently with the references in these court cases and Attorney General's opinions. Your reference to the increase in the level of TxDOT appropriations for the fiscal 2010-2011 biennium over the fiscal 2008-2009 biennium does not tell us whether any revenue measures are responsible for this increase, nor does it identify any revenue measures that may have resulted in these increases. The Section 17.10(b)(1) test focuses on the enactment of additional revenue measures and not on the increase in appropriations levels. Consequently, I see no reason to change our conclusion based on this argument.

I appreciate your further input regarding this issue.

Sincerely,

Susan Combs

cc: The Honorable Jeff Wentworth
The Honorable John Carona
The Honorable Wendy Davis
The Honorable Ruth Jones McClendon