



September 30, 2013

Leslie Rogers, Regional Administrator  
Federal Transit Administration, Region IX  
201 Mission Street, Suite 2210  
San Francisco, California 94105

Re: FTA Application  
Alameda-Contra Costa Transit District  
Job Access and Reverse Commute  
Operating Assistance  
CA-37-X187

Dear Mr. Rogers:

This is in reply to the request from your office that we review the above-captioned application for a grant under section 13(c) of the Urban Mass Transportation Act, 49 U.S.C. § 1609(c) (1964), now codified as part of the Federal Transit Act, 49 U.S.C. § 5333(b).

This is the Department of Labor's (Department or DOL) final determination of Alameda-Contra Costa Transit District's (ACTD's) ability to preserve and continue, consistent with section 13(c), the pension benefits and collective bargaining rights of its employees represented by the Amalgamated Transit Union (ATU) Local 192 (ATU or Union).

Federal Transit law requires as a condition of financial assistance that the interests of employees affected by the assistance be protected under arrangements the Secretary of Labor certifies are fair and equitable, 49 U.S.C. § 5333(b)(1). The law specifically provides:

Arrangements . . . shall include such provisions as may be necessary for

- (1) the preservation of rights, privileges, and benefits (including continuation of pension rights and benefits) under existing collective bargaining agreements or otherwise;
- (2) the continuation of collective bargaining rights;
- (3) the protection of individual employees against a worsening of their positions with respect to their employment;

- (4) assurances of employment to employees of acquired mass transportation systems and priority of reemployment of employees terminated or laid off; and
- (5) paid training or retraining programs.

49 U.S.C. § 5333(b)(2).<sup>1</sup> These arrangements are commonly referred to as section 13(c) agreements because the requirement for such arrangements originated in section 13(c) of the Urban Mass Transportation Act of 1964, 78 Stat. 307. Because the Secretary of Labor's certification is a "condition" for the award of a grant, the Secretary must certify the protective arrangements before the Department of Transportation can award funds to grantees. 73 Fed. Reg. 47,046, 47,047 (Aug. 13, 2008) (preamble to current DOL Guidelines).

In exercising the Department's discretion to ensure fair and equitable protective arrangements in compliance with section 13(c), the Department has reviewed California's Public Employee Pension Reform Act (PEPRA), Assembly Bill 340, (Furutani), Stats. 2012, Chapter 296, West's Ann.Cal.Gov.Code § 7522, et seq., in consultation with the State of California's Office of the Governor, and the State's Labor and Workforce Development Agency with respect to the precise contours of the statute.<sup>2</sup> The Department has also reviewed the relevant collective bargaining agreement, pension plan, and briefs and supporting materials provided by ACTD and the Union to determine the effects of PEPRA on rights protected by section 13(c). We have concluded that PEPRA makes significant changes to pension benefits that are inconsistent with section 13(c)(1)'s mandate to preserve pension benefits under existing collective bargaining agreements and section 13(c)(2)'s mandate to ensure continuation of collective bargaining rights. Thus, PEPRA precludes the Department from providing the requisite certification to the Federal Transit Authority.<sup>3</sup>

### Background – State Law Change to Collective Bargaining Rights

On September 12, 2012, Governor Edmund G. Brown, Jr. signed into California law PEPRA and related pension reform changes. These statutory provisions became effective on January 1, 2013. PEPRA applies to most

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<sup>1</sup> Note the text of the statute was codified from this earlier version in 1994 to separate the fourth assurance into two separate and lettered paragraphs.

<sup>2</sup> Along with the Department's independent review of PEPRA, attorneys from these California state government offices provided the Department with a useful summary of the PEPRA provisions, which the Department relied upon.

<sup>3</sup> This denial of certification is issued without prejudice to ACTD's right to seek or obtain certification under changed circumstances.

California transit systems.<sup>4</sup> PEPRA's practical and legal effect on the employees of transit agencies depends on each union's separately negotiated collective bargaining agreement and the type of pension plan in which the employees participate.<sup>5</sup> In general, PEPRA is immediately effective for employees hired on or after January 1, 2013. These employees are termed "new" employees or, when referring to their participation in any type of a public retirement system or plan, "new" members. PEPRA Article 4, Section 7522.04(e) and (f). For the purpose of this determination, DOL adopts the term "classic," as used by the California Public Employee Retirement System, for all those employees who do not meet the definition of "new." PEPRA introduces a two-tier pension benefit system for these two classes of employees. *Id.*

PEPRA ultimately determines the pension contributions and every significant aspect of the pension benefit calculation for "new" employees. It controls the benefit formula (i.e., percent multiplier of final compensation at various years of service), the definition of compensation used to determine the pension benefit ("pensionable compensation"), and the minimum age for receipt of a pension; it imposes a cap on the amount of final compensation that can be used in the pension benefit determination, and requires "new" employees to pay 50 percent of normal pension costs. Additionally, "new" employees are not eligible to participate in supplemental defined benefit plans. PEPRA Article 4, Sections 7522.10, 7522.20, 7522.32, 7522.34(c), 7522.18(c).

PEPRA also affects the rights of "classic" employees. As of January 1, 2018, PEPRA authorizes employers to set "classic" employees' contribution level at 50 percent of the normal cost of pension benefits after bargaining to impasse, restricted only by a cap set forth in Section 31631.5(a)(1).

### Procedural Background

The section 13(c) process begins when the DOL receives a copy of an application for Federal assistance along with a request for certification of employee protective arrangements from the Department of Transportation. Upon receipt of an application involving employees represented by a labor organization, DOL refers a copy of the application to that organization and notifies the applicant of the referral. After referral and notice, DOL

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<sup>4</sup> Those operated by charter cities and charter counties not participating in the California Public Employees Retirement System (CalPERS) or the 1937 Act County Requirement System and those operated by the University of California are not affected. In addition, transit systems that use private contractors for the operation of all service and vehicle maintenance, as well as other supporting functions, are not affected. PEPRA Article 4, Section 7522.02(a)(2).

<sup>5</sup> PEPRA's effect on employees of transit agencies also depends on whether the pension plan falls under either CalPERS, the 1937 County Act Systems, or can be defined as an "independent" plan, as is the case with the ACTD-ATU Local 265 plan.

recommends the terms and conditions that are to serve as the basis for certification. The DOL's implementing Guidelines (Guidelines) reflect the practice that the previously certified protective arrangement is appropriate for application to the new grant. Therefore, DOL's referral will propose certification based on those terms and conditions. 29 C.F.R. § 215.3(b)(2).

Under DOL's implementing Guidelines, applicants and unions/employees may file "objections" to the terms of a proposed certification within fifteen days. DOL must then determine whether the objections are "sufficient," i.e., "raise[] material issues that may require alternative employee protections" or "concern[] changes in legal or factual circumstances that may materially affect the rights or interests of employees." 29 C.F.R. § 215.3(d). More specifically the Guidelines provide that the parties may "submit objections, if any, to the referred terms," while, at the same time, the parties are "encouraged" to arrive at "a mutually agreeable solution to objections any party has to the terms and conditions of referral." 29 C.F.R. § 215.3(d)(1).

The ATU objected to the proposed terms for employee protection certification contained in the Department's referral for the above-referenced grant on August 26, 2013. The Union stated that PEPRA appears to have removed mandatory and traditional subjects of collective bargaining from the consideration of the parties and prevents the continuation of collective bargaining rights of employees. The Union also stated that among other mandates, PEPRA will impermissibly require participating employers to unilaterally implement changes to retirement benefits without first bargaining with their employee representatives by:

- Raising the minimum retirement ages;
- Reducing pension benefits for new public employees;
- Imposing new formulas for calculating pensions for new public employees;
- Imposing a definition of "final compensation";
- Fixing the vesting schedule, and
- Adjusting the compensation cap annually and requiring certain contributions from employees to equal one-half of the normal costs of the plan.

Letter from Jessica M. Chu to Michael J. Hayes (August 26, 2013), "Objections to Referral Terms".

The Department reviewed the Union's objections concerning PEPRA and found the objections sufficient. On September 4, 2013, the Department communicated to the parties that PEPRA appeared to have removed mandatory and traditional subjects of collective bargaining from the consideration of the

parties and to have prevented the continuation of collective bargaining rights of employees. 49 U.S.C. § 5333(B)(2)(b). The Department determined that PEPRA constitutes a change in legal or factual circumstances that may materially affect the rights or interests of employees represented by the unions. See 29 C.F.R. § 215.3(d)(3)(ii).

The parties were directed to brief specified issues under a Briefing Schedule provided by the Department on September 4, 2013.<sup>6</sup> The issues appear as an appendix to this decision. The Department determined and notified the parties at that time that an interim certification of the grants would not be issued because PEPRA might present circumstances inconsistent with section 13(c). The Union and ACTD submitted their briefs and supplemental materials on September 19, 2013.<sup>7</sup>

### ACTD Pension Benefits

The AC Transit Employees' Retirement Plan (Plan) is an independent plan that was established by California Public Utilities Code §§ 25301-25306 and by local ordinance. See *ATU Br.* at 1 and *ACTD Br.* at 2. The Plan, which is incorporated by reference in the CBA, sets forth the pension benefits of the ATU-represented ACTD employees. See *ATU Br.*, Exhs. 1 and 2. The CBA provides that any amendment to the Plan must be collectively bargained and that no amendment will apply to a represented employee without the ATU's consent. See *ATU Br.*, p. 1 & Exh. 2. ATU asserted and ACTD did not dispute that ACTD amended the Plan without the ATU's consent on February 27, 2013. See *ATU Br.*, p. 2 & Exh. 3.

Leaving aside the Plan amendments ACTD made on February 27, 2013, the validity of which is disputed by the parties, the Plan provides that no ACTD employees were "required or permitted" to make contributions to the plan. See *ATU Br.*, p. 2 & Exhs. 2 (Collective Bargaining Agreement ("CBA"), at §9.4) and 5 (Summary Plan Description ("SPD") at 1). The Plan states that the employer, ACTD, made all contributions to fund the pension benefits. See *ATU Br.*, Exh. 5

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<sup>6</sup> The Department did not send the parties to negotiations. In its September 4, 2013 letter, the Department wrote, "In several other situations the Department convened negotiations and/or discussions between objecting union(s) and the affected transit agency to seek a mutually acceptable resolution of the issues concerning the preservation of pension rights and benefits and the continuation of collective bargaining rights in the face of PEPRA. Although the parties cooperated with each other and the Department and devoted considerable time and effort to find solutions, such was not fruitful." Consequently, as prior proceedings have indicated that PEPRA's broad scope leaves few or no opportunities for a negotiated solution the Department found that negotiations were not "appropriate" in this instance. 29 C.F.R. 215.2(d)(6)

<sup>7</sup> ATU entitled their response *Brief of ATU Local 192* ("*ATU Br.*") while ACTD's response was in the form of a letter to the Department ("*ACTD Br.*").

(SPD at 1). Under the Plan, ATU-represented employees became eligible for pension benefits at age 55 if they have at least 8 years of service. See *ATU Br.*, p. 2 & Exh. 5 (2010 Pension Summary at end of exhibit). The formula under the Plan provides for monthly pension benefits that start at 2.0 percent of monthly average earnings multiplied by the employee's years of service, then increase to 2.25 percent when the employee reaches age 60, and increase again to 2.5 percent when the employee reaches age 65. See *ATU Br.*, p. 2 & Exh. 5 (the 2010 Pension Summary at the end of the Exhibit); *ACTD Br.*, Attachment 1, at page 3. Additionally, in calculating pensionable compensation, the Plan permits the inclusion of payouts of overtime, up to two weeks of cashed in "casual vacation time" per calendar year, and specific other payments by ACTD on behalf of the employee.<sup>8</sup> See *ATU Br.*, p. 2 & Exh. 5 (SPD at 3). Pensionable compensation under the Plan is based on the employee's highest consecutive 3-year period of compensation. *ATU Br.*, p. 2 & Exh. 5 (the 2010 Pension Summary at the end of the Exhibit).

ACTD has taken steps to implement PEPRA as it relates to "new" employees. At a February 27, 2013 meeting of the ACTD's Board of Directors, ACTD passed a resolution to make several amendments to the Plan for the stated purpose of having the Plan's provisions, especially regarding "new" employees hired after January 1, 2013, comply with PEPRA. *ATU Br.* at 2 & Exh. 3 (ACTD Resolution No. 13-006 with, as Attachment A, Plan Amendment 13-A-16); *ACTD Br.*, Attachment 1 at 3-4 (chart showing benefit formulas for new employees that are consistent with the amendments made to Plan to conform with PEPRA). Since those amendments were made, ACTD has deducted 6 percent from "new" employees' wages to contribute to their pension benefits. See *ATU Br.* at 2. Based on the 2013 Plan amendments, this is apparently consistent with PEPRA's requirement that new employees pay 50% of the cost of paying for their pension benefit. See *ATU Br.*, Exhibit 3, Plan Amendment 13-A-16 at 4-5.

#### Position of ACTD

The Department has carefully reviewed ACTD's brief. In response to the Department's briefing order ACTD provided relevant and informative data with regard to the collective bargaining agreement and the Pension Plan. The brief did not discuss the interplay of PEPRA with 13(c) or draw conclusions as to whether certification was consistent with the statute or judicial case law. ACTD has consistently maintained that its grants should be certified because even after the enactment of PEPRA, ACTD and its unions are not precluded from "bargaining on a wide range of pension issues." *ACTD Br.* at 1.

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<sup>8</sup> The "other monies" are amounts contributed by the employee or ACTD to the employee's deferred compensation plan, sick leave amounts rolled over or transferred on the employee's deferred compensation plan, and compensation paid by the ATU while the employee was on leave to work for the union. See *ATU Br.* at Exh. 5 (SPD at 3).

Position of the ATU

The Department has carefully reviewed the Union's objections and brief, along with its attached exhibits. The Union asserts that PEPRA violates section 13(c)(1) by making substantial unilateral changes to pension benefits under the current collective bargaining agreement and violates section 13(c)(2) by significantly restricting the scope of bargaining over pensions. The Union states:

[PEPRA] has thus stripped ATU and other unions representing transit employees of the right to negotiate over any of these critical aspects of their pension benefits. Indeed, the parties can no longer negotiate the benefit formula, definition of final compensation, applicability of the formula to past and/or future service, the employer pick-up, or other benefit features, effectively putting an end to collective bargaining relative to the core subject of retirement benefits.

Letter from Jessica M. Chu to Michael J. Hayes (August 26, 2013), "Objections to Referral Terms" at pp. 2, 3.

DETERMINATION

The Department, in Sacramento Regional Transit District (SacRTD), CA-03-0806-03 and CA-03-0806-04 (September 4, 2013)(copy enclosed), discussed at length the legal arguments surrounding Section 13(c) and PEPRA in the context of an independent retirement plan similar to that offered by ACTD. We have considered those issues in the context of this grant application, and we adopt herein the analysis and conclusions of that determination. See SacRTD at pp. 7-13.

An analysis of PEPRA's effect on the collective bargaining rights of transit workers covered by the ACTD-ATU Local 192 agreement reveals an impermissible conflict with sections 13(c)(1) and 13(c)(2). PEPRA's imposition of a two-tier structure on the collective bargaining agreement primarily affects bargaining unit employees hired after January 1, 2013. PEPRA both reduces existing benefit levels for such "new" employees (thus violating section 13(c)(1)'s "preservation of benefits" requirement), and diminishes a union's ability to bargain over benefits *and* contributions for "new" employees in the future (thus violating section 13(c)(2)'s "continuation of collective bargaining rights" requirement).

PEPRA has or will soon have an impact on many specific aspects of negotiated pension plan benefits for ACTD employees. The impacts discussed below are

intended to be illustrative, not exhaustive.

In both ATU's and ACTD's submissions, it is undisputed that many of the "rights, privileges and benefits" provided in the Plan prior to enactment of PEPRA have been eliminated or worsened for "new" employees who were hired after January 1, 2013, or will be hired in the future. *ATU Br.* at 2-4; *ACTD Br.*, Attachment 1 & Attachment 2. Under the collective bargaining agreement, and also under the Plan prior to PEPRA and ACTD's amendments, ACTD paid the total cost of the pension plan. Since February 2013, "new" employees are making and must continue to make contributions for the cost of their pension benefits. See *ATU Br.* at 2 & Exh. 3 (ACTD Resolution No. 13-006 with, as Attachment A, Plan Amendment 13-A-16, at 4-5).

In addition, the benefit amounts and formulas for "new" employees who retire between the ages of 55 and 66 are lower under PEPRA and the amendments to the Plan made by ACTD to conform to PEPRA than they would have been (or will be for "classic" employees) without PEPRA (and as they continue to be for "classic" employees). See *ATU Br.* at 3, 4; *ACTD Br.*, Attachment 1, p. 3 and Attachment 2, p. 1. ACTD's Attachment 2 sets forth the following comparison between the "Classic Monthly Benefit" (the benefit not affected by PEPRA) and the "PEPRA Monthly Benefit."

<b>Years of Service</b>	<b>Age</b>	<b>"Classic" Benefit</b>	<b>PEPRA Benefit</b>	<b>PEPRA %</b>
17	52	\$0	\$850	1.00%
18	53	\$0	\$990	1.10%
19	54	\$0	\$1,140	1.20%
20	55 (2%)	\$2,000	\$1,300	1.30%
21	56	\$2,100	\$1,470	1.40%
22	57	\$2,200	\$1,650	1.50%
23	58	\$2,300	\$1,840	1.60%
24	59	\$2,400	\$2,040	1.70%
25	60 (2.25%)	\$2,812.50	\$2,250	1.80%
26	61	\$2,925	\$2,470	1.90%
27	62	\$3,037.50	\$2,700	2.00%
28	63	\$3,150	\$2,940	2.10%
29	64	\$3,262.50	\$3,190	2.20%
30	65 (2.5%)	\$3,750	\$3,450	2.30%
31	66	\$3,875	\$3,720	2.40%
32	67	\$4,000	\$4,000	2.50%

*assuming a monthly final compensation of \$5,000*

*ACTD Br.*, Attachment 2, p. 1. ATU also provided a chart to demonstrate the

effect of retirement formula change at various retirement ages.

<b>Monthly Pension Benefit For Classic v. New Employees Assuming 20 Years of Service and a Final Average Salary of \$5,000 per Month</b>		
Age	"Classic" Employee Benefit	"New" Employee Benefit
52	\$0	\$1,000
55	\$2,000	\$1,300
58	\$2,000	\$1,600
60	\$2,250	\$1,800
63	\$2,250	\$2,100
65	\$2,500	\$2,300
67	\$2,500	\$2,500

*ATU Br.*, p. 4. ATU notes that this summary "understates the effect of PEPRA, since as noted above, the final average salary under PEPRA is less than the final average salary under the current Plan (since PEPRA excludes several significant items of pay, including overtime, from pensionable compensation)." *Id.*

In addition to changing the percent multiplier (and thus benefit formulas), PEPRA affects the calculation of the pension benefit in other ways, all of which lower "new" employees' pensions. The Plan permits the inclusion in pensionable compensation of payouts of overtime, some vacation pay, some sick leave pay and some other deferred compensation allowance and any other paid time prior to retirement. PEPRA Section 7522.34(c)'s prohibition against the inclusion of specific forms of compensation in the calculation of pensionable compensation thus eliminates certain amounts previously negotiated by the parties. See also *ATU Br.* at 2,3 and 4; *ACTD Br.*, Attachment 1 at 1-2 (explaining and showing how PEPRA changed the Plan's definition of pensionable compensation). Thus, PEPRA permanently precludes the ACTD and ATU from bargaining to include certain forms of compensation in their definition of pensionable compensation for any employees who were hired after January 1, 2013. Finally, PEPRA prevents ACTD from creating new supplemental defined benefit plans or certain replacement benefit plans for "new" or "classic" employees. PEPRA, Section 7522.18; Section 7522.43; See also *ATU Br.* at 3, 4.

### CONCLUSION

There is little dispute over the impact of PEPRA on the existing rights of employees covered by the ACTD-ATU Local 192 collective bargaining agreement and on the scope of collective bargaining. Congress incorporated in section

13(c) the commonly-understood meaning of collective bargaining that requires, at a minimum, good faith negotiation to the point of impasse, if necessary, over wages, hours, and other terms and conditions of employment. *Amalgamated Transit Union v. Donovan*, 767 F.2d 939, 949 (D.C. Cir. 1985). Meaningful collective bargaining does not exist when a state mandates changes in what the parties have previously negotiated, dictates results, or removes relevant issues from consideration.

It is correct that PEPRA allows for negotiation over some aspects of pension benefits. However, the Department has concluded that PEPRA significantly reduces pension entitlements under the existing collective bargaining agreements for employees hired after January 1, 2013 and precludes the Union from negotiating many aspects of their pension plans, including the employee contribution rate, in subsequent agreements.

Sections 13(c)(1) and (2) require the preservation of pension rights and benefits and the continuation of collective bargaining rights. These rights are prerequisites for federal assistance under section 5333(b) of the Transit Act. Under PEPRA, ACTD cannot comply with the requirements of the Act.

Therefore, the effects of PEPRA render it legally impermissible, under the current circumstances, for the Department to certify fair and equitable employee protective conditions for grants to ACTD.

Sincerely,



Michael J. Hayes, Director  
Office of Labor Management Standards

Enclosure

cc: Scheryl Portee/FTA  
Leslie Rogers/FTA Region IX  
Jessica M. Chu/ATU  
Margot Rosenberg/LEONARD CARDER, LLP  
Kenneth C. Scheidig/AC Transit  
David A. Wolf/AC Transit  
John Haenftling/AC Transit  
Ann Fudge/AC Transit  
Edwin D. Hill/IBEW  
Lee Saunders, c/o William Wilkinson/AFSCME

Keith Uriarte/AFSCME Council 57  
Mary Kay Henry/SEIU  
Mike Hotton/BART Police Officer's Association  
Greg Savage/BART Police Manager's Association  
David L. Neigus/IAM  
Ray Cobb/IBEW  
Gregory Junemann/IFPTE  
Bonnie Morr, c/o Cara McGint/UTU  
Elizabeth A. Roma/Guerrieri, Clayman, Bartos & Parcelli  
Carolyn Gomes/Guerrieri, Clayman, Bartos & Parcelli  
Richard Edelman/O'Donnell, Schwartz & Anderson  
Wesley Toy/SCCEAA

**APPENDIX**  
**PEPRA Objection Questions**

Provide the start date and expiration date of your collective bargaining agreement, including any extensions, as well as the expiration date of your pension agreement.

For each negotiated pension plan, describe its organization (CalPERS, 1937 County Act, Independent System, other); type (defined benefit, defined contribution, jointly administered "Taft-Hartley," deferred compensation/savings, primary or supplemental); and participation (union employees, all employees, multi-employer, etc.).

Describe, separately for "new employees" (those hired on or after January 1, 2013) and "classic employees" (those hired before January 1, 2013), all pension benefit requirements that will be affected by PEPRA. Be specific in terms of participation in the plan, vesting schedule, employee contribution levels, pensionable compensation, minimum retirement age, minimum years of service, special circumstance retirement (early, disability, x-years-and-out), pension benefit formulas, and any other requirement or computation for a pension benefit of any kind.

Describe whether PEPRA will require the negotiation or unilateral imposition of a new level of pension contributions by classic employees on or before January 1, 2018.

Compare the pension benefit levels of each negotiated pension plan with those of PEPRA. Be specific and show by list or chart dollar amounts of benefits at threshold retirement ages and years of service (those points at which the benefit level would change under the pension plan). Assume a final compensation figure of \$5,000 per month, for sake of illustration.