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Co	Criminal Jurisprudence Committee		
Co	Hon. Parker McCollough		
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State of Texas
 House of Representatives
 Austin, Texas
 PARKER MCCOLLOUGH
 STATE REPRESENTATIVE

COMMITTEES
 CRIMINAL
 JURISPRUDENCE
 Chairman
 JUDICIAL AFFAIRS
 REDISTRICTING

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RO-446

October 7, 1992

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Criminal Jurisprudence

The Honorable Dan Morales
 Attorney General of Texas
 P.O. Box 12548
 Austin, Texas 78711-2548

Dear General Morales:

Pursuant to Texas Government Code 402.042, I am requesting, as Chairman of the House Criminal Jurisprudence Committee, your opinion on a serious question affecting the public interest: whether the Board of the Texas High-Speed Rail Authority ("the Authority") has the legal authority to extend a funding deadline imposed in the official order awarding the franchise to build a high-speed rail system in Texas to the Texas TGV Consortium.

This is a matter of great concern to the citizens of Texas. I can attest to this, based on my own discussions with many of them, including numerous state and local officials, and in particular Commissioner Bob Krueger, who serves as a member of the Authority. We need your guidance on this pressing issue affecting the public interest.

Any project estimated to cost \$6.8 billion clearly affects the public interest; moreover, since statements by the franchisee have frequently cited their dependence upon public funding -- whether through tax-exempt bonds, a gasoline tax, or special taxes imposed through special taxing districts -- the public could be profoundly affected by this project.

The Authority's jurisdiction and obligations are set forth in the Texas High-Speed Rail Act, Texas Revised Civil Statutes Annotated, Article 6674v.2 (Vernon Supplement 1992). Pursuant to this Act, the Authority has adopted procedural rules governing the Authority's activities.

On January 16, 1991, Texas TGV and FasTrac filed competing applications for the exclusive 50-year franchise to build and operate a high-speed rail facility in Texas. These filings initiated a hearings process. A hearings examiner, appointed by the Authority, presided over the 17-day proceeding which commenced March 25, 1991.



The hearings examiner filed a Proposal for Decision, containing Findings of Fact and Conclusions of Law, on May 10, 1991. The examiner recommended awarding the franchise to Texas TGV. The Proposal for Decision was served on each party and each party had an opportunity to file exceptions and present briefs to the Authority.

On May 28, 1991, the Authority adopted the Findings of Fact and Conclusions of Law recommended by the hearings examiner, and awarded the franchise to Texas TGV (which later incorporated as Texas TGV Corporation). The Board expressed this decision in the form of an "Order Awarding High-Speed Rail Franchise" ("the Order").

The Order contains several provisions pertinent to my inquiry. First, Paragraph 8 of the Order reads, in pertinent part:

The Franchise awarded requires the partners of Texas TGV to commit to contribute a minimum \$10,000,000 in equity to Texas TGV on or before the first day of July, 1991 and obtain commitments for a total of approximately \$170,000,000 of equity financing for the high-speed rail facility (including the \$10,000,000 amount contributed above) on or before year end, 1992.

Paragraph 11 of the Order reads as follows:

The Franchise awarded requires implementation of the project in a manner that: (a) complies with all applicable laws and regulations; (b) conforms to the Proposal; (c) complies with the terms of this Order, and (d) complies with the terms of the Franchise Agreement.

Paragraph 14 of the Order reads as follows:

The above elements of the Franchise herein awarded shall be supplemented by further definitive terms governing the respective rights, duties and obligations of the Authority and Texas TGV as will be set forth in a Franchise Agreement. Texas TGV and the Authority shall execute the Franchise Agreement on or before January 31, 1992. In no manner, event, or term may this Order be superseded or amended by the Franchise Agreement. (emphasis supplied)

As required by the Order, the Authority and the franchisee did negotiate and enter into a Franchise Agreement, which was approved by a majority of the Authority members on January 22, 1992. Exhibit C to the Franchise Agreement outlines the "Major Milestones" the franchisee must meet to comply with the terms of the franchise. Major Milestone 2 reads, in pertinent part:

Franchisee will obtain Equity Financing Commitments in the amount of \$170,000,000 on or before December 31, 1992 and will cause \$30,000,000 of such Equity Financing Commitments to be invested in the Franchisee on or before December 31, 1992, and an additional \$30,000,000 of such equity Financing Commitments to be invested in the Franchisee on or before June 30, 1993.

There has been some public discussion, by the Authority as well as the franchisee, that Texas TGV may request the Authority to approve an extension to the December 31, 1992, funding deadline.

I will note two other provisions of the Franchise Agreement which may be relevant. The introductory section of Exhibit C states that the failure to meet this funding deadline "will result in an Event of Default, as provided in Section 3.6 (Q) of the Franchise Agreement." Pursuant to Section 3.6 (Q) there is no grace period to cure such an event of default.

Last, I will note that Section 10.2 of the Franchise Agreement provides:

This Agreement may be amended, modified, superseded, canceled, renewed or extended only pursuant to the terms hereof.

I question, therefore, whether the Authority can legally extend the December 31, 1992, deadline. The deadline was set in the Order; further, the Order not only preceded the Franchise Agreement in time, but also created the requirement for a Franchise Agreement that could "[i]n no manner, event, or term" amend or supersede the terms of the Order.

In summary, I am requesting your opinion on whether the Authority, in light of the provisions cited as well as other applicable law, has the legal authority to extend the December 31, 1992, funding deadline set out in Paragraph 8 of the Order and further outlined in Exhibit C to the Franchise Agreement. If so, then what, if any legal standards apply to the actions of the Authority in reconsidering the Order.

I am including with my request a copy of the executed Franchise Agreement, including exhibits. Should you or your staff require any further information concerning this matter please do not hesitate to contact me.

Sincerely,



Parker McCollough, Chairman
Criminal Jurisprudence Committee