



Bay Area Transportation Working Group (BATWG)

February 15, 2019

Commissioners of the Metropolitan Transportation Commission
 Bay Area Metro Center
 375 Beale Street
 San Francisco, CA 94105

Dear Commissioners:

Bay Area Transportation Working Group (BATWG) is an all-volunteer organization formed in 2012 to keep up with and respond to ongoing Bay Area transportation issues and events. We are dedicated to finding ways of easing regional traffic congestion by improving the reliability and general appeal of the Region's passenger rail and bus systems.

This BATWG report will set forth and describe recent instances where some members of the MTC Commission were appointed to their four-year terms by Bay Area's local and county selection process that violated either the MTC Enabling Act or the Brown Act or both.

This unsatisfactory situation has evolved in recent years in part because MTC did not do all it should have done to provide public information about the existence of the once-every-four-years selection process and on how the public could observe and provide input to the proceedings. MTC commissioners are not, after all, like regular employees. They fill important policy-making positions which makes, or should make, both the work they do and their means of selection transparent for all to see. It bears repeating that the decisions made by MTC Commissioners have a direct effect on the mobility and transportation choices of the 7.4 million people living in the nine MTC Bay Area Counties.

BATWG has monitored MTC's website in recent weeks. The "How Commissioners Are Selected" webpage (<https://mtc.ca.gov/about-mtc/what-mtc/commissioners>) said nothing about the 2019-23 commissioner selection process. Nor anything about the specific city and county bodies that make the appointment decisions. Nor about the status of the various appointments. Nor of how citizens may monitor or otherwise involve themselves in the selection process. The webpage was also silent on how a member of the public could communicate his or her desire to be considered for an MTC commissioner appointment to the right parties. (<https://mtc.ca.gov/about-mtc/public-participation/get-involved>).

Nor does MTC's website contain copies of the letters dated September 25, 2018 and signed by MTC Secretary Rosy Leyva which stated: "I have been asked by the Commission to request that [appointing authority] begin consideration of the nomination of [name of incumbent MTC commissioner] for reappointment." Some local and county appointing authorities appear to have regarded these letters as official MTC endorsements and made their appointment decisions accordingly. It is not appropriate for MTC to be acting in ways that appear to be seeking to influence the prescribed local selection process for its governing board.

In the four North Bay counties, City Selection Committees are mandated by MTC's enabling act to provide three nominees to the County Boards of Supervisors for final appointment. Yet Ms. Leyva's letters misstated the requirement by saying "furnish the [county] Board of Supervisors with the names of nominees from which the Board shall appoint a representative." At least three of the North Bay City Selection Committees interpreted MTC's letter to mean that one candidate (the incumbent) was all that was necessary.

BATWG representatives have identified the following departures from the required MTC commissioner appointment process:

Alameda County Mayors' Conference: The Conference has a website that cannot be accessed unless a user knows and types in the URL. Major search engines, including Google and Yahoo, do not provide links to this particular website. BATWG learned of the URL only through a Public Records Act request. Communication roadblocks of this type hinder public participation and lead people to believe that the MTC commissioner selection process is proceeding behind closed doors in violation of the Brown Act. Voters in eight of the county's 14 cities voted no on MTC's Regional Measure 3 toll hike last June. Yet the Conference quietly reappointed the incumbent on December 12, 2018, with no real opportunity for the public to participate or comment.

Contra Costa County City Selection Committee: The Committee did not properly convene to make the 2019-23 MTC appointment and the Contra Costa Mayors' Conference did not act in accordance with the Brown Act and the City Selection Committee Act when it proceeded to reappoint the incumbent on February 7th. When a BATWG representative attended the meeting and attempted to address the issue, he was prevented from doing so by the Chair of the committee, who went on to block all public comment before or during the Committee's consideration of the matter. That was a clear violation of the Brown Act, Government Code sec. 54954.3(a). The denial of public participation in the MTC appointment process is documented in this audio recording: <https://vimeo.com/316455011> Yet at no time did any of the mayors present, who should have known better, raise objections to the Chair's stifling of public input. Despite the fact that Government Code sec. 50276 requires the Clerk of the County Board of Supervisors to serve as secretary, no one in this capacity was present at the meeting and as a result there is no official record of the event on file. For these reasons, the Contra Costa County cities have not as yet made a valid MTC appointment for the 2019-23 term. Pursuant to Government Code sec. 1302, BATWG asks that the Contra Costa County Mayors' incumbent selectee be regarded as a "holdover" MTC commissioner until these irregularities are resolved.

Contra Costa County Board of Supervisors: The Contra Costa County Board of Supervisors' MTC appointment on January 15th is also compromised because of Brown Act violations. Supervisor John Gioia was not elected Board chair until January 15th. Yet several days before that date, he acted as "2019 Chair" to recommend the re-appointment of the MTC incumbent to the Board. This suggests violations of the Brown Act "serial meeting" prohibitions.

Contra Costa County has appointment procedures in place that include public notice of the right to apply for the position, and submit written applications and participate in interviews before the appropriate Board committee before the full Board confirms an appointment. None of these requirements appears to have been followed. Members of the public were not given the opportunity to apply for the position because the Board did not follow its own multi-step process. Nor was the sole applicant, the incumbent, required to complete a written application. BATWG's attempt to provide a basis for evaluating candidates by asking them to respond to questions about MTC's various activities and policy-decisions was ignored. In fact, the supervisors asked no questions of their appointee. Another BATWG objection to the Contra Costa process relates to the fact that this critically important appointment was "buried" among eighty other names in a seven-page list of appointments associated with the Board's annual organization. For these reasons, BATWG asks that the Contra Costa County incumbent be regarded as a "holdover" MTC commissioner until these irregularities are resolved.

Marin County: TRANSDEF, another volunteer transportation improvement group, has been monitoring developments in Marin County and has cited local governments for similar irregularities. The Marin County City Selection Committee failed to submit three MTC nominees to the Board of Supervisors in accordance with the MTC enabling act, Government Code sec. 66503(b), which says, "The city selection committee of these counties shall furnish to the board of supervisors the names of three nominees and the board of supervisors shall appoint one of the nominees to represent the county." (emphasis added). In violation of the Brown Act and its own bylaws, the Selection Committee announced in its October 24, 2018 meeting agenda that MTC nominations would occur at the November meeting, yet the Selection Committee nominated the incumbent for another term prematurely at its October meeting. The body's bylaws say, "No nominations from the floor will be accepted at a prior meeting." BATWG asks that the Marin County MTC nominee be regarded as a "holdover" until these irregularities are resolved.

Napa County: Following bad advice from MTC and county staff, the Napa County City Selection Committee failed to provide three nominees to the Board of Supervisors and nominated the incumbent when it met on November 13, 2018. Meeting video can be viewed at: http://napa.granicus.com/MediaPlayer.php?view_id=17&clip_id=4227. As the video shows (at 8:50), Molly Rattigan, Deputy County Executive Officer, told the Selection Committee, "We are seeking up to [emphasis added] three names for nominations." She also referred to "a letter from the Metropolitan Transportation Commission recommending [emphasis added] the reappointment of the incumbent Commissioner." (at 9:18). She said that the county had contacted the city clerks in Napa County to seek names for MTC candidates on November 6th, but that no names had been submitted as of November 13th. BATWG is troubled by these assertions. MTC's enabling act requires City Selection Committees to provide three nominees to the Boards of Supervisors in the four North Bay counties. Based upon Ms. Rattigan's

interpretation of MTC Secretary Rosy Leyva's September 25th letter as MTC's recommendation [emphasis added] that Napa County reappoint the incumbent. That is simply not how the process is supposed to work. BATWG also notes the inadequacy of Napa County's outreach regarding the nomination process. E-mails to city clerks with a one-week turnaround for citizens to participate in a vaguely-defined nomination process seems unlikely to yield viable candidates. BATWG contends that Napa County's MTC appointment process was not consistent with MTC's enabling act, due to the Selection Committee's failure to properly publicize the process and considering three candidates rather than just the incumbent. BATWG asks that the Napa County MTC incumbent be regarded as a "holdover" until these irregularities are resolved.

Santa Clara County: The Board of Supervisors violated the Brown Act on January 15 by making its MTC appointment as part of dozens of "Board of Supervisors' assignments for 2019," rather than as a separate agenda item. BATWG asks that the Santa Clara County Board of Supervisors MTC incumbent be regarded as a "holdover" until procedural irregularities are resolved.

Solano County: Solano County's MTC appointment process deserves to be a textbook case study of bad government. Last June, Solano County voters rejected Regional Measure 3 (RM3) by 70 percent and Solano County representatives opposed the CASA Compact in the January 17, 2019 ABAG vote, votes which directly contradicted the votes of the incumbent MTC Board member who voted for RM3 and for the CASA Compact. On November 2, 2018 (four days before the November election), the City Selection Committee convened a special meeting in the back room of an Italian restaurant and recommended that this incumbent be appointed to a ninth term as a MTC commissioner. An exposé by reporter Todd Hansen of the Daily Republic and citizen backlash motivated the Board of Supervisors to request that the City Selection Committee repeat its earlier selection process. At a hastily-called special meeting on January 14th, a bare-minimum quorum nominated the incumbent and two of the four mayors in attendance. The two "competing" mayors, Harry Price of Fairfield and Bob Sampayan of Vallejo, were the same individuals who at the November 2nd restaurant meeting moved and seconded that the MTC incumbent be reappointed. BATWG, TRANSDEF and Nine Counties Coalition each submitted questionnaires inviting the three nominees to provide their views on certain critically important MTC policies and issues, and asked the Board of Supervisors to question the three nominees accordingly before the confirmation vote at the February 5, 2019 Board meeting. None of the three candidates responded to the questions and the Board made no attempt to elicit their views. (In fact, the two mayoral candidates were not present at nomination meeting.) BATWG finds no evidence that Solano County ever invited others to apply, nor did it publicize the process in any discernible manner. BATWG asks that the Solano County MTC incumbent be regarded as a "holdover" until these irregularities are resolved.

In sum, the current process by which MTC commissioners are selected is gravely flawed and needs reform. Here is what we think is needed:

- (1) MTC needs to make certain that the local authorities who are selecting its Board members follow both the Brown Act and MTC's enabling legislation. MTC should advertise all future MTC voting commissioner vacancies on its website and through news releases at the appropriate times. MTC should inform the appointing authorities of the

full scope of their legal duties to identify and seriously consider at least the requisite number of candidates and to engage in public outreach sufficient to secure candidates from members of the public and to make the public aware of the commissioner selection process and their opportunity to monitor and participate in it. MTC commissioners and staff should refrain from writing about or discussing prospective candidates (especially incumbents) whose nominations lie strictly within the purview of the local and county appointing authorities. MTC commissioners should be assigned MTC e-mail addresses and should conduct all MTC business through such e-mail accounts on MTC computer servers so that concerned citizens can request such records from MTC and review them if and when incumbent commissioners seek re-appointment.

- (2) Where and as necessary, the relevant County District Attorneys should investigate the above described irregularities and undertake appropriate remedial action.
- (3) The State Legislature should investigate irregularities in the 2018-19 MTC commissioner selection process and revise the MTC Enabling Act as appropriate. The recall process should be expanded to permit the removal of MTC commissioners midterm by appointing authorities and by the voters. Using the Bay Area Rapid Transit District inspector general provision in SB 595 as a model, the Legislature should create an MTC inspector general position to oversee MTC's compliance with applicable federal and state laws, including the MTC commissioner appointment process. BATWG will be following through with the region's State Legislators on this matter.
- (4) Congress in its next surface transportation authorization legislation and in its next Metropolitan Planning Organization (MPO) reform legislation should add specific requirements relative to MPO and MTC commissioner selection and it should focus on the need to require MPO's like MTC to have a robust two-way [emphasis added] public outreach program, including in particular during the commissioner selection process. The U.S. Department of Transportation (USDOT) and congressional oversight committees should investigate the 2018-19 MTC commissioner selection process as a case study for legislative and/or regulatory reform. BATWG has begun a dialogue with Congressman Mark DeSaulnier and will be seeking these actions in forthcoming meetings with our local members of Congress and with USDOT.
- (5) MTC's voting commissioners should hold at least one town hall meeting in their counties every year, at which citizens can publicly and directly question them about matters within the jurisdiction of MTC. All 18 voting commissioners should hold town hall meetings with the public in their counties this spring concerning the CASA Compact.

Sincerely,

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