

HOW CAN WE MAXIMIZE PRIVATE SECTOR PARTICIPATION IN TRANSPORTATION?—PART I

HEARING

BEFORE THE
SUBCOMMITTEE ON ENERGY POLICY, NATURAL
RESOURCES AND REGULATORY AFFAIRS
OF THE

COMMITTEE ON
GOVERNMENT REFORM
HOUSE OF REPRESENTATIVES
ONE HUNDRED EIGHTH CONGRESS

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CONTENTS

	Page
Hearing held on May 18, 2004	1
Statement of:	
Allen, William R., president, Amador Stage Lines, Sacramento, CA; Katsumi Tanaka, chairman of the board and CEO, E NOA Corp., Honolulu, HI; Terrence V. Thomas, president, Community Bus Serv- ices, Inc., Youngstown, OH; Dr. Adrian Moore, vice president, Reason Foundation and executive director, Reason Public Policy Institute; Dr. Ronald D. Utt, Herbert and Joyce Morgan senior research fellow, the Heritage Foundation; and Dr. Max B. Sawicky, economist, Economic Policy Institute	54
Frankel, Emil, Assistant Secretary for Transportation Policy, U.S. De- partment of Transportation	10
Letters, statements, etc., submitted for the record by:	
Allen, William R., president, Amador Stage Lines, Sacramento, CA:	
Letter dated May 25, 2004	152
Parking lot shuttle bus schedule	165
Prepared statement of	57
Frankel, Emil, Assistant Secretary for Transportation Policy, U.S. De- partment of Transportation:	
Information concerning audits	37
Information concerning characteristics of contracts	50
Information concerning grants	22, 33
Information concerning projects	27
Information concerning Sections 5306(a) and 5307(c) of 49 U.S.C.	35
Information concerning standard operating procedures	52
Prepared statement of	13
Moore, Dr. Adrian, vice president, Reason Foundation and executive di- rector, Reason Public Policy Institute, prepared statement of	105
Ose, Hon. Doug, a Representative in Congress from the State of Califor- nia, prepared statement of	4
Sawicky, Dr. Max B., economist, Economic Policy Institute, prepared statement of	144
Tanaka, Katsumi, chairman of the board and CEO, E NOA Corp., Hono- lulu, HI:	
Poster for "The Bus"	181
Prepared statement of	69
Prepared statement of Jennifer Dorn	77
Thomas, Terrence V., president, Community Bus Services, Inc., Youngs- town, OH, prepared statement of	87
Utt, Dr. Ronald D., Herbert and Joyce Morgan senior research fellow, the Heritage Foundation, prepared statement of	125

HOW CAN WE MAXIMIZE PRIVATE SECTOR PARTICIPATION IN TRANSPORTATION?— PART I

TUESDAY, MAY 18, 2004

HOUSE OF REPRESENTATIVES,
SUBCOMMITTEE ON ENERGY POLICY, NATURAL
RESOURCES AND REGULATORY AFFAIRS,
COMMITTEE ON GOVERNMENT REFORM,
Washington, DC.

The subcommittee met, pursuant to notice, at 10 a.m., in room 2154, Rayburn House Office Building, Hon. Doug Ose (chairman of the subcommittee) presiding.

Present: Representatives Ose, Schrock, Tiberi and Tierney.

Staff present: Barbara F. Kahlow, staff director; Lauren Jacobs, clerk; Megan Taormino, press secretary; Krista Boyd, minority counsel; and Cecelia Morton, minority office manager.

Mr. OSE. Good morning. Welcome to this morning's hearing of the Subcommittee on Energy Policy, Natural Resources and Regulatory Affairs.

Today's subject matter is how can we maximize private sector participation in transportation. We have two August panels of witnesses, and we will get to an introduction of them shortly.

Our order of battle here is that we make opening statements—actually, establish a quorum, make opening statements, swear our witnesses in. Then, the witnesses get to make their statements, which we have received. Then, we will go to questions by Members for the witnesses. With that understanding, we will proceed.

Much of the Nation's transportation infrastructure is aging and in need of repair. Also, additional ground transportation services are needed, especially in areas of population growth. There are many advantages to participation by the private sector in improving America's transportation system. For example, infrastructure improvement projects can often be completed more quickly and at reduced costs, transportation services can often be delivered more cost effectively, and Federal and State funds can be devoted to other pressing needs, especially given the deficits we face.

In 1964, the Congress began to enact laws to encourage private sector participation in transportation. The 1966 law that established the Department of Transportation identified six reasons to establish the Cabinet-level department. The second reason was to, "facilitate the development and improvement of coordinated transportation service, to be provided by private enterprise to the maximum extent feasible."

DOT's implementing rule assigned primary responsibility for evaluation of private transportation sector operating and economic issues to the Assistant Secretary for Transportation Policy, whose organization is located within the Office of the Secretary and who is here with us today.

In addition to laws requiring private sector participation to the maximum extent feasible, Federal regulations support this objective. For example, the governmentwide grants management common rule—which we have a copy of right here just for everybody's reference if we need it—provides that Federal grantees and subgrantees, “must not use equipment acquired with grant funds to provide services for a fee to compete unfairly with private companies that provide equivalent services.”

Today, the subcommittee will explore opportunities for further private sector participation in ground transportation and past experiences with public-private partnerships, service delivery by competitively-awarded private sector providers, and existing private sector transportation services.

Also, the subcommittee will examine the administration's record in facilitating private sector participation in transportation and its record in faithfully implementing the various private sector participation statutory provisions through its codified rules, oversight, enforcement and other initiatives.

In March 2003, I learned of a public takeover of a contract that had for the previous 25 years been competitively awarded for mass transit shuttle bus services in Sacramento, CA. I began a 9-month investigation. I found three primary items: first, an unneeded expenditure of substantial Federal funds; second, noncompliance by a local transit grantee with the Federal law requiring private sector participation to the maximum extent feasible; and, third, inadequate enforcement by the Department of Transportation. Without evidence of grantee compliance with the private sector participation requirements, the Department of Transportation awarded \$2.4 million to the local transit authority for the purchase of buses and later allowed this local agency to use these buses in a takeover of an existing mass transit service that had been provided by a private sector provider and at an estimated additional cost of \$277,000 annually.

Before termination of the existing contract, I requested that the Department of Transportation investigate the situation to ensure statutory compliance. After the takeover in August 2003, I recommended that the Department of Transportation initiate a rulemaking to implement the statutory private sector participation requirements outlined in the 1994 law passed by Congress and for the Department of Transportation to take an appropriate enforcement action against the noncompliant Federal grantee. Sadly, to date, the Department of Transportation has neither initiated a rulemaking nor taken any enforcement action that I am aware of. Since my investigation of this case, I have learned of additional cases, some of which we will hear about today, that seem to be in violation of existing Federal regulations, where the Department of Transportation has allowed local transit authorities to compete unfairly with existing private mass transit service providers.

Our witnesses today include the Department of Transportation's responsible Assistant Secretary, leading think tanks experts, and three adversely affected small business operators of mass transit services. Congress wants and Americans deserve a reliable and cost-effective transportation system and one that does not harm existing small business operators or transportation services.

I want to welcome our witnesses here today. They include the Department of Transportation Assistant Secretary for Transportation Policy, Mr. Emil Frankel; the president of Amador Stage Lines, Sacramento, CA, Mr. William Allen; the chairman of the Board and CEO of E Noa Corp., Honolulu, HI, Mr. Katsumi Tanaka; the president of Community Bus Services, Inc., of Youngstown, OH, Mr. Terrence V. Thomas; the vice president of Reason Foundation and executive director, Reason Public Policy Institute, Dr. Adrian Moore; the Herbert & Joyce Morgan senior research fellow at the Heritage Foundation, Dr. Ronald Utt; and, Dr. Max Sawicky, who is an economist at the Economic Policy Institute.

[The prepared statement of Hon. Doug Ose follows:]

Chairman Doug Ose
Opening Statement
How Can We Maximize Private Sector Participation in Transportation?
May 18, 2004

Much of the nation's transportation infrastructure is aging and in need of repair. Also, additional ground transportation services are needed, especially in areas of population growth. There are many advantages to participation by the private sector in improving America's transportation system. For example, infrastructure improvement projects can often be completed more quickly and at reduced cost, transportation services can often be delivered more cost effectively, and Federal and State funds can be devoted to other pressing needs -- especially when faced with deficits.

In 1964 (i.e., 40 years ago), Congress began to enact laws to encourage private sector participation in transportation. The 1966 law that established the Department of Transportation (DOT) identified six reasons to establish the Cabinet-level department. The second reason was to "facilitate the development and improvement of coordinated transportation service, to be provided by private enterprise to the maximum extent feasible." DOT's implementing rules assign primary responsibility for "evaluation of private transportation sector operating and economic issues" to the Assistant Secretary for Transportation Policy, who is organizationally located within the Office of the Secretary.

In addition to laws requiring private sector participation to the maximum extent feasible, Federal regulations support this objective. For example, the government-wide grants management common rule provides that Federal grantees and subgrantees "must not use equipment acquired with grant funds to provide services for a fee to compete unfairly with private companies that provide equivalent services."

Today, the Subcommittee will explore opportunities for further private sector participation in ground transportation and past experiences with public-private partnerships, service delivery by competitively-award private sector providers, and existing private sector transportation services. Also, the Subcommittee will examine the Administration's record in facilitating private sector participation in transportation and its record in faithfully implementing the various private sector participation statutory provisions through its codified rules, oversight, enforcement, and other initiatives.

In March 2003, I learned of a public takeover of an over 25-year competitively awarded contract for mass transit shuttle bus services in Sacramento, California. I began a 9-month investigation. I found: (a) unneeded expenditure of substantial Federal funds, (b) noncompliance by a local transit grantee with the Federal law requiring private sector participation to the maximum extent feasible, and (c) inadequate enforcement by DOT. Without evidence of grantee compliance with the private sector participation requirements, DOT awarded \$2.4 million to a local transit authority for the purchase of buses and later allowed this local agency to use these buses in a takeover of an existing mass transit service -- at an estimated additional \$277,000 annually in public operational expense.

Before termination of the existing contract, I requested DOT's investigation to ensure statutory compliance. After the takeover, in August 2003 (i.e., nine months ago), I recommended that: (a) DOT initiate a rulemaking to implement the statutory private sector participation requirements in a 1994 law initiated by Congress (i.e., 10 years ago), and (b) DOT take an appropriate enforcement action against the noncompliant Federal grantee. To date, DOT neither initiated a rulemaking nor took an enforcement action. Since my investigation of this case, I learned of additional cases - in violation of existing Federal regulations - where DOT has allowed local transit authorities to compete unfairly with existing private mass transit service providers.

Our witnesses today include DOT's responsible Assistant Secretary, leading think tank experts, and three adversely affected small business operators of mass transit services. Small businesses are the backbone of our economy. Congress wants and Americans deserve a reliable and cost-effective transportation system, and one that does not harm existing small business operators of transportation services.

I want to welcome our witnesses today. They include: DOT Assistant Secretary for Transportation Policy Emil Frankel; William R. Allen, President, Amador Stage Lines, Sacramento, California; Katsumi Tanaka, Chairman of the Board & CEO, E Noa Corporation, Honolulu, Hawaii; Terrence V. Thomas, President, Community Bus Services, Inc., Youngstown, Ohio; Dr. Adrian Moore, Vice President, Reason Foundation and Executive Director, Reason Public Policy Institute; Dr. Ronald D. Utt, Herbert & Joyce Morgan Senior Research Fellow, The Heritage Foundation; and, Dr. Max B. Sawicky, Economist, Economic Policy Institute.

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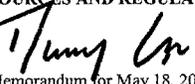
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**MEMORANDUM FOR MEMBERS OF THE SUBCOMMITTEE ON ENERGY POLICY,
NATURAL RESOURCES AND REGULATORY AFFAIRS**

FROM: Doug Ose 

SUBJECT: Briefing Memorandum for May 18, 2004 Hearing, "How Can We Maximize Private Sector Participation in Transportation?"

On Tuesday, May 18, 2004, at 10:00 a.m., in Room 2247 Rayburn House Office Building, the Subcommittee on Energy Policy, Natural Resources and Regulatory Affairs will hold a hearing on private sector participation in transportation, exclusive of air transportation. The hearing is entitled, "How Can We Maximize Private Sector Participation in Transportation?"

In addition, the hearing will explore the Department of Transportation's (DOT's) record in encouraging private sector participation in transportation, exclusive of air transportation, and its record in faithfully implementing the various private sector participation statutory provisions through its codified rules, oversight, enforcement, and other initiatives.

Statutory and Regulatory Provisions

The 1966 law that established DOT identified six reasons to establish the Cabinet-level department. The first two reasons were to assure the coordinated, effective administration of Federal transportation programs, and to "facilitate the development and improvement of coordinated transportation service, to be provided by private enterprise **to the maximum extent feasible**" (emphasis added, Sec. 2(b)(1), P.L. 89-670). Under General Responsibilities, DOT's implementing rules assign responsibility for "Encouraging maximum private development of transportation services" to the Office of the Secretary (49 CFR §1.4(a)(4)). Under Spheres of Primary Responsibility, DOT's rules assign primary responsibility for "evaluation of private transportation sector operating and economic issues" to the Assistant Secretary for Transportation Policy (49 CFR §1.23(d)).

In the Urban Mass Transportation Act of 1964 (i.e., before DOT was established), Congress authorized additional Federal assistance for the development of comprehensive and coordinated mass transportation systems, both public and private, in metropolitan and other urban areas (P.L.

¹ Subsequent codification at 49 USC §101(b) changed "maximum" to "greatest" for consistency purposes.

88-365). In a 1994 amendment, Congress provided, "Private Enterprise Participation. - A plan or program required by section 5303, 5304, or 5305 of this title shall encourage **to the maximum extent feasible** the participation of private enterprise" (emphasis added, 49 USC §5306(a), P.L. 103-272). In the next section, Congress established public participation requirements, requiring each Federal grantee to "develop, in consultation with interested parties, including private transportation providers, a proposed program of projects for activities to be financed" and "consider comments and views received, **especially those of private transportation providers**, in preparing the final program of projects" (emphasis added, 49 USC §5307(c)(2) & (6)). To date, DOT has not issued implementing regulations for either Section 5306 or Section 5307.

The 1964 mass transit law also provided that:

[Federal] Financial assistance provided under this chapter to a State or local government authority may be used to ...operate mass transportation equipment or a mass transportation facility **in competition with**, or in addition to, transportation provided by **an existing mass transportation company, only if –** (A) the Secretary of Transportation finds the assistance is essential to a program of projects required under sections 5303-5306 of this title; (B) the Secretary of Transportation finds that the program, **to the maximum extent feasible**, provides for the participation of private mass transportation companies; (C) just compensation under State or local law will be paid to the company for its franchise or property ... (emphases added, 49 USC §5323(a)(1)).

In 1987, DOT issued implementing rules but only for the charter services part of Section 5323 (49 USC §5323(d)). DOT's rules provide, "If a recipient desires to provide any charter service using FTA equipment or facilities the recipient must first determine if there are any private charter operations willing and able to provide the charter service which the recipient desires to provide. To the extent that there is at least one such private operator, the recipient is prohibited from providing charter service with FTA funded equipment or facilities unless one or more of the exceptions in Sec. 604.9(b) applies" (49 CFR §604.9(a)).

In addition, Federal law addresses private ownership of highways, bridges, tunnels and approaches (23 USC §129) and highway bridge replacement and rehabilitation (23 USC §144).

Lastly, the governmentwide grants management common rule establishing uniform conditions for all Federal grantees, as codified by DOT, provides, "Notwithstanding the encouragement in Sec. 18.25(a) to earn program income, the grantee or subgrantee **must not use equipment acquired with grant funds** to provide services for a fee **to compete unfairly with private companies that provide equivalent services**, unless specifically permitted or contemplated by Federal statute" (emphases added, 49 CFR §18.32 Equipment (c)(3) Use).

Executive Orders and Initiatives

In April 1992, President George H.W. Bush signed Executive Order (E.O.) 12803, "Infrastructure Privatization," to encourage infrastructure privatization. In January 1994, President Clinton signed E.O. 12893, "Principles for Federal Infrastructure Investments."

DOT's Fiscal Year 2004 Performance Plan does not specifically mention private sector participation in transportation. But, it does mention implementing the five initiatives in President George W. Bush's Management Agenda, including a competitive sourcing initiative.

As part of the competitive sourcing initiative, on November 19, 2002, the Office of Management and Budget (OMB) published a proposed revision of OMB Circular A-76, Performance of Commercial Activities (67 FR 69769). On May 29, 2003, OMB issued a final revision. It states, "The longstanding policy of the federal government has been to rely on the private sector for needed commercial services. To ensure that the American people receive maximum value for their tax dollars, commercial activities should be subject to the forces of competition" (p. 1).

In 2003, DOT identified 841 non-inherently governmental full-time equivalents (FTEs) in the Federal Highway Administration, 140 in the Federal Rail Administration, and 120 in Federal Transit Administration (FTA). There is no systematic comparable identification for State and local government employees.

Public-Private Partnerships

In March 2004, the General Accounting Office (GAO) issued a report entitled, "Highways and Transit – Private Sector Sponsorship of and Investment in Major Projects Has Been Limited" (GAO-04-419). GAO stated, "Active private sector sponsorship and investment has been used to a limited extent in the United States to fund, construct, and operate major highway and transit projects. We identified six major projects – five toll road projects and one transit project – where this occurred during the last 15 years" (p. 10). GAO examined the following six "major" (defined as costing \$100 million or more) projects built with active private sector sponsorship and investment: Dulles Greenway in Virginia (opened in 1995), California State 91 Express Lanes (opened in 1995), Southern Connector in South Carolina (opened in 2001), Pocahontas Parkway in Virginia (opened in 2002), Las Vegas Monorail in Nevada (opened in 2004), and California State Route 125 (to open in 2006). Three were for-profit ventures financed with equity and debt; the other three were non-profit ventures financed with tax-exempt debt.

The Subcommittee identified over 60 other major and non-major public-private partnerships, such as for high-occupancy toll (HOT) lanes. In addition, a \$4 billion Dulles Rail Project is under discussion in Virginia (see 4/15/04, 4/16/04 & 4/22/04 articles in [The Washington Post](#)). There are also a great number of public-private partnerships in foreign countries, including for rail service.

GAO identified various advantages and disadvantages to public-private partnerships. Some advantages are: completing projects more quickly, conserving Federal grant funds and State tax

revenues for other projects, limiting States' debts, removing the applicability of some time-consuming Federal requirements, not counting against outstanding debt limits States are allowed to have, and limiting State and local governments' exposure to risks associated with acquiring debt. Some disadvantages are: relinquished control over toll rates, foregone tax revenues, liability for costs if private entities encounter financial difficulty, and loss of flexibility.

Amador Case Study

As Subcommittee Chairman, I sent two letters to DOT relating to the public takeover by a Federal grantee of an over 25-year competitively awarded contract for mass transit shuttle bus services in Sacramento, California. On March 13, 2003, which was before termination of the competitively-awarded contract, I wrote DOT's Federal Transit Administrator asking for her review of a March 6th emergency protest filed by the California Bus Association (CBA). I cited the following statement in CBA's protest, "There is also a negative economic impact to the federal government ... taxpayers will pay additional annual cost of approximately \$277,000 annually ... CBA estimates that Amador [the competitively-award private sector operator] operates the shuttle service over 35% more cost effectively."

On August 6th, which was after the contract was terminated, I sent a followup letter asking the FTA Administrator to: (a) demonstrate specific compliance by the Federal grantee with the private sector participation statutory requirements (49 USC §§5306(a) & 5307, as discussed above), and (b) "undertake a FTA rulemaking to ensure that its grantees will take adequate efforts to integrate private enterprise in their transit programs." With respect to the former, DOT was unable to demonstrate specific compliance and stated, "There is no federal statutory compliance, under this fact pattern, with respect to **purely operational decisions**" (emphasis added, 12/17/03 e-mail from the FTA General Counsel to my Subcommittee). With respect to the latter, DOT has not yet initiated the requested rulemaking.

On July 23rd, the Senate Banking, Housing, and Urban Affairs Subcommittee on Housing and Transportation held a hearing entitled, "Enhancing the Role of the Private Sector in Public Transportation." One of the witnesses also recommended that Congress require FTA to conduct a rulemaking on DOT's private sector participation policy. A second witness identified the problem of publicly subsidized transit services wanting to compete with private operators. He emphasized that, "No other transportation mode has to face this subsidized competition" (p. 12).

The invited witnesses for the May 18, 2004 hearing are: DOT Assistant Secretary for Transportation Policy Emil Frankel; Dr. Adrian Moore, Vice President, Reason Foundation and Executive Director, Reason Public Policy Institute; Dr. Ronald Utt, Senior Fellow, The Heritage Foundation; Bill Allen, President, Amador Stage Lines, Sacramento, California; Terrence V. (Terry) Thomas, President, Community Bus Services, Youngstown, Ohio; and, Katsumi Tanaka, Chairman & CEO, E Noa Corporation, Honolulu, Hawaii.

Mr. OSE. I want to welcome my friend from Virginia to the committee and offer him the chance to offer an opening statement if he so chooses.

Mr. SCHROCK. Nothing.

Mr. OSE. As I said earlier on, that as a matter of course in this committee we swear all of our witnesses in. So, Mr. Frankel, if you would please rise.

[Witness sworn.]

Mr. OSE. Let the record show that the witness answered in the affirmative.

Mr. Frankel, we have received your written testimony; and, trust me, I have read it, including all of the information about the various financing programs that the Department has under way. I want to recognize you for 5 minutes for the purpose of summarizing your testimony. I have a heavy gavel on the time, so I just forewarn you.

**STATEMENT OF EMIL FRANKEL, ASSISTANT SECRETARY FOR
TRANSPORTATION POLICY, U.S. DEPARTMENT OF TRANS-
PORTATION**

Mr. FRANKEL. Thank you, sir.

Mr. Chairman, Congressmen, first of all, I request that longer written statement be made part of the record; and I am pleased to be here on behalf of the Secretary and the Department to discuss private participation in transportation.

As you have noted, this hearing is especially timely in light of the pending reauthorization of the surface transportation programs. Obviously, few things have as great an impact on economic development, growth patterns and quality of life as transportation; and improved facilities in the transportation sector lead to greater productivity in attracting new businesses and improved accessibility. A healthy transportation sector is essential to President Bush's efforts to keep America on track for a more prosperous future.

One way to ensure a vibrant transportation sector is to encourage private participation in the public sector, and I am pleased that you are holding these hearings to look at that issue.

The Department is committed to providing a greater role to the private sector in transportation services and, importantly, in infrastructure investment. I think our commitment to that is indicated by the proposals contained in the administration's SAFETEA proposal to reauthorize TEA-21 and the surface transportation programs.

Improving the transportation system of one of the fastest growing economies in the industrialized world obviously presents significant challenges. Because, as robust as our networks are and our economy is, as you pointed out, they are aging, the transportation infrastructure is aging and is increasingly being operated at or above capacity. We need to seek a wide range of investment alternatives in order to deal with capacity and improvement issues, because congestion represents a significant and growing risk to our economy.

SAFETEA lays the foundation for reforming the way Americans invest in and use our transportation system. The administration seeks to give States new tools to manage congestion, to raise addi-

tional revenue from users, to attract private capital to highway and mass transit infrastructure, and to leverage existing resources more efficiently.

The need for investment capital for transportation is the driving force behind the push for innovative finance. As I have said, we need new sources of investment capital for our transportation system, and we have proposed a series of innovative financing initiatives. Specifically, by trying to foster public-private partnerships; drawing on the public's willingness to pay direct user charges for transportation benefits through tolling and value pricing, which is absolutely critical to leveraging private investment; and also, leveraging that private investment through private activity bonds; enabling additional transportation facilities to be developed more quickly and at less cost; and, more flexible financing options through amendments to the TIFIA and State Infrastructure Bank programs. We obviously can't limit ourselves to one or two of these financing mechanisms but need all of them.

Toll facility financing and construction can be a viable resource alternative, and these enable the creation of public-private partnerships, because the private sector needs to find source revenue streams to give it a return on its investment and to service its private debt.

Promoting innovation is not new to the Department or to the Federal Highway Administration. For decades, the Federal Highway Administration in particular has encouraged increased private sector participation in project planning, design, construction, maintenance and operation of highways and bridges; and, we continue to do that.

I would like to talk a bit about the innercity bus industry, where also the administration has made, in this proposal, the SAFETEA proposal, important provisions. The private sector obviously plays a key role in operating the essential elements of the Nation's transportation system; and, private carriers provide an important, if often overlooked, link in the intermodal chain of personal movements, that is, through innercity or through over-the-road bus services.

The administration's SAFETEA legislation recognizes this potential and supports several initiatives to strengthen the bus industry's role in the national transportation network, including a \$85 million capital grant program for innercity bus intermodal facilities, making intermodal service information improvements an eligible grant expense.

SAFETEA would also require that innercity buses have reasonable and appropriate access to other publicly funded intermodal facilities. I must say that we are disappointed that the House of Representatives, in its bill to reauthorize T-LU, has not recognized or acknowledged and taken any of these steps with regard to strengthening the private over-the-road or innercity bus industry.

The history of public transportation in the United States is obviously a history of private sector involvement in the movement of people; and, in the 1960's, Congress recognized the continued health our urban areas required increased Federal involvement with mass transit to play a critical role.

Mr. OSE. Mr. Frankel, your time has expired.

Mr. FRANKEL. Thank you, sir.

Mr. OSE. That is an excellent summary.

[The prepared statement of Mr. Frankel follows:]

**Statement of
Emil Frankel
Assistant Secretary for Transportation Policy
U. S. Department of Transportation**

Before the

**Subcommittee on Energy Policy, Natural Resources and Regulatory Affairs
Committee on Government Reform
United States House of Representatives**

**Hearing on How Can We Maximize Private Sector Participation in Transportation?
May 18, 2004**

Good morning, Mr. Chairman and Members of the Subcommittee. I am pleased to appear today before the Subcommittee to discuss private participation in transportation. This hearing is especially timely in light of the pending reauthorization of surface transportation programs.

OVERVIEW

Few things have as great an impact on economic development, growth patterns, and quality of life as transportation. Improved highway and transit facilities help national, state, regional, and local economies grow by increasing productivity, attracting new businesses, and providing access to new markets. A healthy transportation sector is essential to President Bush's efforts to keep America on track for a more prosperous future.

One way to ensure a vibrant transportation sector is to encourage private participation in the public sector. The U.S. Department of Transportation is committed to providing a greater role for the private sector in transportation services and infrastructure investment. In fact, the private sector already plays an important role in research programs, such as Intelligent Transportation Systems (ITS), which are based on cooperation between the public and private sectors. Increasing private sector involvement in DOT programs is evident in the Bush Administration's surface reauthorization proposal – the Safe, Accountable, Flexible, and Efficient Transportation Equity Act of 2003 (SAFETEA). A key ingredient of this proposal is innovative financing -- in the context of increasing investment capital for transportation projects and better management of the system.

The Administration's intercity passenger rail reform proposal, the Passenger Rail Investment Reform Act, also seeks to increase opportunities for the private sector by introducing competition into the provision of passenger rail services. Through a competitive selection of service operators, the States could assure themselves that they are getting a quality product and a fair price, and the traveling public would benefit by obtaining more choices and better

service. This creates a system where the marketplace, with its prices and passengers, drives service, rather than a system driven by politics.

The private sector also plays a key role in operating essential elements of the Nation's transportation system. Our national freight rail network, financed principally by private investment dollars, has demonstrated the economic benefits that derive from appropriate investments to meet the demands of new and emerging markets. The Class I railroads report that from 1980 through 2002, they have invested \$148 billion on infrastructure, which has positioned them to be a major contributor to the growth of the U.S. economy. Additionally, private carriers, such as intercity bus services, provide an important link in our transportation system.

INNOVATIVE FINANCE

Improving the transportation system of one of the fastest growing economies in the industrialized world presents significant challenges. As robust as our national transportation networks are, they are aging and increasingly being operated at or above capacity. Domestic and international trade growth is even faster than overall economic growth and certainly faster than capacity is being added to our transportation systems. Congestion is worsening on our highways, at our airports, in our skies, and at our seaports. This congestion represents a significant and growing risk to our economy.

SAFETEA lays the foundation for reforming the way Americans invest in and use our surface transportation system. By giving States new tools to manage congestion, raise additional revenue directly from users, attract private capital to highway and mass transportation infrastructure, and leverage existing resources more efficiently, the President and the Department recognize that the transportation system of the future must be more responsive to customers and more receptive to innovation than it is today. We have seen this shift take place in other network services like telecommunications, and there is no reason we cannot see it happen with our surface transportation system.

The need for investment capital for transportation projects is the driving force behind the push for innovative financing. We need to find new sources of investment capital to finance our Nation's transportation infrastructure system, including developing private and public sector capital. DOT is promoting a number of innovative financing initiatives in order to respond to the shortfall in conventional public funding, by supplementing traditional financing techniques and directing resources to transportation investments of critical importance. Specifically, this is accomplished by fostering public-private partnerships; drawing on the public's willingness to pay direct user charges for transportation benefits and services (e.g. tolling and value pricing); leveraging new sources of capital (e.g. private activity bonds); enabling additional transportation facilities to be developed more quickly and at less cost than would be possible under conventional public procurement, funding and ownership; and more flexible financing options (e.g. Transportation Infrastructure Finance and Innovation Act of 1998 (TIFIA) and State Infrastructure Banks (SIBs)). We cannot limit ourselves to one or two financing mechanisms; but, rather, we need to have a mix of different

financing mechanisms at our disposal. At the same time, the Department is always vigilant to ensure that publicly sponsored innovative finance tools do not crowd out financing by the private sector.

The Alameda Corridor is an example of a successful project that was funded through an innovative blend of public and private funding sources. Part of the funding for that project came from a \$400 million Federal loan. The Alameda Corridor Transportation Authority repaid the loan with interest in April 2004, 28 years ahead of schedule. By repaying the loan 28 years ahead of schedule, the Alameda Corridor Transportation Authority saved approximately \$65 million. The repayment is an indication of the project's initial success and revenue-producing potential. Additionally, studies estimate that more than 2 million jobs nationwide are associated with international trade, moving through the ports of Los Angeles and Long Beach. Building the corridor created 10,000 construction jobs in the Los Angeles area. This evidence illustrates the importance of the Alameda Corridor project to the local, national, and global economy.

The Nation's highways are vital corridors for our economic and social progress. The cooperation between Federal, State, and local governments, as well as private entities, makes toll facility financing and construction a viable resource alternative, as we move further into the 21st century. Potential implications of this effort go far beyond the simple question of how will we pay for the construction of transportation infrastructure in the future, but also confront the nature of the Federal/State relationship, the level of private sector participation and competition in the national transportation system, and the degree to which we can improve operational efficiencies.

PUBLIC-PRIVATE PARTNERSHIPS

Toll financing concepts have also helped to promote public-private partnerships because the private sector is willing to invest in highway facilities if there is a high probability of earning a reasonable return on its investment – this would most likely be done through the collection of tolls. A successful toll road project can be built with virtually any mix of public and private financial sponsorship. The Administrator of the Federal Highway Administration (FHWA) has identified public-private partnerships as being an important element of the Department's ability to reduce congestion and preserve our transportation infrastructure.

Promoting innovation is not new to FHWA. For decades, FHWA has encouraged increased private sector participation in the project planning, design, construction, maintenance, and operation of highways and bridges. The private sector has expertise often not available to the public sector. It can bring innovation, flexibility, and efficiencies to many projects. Public-private partnerships enable private firms to take advantage of efficiencies such as simultaneous design and construction. Several States and private ventures have also asked for FHWA's guidance in implementing public-private partnerships in which the private sector could assume a greater role in project development, financing, and operations, and how these new arrangements will be treated under Federal laws affecting highway projects. Together, the Department and FHWA are also conducting several workshops around the country to

assist states and the private sector in developing public-private partnerships across all modes. These workshops are intended to help states and locals interested in public-private partnerships to overcome barriers and to better understand where and how such partnerships can be initiated. FHWA continues to actively encourage States to explore and employ opportunities for innovation at all stages of transportation projects.

Since the Intermodal Surface Transportation Efficiency Act of 1991 (ISTEA), less than half the States have public-private partnership enabling legislation. Both public and private toll roads may be an additional means of financing and constructing highway facilities in the near future. The extent to which public-private partnerships become a major force in highway finance will depend on the ability of the individual public-private ventures to overcome existing institutional barriers.

INTERCITY BUS INDUSTRY

Private carriers provide an important, if often overlooked, link in the intermodal chain of personal movements, that is, intercity bus services. The transportation community's interest in the private, intercity bus industry is well placed. The industry plays a vital role in the supply of the Nation's publicly available transportation services, with the potential to provide even more. Throughout the country, in every State and in most travel markets, the private bus industry enhances the Nation's mobility by providing one or more of its broad array of services: in regular route service between cities; in commuter and shuttle markets; as an intermodal connector to air, intercity rail passenger, and transit operations; in charter, tour, and sightseeing markets; and in much of rural America -- as the only available public transportation option.

The breadth and depth of the industry is significant. Its dozens of large carriers and its more than 3,000 small and mid-size carriers operate a total fleet of 35,000 vehicles. Its services provide direct connections at more than 200 intermodal terminals. It carries some 40 million passengers per year in the intercity bus market alone (compared with Amtrak's 24 million rail passengers), and it carries more than 500 million passengers annually across its shuttle, commuter, charter, tour, and other markets. In the process, it employs more than 150,000 people and generates \$5 billion per year in carrier revenues. The opportunities for closer public and private sector cooperation in the area of bus passenger services are considerable.

The Administration's SAFETEA legislation recognizes this potential and supports several initiatives aimed at strengthening the industry's role in the national transportation network. The most prominent is an \$85 million capital grant program for intercity bus intermodal facilities, and it includes making intermodal service information improvements an eligible grant expense. Replicating an Airport Improvement Act provision that ensures intercity bus access to airport terminals to the maximum extent practical, SAFETEA would also require intercity bus access to other publicly funded intermodal passenger facilities. Finally, SAFETEA also proposes a significant increase in funding the Federal Transit Administration's (FTA) rural transportation program, which would increase amounts

available specifically for intercity bus service (Section 5311(f)) by approximately sixty percent. We are very hopeful that Congress will pass these provisions.

More can be done, however, to capitalize on the potential of the private intercity bus industry. In addition to our support for legislative changes, the Department is considering an array of program and policy measures that could improve private bus industry presence in the Nation's mix of publicly available transport services. For example, to address potential competition issues between private bus companies and public transit operators, we expect to review service contract and fleet deployment matters across a spectrum of intercity, shuttle, commuter, charter, and rural bus services. In terms of access to intermodal facilities, we are examining the consistency, fairness, and enforcement of the Department's modal administration policies that affect bus access to intermodal facilities. And in the area of better traveler information, we are exploring ways to standardize and expand the availability of intercity bus service information through electronic data sources.

TRANSIT AND THE PRIVATE SECTOR

The history of public transportation in the United States, or mass transit as it is known to many, is a history of private sector involvement in the movement of people to work, to recreate, and to build and enjoy livable communities. Before the transcontinental railroads were built, private entrepreneurs were providing basic mobility to our cities and towns. From the horse-drawn trams of the earliest years, through the building of capital-intensive subway and surface rail lines in New York City, Boston, and Chicago, to the numerous trolley and bus lines that crisscross large and small communities across the country, the private sector has led the way and remains a partner in government efforts to this day.

Until World War II, mass transit was the dominant means of transportation for many if not most people, particularly in our larger cities. But with the increased wealth of the average citizen and the increasing use of private automobiles, public transportation ridership declined steadily and private mass transportation companies began to fail at an alarming rate in the 1950's and early 60's. Congress recognized that the continued health of our urban areas required increased Federal involvement, with mass transit to play a critical role. Thus, in 1964, the Urban Mass Transportation Administration (UMTA), now called the Federal Transit Administration (FTA), was established in the Department of Housing and Urban Development. Unlike other DOT programs grounded in the Commerce Clause of the Constitution, the Urban Mass Transit Act of 1964 (UMTA) (Public Law 88-365) is grounded in the Welfare Clause. As a "welfare clause" agency, FTA's ability to exert influence over the transit industry is limited to setting terms and conditions over the use of Federal grant funds. Therefore, unlike agencies with authority grounded in the Commerce Clause, FTA has very limited authority to regulate.

From the outset, UMTA's authorizing legislation recognized the value of this history and required both maximum feasible participation of the private sector in planning the provision of mass transportation services assisted by UMTA, as well as strong protection of private transportation companies providing charter, school bus, and sightseeing services, which, by

statute, are expressly excluded from the definition of public transportation. Recipients of transit assistance must agree, as a condition of FTA funding, that they will not use FTA-funded assets for such services in competition with the private sector. FTA has regulations in place to enforce these private sector participation and protection requirements. Through continuing information and outreach FTA ensures the rules are well understood by all parties. For charter bus service, no FTA recipient can provide the service if there are willing and able private providers to do so, with some exceptions. Any such service must be incidental to, and not interfere with, the mass transit purposes of the assets acquired with FTA assistance. No exclusive school bus service can be provided, although transit operators do carry students, like any other passenger, and on mass transit routes designed to include their needs, so-called "tripper" service. Under no circumstances can such service be a closed-door service available only to students, i.e., it must be regular mass transit service open to the general public.

Understandably, there will be occasions when private providers believe that the public sector is unfairly or illegally competing with them. During the past three fiscal years, FTA has received roughly a dozen charter bus complaints each year, a relatively small number given the approximately 2000 FTA recipients subject to the charter regulation. Pursuant to the Conference Report accompanying H.R. 2673, FTA will soon release a report on charter service, which revisits the relevant regulatory framework and analyzes how regulation can effectuate the statutory prohibition.

CONCLUSION

The Department will continue to look for opportunities to strengthen the role of the private sector in the national transportation network. The Administration's SAFETEA proposal includes a number of important initiatives to inject more capital, both public and private, into the transportation system through innovative financing techniques. But to derive the greatest benefit from value pricing mechanisms for congestion management and facility improvement, and to access resources for infrastructure financing beyond State and Federal government funding, States need the ability to encourage private sector participation in surface transportation infrastructure financing.

I want to be clear about where the Bush Administration, the Department, and Secretary Mineta stand. We are for public-private partnerships. We support them and we want to make them much easier to implement. Strengthened public-private partnerships are key to the Administration's innovative finance reauthorization proposals for surface transportation.

At DOT, we are doing all we can to encourage innovative financing and public-private partnerships, and to remove constraints that hinder projects. We do not want to stifle innovation and creativity, as we carry out our duties to protect the public interest. Competition is an incubator of innovation. The Administration's SAFETEA reauthorization proposal will give States more options and flexibility for transportation solutions and will take the first steps toward fundamentally reforming the way Americans purchase transportation infrastructure. The intercity bus industry is a vital component of our

transportation network, and it is important we continue to ensure its active role in communities throughout the nation. We must continue to work together to maximize public and private resources for transportation and the role of the private sector in the provision of mass transit and intercity services.

Mr. Chairman, I again thank you for this opportunity to appear before you today. I will be pleased to answer any questions you may have.

Mr. OSE. I recognize my friend from Massachusetts, if he chooses, for the purpose of an opening statement.

Mr. TIERNEY. I am going to pass on the opening statement, and we can get right to the questions. Thank you, though.

Mr. OSE. My friend from Ohio, which is a large State, for the purpose of an opening statement.

Mr. TIBERI. No, thank you.

Mr. OSE. We are going to go straight to questions.

Mr. Frankel, I am curious about something. I want to clarify something. I saw in your testimony the comments about intercity bus service and then also transit and private sector; and I concluded implicitly, I hope correctly, but I stand to be corrected if otherwise, one is between cities and one is within a city. Transit is considered—I mean, that is the nomenclature for bus service within a city?

Mr. FRANKEL. Essentially, that is the case, Mr. Chairman. Yes. That is why it is sometimes referred to—or more often, I guess—as over-the-road buses. That is the particular focus on services between metropolitan areas. Although, in fact, many—as you well know, and it is a subject here, in many cases the same companies will sometimes, under contract, provide services within a metropolitan area or urbanized area.

Mr. OSE. They may have dual wings of the business doing intercity and transit services?

Mr. FRANKEL. Correct. Our proposals are really directed at the private sector provision of what I will call innercity or intrametropolitan area of services.

Mr. OSE. Now, the Transit Administration works with local public transit providers?

Mr. FRANKEL. That is primarily the case. That is right. Although, as you well know, one of its important programs is rural, the rural bus program, in which in virtually all cases, if not all, those services are provided under contract, usually by private companies.

FTA is the administer of the grants, grants made through States, through State departments of transportation, largely, for rural bus services. Your description is basically the case. That is certainly the way that we think of FTA, to a large degree.

Mr. OSE. That is why I chose the word local rather than rural or urban.

Within these arrangements between FTA and the local public service provider, FTA is asked to make grants along the course of business, is that correct?

Mr. FRANKEL. Of course this is true for the Department, but FTA is a grantmaking agency; and its powers, as you know, derive from the welfare clause of the Constitution, not, as we pointed out in my written statement, not from the commerce clause. It is essentially not a regulatory agency, unlike, for example, NHTSA, the National Highway Traffic Safety Administration, which is essentially a regulatory agency versus a grantmaking agency like FTA.

Mr. OSE. I have page 5 where that you talk about the welfare clause. For those grants, your testimony states: FTA's ability to exert influence over the transit industry is limited to setting terms and conditions over the use of Federal grant funds.

Now when you set terms and conditions, to what extent do you set terms and conditions? What are the parameters of the terms and conditions on the grants that you otherwise make?

Mr. FRANKEL. Well, Mr. Chairman, I think probably in terms of providing you the detail that you might require, I would rather supply that subsequently in writing. I am not the Administrator of FTA, and I can say only in general terms, it is exercising oversight, obviously, and making sure that the grants are carried out consistent with national purposes and the statutory purposes.

[The information referred to follows:]

Question 1. To what extent does FTA set terms and conditions over the use of Federal grant funds/what are the parameters of the terms and conditions on the grants that you otherwise make?

Response: FTA sets terms and conditions over the use of Federal grant funds, as required by statute, regulations, and policy. The principal statutory provisions are those set forth at Title 49 of the United States Code, Chapter 53. The principal regulatory provisions are those set forth in the Departmental rules, codified at Title 49 of the Code of Federal Regulations, Parts 18 and 19, which carry out the governmentwide administrative provisions applicable to grants of Federal assistance. Certain types of terms and conditions are set forth in grants that are awarded for particular types of projects. However, there are certain types of terms and conditions that apply to all types of public transportation projects, which are set forth in the FTA Master Agreement, incorporated by reference into all FTA grant agreements.

Mr. OSE. If a local service provider comes forward and says to the FTA, we are applying for a grant of X amount of dollars to acquire a maintenance facility, you would judge that under the circumstances at that time?

Mr. FRANKEL. Well, first of all, the grants are largely—again, some exception with the rural program, obviously—but the grants to which you are referring, to more urbanized areas, are strictly capital grants. They are not for operations.

They are no longer in the business, as you well know, of providing operating subsidies. And the conditions really relate—the development of these capital programs, as is true of a State transportation agency, are consistent through planning processes, the planning requirements of how T-21 is extended going through an MPO process, the development of TIPS and State TIPS—

Mr. OSE. All of these are capital assets?

Mr. FRANKEL. The acquisition of capital assets. These become programs subject to local planning processes and priorities and then are funded and, in many cases, are funded through formula programs. Not entirely. FTA, unlike the highway program, is not entirely by any means a formula program, but there are elements of that in which the local agencies in cooperation, if you will, with the MPOs develop their own priorities of how these capital grants can be used, these capital funds can be used.

Mr. OSE. My time has expired.

Mr. TIERNEY. Thank you, Mr. Frankel, for your testimony here today and for joining us.

Some people would think that local transit systems are, in fact, local, that the local community would be the one to decide whether or not they are going to use a private carrier or a public carrier. I am getting the inference from your testimony that the administration—I will say “you” except I think you are representing the administration’s position on this—somehow thinks that is a decision that shouldn’t be left to the local community, that the community should be forced to use private companies instead of public companies. Am I correct in where you are going on that?

Mr. FRANKEL. No, I wouldn’t say that, Congressman. I think, frankly, your initial characterization is generally what our view is, particularly strongly; and I think this permeates our SAFETEA proposal, that decisions are State and local decisions to be made particularly in terms of operations. There are provisions in the law to which the chairman has made reference which emphasize an important role for the private sector, which we do try to recognize; and, we do try to strike a balance in terms of creating options and alternatives for State and local authorities and agencies to utilize private resources and private capital.

Mr. TIERNEY. I have a little trouble buying that, because I look at the administration’s reauthorization proposal, and I think they go a little bit further than that. It seems to me what they try to do is allow the Department of Transportation to withhold certification of a transit program, if the program doesn’t, in the Federal agency’s opinion, allow sufficiently for private operators to compete.

We are putting the Federal opinion of whether or not there was the right amount, in their subjective opinion, to compete or not, as opposed to the local people. I am disturbed by that. I am wondering

how an administration that tells us how much they like the local communities and all decisions are local could get to the point where they have that sort of, I think, heavy-handed language in there, or at least language that allows for interfering on a subjective basis. Can you reconcile that for me?

Mr. FRANKEL. Well, again, Congressman, I think this permeates the law and has for some time. There is a balance to be struck. I think the balance, to a significant degree, has to be struck on a case-by-case basis. As I pointed out and as you recognized, the power of FTA, unlike other agencies, is really conditioning and exercising oversight in grants—capital grants that it makes, in ensuring that they used in a manner consistent with the whole statutory framework.

That is something that we try to do. Decisions are made one way or the other; and, you know, there can be controversial decisions. But, essentially, that is exercising—that has been true certainly before our proposal. Our proposal—

Mr. TIERNEY. This is new language. Your proposal injects something entirely new into the process here. This isn't the proposal where the administration says, well, we are going to leave it to the local community. It says that we are going to have the Department of Transportation actually make a subjective decision as to whether or not this sufficiently allowed private competition and then withhold certification if the Federal level doesn't think that is the case.

Mr. FRANKEL. Respectfully, Congressman, I don't think that is something we are proposing or something you are proposing.

Mr. TIERNEY. Let me put it this way. It specifically repeals Section 5305(e)(3), which, you know, is a pretty clear point. Then, it adds to that language. So, I mean, how do you tell me that you don't think it is something new, something that breaks from the past?

Mr. FRANKEL. It is trying to create a framework where balance and decisions can be made consistent with, I think, what the framework of this law has been for some time. I think the major initiatives that we have taken deal with trying to promote greater private investment and private engagement. But largely—

Mr. TIERNEY. You are trying to put your finger on the scale. That is what troubles me. If it is a local decision, then let's keep our finger off the scale, and let's not say we are going to make a Federal justification for our subjective opinion on that.

How are we going to protect that from happening, Mr. Frankel? How are we going to ensure that local communities are, in fact allowed to make a local decision? If you put the kind of clause that the administration wants, how are we going to protect that and how are we going to say that the local community is not going to be overruled by some bureaucrat at the Federal level who just subjectively decides, hey, you know, you don't have enough Federal people, and this is the ideology that we have, and we want the private guys in there?

Mr. FRANKEL. Well, Congressman, again, I think it is a question of balance on a case-by-case basis.

Mr. TIERNEY. Where is the balance? You keep using this word "balance." This isn't a situation where you say that the Federal Department of Transportation is going to make sure that there is a

balance. You are saying that they are going to make sure that there is going to be certification withheld if they didn't think there is enough private angle in there.

Mr. FRANKEL. Again, in my opinion, respectfully, that is consistent with, maybe clarifies, but consistent with what the thrust of the law has been for some time.

Mr. TIERNEY. Mr. Frankel, I tell you that in 20 odd years of practicing law and looking at things like this, I think you are so off the mark on that. But you have certainly maintained your line, and I respect your position that you have to maintain the story. That is your story and you are sticking with it, as they say. So thank you.

Mr. FRANKEL. Thank you, sir.

Mr. OSE. Mr. Frankel, the 1966 law that established DOT identified six reasons to establish the Department. The second reason was to facilitate the development, improvement of coordinated transportation service to be provided by private enterprise to the maximum extent possible—Section 2(b)1 of Public Law 89-670.

The question is, since January 2001, in highways, mass transit and rail, since January 2001, what private sector participation projects including public private partnerships—has the administration initiated or facilitated?

Mr. FRANKEL. Well, let me say, Mr. Chairman, that much of that really rests, as I referred to, in proposals we have made in SAFÉTEA. There are steps that we are trying to take administratively.

One project I would like to mention—I sit in my capacity as Assistant Secretary for Policy on something called the Credit Council, which is, if you will, a board of directors for the TIFIA program. One of the projects that—one of the loans, if you will, credit assistance that we approved is for SR-125, which is a private—a franchised private highway, if you will, developed in southern California, with which I am sure you are quite familiar.

Also, we have made proposals, as you know, and Congress has been receptive so far in this process to proposals we have made to amend the TIFIA program. We are also looking at opportunities administratively to open up greater innovation in the highway area on the part of States and allow them to build and utilize mechanisms—existing mechanisms to create public-private partnerships.

Finally, as I mentioned in my testimony, a very important proposal that we have made in our legislation is to open up the opportunities for State decisions about utilization of highway user charges, to create revenue streams to support private investment. I can't resist saying that I think the T-LU, passed by the House, its provisions for tooling we find as unduly constraining and making it much more difficult for private investment to be made in the highway sector.

I might say in the rail side, this again is in the nature of the proposal, really at the heart of the President's proposal to reform the provision of innercity passenger rail services, is to—I wouldn't say privatize. It has been accused of that. That is not a goal of the administration, rather to open up the opportunities for competition in the provision of innercity passenger rail, which could include—not limited to but certainly include an important role for the private sector.

That is important. So far, we haven't been able to engage the Congress I think in meaningful discussion as yet about reform of innercity passenger rail. But, that is one of the most important elements.

In terms of the transit area, I am not as familiar with specific steps in that area, and I would like to supply you subsequently with more specific answers in that regard.

Mr. OSE. OK. We would appreciate that.

[The information referred to follows:]

Question 2. In terms of the transit area, what private sector participation projects, since January 2001, has the Administration facilitated or initiated? This includes public/private partnerships.

Response: FTA encourages public/private partnerships in developing transit infrastructure and local transit agencies' provision of services – through innovative finance transactions, design-build programs, and joint development projects, in particular – that lead to hundreds of millions of dollars in private sector investment in mass transit. For example, on June 11, 2004, FTA approved a request by the Virginia Department of Rail and Public Transportation (VDRPT) to enter preliminary engineering for a proposed extension of the Washington, D.C. Metrorail system from West Falls Church through

Tysons Corner to Wiehle Avenue in Reston, Virginia, and to complete an environmental impact statement for a potential further extension of that system to Dulles International Airport in Loudon County. VDRPT intends to construct these extensions under a design-build contract with Dulles Transit Partners, a consortium of private engineering and transportation firms, in accordance with Virginia's Public Private Transportation Act ("PPTA"). (The Virginia State legislature enacted its PPTA in 1995 with the twin objectives of building transportation infrastructure more quickly and efficiently and encouraging private investment in that infrastructure.) Together, the two potential extensions would comprise approximately 23 miles of rapid rail at a cost of \$4 billion. Under the contract being negotiated, the private consortium would build the extensions at a fixed price, including a built-in profit margin.

Additionally, FTA provides training and technical assistance to local transit agencies for fostering private sector participation in local programs of projects for mass transportation, as required by the Federal transit statutes and the joint FTA/Federal Highway Administration statewide and metropolitan planning regulations, and funds and assists research studies in the area of private sector participation, under the aegis of the Transit Cooperative Research Program (TCRP) of the Transportation Research Board, National Research Council. Five such studies have been produced since January 2001:

1. TCRP Project J-6, Task 30, "Supplemental Analysis of National Survey on Contracting Transit Service."
2. TCRP Project H-27, "Transit-Oriented Development and Joint Development in the United States: A Literature Review."
3. TCRP Project J-3, "International Transit Studies Program: Design-Build Transit Infrastructure Projects in Asia and Australia."
4. TCRP Project B-16, "The Role of the Private-for-Hire Vehicle Industry in Public Transit."
5. TCRP Project B-21, "Effective Approaches to Meeting Rural Intercity Bus Transportation Needs."

Mr. OSE. From your answer and summary on that State Route 125, the FTA provided some credit assistance, which I presume to be some sort of grant.

Mr. FRANKEL. That is the TIFIA program. A TIFIA loan was approved in connection with SR-125.

Mr. OSE. And then the administration's other initiatives, there is one dealing with innercity rails and trying to find some means of making it more efficient, which will be particularly useful along the Atlantic Seaboard. Then you are going to get back to us with additional ones, both in highways and rail and specifically in the transit area.

Mr. FRANKEL. That is correct.

Let me respectfully, sir, just amend something you said. As a matter of fact, the President's proposal on innercity passenger rail is to open this up for all parts of the country. I think a State that has done more on its own than almost any other is California, and I think the playing field needs to be leveled in that regard.

We have made proposals that would allow all—appropriate areas of the country, regions of the country that want to move and where innercity passenger rail can fill an important niche in a multimodal transportation system, to allow them to develop systems which would receive—be eligible for capital grants from the Federal Government and would allow opportunities which we think can be done under existing law to enhance competition in the provision of those services. That is meant to be a national program, not a regional program.

Mr. OSE. Right. I see my time just expired.

The gentleman from Massachusetts.

Mr. TIERNEY. Mr. Chairman, I think Mr. Frankel has been kind in answering the questions I had to ask.

I would just like to ask for unanimous consent to put on the record a statement of the Amalgamated Transit Union with respect to this issue.

Mr. OSE. Without objection.

Mr. TIERNEY. Thank you. Thank you, Mr. Frankel.

Mr. OSE. Mr. Frankel, in 1994 Congress passed amendments to the 1964 mass transit law that required private sector participation to the maximum extent feasible; and I cite as reference Section 5306(a) and 5307(c) of Public Law 103-272 in making that statement.

In your written testimony, entitled Transit and the Private Sector, you state: FTA's ability to exert influence over the transit industry is limited to setting terms and conditions over the use of Federal grant funds. And that is on page 5. In fact, underline that.

My first question is, does the Department of Transportation—let's back up. Congress passed this law; the Executive signs it. Congress passes legislation; the Executive signs it. It becomes law. The agencies then go to rulemaking processes to implement that law.

Now, this law which was passed in 1994, these amendments, does the Department of Transportation intend to issue implementing rules for Section 5306(a), private enterprise participation, and 5307(c), public participation requirements, as I requested in writing in August 2003?

Mr. FRANKEL. Mr. Chairman, rules are not always the means by which an agency will implement statutes which have been enacted. As I pointed out and as you acknowledge, FTA is a grantmaking agency, not a regulatory agency. It does issue rules on occasion, but it is not principally in the process, in the business, if you will, of issuing rules.

These laws can and should be enforced through other—often-times, other means, guidance to the field and to grantees. Policy statements, much of which has been—

Mr. OSE. Let me just interrupt there, if I might, Mr. Frankel, because it has been brought to my attention—it was brought to the Department's attention by third-party private providers that certain local grantees were not complying with these provisions in a 1994 law; and the feedback I get in sum and substance is, well, you know, this is—I am summarizing, paraphrasing, putting words in our mouth. However you wish to make it sound, the feedback from the agency was: Well, you know, we are not an enforcement agency.

Well, every department and agency of the government—I can go to different spots—enters into contracts, grants and what have you. Are you saying that you are unique because these other departments and agencies have enforcement mechanisms? Are you saying that DOT is unique in this respect?

Mr. FRANKEL. No. First of all, we are specifically I think in this area talking about FTA. I am not saying—I don't want to—I can't speak to what may or may not have been said. I am pointing out that the enforcement mechanisms, if you will, the oversight mechanisms exercised by FTA in this regard is through the enforcement of the grants, ensuring that grants are used in a manner consistent with the statutory framework; and, unfortunately, that often takes the more extreme measure of either terminating grants or limiting or withdrawing some of the grants, as opposed to the more classic regulatory powers that might be exercised by certain other agencies as the particular means available to FTA.

It is also further complicated—and without reopening the discussion with Congressman Tierney, it is also complicated by the fact that these are State or, in this case, local decisions going through a planning process. And, really, the enforcement mechanisms—among the enforcement mechanisms available to FTA is the certification of the planning process, to make sure that as capital programs—surface transportation capital programs are developed and go through the planning process, the MPO process, that FTA and the Federal Highway Administration certify that the planning process has considered all of the things that need to be considered under Federal law.

There are a web of enforcement mechanisms, not necessarily the classic ones that people are more familiar with with certain other agencies.

Mr. OSE. What happens when a grantee doesn't comply with the terms of the grant—the terms and conditions of the grant that the Secretary has otherwise signed off on? I mean, this sounds great—I mean, I want some of this kind of thing. How do I get the queue for this? It is like the agency says, well, sorry we can't enforce it.

Mr. FRANKEL. No, that is not the case. If in fact there has been a violation, it could take the form of not certifying a plan. That is, a TIP is developed—or, indeed, the whole planning process could be—certification for a planning process and MPO could be withdrawn. That has happened a couple of times. Not difficult to sustain politically, I might say, where it has been done, but it has been done. In the case of a particular grant that the agency, in this case FTA, could decide that the grant should be terminated or suspended or some portion of it suspended.

That is the particular enforcement mechanism. It doesn't always allow for some of the subtleties that are available with some regulatory agencies where they can exercise their power in a different way.

Mr. OSE. However, the grantee knows the rules of the road, so to speak, when it applies for the grant. That if it does not comply with terms and conditions, the grant can be terminated?

Mr. FRANKEL. Well, and/or the planning agencies.

Mr. OSE. My time has expired.

Mr. TIERNEY. It has expired again, Mr. Chairman.

Mr. OSE. I apologize.

Mr. TIERNEY. You are free to continue on if you want. I know you have your finger only about halfway down the page there.

Mr. OSE. I have multiple pages, though.

Mr. TIERNEY. We can go back and forth over my one point again, if you want to do that.

Mr. OSE. Are you teaming up on the chairman here?

Mr. TIERNEY. Why not?

Mr. OSE. All right. So back to my question. Pursuant to the 1994 law, which, if my chronology is correct was 10 years ago, what is the intention of the Department of Transportation as it relates to implementing rules, putting the law into effect regarding private enterprise participation in public participation requirements? Are you or are you not going to undertake a rulemaking?

Mr. FRANKEL. Well, I think I am—it would be more appropriate for the Administrator of FTA to answer that specific question. That is where the rulemaking, if you will, would occur. I do want to say that traditionally what has been done in this area—traditionally, what has been done in this area, the steps that I have described, that is a review of the planning process and a continuing oversight over the grant.

Mr. OSE. Well, on August 6, 2003, I actually sent a letter to the Administrator Jennifer Dorn, and the feedback I got from counsel to Ms. Dorn was that Dorn refused to undertake a rulemaking to effectuate the statutory private sector participation requirements since there was a legislative proposal that Congress was still considering.

Now what happens if Congress doesn't take this up? We are going to sit here in abeyance forever, pending some legislative resolution?

Mr. FRANKEL. Well, I think it is not some—I think what we are dealing with, obviously, is the pendency of reauthorization legislation. We are operating in a framework—as you know, but for three extensions, we would have no authorizing legislation for any of these programs.

We are in the stage where we are, hopefully, about to enter into a period of a multi-year reauthorization and some change in these programs in which Congress, still in the conference process, will have an opportunity to look at some of the issues that we are talking about this morning.

I think the feeling—and I can't speak for Administrator Dorn, but I think the feeling was that this was a particularly maybe inappropriate time, while Congress itself was looking at these issues, to issue a rule.

There are other means, as I said, available. There are regular means available.

Mr. OSE. We passed a law in 1994. We passed a law in 1994. It passed with support from both sides of the aisle, in both Houses of the Congress, and administration from the other party had signed it. Now, are you telling me that, 10 years in, we are waiting for, I don't know, for it to rain cats and dogs before we pass a rule implementing legislation that we passed 10 years ago?

Mr. FRANKEL. Well, I am not saying that. But whether the Administrator and FTA intends on considering a rule is something that I think it is better for FTA to respond to.

I do want to reiterate what I have said earlier; and that is rule-making, in my opinion, may not be the appropriate step and the best means to carry out that statute in a process where FTA, as a grantmaking agency, essentially has the power to condition grants and exercise oversight as how these grants are used.

That is a continuing process. It is on a one-by-one basis but also could take the form of issuing guidance or policy statements to the field and to grantees.

Mr. OSE. You don't have any parameters by which a potential grantee out in the private sector or in the public provider sector can go to to look at how they might approach FTA for a potential grant? I mean, it is just pretty nebulous, it sounds to me.

Mr. FRANKEL. Well, I am not sure I am understanding your question exactly.

Mr. OSE. Well, we don't have rules. I am not aware of any guidance. Congress passed a statute, but we don't have any rules. I am not aware of any guidance. If I am out in the public or private sector trying to provide transit, whether it be public or private, I am sitting there kind of grasping at clouds, if you will, to figure out how to put in an application.

I am aware of the terms and conditions. But, interestingly enough, you know, I have more than anecdotal information that says that, when a grantee violates the terms and conditions, the Department of Transportation says we can't get into that, because we don't have a rule.

I mean this is a circuitous argument. You are going to have to correct me if I am wrong.

Mr. FRANKEL. I don't know that was the basis, if you will, of any decisions that are made on some of the cases that you are particularly concerned with. But the—again, whether rulemaking is the appropriate way to carry this out—there have been attempts over the years on the—as I understand it, by the Department to issue guidance or policies; and, as a matter of fact, under pressure—this

is now sometime ago, but under pressure from Congress, the Department had to withdraw those rules.

With all due respect, as Congressman Tierney's questions indicated, this is not an area in which there are Blacks and Whites; and I think people have to look at this, if you will, on a case-by-case basis.

It may be appropriate for FTA to consider the issuance of additional guidance or new guidance. But, again, through the planning process, that is at the heart of this really. These are local decisions, and looking at the validity or the authenticity of the planning process and through the use of certification or denying certification to a plan or to the process, it becomes a toll that is available to the Department and has and continues to be so.

Mr. OSE. Can you tell us how many times you have—what was your word—revoked a grant? Have you taken any enforcement actions on grantees where the grantees have violated the terms and conditions of their grant?

Mr. FRANKEL. I think I would—rather than try to guess at that, Mr. Chairman, I will be happy to supply you that.

Mr. OSE. I got three I would like you to check on specifically. They will be testified to later.

Mr. FRANKEL. Right.

[The information referred to follows:]

Question 3. How many times have you revoked a grant? Have you taken any enforcement actions on grantees where the grantees have violated the terms and conditions of their grant?

Response: Throughout the 40-year history of the Federal transit program, FTA has taken various types of action to ensure that grantees comply with the terms and conditions applicable to their grant agreements. These have ranged from formal proceedings, prescribed, for example, under the Federal claims collection, bid protest, Buy America, charter, school bus, bus testing, civil rights, Davis-Bacon, and drug and alcohol regulations, and other similar enforcement mechanisms, to informal actions to bring grantees into compliance. Absent extreme circumstances, FTA will first seek voluntary

compliance to correct noted deficiencies before resorting to more aggressive approaches. This may involve merely deferring action on pending grant applications or disallowing draw down of requested funds under grants until the grantee provides adequate evidence of its compliance with the applicable requirements.

It is very rare for FTA to rescind or terminate a grant, either for cause or at the request of a grantee. FTA does not keep records of grant rescissions or terminations. Please see the responses to the second set of Questions for the Record for a full explanation of FTA's enforcement of the requirements for private enterprise participation in Federally funded mass transportation.

Mr. OSE. I do just want to say, in 49 CFR, it does vest in the Office of the Secretary the responsibility for encouraging maximum private development, maximum private development of transportation services.

Mr. FRANKEL. Right.

Mr. OSE. Frankly, I know what kind of money is involved in buying one of these buses. It is not exactly chump change. You might want to think about providing certainty to the potential private providers of transit by adopting a rule or some sort of framework under which there is certainty. I mean, I have to tell you, that is just a glaring gap in how this is proceeding. I don't mean to beat you over the head on it.

Mr. FRANKEL. No, that is fine.

Mr. OSE. Frankly, it is just not acceptable management. I know guidance has no legal effect. So does he.

Now in terms of—well, I yield to the gentleman from Massachusetts. Undoubtedly, you have questions.

Mr. TIERNEY. I have no questions. I am just watching you go on and on. You have dug far enough. We will see where it goes.

Mr. OSE. OK. Mr. Frankel, the common rule that guides governmentwide grants management, provides various remedies for grantee noncompliance. Those include temporarily withholding cash payments pending correction of any deficiency, disallowing all or part of the cost of the action that is not in compliance, wholly or partly suspending or terminating the current award for the grantee's program, withholding future awards—excuse me, withholding further awards for the program, or taking other remedies that may be legally available. That is in 49 CFR, subsection 18.43(a), on page 148.

Now, going back to 5306(a) and 5307(c), dealing with private sector participation, has DOT enforced anything under either of these sections in any of those five remedies? I think your testimony was you would like to respond to that in writing?

Mr. FRANKEL. I would, sir.

[The information referred to follows:]

Question 4. In regard to sections 5306(a) and 5307(c) [49 U.S.C.] has the DOT enforced anything under either of these sections in any of the five remedies: withholding cash payments pending correction of any deficiency, disallowing all or part of the close of the action that is not in compliance, wholly or partly suspending or terminating the current award for the grantee's program, withholding further awards for the program, or taking other remedies that may be legally available.

Response: Yes. Through its oversight and triennial reviews during Federal Fiscal Years 2000 through 2003, FTA identified ten grantees that were deficient in their compliance with the requirements for private sector participation and outreach to private operators, as follows:

FY 2000:	Central Ohio Transit Authority (Columbus, Ohio) Sacramento Regional Transit District (Sacramento, California)
FY 2001:	City of Winston-Salem, North Carolina City of Pocatello, Idaho
FY 2002:	James City County (Virginia) Transit Company Lexington-Fayette (Kentucky) Urban County Government City of Waukesha Metro (Waukesha, Wisconsin) Waukesha County, Wisconsin
FY 2003:	Saginaw Transit Authority Regional Services (Saginaw, Michigan) San Joaquin Regional Rail Commission (San Joaquin, California)

In all instances in which FTA identifies deficiencies during a triennial review, it makes recommendations for corrective action by the grantee and provides the grantee an appropriate amount of time to take action voluntarily to bring itself into compliance. Only in extreme cases in which there is a lack of good faith efforts by a grantee does FTA resort to formal enforcement measures. In all of the instances identified above, the grantees took actions voluntarily to bring themselves into compliance.

Mr. OSE. Now, you also have—within the grants process, there is a triennial audit that occurs on all of the grants.

Mr. FRANKEL. That is of the planning process. That is correct, sir. You are right.

Mr. OSE. So every grantee is subject to a triennial audit?

Mr. FRANKEL. That is apparently the case. At least I think what we are talking here, in the context of FTA.

Mr. OSE. Within the body of your response to the previous question, I would like to know how many of these triennial audits, including deficiency findings of noncompliance with private sector participation requirements—I would like you to specifically respond to that question.

Mr. FRANKEL. OK. I would be happy to do that, Mr. Chairman. [The information referred to follows:]

Question 5. How many triennial audits are grantees subject to?

Response: By definition, each grantee undergoes a triennial audit once every three years.

Mr. OSE. Then the second is, how many of these noncompliance findings resulted in an enforcement action?

Now I want to go through a specific situation in Sacramento. I briefly discussed my investigation of this situation regarding a 25-year, competitively awarded contract for mass transit service in Sacramento. I just want to step through this and make sure that my understanding of the facts is, in fact, your understanding of the facts.

There was a July 2000, triennial audit in which the Department of Transportation found a deficiency by the grantee in compliance with the private sector participation requirements. That is my understanding. Is that correct? This is for Sacramento RT.

Mr. FRANKEL. I am aware of the particular case.

Mr. OSE. If that gentleman would like to testify, he can step forward, rather than whisper in your ear. We can get it straight from him, if you would rather.

Mr. FRANKEL. I don't want—I want to try to answer your question as accurately as I can.

My understanding, Mr. Chairman, was that related to the public notice requirements in terms of the provision of services. There were additional—as you well know, the transit agency established new services, and there was a question about public notice of the—my understanding, is a question of appropriate public notice of those services.

Mr. OSE. In terms of where the notices were placed and where they were circulated to?

Mr. FRANKEL. I believe that is the case.

Mr. OSE. We would like to ascertain whether or not that is your understanding in fact, rather than belief. So we are going to submit that question to you in writing.

Mr. FRANKEL. Thank you, sir.

Mr. TIERNEY. Clarification. Can you give me the date?

Mr. OSE. It is July 2000.

Mr. TIERNEY. Thank you.

Mr. OSE. Now when the triennial audit determined a deficiency, did you notify the grantee of this deficiency in August 2000? My information is that you did.

Mr. FRANKEL. Again, Mr. Chairman, I think these detailed questions really are appropriately directed—I know you have done so in letter—but appropriately directed to FTA rather than to me. I think we will supply—obviously, the Department and FTA will supply you with specific answers to those questions.

I am really not in a position to speak on such matters. I can talk generally about this particular case in the context of the subject of this hearing. But, in terms of the specific details, I am not the Administrator directly responsible for that. I think it would be misleading for me to try to answer those specific questions.

Mr. OSE. Does the gentleman right behind you know the answers?

Mr. FRANKEL. I don't know whether—he is the counsel to FTA, as you know. But, I think probably the more appropriate step, Mr. Chairman, would be for us—in terms of the specific questions, as opposed to kind of putting them in the context of the overall sub-

ject of this hearing, for us to prepare a written response in which we can draw on FTA's detailed knowledge of these circumstances.

Mr. OSE. OK. Well, let's just go through the questions and see what you can recall from previous discussions at the Department.

So, we aren't able to ascertain whether or not the grantee was notified in August 2000 of the deficiency finding?

My information tells me that, on October 1, 2000, the Department of Transportation approved \$2.4 million in the form of a grant to this particular agency to purchase new buses.

Mr. FRANKEL. That is my understanding.

Mr. OSE. Did the terms and conditions of that grant preclude the use of those buses to, if you will, squeeze out a private provider on any service that they are currently providing?

Mr. FRANKEL. My understanding of this situation is, respectfully, that was—that is not our perception, let me say, of the circumstances. The circumstances here, as I understand it, were that the State of California—State of California, not the local transit district—the State of California had made it—through its general services agency had made a decision to terminate charter services. The transit—local transit agency, again going through the process of developing its operations, developed new services, new scheduled regular services, not charter services available for the public, and these buses were utilized. This capital equipment was utilized in the provision of those services.

Mr. OSE. OK. Under the same code section, which is the 49 CFR, on page 136, subsection 18.323, and I am—notwithstanding the encouragement in subsection 18.25(a) to earn program income, the grantee or subgrantees must not use equipment acquired with grant funds to provide services for a fee to compete unfairly with private companies that provide equivalent services, unless specifically permitted or contemplated by Federal statute.

Was the service for which the State of California, through the Department of General services, using these \$2.4 million worth of buses, was that specifically permitted or contemplated by Federal statute?

Mr. FRANKEL. I hope this is responsive to your question, Mr. Chairman. But I think it is fair to say that the decision—in administering the grant the decision was—that the circumstances in Sacramento in this case did not fit the circumstances you described or the law as you described it. These were not services in competition. The local transit agency was not developing services in competition with what had been charter contractual services with the State of California.

I understand and respect the fact that you have a different view. But, I'm saying that the agency in this case, FTA, in administering the grant reached the conclusion that there had not been a violation of this law, of this regulation or requirement.

Mr. OSE. Well, if I can just share—actually, I see my time is up.

Mr. TIERNEY. I am ready to go.

Mr. OSE. Well, then I will yield to the gentleman from Massachusetts.

Mr. TIERNEY. Mr. Frankel, as I understand the sequence of events on this—and perhaps you can help me here—is that the De-

partment of General Services terminated the contract with Amador.

Mr. FRANKEL. They either terminated it or had even given notice that they were going to terminate it. I am not exactly sure of timing.

Mr. TIERNEY. But that happened?

Mr. FRANKEL. Correct.

If I can, Mr. Congressman—I am sorry. I believe there was the expiration of a contract and indication that the contract would not be extended further.

Mr. TIERNEY. OK. And, following that, they had contracted to purchase fare medium from SACRT?

Mr. FRANKEL. That is my understanding.

Mr. TIERNEY. It wanted more frequent and more comprehensive service?

Mr. FRANKEL. Open to the public. Like any scheduled service, with intermediate stops and conceivably routes somewhat different from what the contractual services had been.

Mr. TIERNEY. Exactly. And, in fact, the SACRT isn't a charter service, is it?

Mr. FRANKEL. The decision by FTA in administering the grant was this did not—was not in competition with the earlier charter service.

Mr. TIERNEY. Because the charter service has a closed clientele, which is what Amador had, and SACRT is open to all the public, and the other group that Amador had was within that larger group?

Mr. FRANKEL. Correct.

Mr. TIERNEY. It is not even applicable on that basis. We really are discussing apples and oranges here, charter versus noncharter, when we talk about the type of service and the legal basis here. Am I correct?

Mr. FRANKEL. I think, without necessarily referring to apples and oranges, as I said, the FTA's decision, as I understand it, was that this service provided by the Sacramento transit agency was not in competition with the—was different from, not in competition with the earlier charter service, which had not been extended by a different agency, that is, the State of California's General Services Agency.

Mr. TIERNEY. I think some of the statutes that Mr. Ose is referring to really talk or speak to the formation of transit authorities after bus operators go bankrupt?

Mr. FRANKEL. Right. That is the whole basis of FTA. Much of our local transit programs, as we all know—

Mr. TIERNEY. That is not, in fact, what occurred here in that situation? That is not applicable either.

Was Amador ever denied the avenue of appeal that the FTA does provide?

Mr. FRANKEL. No, my understanding is that there was a process and that they have gone through. I don't know myself whether that process is completed or their opportunities for litigation or appeal, but there has been a process, and they have availed themselves of that process.

Mr. TIERNEY. I just don't want to beat this to death, but SACRT can't be competing with Amador if Amador had already been notified that they were being terminated?

Mr. FRANKEL. That apparently was—I assume——

Mr. TIERNEY. The termination that was made.

Mr. FRANKEL. I assume that was one of the bases of FTA's decision or view that there was not a violation of any law.

Mr. TIERNEY. I think the determination was clearly made that SACRT currently does not provide services that meet the definition of charter service.

Mr. FRANKEL. That is again my understanding of the basis of FTA's actions here, or its response to these circumstances.

Mr. TIERNEY. Thank you.

Mr. OSE. I thank the gentleman. I think you were trying to help me. It is my understanding that—and we will get into this with the next panel—but the service that Amador was providing did not have a closed clientele, that you could walk up and get on; that the—there was no charge whether you were envisioned as part of that clientele by the Department of General Services or not. So, in fact, it was not a charter service, it was something else. It was an intracity transit service, and interestingly enough, as it relates to my friend's comment about provisions of this law applying now to the bankruptcy of a local transit agency, if I understood his point correctly, the requirements for maximum feasible private sector participation embedded in the law that originally set up the Department of Transportation, not some subsequent requirement.

I would like to go on with my understanding of the chronology of events here. I want to go back to the \$2.4 million for purchase of new buses. I will readily admit that I advocated for that to the FTA, but I did not understand that those buses were going to be used to, in effect, replace the transit service that Amador was providing otherwise.

In July 2001, the local grantee, the Sacramento RT, adopted a new standard operating procedure, including the promise of notification and specific publications of general circulation regarding changes to the contract and the like, to ensure no future violation of private sector participation requirements. It appears to me in July 2001, the grantees recognized that they were subject to the private sector participation requirement. Is that your understanding also?

Mr. FRANKEL. I would assume that to be the case. I don't want to say. Having not been involved in it, I can't speak specifically, but I assume that to be the case. The law is the law. Everybody involved in this area understands what the requirements are.

Mr. OSE. I might quibble over that given the testimony we are going to get from the second panel.

On March 6, 2003, I am told that the private sector provider in this case, Amador, California Bus Association filed an emergency protest with FTA; is that your understanding?

Mr. FRANKEL. I can't speak to the dates, Mr. Chairman. I don't know the specifics.

Mr. OSE. On March 13th, I asked the Department of Transportation to expedite its review of this emergency protest. And on March 18th, I'm told that the Department of Transportation's re-

gional office directed the grantee, Sacramento RT, to stay its proposed takeover of the transit service from Amador stating, “FTA further requests that SACRT hold any action on the subject contract or service in abeyance pending the outcome of our review of SACRT’s response.”

Is that your understanding?

Mr. FRANKEL. Without getting into the specifics, I believe it was directed to—again, through the enforcement of the grant, whether the grant had been utilized in a manner consistent with the requirements. That is the grant to require the buses and not to compete with the private sector. Obviously, FTA wanted to take the time to be able to make a thoughtful decision about that.

Mr. OSE. We are able to confirm that occurred on March 18th; is that your testimony?

Mr. FRANKEL. I can’t speak to the specific dates. I am not the Administrator.

Mr. OSE. We will send you another letter.

On March 25th, I’m told that the grantee, Sacramento RT, effectively said, big deal, to the FTA, and they acted to award the contract. Is that your understanding, that contract to replace Amador was agreed to by Sacramento RT on March 25th?

Mr. FRANKEL. Again, I will have to confirm the specific facts that—to which you’re referring.

Mr. OSE. On August 5, 2003, without having any specific documentation of compliance with the July 2001 standard operating procedure, the Department of Transportation issued a decision on the March 6, 2003, emergency protest finding that the grantee met, “minimum compliance.” And the quotation I cite is, “RT has met with the minimum statutory requirements for public notice and comment in section 5307, and that while it appears that RT could have done more to explore the use of private sector providers in this situation, RT has met the minimum requirements of section 5306.” I have a copy of the decision here.

How do you determine someone has met the minimum requirements if you don’t have a rule in place to define that?

Mr. FRANKEL. Well, I suppose—people can differ about that. As an individual, I would say that is quite possible. There is a law here. There are a set of requirements driven by the statute, and we have been talking about exactly that, exactly. As I said, they are striking the right balance here, and I think FTA is in a position in terms of enforcing its grants and assuring grants are used in a manner consistent with the law to be able to make a decision on a case-by-case basis.

I don’t know necessarily, with all due respect, Mr. Chairman, that a rule or guidance, additional guidance, might be appropriate and useful in these circumstances, but I can’t see any reason why an agency cannot make a decision based on facts presented to it as to whether or not the law has been complied with. I think that is what FTA did. I understand that you might have a different view and conceivably might have reached a different decision. This was directed to the public notice requirements, as your quote indicates.

Mr. OSE. I am trying to understand the logic. In July 2001, the grantees promised to adopt new notification procedures to ensure no future violation of the private sector participation requirements.

If the process at that time had been satisfactory, why did they have to adopt new ones? If they had to adopt new ones because the process wasn't satisfactory, how can RT then be found in compliance with, "the minimum requirements?" There seems to be a disconnect here.

Mr. FRANKEL. I understand what you are saying, Mr. Chairman, and I am not in a position to speak to that. Obviously there are remedies available to the parties here if they feel there has been an abuse of discretion. But, the agency acted on the basis of the information and the facts it had that there had not been a violation of the terms of the grant.

Mr. OSE. My time has expired. The gentleman from Massachusetts.

Mr. TIERNEY. I don't want to interfere with your progression on that. I just think the point I would make here is that there is a process, and that to my knowledge, at least, and, Mr. Frankel, you confirmed that, that Amador is going through that process and availing themselves of it. If you don't like the answer, I guess, it is not nearly—if we are going to try to change the law because they don't like the answer they are getting, I think perhaps the Transportation Committee might be the place to go.

It seems clear to me that Amador, the company, had an avenue to go. I think there are serious issues here that—where a determination could be made that Amador had a closed situation, and RT has a different situation. I think that the sequence of events are pretty clear that Amador was terminated, and SACRT was contracted. So I can see where the agency made that decision. I think, if the facts break out some other way, then the process will let us know how it happens, and people can avail themselves of it. If we want to change the statute, then certainly they would go to the proper avenue and proper committee and try and work on that basis.

Mr. Frankel, let me just ask you very broadly is there anything about the process in this particular case that you think has been abused or somebody has not had the opportunity to avail themselves of?

Mr. FRANKEL. Not to my knowledge, Congressman. I am not the direct official responsible for the administration of these laws, but, to the extent that I am aware of it, there is nothing that appears to indicate that FTA has not exercised its discretion and judgment to the best extent that it possibly can, recognizing that people—whenever judgment is exercised in the administration of laws, that people will have different views.

Mr. TIERNEY. I'll yield back.

Mr. OSE. I thank the gentleman.

You know, this isn't about Amador or Ohio or Hawaii. This is actually about the use of Federal dollars, because the net effect of this process of the minimum compliance, if you will—those aren't my words, but the Federal taxpayer ended up paying \$277,000 more per year for service that they had been receiving from a private provider who had virtually no complaints filed with the Department from open clientele, and who had for any number of years successfully met the terms of the contract. This is about Federal money.

Mr. TIERNEY. Will the gentleman yield?

Mr. OSE. Yes.

Mr. TIERNEY. Are you saying they were arbitrarily taken off the contract?

Mr. OSE. I am saying that someone figured out how to change the contract without putting it into a publication of adequate general circulation. They got caught in this July 2000 triennial audit and were advised that they needed to change their process. At that point, subsequent to that point, they did it again, and the grantor in this case, the Federal Government, FTA, is basically turning a blind eye to the expenditure of \$277,000 more annually.

Mr. TIERNEY. Are you telling me basically you just want the facts reinterpreted? You don't agree with the FTA's review of this situation?

Mr. OSE. Actually I don't care who provides the service. I just want my \$277,000 back.

Mr. TIERNEY. What I am trying to get at here, I don't live in California.

Mr. OSE. You would be welcome to move there. We need more attorneys.

Mr. TIERNEY. I bet. I mean, what you are saying, though, is that somebody—and who is the one who terminated Amador to begin with?

Mr. OSE. That is what I am trying to find out. It appears to me as if SACRT did, and then FTA signed off on that.

Mr. FRANKEL. If I may respectfully take some issue with a couple of the comments you have made, Mr. Chairman. First of all, the decision about the contract, the initial decision about the contract with the private company was a decision by the State of California, by an agency of the State of California, not by the local transit agency.

Second, it is my understanding since FTA, outside of the Rural Transit Program, is not in the business any longer of making—operating grants subsidizing operations, that the \$277,000 a year to which you are referring is not Federal money. I am not saying that it is not taxpayer money, and your point, as a public official, may be perfectly appropriate, but those are not Federal funds. What the Federal funds were used for, which concerns you, and I appreciate that—what the Federal funds were used for was for the capital acquisition of the buses that were used in the service.

Mr. OSE. \$2.4 million.

Mr. FRANKEL. I don't know exactly what the—

Mr. OSE. If you want to talk about 2.4 million, the larger the number, the better. I would like to recover that, too.

Mr. FRANKEL. Whatever it is, it is. There were the capital grants which were made for buses for the transit agency which were used in this service, which was, again, in the determination of FTA, a new service. The transit agency didn't make the decision to terminate a contract and then use Federal money to buy buses and provide the same service. That is not the perception and judgment of FTA.

Mr. OSE. Except the \$2.4 million was obtained from FTA sometime prior to the Department of General Services's decision to terminate or to reopen the contract; am I not correct on that?

Mr. FRANKEL. I would have to verify that, but that is likely to be the case.

Mr. OSE. How is it that the local grantee can now use assets acquired by funding of FTA to provide a service for which there is a private provider who can provide that same service regardless of whether it is for more or less?

Mr. FRANKEL. The decision by the agency was that it was not the same service.

Mr. OSE. Which agency?

Mr. FRANKEL. FTA, in administering the grant and exercising oversight of the grant.

I appreciate you have a different view, and I respect that, but the agency's—at the heart of the agency's decision, and certainly an important element of it, is it was not the same service, but different service. It was public service as opposed to a contractual charter service with an agency of the State of California.

Mr. OSE. Mr. Frankel, I have the advantage of going home every weekend. I know exactly the service that was being provided, because I could walk up without identification and get on the bus. It was not a charter. I was not precluded from being a rider, if you will. Nobody asked me for ID. I didn't have to pay. I could just go to the parking lot where I knew the bus was going to be, get out of my car, walk over and get on the bus.

Mr. FRANKEL. I am not an expert on this, but I think what distinguishes—certainly as far as what I think—what distinguishes charter services at least in this these circumstances, it was point to point. It was not the kind of scheduled route, if you will, with intermediate stops and maybe a somewhat different group, which is my understanding is the transit agency was providing, albeit still providing the basic service of parking lot to downtown points of employment.

Mr. OSE. We are going to have testimony from somebody later that will flesh that out, because I happen to think the circumstances upon close examination are significantly different from your understanding.

The gentleman from Massachusetts.

Mr. TIERNEY. We had \$2.4 million that Mr. Ose was able to extract from the Federal Government here to provide equipment that should have gone probably to Massachusetts, no doubt.

Mr. OSE. I will be happy to give it to you.

Mr. TIERNEY. We could have used it. And, that was for RT to run its routes. Subsequently, some sufficient time later, Amador is notified that they are being terminated, and they are notified by the State and not by RT, right?

Mr. FRANKEL. That is the case. I can't confirm the dates and the exact sequence.

Mr. OSE. I will stipulate that is my understanding also.

Mr. TIERNEY. So that helps me. First, you have RT up and going with buses that they got from Federal money, and they are doing their thing, and Amador gets terminated. Then the State is the one who contracted with the RT?

Mr. FRANKEL. No. There is no contract. RT is providing service.

Mr. TIERNEY. Just expanded its routes and provides service.

Mr. FRANKEL. It is operations. And that is a local decision in which FTA does not get engaged.

Mr. TIERNEY. The local decision said there's a need, there's some people that could use a ride, and RT just expanded their routes.

Mr. FRANKEL. I presume the transit agencies in your congressional district will make decisions about where it is going to provide service.

Mr. TIERNEY. They are now doing that, and Amador feels chagrined by this whole thing, and that they're not being treated properly or whatever. And then, they have an appeal process which they have availed themselves of.

Mr. FRANKEL. It is my understanding that they have gone through a process, and they still have remedies, I presume, available to them.

Mr. TIERNEY. Which I presume they raised the issue of whether or not they were a closed service or charter or whatever, and that is one of the issues that will be determined in that process.

Mr. FRANKEL. I can't speak to the specific issue. The specific issue that was raised with FTA is whether the appropriate procedures had been followed as far as public notice in connection with the capital grant for the acquisition of the buses which were subsequently utilized in routes that were frankly not obviously inconsistent with the routes that had been provided on a charter basis by the private contractor.

Mr. TIERNEY. Let me do this again. The issue is nothing to do with what happened on the termination of Amador or with the subsequent absorption of those clientele. From there, they went back and decided to get some technical point of a notice. I am telling you how it sounds from here.

Mr. FRANKEL. Bear with me for just a minute. Let me be accurate about this. With respect to the acquisition of the buses, the public notice was initially deemed to be inadequate and was remedied in the view of the agency administering the grant. In the case of the service, the extension of the service, the public notice given by the transit agency was deemed to be adequate. I presume both of those were raised, but I don't know that for a fact, in connection with the appeal.

Mr. TIERNEY. The first notice was where they were going to get the Federal money to buy the buses, and they said originally that was inadequate, so they made it adequate, and they got the money. At some point, they were deemed adequate, and they got the money.

Mr. FRANKEL. That is my understanding.

Mr. TIERNEY. Later, when they decided to change their routes to expand their services that now encompasses where Amador used to be, there was another notice, and somebody has challenged that, but the FTA has decided they think it was sufficient minimally or otherwise, that it was sufficient.

Mr. FRANKEL. Again, that is my understanding.

Mr. TIERNEY. Aggrieved parties have a process that they can go through to have that issue litigated in some sense?

Mr. FRANKEL. They have availed themselves, as far as I know, of appeals to FTA. And under administrative law procedures, one can always contest whether an agency has abused its discretion,

which is really kind of at the heart of this inquiry in many of these questions whether there has been an abuse of discretion on the part of FTA in administering these grants.

Mr. TIERNEY. Let's go back and say suppose that in the process someone says the notice of the new routes for, you know, the RT or whatever, it was insufficient, so you can't do your new routes. That just leaves Amador without doing the routes, and leaves RT without doing the routes, and leaves these people walking, right?

Mr. FRANKEL. I presume that would be the case. They were separate, but there were parallel decisions. There was a decision by the State of California not to renew the contract with the private contractor—private company.

Mr. TIERNEY. I guess my question that you can't answer, is there some conspiracy theory here that the State was in cahoots with somebody and decided to go after Amador, thinking that once we knock off Amador, somehow this other service will be expanded? Is that the crux of the argument here?

Mr. OSE. My only concern is the \$277,000.

Mr. TIERNEY. Yeah, but, you know, you have the situation, it seems, to have gone along. Amador got knocked off, which is totally separate from the issue of notice and then provision of services by RT.

Mr. OSE. If the gentleman will yield.

Mr. TIERNEY. Sure.

Mr. OSE. My concern here is the process was not properly compliant, and the result was that the Department of General Services ends up asking for an extra \$277,000 from us to provide a transit service for which there had been no complaints or inadequacy.

Mr. TIERNEY. Reclaiming my time. They are not asking for \$277,000 from us. It is not our problem. They are getting that from the State. Second, there is an appeal. These people are making the arguments in the appropriate place, so what are we doing here?

Mr. OSE. Actually examining the manner in which the Federal agencies—

Mr. TIERNEY. I think it is a little inappropriate for us to be jumping in the middle of the process as opposed to waiting to see how it played out and then deciding whether or not this needed to be done. Either party could still prevail, if I understand. We are jumping in and trying to put our foot on the pedal.

Mr. OSE. I am not sure that either party can prevail at this point. I would defer to Mr. Frankel to clarify that, but I believe this contract has been executed and in place.

Mr. TIERNEY. There is no contract.

Mr. OSE. The contract between the Department of General Services and SACRT for the service being provided, that is in place.

Mr. TIERNEY. I am trying to clarify. He's indicated there are no services that they are looking for.

Mr. FRANKEL. If you will allow me to correct this, my understanding is the terms are different. There was a contract between the General Services Administration and the private company Amador. That contract was not extended. A local transit agency is supplying services which fill that market, if I could put it in those terms.

There is a subsidy to which you made reference. There may, in fact, be a contract, I don't know, between the State and the local transit district to pay their money as an operating subsidy. But, again, not to split hairs, it is a different contract from the contract that existed between the State and the private contractor. I know in my State, the State department of transportation—I can't speak about California—the State department of transportation provides operating subsidies to local transit districts who are losing money. I presume, if it is not exactly that in California, it is probably something similar to that. It is a different kind of arrangement between the State and the transit district from what existed between the State and Amador to provide a specific service from point to point for its employees.

Mr. TIERNEY. The State subsidizes RT for its general services, for the entire service it provides. If they do anything at all, that would be the nature of that.

Mr. FRANKEL. It is typically the case.

Mr. TIERNEY. Let's use the case of Massachusetts, and they are trying to change that and take away from the subsidies. I'm sure that some States have taken them off the subsidies, and some have them on there, but it is generally for their entire operation and not for any specific aspect of it.

Mr. FRANKEL. Certainly the case in my State. I don't know the circumstances. It is possible that there may be a specific contract between the State and the regional—excuse me, the local transit agency that this service would be subsidized, but I don't know about that. Generally these are in the nature of operating subsidies. The Federal Government, as I said, except for rural services and some other limited services, does not provide operating subsidies to local transit agencies.

Mr. TIERNEY. With respect to the particular claimants or individuals on this Amador, is there still a process of which they are availing themselves? Is that ongoing, or where is that, do you know?

Mr. FRANKEL. I don't know the answer to that, Congressman. Again, we'll try to supply that to you.

Mr. TIERNEY. I ask that, and in deference to the chairman, I want to know where we are coming in this situation. Is it not yet done, and maybe we ought to hold back a little bit.

Mr. OSE. I think we are going to find out from the next panel because the principals are going to be testifying. I just want to make sure we are all clear on the process here. The Department of General Services, on the anniversary date of its existing contract with then service provider Amador, readvertised, put out a request for proposals to provide a transit service for the intracity movement of an open clientele; in other words, you could walk up and get on. You could still walk up and get on this transit service. That part hasn't changed.

The Department of General Services executed that contract, and subsequent to the execution of that contract entered into an agreement with SACRT to use buses that had been acquired, procured, using an FTA grant; am I correct on that understanding?

Mr. FRANKEL. My understanding, Mr. Chairman, is that the service being provided by the Sacramento Transit Agency is not the

same as—it may be the same in the sense of serving similar customers, but it is distinguishable, certainly in a legal context, from the service that had been provided by Amador. It is not considered by FTA to be charter services as the prior contract with the private company had been considered hence, in the view, the determination of FTA that it was not in competition with a private company.

Mr. OSE. Can you, for the record, share with us the characteristics of the existing contract that distinguish it from the previous contract in terms of the conclusion you guys reached that the previous contract was a charter and the existing one is not? Would you share those characteristics with us for the record?

Mr. FRANKEL. I don't want to do that here. We certainly will supply that, and I assume your question assumed that we will do so subsequently.

[The information referred to follows:]

Question 6. What are the "characteristics of the existing contract that distinguish it from the previous contract in terms of the conclusion you guys reached that the previous contract was a charter and the existing one is not?"

Response: In the second instance ("the existing contract" referenced in the above question), FTA opened an investigation upon receiving a charter service complaint by the California Bus Association (CBA), but FTA learned during its investigation that the new service had been incorporated into Sacramento Regional Transit's regular program of mass transit services. Thus, this service was not charter service by the grantee.

Mr. OSE. Now, given the history that was evidenced in the triennial audit of July 2000, what is the Department of Transportation doing to ensure ongoing compliance with the July 2001 new standard operating procedure that this grantee adopted?

Mr. FRANKEL. I would have to refer at least in general terms, Mr. Chairman, to the—to my initial remarks, and that there is a regular process of review and certification of the planning process and continuing oversight over this, like any other grantee agency, that they are acting within the terms of law. And specifics beyond that we will have to supply to you.

[The information referred to follows:]

Question 7. What is the DOT doing to ensure ongoing compliance with the July 2001 new standard operating procedure that this grantee adopted?

Response: FTA will continue to monitor Sacramento Regional Transit's adherence to its standard operating procedure for public and private sector participation both informally and through the triennial review process. Additionally, FTA has addressed this subject with the grantee during its regular quarterly review meetings. FTA has also received personal assurances from the grantee's chief executive officer that Sacramento Regional Transit is complying with its standard operating procedure as part of its compliance with FTA's metropolitan planning requirements – including the requirements for outreach to private operators and public participation in the development of the grantee's program of projects.

Mr. OSE. Now, one of the responses we got back from legal counsel was that the Department of Transportation does not intervene in, “operational decisions.” What I did is I went to 49 CFR and looked for the phrase “operational decisions,” and I didn’t find it. Did I miss it, that the compliance with the Federal grant—if the noncompliance is a function of operational decisions that there is no recourse?

Mr. FRANKEL. I think I would answer that in a little different way, which is that it is the case that FTA does not engage in exercising oversight over—generally speaking, over decisions made about such issues such as routes, fares and so forth.

Mr. OSE. Let me go the second step. If I go back from 49 CFR to the legislation that was passed and signed, is there some provision in there whereby, “operating decisions” are outside the compliance review process which you otherwise exercise? In other words, if I submit a grant request, and you or FTA approves it and provides the funds, and I use those funds to operate a transit system, is that an operating decision that leaves the use of those assets acquired by virtue of an FTA grant that may push a private provider out of the market—is that operating decision not subject to compliance requirements?

Mr. FRANKEL. I don’t want to try to engage in a legal discussion here, because I am not expert on transit law, but, it is the case, the pattern of this agency, which is not regulatory. It makes capital grants to local transit authorities, and it does not engage in the process, and I wouldn’t think, with all due respect, that the Congress of the United States would want to engage in the process of looking over the shoulder and having to approve decisions about what fares should be charged, what compensation should be paid, what routes should be developed in response to the local community.

I might say, if you will bear with me, that one of the principles we tried to capture in the proposal, the safety proposals, for reauthorization is to really try to strengthen State and local discretion. And, we hope that, as this law emerges, this reauthorization emerges from Congress, that there will be continued respect for State and local discretion I know that both of you have been strong supporters of throughout your careers.

Mr. OSE. Well, we are in a bit of a dilemma here. Mr. Frankel, we have a number of other questions that, due to the exigencies of time, we are going to submit to you in writing. They follow along pretty significantly my train of questioning so far.

Mr. FRANKEL. I suspect our answers may follow along the same basis.

Mr. OSE. Mr. Tierney and I have been called for a vote. We are going to go ahead and excuse this panel, and then we are going to take a recess and go vote and come back.

Mr. Frankel, I thank you for your attendance. I happen to have strong opinions on this. Hopefully you can defend your position.

Mr. FRANKEL. Thank you, sir. And I appreciate the opportunity to be here.

[Recess.]

Mr. OSE. We are back. Our second panel is comprised of six witnesses, individually. They are—our first witness is the president of Amador Stage Lines of Sacramento, CA, Mr. William Allen.

Also joining us is the chairman of the Board and CEO of E Noa Corp. from Honolulu, HI, Mr. Katsumi Tanaka. We also have Youngstown, OH, the president of Community Bus Services, Mr. Terrence Thomas. Joining us from the Reason Foundation is the vice president for the Reason Foundation, the executive director of the Reason Public Policy Institute, Dr. Adrian Moore. We have from—joining us from the Heritage Foundation, the Herbert and Joyce Morgan senior research fellow, Dr. Ronald Utt.

Sixth but not least, we are joined today by an economist from the Economic Policy Institute, Dr. Max Sawicky. Welcome to our witnesses.

Gentlemen, as you saw in our first panel, it is the custom of this committee to swear in all of its witnesses. If you would all rise and raise your right hands.

[Witnesses sworn.]

Mr. OSE. Let the record show that the witnesses all answered in the affirmative. OK. Our practice here is that we recognize the witnesses for 5-minute periods to summarize their written submittals. Mr. Allen, you are recognized for 5 minutes.

STATEMENTS OF WILLIAM R. ALLEN, PRESIDENT, AMADOR STAGE LINES, SACRAMENTO, CA; KATSUMI TANAKA, CHAIRMAN OF THE BOARD AND CEO, E NOA CORP., HONOLULU, HI; TERRENCE V. THOMAS, PRESIDENT, COMMUNITY BUS SERVICES, INC., YOUNGSTOWN, OH; DR. ADRIAN MOORE, VICE PRESIDENT, REASON FOUNDATION AND EXECUTIVE DIRECTOR, REASON PUBLIC POLICY INSTITUTE; DR. RONALD D. UTT, HERBERT AND JOYCE MORGAN SENIOR RESEARCH FELLOW, THE HERITAGE FOUNDATION; AND DR. MAX B. SAWICKY, ECONOMIST, ECONOMIC POLICY INSTITUTE

Mr. ALLEN. Thank you. My name is William Allen. I am President of Amador Stage Lines, one of the largest private bus operators in Sacramento County. I am here today to outline FTA's failure to enforce Federal requirements on a grantee, Sacramento Regional Transit.

As a result, RT began operation of a local parking shuttle that had been competitively contracted through various private carriers since the late 1970's. Amador has operated its service from 1993 to 2003. FTA abetted the transfer of over \$2.4 million from taxpayers for the purchase of buses that would ultimately be used to take business away from taxpaying private operators like ourselves.

This transfer of funds happened even though RT failed to properly notify interested parties, as required by Federal notification and consultant statutes.

What is even more incredible to me is that RT reduced service to half the frequency of the private operator, but still lost over \$277,000 annually just to provide the service that in the past had been provided by tax-generating private operators at a profit. In part, due to poor decisions like this, RT is now facing a systemwide

rate hike in the attempt to increase its dreadful 21 percent revenue return through its fare box.

In 1998, 1999, RT entered into secret negotiations with the State and received an exclusive agreement to operate the local bus contract. Actions taken by RT, starting in 1998, 1999 to the start date of April 7, 2003, violated Federal statutes, regulations and a signed grant agreement with the FTA conditioning use of these funds.

In 2001, Amador had in good faith extended the contract to the State with no knowledge of the aforementioned secret negotiations. It wasn't until December 2002 that some of the riders began voicing their displeasure to our drivers about the impending change of carriers. This was the first time that our company had any idea that RT was intent on taking over this service.

On January 27, 2003, myself, numerous riders and the California Bus Association attended the RT board meeting to voice our protest to the service. The RT board ignored the public comments and authorized the takeover. On March 6, 2003, CBA filed an emergency protest with the FTA's Washington office requesting relief from the pending nationalization of the State shuttle routes. On March 13, 2003, Chairman Ose wrote Administrator Dorn requesting an FTA review of the CBA protest filed on March 6th.

His letter specifically referred to CBAs request to suspend the contract's termination until the FTA had completed an investigation. On March 18, 2003, the FTA notified RT that it was requesting that they hold any action on the subject contract or service in abeyance pending the outcome of FTA's review.

The FTA's letter of March 18th makes it clear that the FTA had first recognized its statutory responsibilities. On March 24, 2003, the RT board at the urging of its general manager completely ignored the FTA's written instructions to cease and desist and approved the final April 7th takeover plan.

After being made aware of the RT's decision on March 24th, the FTA never admonished RT for its brash behavior. Moreover, FTA's lack of response encouraged RT to continue without fear of consequences. Ultimately, FTA sided with RT's argument. This seemed odd since the August 2, 2002, triennial audit financed by the FTA had cited RT with violation of the private sector statutes on notification and consultation during the same time period as this case.

The FTA could never demonstrate by independent investigation or by evidence from our RT how RT met each statutory obligation as requested by Chairman Ose's letter of August 6th.

In what appears to be a cry for rulemaking after further followup requests by Chairman Ose, the FTA states that they had no jurisdiction over statutory compliance by grantees for operational decisions. This came even after the FTA felt they had enough jurisdiction on March 18th to issue a cease and desist letter to RT.

FTA's record of failure is allowing a grant to RT for \$2.4 million for equipment, when the intent of the grant was to buy equipment that would displace private operations. This is in violation of various codes which state in part that assistance programs must not use equipment acquired with grant funds to provide services for a fee to compete unfairly with private companies that provide equivalency.

FTA grantees must comply with rigorous planning and private enterprise requirements. A congressionally mandated audit found that RT had failed the entire public participation process. The FTA's failing to encourage private participation prevented unfair and unlawful Federal subsidized competition.

Amador employees have been harmed by the failure of the FTA. Approximately 25 drivers, mechanics and cleaning personnel were left without jobs due to the FTA's inaction and inability to enforce their regulations. Amador urgently requests FTA engage in meaningful rulemaking as requested by Chairman Ose.

The FTA has failed to meet the standard of enforcement to the detriment of the taxpayers and riders across the country. It is time for this practice to stop.

Thank you very much.

[The prepared statement of Mr. Allen follows:]

Testimony Before
Subcommittee on Energy Policy, Natural Resources, and
Regulatory Affairs
Hearing On

Private Sector Participation in Transportation

By

William Allen, President, Amador Stage Lines

My name is William Allen, President, Amador Stage Lines, one of the largest private bus operators in Sacramento County. I am here today to outline a series of anti-private enterprise participation rulings by the Federal Transit Administration (FTA). They resulted in the public takeover of an over 25 years competitively-awarded contract for the private sector to operate local bus service in Sacramento, California. Now, the local Sacramento Regional Transit (hereinafter referred to as Regional Transit) is providing the bus service but at a higher cost of over \$277,000 annually and with reduced service to bus riders. The takeover was made with complete disregard of Congressionally-mandated requirements for participation of private enterprise. And, ironically, the bus service did not require any Federal subsidies until FTA approved a \$2.4 million capital grant to Regional Transit in October 1, 2000.

Amador Stage lines, established in 1852 (as a Stagecoach Line carrying passengers in the "Gold Country" of Northern California), has a long history of providing mass transit services, including local shuttles to public and private parties. For over 25 years, the Department of General Services, State of California (hereafter referred to as DGS), has regularly contracted out a scheduled fixed-route shuttle bus service in downtown Sacramento for state employees.

Amador Stage held this contract from 1996 to April 6, 2003.

Regional Transit, a recipient of Federal FTA funds, was unsuccessful as recently as 1995 in competing against local bus companies to provide this State of California shuttle bus service.

In 1998-99, Regional Transit entered into private negotiations with DGS for the purpose of entering into an exclusive agreement - barring local private bus companies - to operate the local bus contract. Regional Transit could eliminate private operator participation if it could avail itself of new federally-subsidized buses. By systematically excluding all private operator involvement throughout the entire planning process, Regional Transit was able to guarantee itself receipt of over \$2.4 million in Federal capital funds to pay for new shuttle buses. FTA approved these funds despite the complete absence of documented justification for the project and failure to meet any of the federal Private Sector Participation standards required by Congress for the 40-year period of the federal transit funding program.

All actions taken by Regional Transit starting in 1998-99 to the start date of April 7, 2003 were unmistakably in violation of federal statutes, regulations, and a signed grant agreement with the Federal Transit Administration conditioning expenditure of these funds.

In January 2003, Amador's representative, the California Bus Association (CBA), obtained a January 27, 2003 Regional Transit agenda item requesting further Board approval for the unlawful takeover of the privately-operated shuttle service and immediately filed a protest. After the Regional Transit Board approved the

takeover of the DGS shuttle bus service on January 27 despite the formal CBA protest and public presentation outlining how the private sector was excluded from the process, CBA obtained all past Board items and notices not previously disclosed to local bus companies. Then, CBA filed an emergency protest with the FTA in Washington DC on March 6, 2003, requesting relief from the pending nationalization of the state shuttle routes.

On March 13th, Chairman Ose sent a letter to FTA Administrator Dorn requesting an FTA “...*review of the ‘Sacramento Regional Transit Emergency Protest’ filed by ... (CBA) on March 6, 2003.*” This letter specifically referred to CBA’s request to suspend contract termination until FTA completes an investigation of possible violations of laws and regulations “...*especially those governing private sector participation requirements.*”

Almost immediately after receipt of Chairman Ose’s letter, FTA’s Region 9 Administrator, on March 18th, formally notified Regional Transit requesting that they “...*hold any action on the subject contract or service in abeyance pending the outcome of our review of SRT’s response.*” FTA’s March 18th letter of notification to Regional Transit is *prima facie* evidence that FTA, at first, recognized its statutory responsibilities under the law to come to a decision on possible violations and act accordingly as FTA has done in the past.

On March 24th, the Regional Transit governing board, at the urging of the General Manager, approved the final April 7th takeover plan in spite of FTA Region 9's written instructions to "cease and desist".

As for FTA's subsequent actions immediately after the April 7th Board rejection of FTA's March 18th letter which FTA was made aware of by both parties, FTA never admonished Regional Transit. Lacking a follow up letter by FTA relieving Regional Transit of future adverse consequences, FTA did not impede the Regional Transit takeover before a ruling on the merits of CBA's complaint.

FTA ultimately accepted on face value, without regard to its own lack of due diligence in the grant application process, every argument put forth by Regional Transit. FTA arrived at its decision in spite of an abundance of material evidence to the contrary produced not only by CBA but also surprisingly by a Congressionally-mandated FTA-financed August 2, 2000 Triennial Audit citing Regional Transit with violations of private sector statutes on notification and consultation during the very time the violations were occurring.

In a formal response to the Chairman's March 13, 2003 letter, FTA Administrator wrote to Chairman Ose on August 1, 2003 pledging that "*...the issues you raise in your letter of March 13 will be fully addressed.*" No subsequent decision or letter of explanation by FTA ever addressed any of the statutory provisions raised in the Chairman's March 13th letter.

After the Regional Administrator's August 5th decision approving Regional Transit succession of the state service, Chairman Ose sent another letter to FTA's Administrator on August 6, 2003, requesting demonstration of how Regional Transit had met the specific statutory requirements. FTA's final reply to the Chairman, after denying CBA's appeal, never demonstrated by independent investigation or by evidence how Regional Transit had met each statutory obligation, as outlined in Chairman Ose's letter or CBA's complaint and appeal.

After further follow up requests by Chairman Ose, FTA unequivocally and bluntly stated that it had no jurisdiction over statutory compliance by grantees for "operational" decisions, even in the face of issuing FTA's its own March 18th "cease and desist" letter to Regional Transit and the plain language of Federal law, regulations, Congressional intent and Court interpretations of FTA's statutory responsibilities.

FTA's record of failure in this case is profound. FTA abdicated its responsibility to enforce Congressionally-mandated statutory standards, federal regulations and FTA's own signed GRANT AGREEMENT with Regional Transit as a condition of receipt of \$2.4 million to purchase new shuttle buses. Instead of assuming a quasi-judicial role in this complaint as required by Congress, FTA became, in effect, an unapologetic advocate for the grant recipient. Here are a few examples of FTA's neglect of its statutory and regulatory responsibilities:

- FTA GRANT AGREEMENT with Regional Transit required a planning notification standard for private operators. This statutory requirement was never complied with, as validated by an FTA audit in 2000. The audit correctly concluded that Regional Transit never had a notification standard for private operators when it applied for the \$2.4 million in FTA grant funds. FTA, while citing this fact, bizarrely found that Regional Transit had not excluded private operators in the planning process for the \$2.4 million grant. FTA could not produce one notification or comment documentation or any other tangible evidence of private bus participation that complied with the Master Agreement provisions in Section 13 of the agreement binding Sacramento RT to “...*the private enterprise provisions of 49 USC §§5303 through 5306, and 5323(1)...*”.

- 49 USC §5306 requires plan and programs funded pursuant to an FTA Master Agreement for each project “*shall encourage to the maximum extent feasible the participation of private enterprise.*”

- 49 USC §5307 requires recipient consultation with and consideration especially of private transportation providers. This explicit and unequivocal command from Congress to all FTA recipients was disregarded by both Regional Transit, the grant recipient, and FTA, the enforcer of Congressional mandates.

- 49 USC §5323(a)(1) requires, in part, a finding or administrative decision by the Secretary that a program in competition with a private mass transportation company provides for participation of private transportation companies to the maximum extent feasible. In our case, FTA refused to decide on two standards in this statute that had to be met before FTA could legally approve over \$2.4 million in federal funds to purchase equipment to replace a local private transportation service. FTA never decided that the funding was essential to the overall program of the region and that the program to the maximum extent feasible provided for the participation of private transportation companies. Throughout the entire public hearing and planning process, Regional Transit never disclosed to FTA or the public that \$2.4 million in capital funds would be used to displace a 25-year continuously competitively-funded private bus transportation service.

- Under DOT Regulatory provisions, 49 CFR §18.32 Equipment, requires that all of the Department's assistance programs *"...must not use equipment acquired with grant funds to provide services for a fee to compete unfairly with private companies that provide equivalent services..."*.

FTA's August 5, 2003 Decision absolved Regional Transit of each of the statutory and regulatory responsibilities I have referred to today by, in part, concluding that over a multiple year period (1999 to April 2003) Regional Transit *"...has met the minimum statutory*

requirements...” without any evidence of specific compliance with, for example, a new July 1, 2001 Standard Operating Procedure (SOP) adopted by Regional Transit to cure past Federal planning and private enterprise participation statute violations contained in FTA’s August 2, 2000 “*Fiscal year 2000 Triennial Review Report*” mentioned above.

FTA’s decision also contained this startling acknowledgement: “*FTA grantees must comply with rigorous planning and private enterprise requirements (49 U.S.C. 5303-5307)*”. How could Regional Transit have come close to complying with “*rigorous planning and private enterprise requirements*” contained in multiple statutes when FTA then reveals in this same decision that its audit showed Regional Transit had failed the entire public participation process?

FTA first neglected to discharge its responsibilities to make critical findings, as required by Congress, when Regional Transit submitted the grant application containing \$2.4 million in new buses and then FTA compounded its abdication of administrative authority by refusing to enforce compliance with these statutes when CBA brought Regional Transit’s statutory breaches to FTA’s attention in great detail and specificity throughout the complaint process.

It is clear from the facts of our case that DOT and FTA are not meeting Congressional intent to encourage private enterprise to the maximum extent feasible, make the necessary findings by the Secretary of maximum private operator participation, and prevent

unfair and unlawful Federally subsidized competition with private bus providers.

Amador Stage purchased equipment for the purpose of providing this locally funded service and was injured by the preemptive actions of Regional Transit that were ultimately deemed acceptable by FTA.

To this end Amador Stage Lines urgently requests that FTA engage in meaningful rulemaking as Chairman Ose requested on Aug 6, 2003 that will establish thresholds that meet the meaning of the words in FTA's decision that its grantees must meet "*rigorous planning and private enterprise requirements*". For the past 10 years FTA has failed to meet this standard of enforcement at a great loss to national taxpayers and riders across the country.

Mr. OSE. I thank the gentleman. Our next witness is Mr. Katsumi Tanaka, who is the chairman of the Board and CEO of the E Noa Corp., a transit provider in Honolulu, HI. Welcome, sir. You are recognized for 5 minutes.

Mr. TANAKA. I am pleased to be addressing this body which gives an opportunity for which I have thirsted over the course of many years. In 38 hours or so, back in Honolulu, HI, the county of Honolulu will apply for \$20 million circumventing FTA scrutiny in order to run a service that we have been running for over 38 years.

Let me demonstrate my point. Back in Waikiki, we have 95 percent of the tourists. This is a fixed route for which we run trollies. At this very hour the county of Honolulu, instead of serving local residents, is about to serve tourists.

Let me demonstrate further. This pamphlet is in the Japanese language, not in the English language. In the front page, at the preface, is the mayor of Honolulu, Jeremy Harris, who says to the Japanese people, using Federal dollars and local taxes, you will enjoy economic tours around the Island for \$2.

Obviously, operations like us who depend totally on revenue from fares without subsidy will be wiped out. Our peril back in Hawaii is that the private sector today is about to be assaulted by the government, Federal and county, constantly courting tourists instead of local residents.

Moreover, the most popular destination on the Island of Oahu is called Hanauma Bay. About 8 years ago, in the name of ecology, Haunama Bay was closed to balance ecology as well as the visitors' desire to visit it.

Once Haunama Bay, which was the most coveted of business for the private sector, the private sector has been ostracized. The only buses that are allowed into Haunama Bay today are the city buses.

As a result, many parts of Oahu, local residents ask for many buses, more services, more frequency, to which the Mayor of Honolulu will say, we have to serve areas where there are more customers. Where the customers are is in Waikiki, where the customers thirst for low fares, where the private sector depends entirely on its livelihood. That is the very purpose for which the county of Honolulu is asking for \$20 million. I hope that FTA and others will put a stop to Honolulu County's operation of tourists, while neglecting local residents.

We are a small business. Moreover, the buses, the city bus is run by the Teamsters. The average hourly wage of the Teamsters is about 48 percent higher than private sector. Moreover, the Teamsters are provided, of course at taxpayers expense, full benefits, medical, pension funds. Today the private sector in Hawaii is losing drivers to the city bus.

We are not capable of redressing our grievances because of the powerful combination of Federal funds, county funds and the State—county of Honolulu. The very same regime that operates tour operations also operates the police, and there is systematic harassment of our drivers with neglect of the city buses. This is truly a phenomenon that I never expected to take place in the United States. This is truly a matter for which we need your succor immediately, not future deliberations.

Again, I repeat, within 38 hours or so the county of Honolulu may be granted \$20 million, and this is a statement from Jennifer Dorn. We have learned from experience that this exemption, meaning grants of \$25 million or so, encourages project sponsors to artificially define projects into smaller segments in order to avoid being subject to FTA assessment.

That is exactly the point, the county of Honolulu that started with asking for more than \$2 billion for the entire Island of Oahu, arguing the case that the residents of Oahu deserve better public transportation. Instead, the magnified program has shrunk into Waikiki only. I repeat in Waikiki, 95 percent of the tourists live in Waikiki.

So today the very same regime asking for \$20 million has aggrandized its appetite to constantly court tourists as a source of revenue at the general neglect of local residents. Thank you very much. We need help immediately in the form of FTA not certifying whatever the allegations are the county of Honolulu makes.

[The prepared statement of Mr. Tanaka follows:]

Testimony of
Katsumi Tanaka, Chairman of the Board and CEO
of
E Noa Corporation, Honolulu, Hawaii
Before the
Subcommittee on Energy Policy, Natural Resources
And Regulatory Affairs,
Committee on Government Reform,
House of Representatives,
Congress of the United States

Hearing on Private Sector Participation
In Transportation

May 18, 2004

I am Katsumi Tanaka, Chairman of the Board and CEO of E Noa Corporation, operator of the Waikiki Trolley and E Noa Tours in Honolulu, Hawaii. Thank you for providing me with this opportunity to discuss how the federally-subsidized mass transit provider in Honolulu, namely, the City and County of Honolulu, and its captive corporation, Oahu Transit Service (OTS), stifle private sector competition at every turn, regardless of the intent of the federal laws and regulations.

I will cite three specific instances of such unfair competition: (1) The Hanauma Bay monopoly; (2) The aggressive recruiting of visitors; and (3) The formulation of the Bus Rapid Transit proposal.

The primary business of the private passenger carriers in Honolulu is serving the visitors to Hawaii.¹ We employ a variety of vehicles including buses of all sizes, trolleys, vans, and trams. The core of our business is in Waikiki, a compact urban resort area of less than two square miles where approximately 95% of the visitors to Oahu stay. On an average day, Waikiki houses 72,000 visitors. Also, about 19,000 residents live in Waikiki.²

Waikiki and its visitors are the alpha and omega of existence for the privately owned passenger carriers in Honolulu. Take the visitors, who are our customers, away, as the City and County seeks to do, and there is no more major private ground transportation industry in Hawaii.

The Hanauma Bay Monopoly

The City and County monopolizes pick-up and delivery service to a very popular visitor destination, namely, Hanauma Bay, partially under the guise of avoiding overcrowding.³ Visitors carried by private tour operators may only stop at the overlook for a few minutes, but none of their passengers may stay at Hanauma Bay and be picked-up later. Visitors arriving by the federally subsidized TheBus, namely, Route 22, can get off TheBus at Hanauma Bay and stay as long as they wish, enjoying the beach, the water and the marine life, and return to Waikiki on a later bus at a time of their

own choosing.⁴ In fact, the vast majority of passengers on Route 22, which runs from Waikiki to Sea Life Park and return, are tourists. The City chooses to ignore two facts: (1) there are private sector passenger carriers ready and prepared to bring visitors to and from Hanauma Bay; and (2) there are alternative means available for achieving the valuable goal of preserving the fragile environment of the Bay, without, in effect, banning customers of the private tour operators from enjoying the beach, the water and the marine life.

The City in this instance is acting as an entrepreneur, seeking to: (1) maximize its revenues; (2) use its power as a regulator to eliminate potential participation by private transportation carriers; and (3) maximize the federal tax dollars it receives as a federal grantee. The City receives federal funds, which it then uses to compete unfairly with private carriers while simultaneously using its regulatory power to make sure private carriers cannot compete with the City. The injustice of the arrangements for serving Hanauma Bay has been called to the attention of City officials many times, but no changes have been made.

The Aggressive Recruiting of Visitors

The fundamental problem is that the City is simultaneously regulator and entrepreneur, a basic conflict of interest, which it has not been able to resolve, as noted in the paragraphs relating to Hanauma Bay. As entrepreneur, the City desire to maximize ridership and revenues for its highly subsidized public transportation service, TheBus. As regulator the City is responsible for creating a level playing field in which subsidized public transit services do not unfairly compete with private transportation carriers.⁵ What has happened in Honolulu is that the City's desire to promote the well-being of its own highly subsidized transportation service has taken precedence over other choices in a manner that is detrimental to privately-owned passenger carrier companies. The combination of federally subsidized City buses serving primarily tourist destinations plus the City's anti-private sector regulatory schemes harm the private carriers and hurt their ability to

survive economically.

The City's determination to recruit visitors to the subsidized TheBus is further evidenced by the authorized publication of two guides to the City's bus service, one in English and one in Japanese, The Bus Map and Guide Book. The emphasis in the Guides is on how to travel to attractive tourist destinations using TheBus. The guides, promoted on the OTS web site, are widely available for purchase in Waikiki. They include a glowing invitation from the Mayor to visitors to ride TheBus.

The City and County's fare structure includes a \$20 "Visitor Pass," which allows unlimited use of TheBus for four consecutive days and which is sold throughout Waikiki. Furthermore, a visitor may circle Oahu on TheBus for just \$2.

Finally, the City is seeking to commence its BRT system, not by providing additional service to rural and suburban customers, who have the fewest public transit options and are badly in need of public transportation, but by adding to services that are already available in Waikiki, with its high concentration of visitors, a group well served by the private transportation carriers. Obviously, the revenue per passenger mile will be higher in Waikiki than in rural and suburban Oahu, but a primary purpose of public transportation is to provide subsidized services to those most in need, especially low-income families, youth and the elderly living on limited means. These are not the residents of Waikiki nor are they the tourists visiting Waikiki.

The Formulation of the Bus Rapid Transit Proposal

On July 22, 2002, E Noa Corporation wrote to Jennifer Dorn, FTA Administrator, protesting the bypassing of the private transportation carriers by the City and County of Honolulu in the planning and development of its BRT Proposal, for which federal funds are being sought.⁶ In that letter we cited what appeared to us to be violations of FTA Circular C9300.1A, section

4, subsection 9, USC 5307 re urbanized area formula grants, and 49 USC 5323(a), all of which emphasize the importance of consultation with private transportation companies in the development of plans and programs requiring federal assistance as well as protecting private providers of transit against competition from federally assisted transit providers.

The BRT Plan was not developed in consultation with private passenger transportation carriers. Just briefly: (1) There were no meetings with the members of the Private Passenger Carrier Division of the Hawaii Transportation Association (HTA) with respect to the planning of the BRT; (2) There were community meetings, but in no sense was these designed to be consultative sessions with the private passenger carriers; (3) The City and County did convene five geographical working groups, to address operational details of the proposed BRT, subsequent to the selection of the preferred alternative by the City Council. Two or three representatives of the private passenger carriers were members of the Waikiki Working Group, among 30 to 40 other members representing a variety of interests. The five meetings of this group, mostly dedicated to power point presentations by the City and its consultants, did not constitute consultation with the private transportation carriers; and (4) The BRT Plan does not examine whether implementation of the Plan would have a deleterious impact on the private transportation providers. The Supplemental Draft Environmental Impact Statement (SDEIS) asserts that, "The number of tourists expected to use the public transit system with the BRT is forecast to be no greater proportionally than today." (p. 5-20) There are no detailed data and analyses in the SDEIS or any subsequent EIS to support this assertion. This statement was not developed in consultation with the private passenger transportation carriers.

On September 9, 2002, Williams Sears, Chief Counsel, FTA, responded, on behalf of Ms. Dorn, stating that with respect to the EIS process there is no provision for involvement or access by a private company greater than that afforded the general public.⁷ The response was a bit frustrating because, in

the development of the BRT, the EIS is in essence both the plan and the assessment document. There is no separate, stand-alone plan.

Let me note that 49 USC 5323(a) states very specifically that: "Financial assistance provided under this chapter to a State or local governmental authority may be usedto operate mass transportation equipment or a mass transportation facility in competition with, or in addition to, transportation services provided by an existing mass transportation company, only if

- a. The Secretary of Transportation finds the assistance is essential to a program of projects required under sections 5305-5306 of this title;
- b. The Secretary of Transportation finds that the program, to the maximum extent feasible, provides for the participation of the private mass transportation companies."

There was no request to the Secretary of Transportation for such a finding nor did the Secretary issue such a finding in the case of the Honolulu BRT proposal or its truncated version, the Honolulu IOS proposal. In our case, participation of the private sector passenger carriers in the program to the "maximum extent feasible" proved to be a fiction.

In conclusion, the private passenger carriers were not consulted in any special way in the development of the BRT proposal, nor were the assessment made by the City in its EIS documents about the economic impact of the BRT on private transportation carriers anything more than mere assertions.

In Conclusion

I hope that these few examples -- (1) The Hanauma Bay monopoly; (2) The aggressive recruiting of visitors; and (3) The formulation of the Bus Rapid Transit proposal --will prove useful to you as you seek to assist FTA in providing increased opportunities for private sector participation in furnishing local transportation services and protecting private carriers against unfair competition from publicly subsidized mass transit providers. On behalf of all the private passenger carriers in Honolulu, I urge you to require FTA to engage in meaningful rule making so that what has happened

to us and is still happening will not happen to others and will not happen to us in the future.

¹ One of the private passenger carriers does provide school bus service under a contract with the State of Hawaii.

² Data drawn from Wilson Okamoto Corporation, Waikiki Livable Community Project: a Report Prepared for the City and County of Honolulu, December 2003.

³ See section 8 of Amended Rules and Regulations Relating to Visitor Use Level and Controls at Hanauma Bay Nature Preserve, Department of Parks and Recreation, City and County of Honolulu, adopted July 1, 1998.

⁴ To the best of our knowledge, the City and County has never sought an exemption under the provisions of 49 USC 5323(a) to provide this “mass transportation facility in competition with, or in addition to, transportation services provided by an existing mass transportation company.”

⁵ See 49 USC 5323(a) and Federal Transit Administration (FTA) Circular C 9300.1A, Section 4, Subsection 9a.

⁶ See Letter of Tom Dinell, Consultant to E Noa Corporation, to Jennifer Dorn, FTA Administrator, dated July 22,, 2003.

⁷ See Letter of William P. Sears, Chief Counsel, FTA, to Tom Dinell, dated September 9, 2002.

Mr. OSE. Thank you, Mr. Tanaka. Do you want to introduce Ms. Dorn's statement into the record?

Mr. TANAKA. Yes.

[The information referred to follows:]



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Hearing on the Rating and Evaluation of New Fixed Guideway Systems

04-28-04

Statement of
Jennifer L. Dorn
 Administrator
 Federal Transit Administration
 U.S. Department of Transportation
 Before the
 U.S. House of Representatives
 Committee on Appropriations
 Subcommittee on Transportation and Treasury, and Independent Agencies
 Hearing on the Rating and Evaluation of New Fixed Guideway Systems
 April 28, 2004

Thank you, Mr. Chairman, for the opportunity to testify today on FTA's New Starts program. We appreciate your continued strong interest in ensuring that the projects funded through this program are appropriately justified and well managed. America's taxpayers have a right to expect that the investments made on their behalf are cost-effective, delivered on time and within budget, and produce the benefits that were promised.

I am pleased that FTA has achieved significant progress in recent years to improve the New Starts project evaluation and oversight program. This progress has already earned noteworthy recognition. It has been praised by GAO[1] and cited as an example for other Federal grant programs to follow.[2] In fact, the FTA New Starts Program is one of the few programs across the Federal government that has been removed from the Government Accounting Office's (GAO) "High Risk" list.[3]

This progress was also reflected in the ratings received by FTA's New Starts program under Office of Management and Budget's (OMB) Program Assessment Rating Tool (PART). OMB uses PART to assess and evaluate programs across a wide range of issues related to performance, including purpose and design, planning, management, and results. Among the 62 competitive grant programs across the Federal government that were subject to PART ratings last year, the New Starts program achieved the highest score (83 out of a possible 100). Further, the New Starts program was one of only seven competitive grant programs that received a score of 100 in the program management category, which assesses agency management of the program, including financial oversight and program improvement efforts.

Despite this success, FTA continues to focus on finding new and better ways to help project sponsors develop good projects and manage them effectively. I particularly want to thank you, Mr. Chairman, for your continued interest in strengthening FTA's project evaluation and oversight program.

FROM THE ADMINISTRATOR

NEWS & EVENTS

SAFETY & SECURITY

STRATEGIC BUSINESS PLAN

GRANT PROGRAMS

RESEARCH & TECHNICAL ASSISTANCE

GOVERNMENT & LEGAL

TRANSIT DATA & INFO

The Fiscal Year 2005 New Starts Budget Request

The President's FY 2005 budget provides \$1.5 billion for the New Starts program. This budget is a reflection of the Administration's strong commitment to continued Federal investment in major transit projects that are cost-effective, locally supported, delivered on time and within budget, and achieve their promised transportation benefits. It is a \$216 million (16 percent) increase over the FY 2004 enacted level and reflects the specific project funding recommendations found in FTA's Annual New Starts Report for FY 2005.

In addition to funding the 26 existing and one pending full funding grant agreements (FFGA), the budget funds seven additional projects -- five that are expected to be ready for a new FFGA before the end of FY 2005 and two meritorious projects in Raleigh and Charlotte, North Carolina. Although we are not convinced that these two projects will be ready for an FFGA by the end of FY 2005, we believe these meritorious projects should be permitted to use Federal funds to continue advanced design and limited capital acquisition activities.

This is, as you know, not the first time that meritorious projects have been proposed for funding in advance of an FFGA recommendation. In its FY 2003 request, FTA proposed funding for five meritorious New Starts investments. Four of these five projects have subsequently been recommended for or have already been awarded an FFGA; the fifth is recommended in this budget request. Previous budget proposals for FY 2000, 2001 and 2002 also included funding for promising projects in advance of being ready for an FFGA commitment.

The seven "new" projects recommended for funding were among 29 that were evaluated and rated in the FY 2005 Annual New Starts Report. Of the 29 that were rated: 17 received "recommended" ratings (including the seven funded in the President's FY 2005 Budget); 7 received "not recommended" ratings; and 5 were "not rated" because complete, accurate data needed to rate the project was not yet available from the project sponsor.

Improvements to the New Starts Project Evaluation and Oversight Process

FTA has taken very seriously the President's directive to make Federal agencies more citizen-centered and results oriented. In the New Starts arena, this has meant more rigor, consistency, and accountability to ensure that:

- Every project's transportation benefits justifies the cost;
- Every project is finished on time;
- Every project is finished within budget;
- And every project delivers the benefits it promises.

Enhanced Rigor

In the FY 2004 New Starts rating process, FTA implemented a measure of "travel time saved" to replace "number of new riders" in the calculation of cost-effectiveness, making certain that taxpayers get value for their investment in New Starts projects by utilizing a measure that more fully captures the transportation benefits of each project, including congestion relief. Unlike "number of new riders," which assumed that congestion relief is the same for each new rider everywhere, "travel time saved" credits projects with reducing travel time for current transit users and more accurately credits the project for congestion relief attributable to new

transit riders based upon the length of the trip and whether the rider had used congested roadways. For the FY 2005 process, FTA made no additional changes in measures, break-points for ratings, or weightings among measures in the determination of ratings. However, with FTA's new reporting and analysis software – Summit – we have been able to assist the industry and improve our own efforts to verify that the local forecasting models that produce estimates of both "number of new riders" and "travel time saved" are reasonable, consistent, and up-to-date.

In years past, FTA's ability to assess the accuracy of local forecasting models was limited, and the ability of a project sponsor to identify potential flaws in the technical analysis was limited, as well. The Summit reporting and analysis software produces a computation of user benefits from locally developed forecasts, as well as standardized analytical summaries of both the forecasts and user benefits. These reports and summaries have provided both FTA and transit agencies a means to identify and diagnose travel forecasting problems related to assumptions regarding fare and service policies, regional transportation networks, land use, and economic conditions, as well as model coding and other attributes of forecasting procedures. They also help ensure that the local forecast is utilizing comprehensive and up-to-date data on travel behavior and local transportation systems. Most importantly, these reports and summaries give transit agencies and communities an invaluable tool to compare mode, alignment, and other system options – a tool that supports better decision-making, especially during early stages of the project development process. The bottom line: FTA is now demanding much more accurate benefit projections, resulting in more reliable project justification measures, including cost-effective projections.

As noted, five projects were not rated this year because local forecasting model issues could not be resolved prior to publication of the New Starts Report. However, to understand the magnitude of the impact that this tool is having on the program, it should be noted that, over the last two years, FTA has required 22 of the 29 projects that were rated in this report to correct flaws in their underlying local forecasting models.

These corrections produced more accurate estimates of transportation benefits, bringing more discipline and rigor to the project evaluation process, and helping to ensure that FTA can objectively and consistently apply the project evaluation criteria established in law. Most importantly, by improving the analytical tools and capacity of local agencies, we enable the public and local decision-makers to better understand the impacts of alternative approaches to solving transportation problems, so they can make better decisions.

In our continuing effort to ensure that every project produces a good return on investment, FTA has also placed increased attention on reducing project costs. We remind project sponsors that their project's cost-effectiveness measure can be improved not only by improving transportation benefits, but also by reducing the cost of the project. Last year, proactive project cost management by FTA and project sponsors resulted in a total savings of \$673 million for seven proposed New Starts investments, with no significant diminution of project benefits. We know that generating accurate benefit estimates is important, keeping costs as low as possible is equally important.

It has been said by some that FTA's evaluation process does not disqualify poor projects. This erroneous claim is often supported by pointing to projects that were not even funded by FTA, such as South Jersey's River Line, or by saying that FTA never turns down a project. A review of what has happened to the 257 projects that were authorized under ISTEA or TEA-21, or which otherwise have been appropriated New Starts funding, tells a different story. Of those 257 projects:

- 23 projects (approximately 10 percent) were not subject to FTA's evaluation

and rating process. This included 19 projects that moved forward as projects seeking less than \$25 million in New Starts funds and 4 were constructed with no New Starts funds.

- Only 86 projects (about one-third) were approved by FTA into preliminary engineering, which is the first hurdle in the project development process that requires an FTA evaluation and rating. However, 18 (21 percent) of the projects approved into preliminary engineering were subsequently discontinued by the project sponsor, as they were unable to meet FTA's financial or project justification standards for later project development stages.
- Only 40 projects (about 15 percent) have, thus far, merited a full funding grant agreement.

Another 28 projects remain in the project development process, with 9 in final design and 19 in preliminary engineering. Even if every one of these projects succeeds in its quest for an FFGA, only 68 (about one-fourth) of the original 257 authorized projects will have met the rigorous standards established by Congress and the FTA to qualify for a full funding grant agreement.

Improved Consistency

With the full support of Secretary Mineta, one of my primary objectives as Administrator during the past three years has been to ensure that FTA's project rating system is as objective and transparent as possible. Objectivity and transparency are essential to ensuring the credibility of the New Starts evaluation process, and improving the ability of sponsors to develop projects that meet the high standards established by Congress. FTA's project rating should not come as a surprise to a transit agency when it is published in the New Starts report. To that end, FTA has worked proactively to educate the transit industry about the New Starts planning, project development, and evaluation processes. Since the New Starts final rule was issued in December 2000, FTA (either on its own or in conjunction with the American Public Transportation Association) has sponsored 24 national workshops on the planning and evaluation of major transit investments, with several more planned before the end of the year.

FTA has also participated in a number of locally-sponsored workshops on New Starts. These events are intended to not only assist project sponsors in meeting FTA requirements, but also to help improve local planning processes and techniques, which will ultimately result in better transit investments. In early April, for example, FTA staff participated in a Florida Department of Transportation seminar for transit planners and travel forecasters from throughout the State about technical methods, data needs, and the critical steps in producing reliable ridership forecasts. More recently, at an event co-hosted by the Massachusetts Bay Transportation Authority, FTA met with New Starts project managers from over 20 transit systems for three days to discuss a variety of project planning issues, including improved travel forecasting tools, alternatives analysis, and the integration of project planning with the NEPA process. This "New Starts Roundtable" will be repeated for a west coast audience in May, marking the fifth consecutive year FTA has sponsored these twice-yearly industry functions.

Written guidance and technical tools are also updated and electronically published on a regular basis. The FTA public website addresses such topics as the development and evaluation of alternatives to meet locally-identified corridor transportation problems, cost estimation, benefit calculation, financial planning, and project management.

In addition, the Deputy Administrator and I have made it a priority to communicate directly with the general managers of transit agencies about specific problems and concerns throughout project planning, development and construction. Too often in the past, FTA technical staff talked with project technical staff, and little

information about significant issues was communicated openly and unambiguously to the general manager. Ratings at the end of each year sometimes came as a bolt from the blue, and there was little a manager could do to fix whatever problems had been identified. I know that general managers don't always enjoy receiving these calls, but I believe they appreciate them. As the transparency of the process increases and project sponsors become more aware of the requirements, these calls will become less necessary and those that are necessary can be made earlier in the project development cycle.

Developing and applying the New Starts criteria and policies to every project, every time is key to an objective and consistent evaluation and rating process. Occasionally, FTA is charged with "changing the rules" – and it is true that we do sometimes change the manner in which we implement the regulations. That is how we apply the lessons learned in past projects – some of which have been troubled projects – in a consistent manner to new projects. Among the policies that have been adopted in the last several years as a result of past experience are FTA's requirements that:

- The project sponsor must have the requisite technical capacity in place to manage the project prior to entering each new stage of the development process (i.e., preliminary engineering, final design, and award of an FFGA) to avoid problems like those we have seen in the Tren Urbano project.
- The terms of all major 3rd party agreements must be finalized prior to final recommendation for an FFGA, to avoid unexpected schedule and cost delays like those experienced with respect to railroad rights-of-way in the Tri-Rail project (Fort Lauderdale, FL), and utility relocation in the Hiawatha project (Minneapolis, MN) project.
- The significant risks related to all critical path elements of the project schedule and budget (e.g., real estate acquisition) must be identified, and mitigation measures or appropriate contingencies must be in place to ensure that the overall budget and schedule is achievable.
- Every project must be justified based on merit, in order to avoid situations like extending BART to the airport, where, in 1997, the project was exempted from evaluation based on project justification criteria because it was part of a set of projects that, considered together, had a proposed high local share. Every project must now prove its individual worth based on transportation benefits, cost-effectiveness and land use criteria, as well as the financial criteria, in order to advance through development and be awarded an FFGA.

One new tool we are using to help ensure that projects meet their cost, schedule and transportation benefit expectations is a quantitative risk assessment. These risk assessments help FTA and project sponsors identify the issues that could affect schedule or cost, as well as the probability that they will do so. Developed, in part, to help manage the Federal Government's risk with regard to the 100 percent Federally funded Lower Manhattan Recovery projects, this risk assessment tool has given both FTA and project sponsors a new quantitative means to manage risk more explicitly and reduce the likelihood of cost and schedule overruns. FTA's Project Management Oversight Contractors (PMOCs) have already completed a risk assessment or have one currently underway for all of the projects expected to be ready for a new FFGA and/or recommended for funding in FY 2005. The assessment tool examines risks that are specific to each project, and assesses the probability and magnitude of the effect on cost, contingency requirements, and schedule. In addition, it supports the development of mitigation measures to reduce or eliminate risks before they become reality. Used at the beginning of a project, it provides an overview of the level of risk involved in the project, including the project's budget and schedule projections. Used over time, the tool can be used to track the success of mitigation measures and assess trends with respect to project execution, so that any necessary intervention measures can be taken as early as possible. We believe the risk assessment tool will improve project management, as well as project oversight.

Currently, we are focusing risk assessments on those projects that are further along in project development, but will eventually use this important tool to assist sponsors with projects in preliminary engineering. Ultimately, we would like to be in a position to offer risk assessments to project sponsors during the alternatives analysis stage of project development. We know that the earlier project sponsors identify and understand the ramifications of alignment, design, engineering, and other decisions, the better our projects will be, and the fewer undesirable "surprises" communities will face in later stages of development. I want to emphasize that a risk assessment is not a "test"; there is no single threshold or passing score. It is a tool to assist both FTA and project sponsors in identifying project uncertainties and developing a plan for managing those uncertainties within the total project cost and schedule. We believe this approach will be particularly useful as FTA responds to Congress's request that we become more involved in project assessment during the alternatives analysis stage.

Improved Accountability for Results

Over the last three years, the discussion of results in the transit industry has changed dramatically. No longer is it common for transit systems to define their success by the number of buses or railcars they own; no longer do New Starts project sponsors define success as simply obtaining Federal funds or completing construction. "Transit success" now means "transit riders."

Starting in 2001, FTA has required, as part of every new Full Funding Grant Agreement, a rigorous and statistically valid assessment of the ridership results achieved by the project. Project sponsors must perform a detailed analysis of their travel forecasts throughout the planning and project development process, and compare the forecasts to observed ridership shortly after the project has opened for service. These "Before and After" studies are intended to not only focus attention on this important outcome, but also to provide insight into the variables which most impact the accuracy of travel forecasts, capital and operating cost estimates, operating plans, and ridership results.

In addition, FTA is currently reviewing travel forecasts and evaluating the actual ridership performance of projects that opened for revenue service in the last ten years. In addition to assessing how well the projects met local goals and ridership estimates, we expect to gain additional insight into the factors that influence demand and utilize that insight to improve the reliability of forecasting procedures. Preliminary work in this area suggests that actual ridership compared to forecasted ridership has improved over the decade. Still there is much room for improvement. FTA is continuing its analysis of travel demand models, procedures, and assumptions to help identify the causes of overly optimistic forecasts, to correct deficiencies, and, ultimately, to improve the reliability of local travel forecasts throughout the country. This will help ensure that New Starts projects deliver the benefits they promise.

We are not putting the accountability burden solely on project sponsors, however. Last year, FTA implemented a unique performance accountability pilot program for its senior executives. For the first time, FTA senior executives were held jointly accountable for four core performance accountabilities. These accountabilities focus on key results that are important to our customers – grantees, transit riders, and taxpayers. One of the unique features of our core accountabilities is that the results are not all under the direct control of FTA, and certainly not under the direct control of any single member of our Senior Executive Service (SES) team. Despite this, our SES team agreed that, if we did not collectively achieve at least two of the four core accountabilities, no SES bonuses would be awarded for FY 2003.

The four joint core accountabilities were:

- Transit Ridership Growth: Ridership in the largest 150 transit systems will increase an average of 2 percent over the prior year, controlling for changes in employment in the local area.
- Safety and Security Readiness: 100 percent of the 30 largest transit agencies will accomplish at least 80 percent of the items on FTA's Top 20 Security Action Item List.
- Major Project Cost Control: 100 percent of New Starts projects with FFGA's will not exceed their current baseline cost estimate by more than five percent.
- Grant Processing Efficiency: 80 percent of all grants processed by FTA will be awarded within 60 days after submission of a complete grant application.

We successfully achieved our objectives on three of the four core accountabilities. We fell short of a perfect record by achieving a 1.2 percent average increase in ridership, rather than our 2 percent target. At the same time, we exceeded our goals for both Safety and Security Readiness and Grant Processing Efficiency. In fact, the time for processing grants, including FFGAs that require a 60-day Congressional review period, was reduced from an average of 67 days in 2001 to 39 days in 2003. I believe our success demonstrates not only that action is driven by measurement and monitoring, but also that joint accountability promotes teamwork and inspires greater personal effort, and I am extremely pleased that Secretary Mineta has approved the continuation of FTA's SES performance accountability pilot project for FY 2004.

The Future

While we believe that considerable progress has been made, FTA continues to pursue methods to better account for the full range of project benefits in the project evaluation and rating process, and we fully support this Committee's desire to have FTA more directly involved as communities consider and analyze alternative solutions to their transportation problems. Further, as the Committee is aware, we seek to modify our organizational structure to improve customer service and increase accountability for project success within FTA.

In addition, this Administration believes it is critical that the surface transportation reauthorization legislation include some modest, but important changes in the New Starts program. We are pleased that the House and Senate have both adopted some of the provisions proposed by the Administration. We are eager to work with Congress to ensure their adoption in the enacted legislation. In particular, we encourage Congress to adopt the following provisions.

First, we ask that the current exemption from project evaluation and rating for projects seeking less than \$25 million in New Starts funds be eliminated, as in the Senate bill. We have learned from experience that this exemption encourages project sponsors to artificially define projects into smaller segments in order to avoid being subject to FTA assessment, and can lead to the expenditure of Federal taxpayer dollars on projects that would not meet minimum financial or project justification standards. Under TEA-21, approximately \$360 million of Federal New Starts funds have been spent on projects that were exempt from FTA's project evaluation and rating system.

Second, we request that FTA be permitted to utilize a simplified project assessment and rating system for projects that cost less than \$75 million, as included in both bills, but without creating a separate program account for such projects, as the House bill would create. As Secretary Mineta has often noted, the creation of separate programs with separate pots of money encourages communities

to design projects based on their perception of where they have the best chance of getting money, rather than the merits of the proposed solution. Our New Starts program should not presume that there is a pre-determined mix of appropriate solutions to transportation problems nationwide.

Third, we request that non-fixed guideway corridor projects be made eligible under the New Starts program, with no requirement that a specific percentage of the project to be fixed guideway, as proposed by the Administration. Creating artificial constraints on local decisions concerning the best way to address transportation problems drives up costs and will likely result in less than optimal transportation solutions. There is no evidence suggesting, for example, that every bus rapid transit solution will be most appropriately constructed and delivered at the best price if every bus rapid transit system is required to operate on a fixed guideway for at least 50 percent of its route.

Finally, the Administration encourages the Congress to make projects that have not yet been evaluated and rated by FTA (i.e., projects still in alternatives analysis) ineligible for New Starts funds for planning purposes, as the Senate bill provides. Under TEA-21, at least \$80 million of Federal New Starts funds have been spent on planning and early project development activities that have not produced viable New Starts investments. We believe these explorations of local interest and support should be funded exclusively with local monies.

Mr. Chairman, we look forward to working with this Committee to continue to improve the New Starts program, as well as FTA's processes for evaluating, rating and overseeing New Starts projects. Thank you again for the opportunity to testify on these important issues. I would be happy to respond to questions from the Committee.

[1] Hecker, JayEtta Z., Director of Physical Infrastructure Issues, GAO. "Transportation Programs: Opportunities for Oversight and Improved Use of Taxpayer Funds." Testimony Before the Committee on Transportation and Infrastructure, House of Representatives, July 22, 2003, p. 20.

[2] Intercity Passenger Rail: Amtrak's Management of Northeast Corridor Improvements Demonstrates Need for Applying Best Practices. GAO-04-94, February 2004, p. 46.

[3] GAO High Risk Series, An Update. GAO-03-119, January 2003, p. 3.

[TRANSIT GLOSSARY](#)

[PRIVACY POLICY](#)

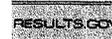
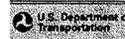
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Mr. OSE. Without objection so ordered. Mr. Thomas, you are recognized for 5 minutes. Welcome, sir.

Mr. THOMAS. Thank you, sir. My name is Terry Thomas. I am president of Community Bus Services in Youngstown, OH. CBS provides contract bus services for senior citizens and persons with disabilities, and has been in business since 1933, and we now operate over 100 vehicles.

Like the other bus companies testifying today, we have come to realize that the private investment we have made in public transit is viewed as an undesirable impediment by many public transportation agencies, including the FTA.

CBS's most recently awarded public transit service contract is with the city of Niles, OH, in Trumble County. After a 10-year-long struggle to bring public transit to the largest populated county in the United States, Mayor Ralph Infante of Niles, OH, successfully secured an FTA grant to operate public demand response transit service.

In September 2003, my company was awarded the competitively procured contract to operate the service. If this was all there was to the story, it would be viewed as a positive example of competitive contracting. However, because of the actions of WRTA and the Chicago Regional Office of the FTA, much needed service was needlessly withheld from the people of Trumble County for 10 long years. The WRTA, for several decades, was the only public transit system in the Youngstown-Warren Area.

Yet, while receiving FTA formula funding for decades, based in large part on Trumble County's population, WRTA consistently refused to extend service to Trumble without being paid additional for the cost of the service.

The longstanding frustration eventually led Trumble and the city of Niles to create its own system. Niles solicited bus service proposals from qualified providers. WRTA never submitted a proposal in response to Niles' solicitation. Instead, WRTA immediately protested the award of any contract resulting from the effort.

The approach by WRTA was to try to thwart the award of any contract to operate public transit service to anyone other than itself, thus guaranteeing WRTA exclusivity and a monopoly in providing public transit services in the two-county area on a non-competitive basis.

FTA's Chicago Regional Office supported WRTA in this effort, ruling that WRTA was at an unfair competitive disadvantage in December 2002. The city of Niles appealed the FTA Chicago Regional Office finding, and it was subsequently reversed in May 2003 when reviewed by the FTA General Counsel's office in Washington, DC.

Niles only then was able to move forward and award a contract, albeit not until September 2003. Let me emphasize that it was not until the FTA General Counsel's office stepped in from Washington, DC, to reverse the decision of the FTA Chicago Regional Office and its local grantee transit property, the WRTA, that Niles was able to proceed with this bus service delivery.

Although Niles eventually prevailed, 10 years is a long time to wait for a decision. In a separate Ohio example, a local private bus company, Advanced Coach, filed an FTA complaint against the

Southeast Area Transit, called SEAT, an FTA grantee in southeastern Ohio.

The complaint involved SEAT's unfairly competing against private bus companies by operating bus service for a fee to third party entities utilizing equipment and facilities acquired with Federal grants. Some of these contracts involve peak hour shuttles to local employers that would otherwise be operated by private bus companies without FTA funding.

FTA has stepped back from encouraging the use of private bus operators, as required by the Federal Transit Act, by abandoning the fully allocated cost doctrine. This regulation was supported and framed under a contract for the FTA by the consulting firm of Booz Allen, which required public federally subsidized transit agencies to compare true costs of operations, include fare allocations of administrative, maintenance and related costs as opposed to mere operational and marginal costs. It is no surprise that the public transit agencies pressed until the FTA relented and abandoned the analytic fully allocated cost requirement.

I have attached Circular 7005-1 issued in December 1986 that describes the fully allocated cost requirements. Utilizing bus operators as an element of a community transportation program makes good fiscal sense and is operationally practical.

I ask that FTA engage in a rulemaking, as Chairman Ose has requested, that will establish meaningful thresholds that meet the meaning of FTA's own words, and that its grantees meet rigorous planning and private enterprise requirements.

Given that under FTA private sector provisions there exist no private right of action for judicial review in the courts, an arm's-length enforcement responsibility should be given either to the DOT Secretary's office or become subjected to negotiated rule-making, where the private sector has a position to sign off on new arm's-length enforcement rules.

Otherwise, by continuing the current course of action, private bus operators will soon be forced out of business altogether.

In my short time before you today, I want to leave you with the thought that many of the frustrations which have been encountered by private bus operators in the Federal transit program could be resolved with statutory language directing FTA to make rules that protect private bus operators that offer more uniformity and arm's-length enforcement.

Thank you so much, Mr. Chairman and Mr. Tierney.

[The prepared statement of Mr. Thomas follows:]

87

TESTIMONY
OF TERRY THOMAS, PRESIDENT
COMMUNITY BUS SERVICES, INC.
OF YOUNGSTOWN, OHIO

BEFORE
SUBCOMMITTEE ON ENERGY POLICY, NATURAL
RESOURCES AND REGULATORY AFFAIRS
U. S. HOUSE OF REPRESENTATIVES

HEARING ON
PRIVATE SECTOR PARTICIPATION
IN GROUND TRANSPORTATION

WASHINGTON, D.C.

MAY 18, 2004

My name is Terry Thomas and I am the Chairman of the Community Bus Services, Inc. of Youngstown, Ohio. My company is in the business of providing private bus services for the elderly and persons with disabilities often referred to as "paratransit service, as well as school bus services, and group transportation. CBS has been in business since 1933 when my father first transported students using station wagons. Having grown substantially since then with now over 100 school buses and paratranist vehicles in operation, CBS is the largest private bus operator in Mahoning and Trumbull Counties in Ohio. This is indicative of an industry primarily comprised of many small to mid-size companies.

I have also served as president of the National School Transportation Association ("NSTA") and currently serve as the chairman of the NSTA Legislative Committee. I wish to thank the Subcommittee on Energy Policy, Natural Resources and Regulatory Affairs for holding these hearings and for affording private operators a long overdue opportunity to present our perspective on the implementation of congressional policy by the Federal Transit Administration ("FTA") through a rulemaking process.

My company currently provides transit and school bus services to some five public entities under competitively awarded contracts, the most important part of our business. Like many other companies, however, we have come to realize that the private investment we have made in mass transportation services and in school

bus services is viewed as an undesirable impediment by many public transportation agencies, including the Federal Transit Administration.

I would like to share with the subcommittee my view of the status of private enterprise participation in providing transit services, and my experience and frustration with the actions of public transit systems and rulings by the FTA that have been detrimental to private enterprise participation. These actions were taken and rulings were made despite Congressionally-mandated requirements for a role for private enterprises to participate in the planning and delivery of transit services.

CBS has had a longstanding approach to forging partnerships with all its public sector customers, including public transit systems. We embraced the concept of public-private partnership formation during the 1980s, and subsequently built relationships with public transit systems, public school systems, counties, municipalities and human services agencies. We have been quite successful in following this model of doing business.

CBS has provided public transit services in the past through competitively awarded contracts from the Greater Cleveland Regional Transit Authority in Cleveland and the Western Reserve Transit Authority in Youngstown. Our most recently awarded public transit service contract is with the City of Niles, Ohio. After a decade long struggle to bring public transit service to the largest county not

served by public transit service in Ohio, Mayor Ralph Infante of Niles, Ohio successfully secured an FTA grant to operate public demand response transit service in Trumbull County. CBS was awarded the contract to operate this service, which began in September 2003.

If that was all there was to the story, it would certainly be viewed as a positive example of competitive contracting for public transit service. However, because of the actions of the Western Reserve Transit Authority and the regional office of the FTA, much needed service was needlessly withheld from the people of Trumbull County for nearly a year. Western Reserve Transit Authority for many years was the only public transit system in the Youngstown-Warren urbanized area, comprising Mahoning and Trumbull Counties. Yet, while receiving FTA formula funding for decades based in large part on Trumbull's population, WRTA consistently refused to extend service to Trumbull County without being paid for cost of the service. The longstanding frustration this caused eventually led Trumbull County and the City of Niles to create its own system, the Niles Trumbull Transit System.

WRTA never submitted a proposal in response to Niles' solicitation in October 2002. Instead, it immediately protested the award of any contract resulting from the effort. The approach by WRTA was to try to thwart the award of any contract to operate public transit service in Trumbull County to anyone other than WRTA, thus guaranteeing WRTA exclusivity in providing public transit services in

the two-county area on a non-competitive basis. FTA's regional office supported WRTA in this effort, ruling that WRTA was at an unfair competitive disadvantage in December 2002. The City of Niles eventually appealed the finding and it was reversed in May 2003 when reviewed by the FTA General Counsel's Office in Washington, and Niles was able to move forward and award a contract, albeit not until September 2003.

Most recently, a local private bus company, Advanced Coach, filed a complaint with FTA against South East Area Transit (SEAT), an FTA grantee, in Southeastern Ohio. The complaint involves SEAT unfairly competing against private bus companies. SEAT is operating a variety of mass transportation services for a fee to outside third party entities utilizing equipment and facilities acquired with federal grants.

Some of these contracts involve peak hour shuttles to local employers that would otherwise be operated by local bus companies without FTA funding. The complaint itself cited Starlight Industries and two contracts with Genesis Healthcare, a local Ohio entity.

Based on recent data of other FTA grantees in Ohio I am analyzing, there are other examples of FTA grantee third party contracts that, at a minimum, have not met the Federal statutory tests of private sector participation.

Let me recall for the Subcommittee that the policy of leveraging public mass transportation infrastructure investment with private equity has been an essential part of the Federal transit subsidy program for its entire history, starting in the administration of President Lyndon Johnson. This policy has been one of the most profoundly bi-partisan policies of the Congress. For example, it was Democratic Senators Daniel Patrick Moynihan of New York and Democratic Senate Majority Leader George Mitchell who joined with Republican Senate Minority Leader Bob Dole and Republican Senate Finance Chairman Mark Hatfield to lead the coalition which passed the historic Intermodal Surface Transportation Efficiency Act of 1991, commonly known as "ISTEA." The ISTEA legislation was premised upon the leveraging of private sector investment. Indeed, David Osborne, co-author of the celebrated book Reinventing Government, who served as a principal advisor to Vice President Al Gore for the Clinton Administration's National Policy Review, specifically cites the FTA's former Office of Private Sector Initiatives, which promoted the use of privately funded transportation resources, as a model for achieving competition and efficiency in the delivery of government services, at page 85 of his book.

Yet, the FTA disbanded the Office of Private Sector Initiatives in 1993. At that time, the FTA also issued an unlawful and non-binding rescission of its Private Sector Participation Guidance, which provided a framework of expectations for the utilization of competition and consideration of privately operated transportation resources as a compliment to publicly subsidized government monopoly service.

FTA at that time described the utilization of competition and private sector resources posed an unreasonable paperwork burden on government and therefore were counterproductive. This is the kind of double-speak with which the FTA has moved away from the congressional statutory language mandating private enterprise participation to the maximum extent feasible.

Part and parcel of the FTA's stepping back from encouraging the use of private transportation operators to the maximum extent feasible, as required by the Federal Transit Act, was the abandonment of the "fully allocated" cost doctrine. This doctrine is enshrined under DOT Regulatory provision, 49 CFR §18.32 Equipment, requiring that all of the Department's assistance programs "*...must not use equipment acquired with grant funds to provide services for a fee to compete unfairly with private companies that provide equivalent services...*". This regulation was supported and framed by work done under contract for the FTA by the consulting firm of Booz Allen, which required public federally subsidized transit agencies to compare the true cost of operations, including fair and reasonable allocations of administrative, maintenance and related costs, as opposed to mere marginal costs, when reviewing the relative financial merits of operating transit services under competitive contract rather than in-house. It is no surprise that the bureaucratic public transit agencies found this guidance offensive and pressed until the FTA relented and abandoned the analytic requirement. This has occurred though it has been repeatedly demonstrated that when analyzing the cost of providing transit service on a fully-allocated basis, private transportation providers

consistently supply less costly services than public transportation systems. The use of fully-allocated costing as the appropriate basis for making an award of a contract has long been recognized and was a basis for encouraging private sector participation in public transportation by leveling the playing field so that apples to apples comparison as to the actual cost of providing service could be accomplished. I have attached Circular 7005.1, issued in December 1986 describing the fully-allocated costing requirements.

In pushing aside over the past decade the long-standing model public/private partnership program of the FTA, that agency ignored direct pleas to FTA to uphold its statutory responsibilities. The record reflects that the overwhelming majority of comments received about FTA's abdication of private enterprise participation enforcement were in opposition to such change. . Among the voices raised against FTA's explicit lack of enforcement were those of David Osborne, Senator George Mitchell, Senator Bob Dole, Senator Bob Graham, Senator Mark Hatfield, Mayor Kurt Schmoke of Baltimore, and many others.

Public policy rightly emphasizes mobility alternatives for all. Opportunities to enhance the quality of life of the elderly and disabled citizens are increased by making available adequate transit services. In addition, improved mobility and greater access to education, jobs, and job training greatly impact the quality of life for all Americans. It is through the coordination of all transportation resources that we are able to enhance the

transportation alternatives available to every citizen. Utilizing private bus operators as an element of a community transportation system makes good fiscal sense and is operationally practical; unfortunately, many agencies ignore these readily available resources in their own back yard. I ask that FTA engage in rulemaking as Chairman Ose has requested that will establish meaningful thresholds that meet the meaning of FTA's own words that its grantees must meet "*rigorous planning and private enterprise requirements*". As I have shown above FTA has failed to meet a standard of enforcement as intended by Congress.

Existing Federal transit statutes must be enforced to encourage both public transit agencies to consider contracting with private transportation companies to the maximum extent feasible and provide less costly and much needed services while and maximizing all available transportation resources. I also urge that rulemaking address unfair competition from Federally subsidized transit agencies in areas outside of providing public transit service, such as third party services to public or private entities that result in putting private transportation providers out of business and the loss of jobs to their employees.

I wish to thank the Subcommittee for its patience and courtesy in allowing me to testify here this morning. I would be happy to answer any questions you may have or to provide additional information to support your work. It has been an honor to appear before you today.

ATTACHMENT



U.S. Department
of Transportation
Urban Mass
Transportation
Administration

CIRCULAR

UMTA C 7005.

December 5, 1986

Subject DOCUMENTATION OF PRIVATE ENTERPRISE PARTICIPATION
REQUIRED FOR SECTIONS 3 AND 9 PROGRAMS

1. PURPOSE.

This Circular provides guidance to Urban Mass Transportation Administration (UMTA) grant applicants and recipients of UMTA funds for the development and documentation of the local process for considering of the capability of private providers to perform mass transportation and related support services. This documentation will allow UMTA to make the findings required under Sections 3(e) and 8(c) of the Urban Mass Transportation Act of 1964, as amended (UMT Act) and to determine compliance with Sections 8(e) and 9(f) of the UMT Act.

2. SCOPE.

This Circular applies to programs to be funded with Federal assistance under Sections 3 and 9 of the Urban Mass Transportation Act of 1964, as amended, and Sections 103(e) (4) and 142 of Title 23, U.S.C.

3. BACKGROUND.

The joint UMTA/FHWA planning regulation (48 FR 30332, June 30, 1983) requires that the local planning process be consistent with Sections 3(e) and 8(e) concerning the involvement of private transportation providers. On October 22, 1984, UMTA published "Private Enterprise Participation in the Urban Mass Transportation Program" in the Federal Register (49 FR 4310). (The Policy Statement.) On January 24, 1986, UMTA published "Guidance on Documentation of Private Enterprise Participation in Urban Mass Transportation Programs; Notice" in the Federal Register (51 FR 3306). (The Guidance.) These documents strengthen UMTA's implementation of the private sector participation provisions of the UMT Act and were intended to provide a greater competitive environment and increase the opportunities for private sector participation in mass transportation operations.

The Policy Statement was designed as a general statement of policy and continues in effect. The Guidance provided that it was effective for Fiscal Year 1986 and would be followed by a Circular establishing guidance for future years. This Circular supersedes the Guidance. A recent action of Congress directly relates to UMTA's involvement in private sector initiatives, and this Circular reflects that action.

Specifically, the Department of Transportation and Related Agencies Appropriations Bill, 1987 (H.R. 5205), contains a provision, Section 327, relating to private sector involvement in UMTA programs. That section imposes restrictions on what UMTA may do regarding private sector involvement, but it also provides "...that it is not the intent of this section to supercede [sic] the existing statutory requirements of Section 3(e), 8(e), and 9(f) of the Urban Mass Transportation Act of 1964, as amended." The explanatory language of the accompanying conference report (H.R. Rpt. 99-976), reiterates the prohibitions and provides that: "The conferees want to be certain that UMTA does not exceed its current statutory authority as it implements its private sector initiatives." The provision thus imposes limitations on UMTA but also recognizes UMTA's ongoing statutory responsibilities under Sections 3(e), 8(e) and 9(f) of the UMT Act. After reviewing the provision and its legislative history, UMTA interprets Section 327 to mean that UMTA may not:

- a. Condition a Section 9 grant on a specific level of private sector involvement;
- b. Establish quotas for private sector involvement; or
- c. Mandate the local decision regarding private sector involvement.

This Circular imposes no such requirements.

However, for UMTA to continue to exercise its statutory responsibilities, as Section 327 recognizes it must, UMTA requires that grantees use a locally developed process for the consideration of private enterprise. UMTA seeks to ensure that the means by which local public bodies select service providers, although locally determined, allows UMTA to make the statutory findings required under Sections 3(e) and 8(c) as well as comply with the provisions of Sections 8(e) and 9(f) of the Act. UMTA will not withhold funds with respect to any particular decision by a grantee regarding private sector participation, but it will exercise its full statutory responsibility in ensuring that a local process is in place which encourages private enterprise participation to the maximum extent feasible and that that process is followed.

4. DEFINITIONS.

"Costs" means fully allocated costs which are attributable to the provision of the service. The application of these costing principles which reflect generally accepted accounting principals are more fully described in "Guidelines for Fully Allocated Costs in Transit Service," available from UMTA on request.

"New or restructured services" means a significant service change. This may involve any of the following: establishment of a new mass transportation service; addition of a new route or routes to a grantee's mass transportation system; a significant increase or decrease in service on an existing route in a grantee's mass transportation system; a significant realignment of an existing route in a grantee's mass transportation system; or a change in the type or mode of service provided on a specific regularly scheduled route in a grantee's mass transportation system.

5. LOCAL PROCESS.

Each UMTA grantee must develop or adopt a process for the consideration of private enterprise participation and the private operation of mass transportation and other support services to the maximum extent feasible to provide a basis for UMTA to make the Section 3(e) and 8(c) findings and to ensure compliance with Sections 8(e) and 9(f).

In those cases where the State is the recipient of UMTA funds and passes those funds through to local entities, the subrecipient must submit the appropriate documentation to the State. The State is expected to provide UMTA with a summary of this documentation. The documentation itself should be retained by the State to be made available to UMTA upon request.

Each locality is free to develop its own process for the consideration of private enterprise. At a minimum the locally developed process must include those factors set forth in The Policy Statement, which include the following:

- a. Notice to and early consultation with private providers in plans involving new or restructured service as well as the periodic re-examination of existing service.
- b. Periodic examination, at least every three years, of each route to determine if it could be more efficiently operated by a private enterprise.
- c. Description of how new and restructured services will be evaluated to determine if they could be more effectively provided by private sector operation pursuant to a competitive bid process.
- d. The use of costs as a factor in the private/public decision.
- e. A dispute resolution process which affords all interested parties an opportunity to object to the initial decision. UMTA's complaint process is designed to accept appeals of this local dispute resolution process.

A grantee should submit its process to UMTA. The acceptability of the local process is an essential element in UMTA's making the Section 3(e) and 8(c) findings as well as determining compliance with Sections 8(e) and 9(f) of the Act.

6. TIP/AE DOCUMENTATION.

At the time of the submission of the TIP/AE, a Metropolitan Planning Organization (MPO) is expected to certify that the local process has been followed and to describe how the local process led to the development of the projects contained in the TIP/AE. This documentation should contain:

- a. A description of the involvement of the private sector in the development of the specific projects. The determination of whether service or support functions reflected in the annual element are to be provided by a public or private provider can be arrived at through use of requests for proposals, requests for bids, or other means in the local planning process;
- b. A description of the proposals received from the private sector and how they were evaluated;
- c. A description of impediments to holding service out for competition and the measures taken to address the impact of such impediments; and
- d. A description and status of private sector complaints.

The nature and length of documentation will be left to the grantee's discretion. It is UMTA's expectation that the documentation will be kept to a minimum, and that information previously submitted need not be resubmitted. If additional information or clarification is needed, UMTA may require it prior to approval of the Program of Projects.

7. COMPLAINT PROCESS.

The MPO should develop a process and ensure the fair resolution of disputes for all parties. Interested parties may appeal the local decision to UMTA in accordance with the provisions of The Policy Statement. Complaints to UMTA will be referred to the MPO unless the Complaint states that the Complainant has already attempted to resolve the problem at the local level. Once a Complainant has exhausted his local dispute resolution process, he should send his complaint to:

Chief Counsel
Urban Mass Transportation Administration
400 7th Street, SW
Room 9328
Washington, D.C. 20590


Ralph L. Stanley
Administrator

Mr. OSE. We appreciate your testimony. Our next witness is the vice president of the Reason Foundation, Dr. Adrian Moore. Sir, we received your testimony. It is lengthy. You are recognized for 5 minutes to summarize.

Dr. MOORE. Thank you, Mr. Chairman. You know, the stories we have just heard about anti-competitive behavior by public transit agencies has a long history. I wrote a book a few years ago published by the Brookings Institution that documented a great many, sort of a historical pattern. It is the nature of public transit agencies that they try to rub out any competition that they might face from the private sector.

In the context of Federal grantmaking, the State and local transportation projects that receive Federal grants have a different accountability structure than ones that are funded locally. You can see this where you live, when you look at projects that are funded, say, by a local sales tax versus ones that get Federal grants. You hear about the ones that are funded with State and local funds. The Department of Transportation or the local transit agency feels compelled to make sure that people know how this money is being spent.

Projects funded with Federal grants you generally never hear about. There are things that are done quietly on the side by these agencies. They are only accountable to the FTA or the DOT. It a different accountability structure. At the same time, the kind of free money aspect of these grants creates strong incentives to use the dollars internally rather than make use of private sector participation, not necessarily weighing cost effectiveness and speed of production and so forth, and I think all of that is pretty much common sense.

That is why these provisions that the chairman read earlier in the hearing are in the law. There is a recognition that there are some incentive problems here, and we need to have it in the law that private sector participation needs to be weighed.

I think where FTA and DOT are missing the bus is that—you can't have a hearing without at least one pun—where they are missing the bus is they are not making these grants on a performance basis. We understand that we want State and local governments to make these decisions on their own. These are State and local services. But, the fact is, if you are going to get Federal money to do something, being accountable for the use of that money makes sense.

I am not talking about micromanaging those things. But, if it is within the law and within good management practices for the DOT to ask these agencies to report back what are the projects they are using the money for, how were they executed, and are they meeting the goals that they stated they were going to meet in applying for the funds in the first place?

By not following through in that fashion, by not making full use of the private sector, we are missing a lot of value. There is a lot of displaced private funding that could be brought to the transportation projects.

Again, the chairman made a good summary of the transportation funding needs that we face in this country. There is a lot of private money that could go to provide transportation services if they were

allowed to do so and they weren't pushed out of the market. This goes from toll-funded roads to private transit services within cities.

When you think about transit services within cities, since that is a lot of what we are focused on here, there is a lot of biases in the way things are funded away from doing competitive operations of these systems once you have purchased the capital with a Federal grant. But, it is interesting to see that in the United States and Europe, where you have contracted out operation of bus services, you have made use of private sector participation, you are looking at an average of 35 percent cost savings. I think some of the examples have highlighted those kind of savings.

It is also very interesting to see how much the costs of publicly operated systems plummet when part of the system is operated by a private contractor or when they do face direct competition from a private bus service. The cost differentials become really obvious. It makes the public agency very uncomfortable.

Surveys performed by the Transportation Research Board of transit agencies who have contracted out operations find that 80 percent of them would say that they would gladly do this again if they had a chance to do it over again. They are very satisfied with private sector participation. These are not cheerleaders, these are not private companies, these are public officials, public employees, who are just trying to get the job done.

To boil this down to recommendations, I think, at this level I think the DOT needs to make these grants on a performance basis, set out clear criteria. It is already in the law. They can fold that into the contract criteria in a fairly straightforward fashion. I think they believe that it is sort of implicit and it is embedded in the local planning process, and, if you have ever been participated in an MIS, you have probably seen that is not the case. MISs are very political processes, they are not technical processes.

Embedding some of this in the grant requirements makes sense. Obviously the transportation funding bill, even if the one that is currently up is not in the debate stage any more, it is going to come around again. There are a lot of things embedded in the transportation funding bill that are problematic or raise barriers to private sector participation. I think we need to continue to tackle those.

Thank you very much.

[The prepared statement of Dr. Moore follows:]

**Statement of
Dr. Adrian Moore
Vice President
Reason Foundation
Before the
Subcommittee on Energy Policy, Natural Resources
and Regulatory Affairs
Committee on Government Reform
United States House of Representatives
May 18, 2004**



Reason

Introduction

Current law and the Administration's policies are clearly aimed at expanding the competitive and private provision of services that are not inherently governmental. In the transportation sector, while there is a great deal of experience with private sector participation in providing a wide range of services, we have fallen short of taking full advantage of it.

The opportunities for private sector participation in transportation services runs a wide range. In many cases government agencies compete with private service providers or have forced private providers out of the market in order to maximize revenue for government services. In such instances the market would provide transportation services if government competition or regulation were removed.

In many more instances, the best opportunity to involve the private sector is via a public-private partnership. There is a vast range of such opportunities from the building of new infrastructure, to maintaining existing infrastructure, and the operation of existing services.

And, in some cases, there may be no economically or operationally viable role for the private sector and full responsibility must rest on a government agency.

By not capitalizing on all opportunities to involve the private sector we are increasing the costs of transportation services, limiting their flexibility, stifling innovation, and creating a static system to the detriment of taxpayers and travelers.

I would like to focus on the results of and opportunities for private sector participation in transport services, with special focus on urban transit, new roads, and maintaining existing roads.

Private Participation in Transit Services

If bread on supermarket shelves were moldy and increasingly expensive, we'd expect fewer people to buy bread. When faced with paying more for a worse product, it's not surprising that more customers simply refuse to buy the product. We should be similarly unsurprised to discover that—after years of fare increases and degraded service—transit ridership continues to fall.

Between 1960 and 2000, transit's share of work trips fell from over 12 percent to under 5. And while ridership falls, costs rise—not just for bus riders, but for taxpayers, too. Again, between 1960 and 2000, federal transit subsidies nearly tripled and total government subsidies ballooned to over 7 times 1960 levels. In other words, taxpayers—whether they use transit or not—have clearly endured their own kind of fare hike. Why do costs continue to rise as transit serves an ever-shrinking slice of America? Moreover, transit's remaining customers often receive poor service.

Some blame the bus itself, and there's no doubt the lowly bus suffers from an image problem. Decades of slow, spotty, unpleasant and unpredictable service have earned the bus the reputation as the transportation option of last resort. Of course the cause-and-effect behind the bus' fall may blur. As fewer people ride the bus, transit agencies anxious to control costs may reduce service even more. Ridership continues to fall, while a service that wasn't great in the first place degrades even further.

Some argue that the bus is simply too unappealing to attract a sizeable number of patrons. It's this perception that leads many transit agencies to pursue other transit modes, such as light rail. Light rail, they say, is hip and appealing while the bus is simply lowly.

But the research tells us there's nothing inherently lowly about the bus. For example, a 2001 GAO report notes:

While transit officials noted a public bias toward light rail, research has found that riders have no preference for rail over bus when service characteristics are equal.¹

Moreover, rider surveys reveal that patrons have straightforward requests for improved service, and these requests have little to do with a bias against the bus. Bus patrons simply want more routes, and faster, more frequent, more reliable service.

Others look at the dismal state of public transit and say the problem is much bigger than the bus. They say the problem is that transit has largely outlived its usefulness. After all, in most any society where wealth increases, private auto ownership and suburbanization will likely follow. Public transit simply lacks the speed, flexibility and convenience to be relevant in modern America.

Those who hold this view have a point. And we must be realistic about how much public transit can contribute to American's transportation needs. After all, transit simply cannot compete with the car in terms of speed, flexibility and convenience. And auto ownership has become prevalent even among transit's primary clientele—the poor. Three-fourths of households earning less than \$20,000 have at least one car.²

¹ General Accounting Office, "Bus Rapid Transit Shows Promise," Washington, D.C.: GAO Report 01-948, September 2001.

² John Pucher and John L. Renne, *Socioeconomics of Urban Travel: Evidence from the 2001 NHHS*, *Transportation Quarterly*, Vol. 57, No.3, Summer 2003.

Still, millions of Americans do rely on transit to get them to work, to school and to other appointments. So if we agree that the problem isn't the bus itself, and that transit is still relevant for millions of Americans—what does account for transit's woes?

From the point of view of the bus rider, the problem is customer service. Let's remember what ridership surveys tell us. Bus patrons have very straightforward requests: more routes, and faster, more frequent, more reliable service. From the point of view of the taxpayer, the problem lies with incentives. Our current system lacks the incentives to emphasize cost containment.

So what could satisfy both the transit patron and the taxpayer? Often the answer is private sector participation.

Whenever we consider doing something new, whether it's buying a car or privatizing a transit system, we should always do our homework. One way to allay fears about doing something new is to examine the experience of those who have gone before us. Are these people satisfied with their decision? Transit private sector participation—specifically competitive contracting—enjoys very high satisfaction rates. A recent Transportation Research Board survey notes that—when asked if they had to do it over again—roughly 80 percent of transit managers who chose contracting say they would stick with it a second time.³ Eighty-percent, what elected official wouldn't dream of such approval ratings!

That 80 percent approval rating is even more impressive when you consider who these transit managers are. They aren't cheerleaders for private sector participation. They aren't executives from firms who might benefit from increased private sector participation. They are public employees who needed a way to improve service and cut costs. They're pleased with private sector participation simply because it works.

Consider the following:⁴

³ Transportation Research Board, "Contracting for Bus and Demand-Responsive Transit Services: A Survey of U.S. Practice and Experience," Special Report 258, 2001.

⁴ E.S. Savas and E.J. McMahon, *Competitive Contracting of Bus Service: A Better Deal for Riders and Taxpayer*, Civic Report No. 30, New York: The Manhattan Institute, November 2002.

- In the US and Europe, competitive contracting has reduced operating costs from 20 to 51 percent, with savings of about 35 percent being the norm.
- Competitive contracting cut bus operating costs by 26 percent in Houston.
- By over 30 percent in San Diego
- By 46 percent in Denver.
- Moreover, in all cases contracts protected public transit employees from losing their jobs.

Moreover, improved service often accompanies lower costs. After decades of subsidies, outside money has become more important to agencies than revenue from fares. And as in any service, when customer patronage is detached from revenue, customer service falters. However, since companies bid for the right to serve bus patrons, competitive contracting can bring customer service back to transit.

The question is often asked: “Which transit services can be privatized?” The most obvious answer is the bus service itself, but that’s just the beginning. Here is a sample of some more:

- Accounting
- Construction management
- Customer information
- Human relations
- Emissions testing
- Equipment maintenance
- IT
- Printing
- Risk management
- Web site design and management

I could go on and on, but instead of doing that let’s agree that the question should be turned on its head. We need not ask, “Which transit services can be privatized?” but rather, “Which cannot?”

Foothill Transit in Los Angeles shows the validity of our new question. The agency has essentially no employees. A management company handles all the central office functions and oversees the contract transit operators. The results: As of 2000, the Foothills buses were operating at a unit cost 42 percent lower than that of LA County Metro's publicly operated lines.⁵

Of course, private sector participation is not an all or nothing proposition. An agency may decide to privatize some functions and keep others in-house, and certainly these decisions will vary from agency to agency.

Moreover, we must take care to understand why private sector participation works. The key distinction isn't so much private vs. public, but competition vs. monopoly. Private transit operators that are shielded from competition have shown that they will become inefficient, while public agencies exposed to competition have improved efficiency. Competition prods service providers to offer an appealing product, and local oversight ensures the fulfillment of performance measures.

Transit exists first to serve those who have no other transportation alternatives. Welfare researchers of all ideological stripes agree that one of the best ways to spur upward economic mobility is to improve physical mobility. When the transit dependent poor and handicapped have better access to education and employment, they are better able to pull themselves up the economic ladder and realize greater personal fulfillment. In other words, the bus can serve a very important role, and private sector participation can help it become the best it can be.

Private Sector Participation in Providing New Roads

⁵ Ibid

Americans waste \$70 billion each year stuck in traffic, according to the latest annual mobility report from the Texas Transportation Institute. Yet this huge cost suggests an entrepreneurial opportunity. The Reason Public Policy Institute first suggested in 1988 that the private sector could build supplemental congestion-relief lanes, using electronic toll collection to charge market prices so as to keep the lanes free flowing even at the busiest of rush hours. The first such lanes were developed in Orange County, California under a private franchise awarded in 1991 under California's AB 680 public-private partnership legislation. Opened to traffic in December 1995 in the median of SR-91, the "91 Express Lanes" demonstrated that electronic variable pricing works superbly to keep traffic flowing smoothly. And the toll revenues proved sufficient to pay for the construction, operation, and maintenance of the new lanes.

Because the 91 Express Lanes were built where high-occupancy vehicle (HOV) lanes had originally been planned, the franchise agreement required that the private franchisee permit three-person carpools to use the lanes at no charge. The concept of limited-access lanes to which one could gain access either by meeting an occupancy requirement or by paying a toll was dubbed High Occupancy Toll (HOT) lanes in a 1993 Reason paper. HOT lanes can be created either via new construction or by converting existing, underutilized HOV lanes into HOT lanes. The next three HOT lane projects to emerge in the 1990s—on I-15 in San Diego and on I-10 and US-290 in Houston—were all HOV conversions. A private firm was hired to manage the I-15 Express Lanes, illustrating another role for the private sector.

The early years of the 21st century have seen a proliferation of proposals for more congestion-relief lanes in congested urban areas. Denver and Minneapolis are converting existing HOV lanes to HOT lanes, with private-sector management. The Virginia DOT has received private-sector proposals to add two HOT lanes in each direction to the southwest quadrant of the Washington Beltway (I-495) and to add HOT lanes to I-95 approaching the Beltway and the Shirley Highway (I-395) within the Beltway. In Maryland, the State Highway Authority has requested the private sector to advise it on the feasibility of private projects to add Express Toll Lanes to the Maryland portion of the Capital Beltway (I-495), the Baltimore Beltway (I-695), and several other major highways in the area. Denver is reviewing unsolicited proposals for new

HOT or express toll lanes on two major freeways, and a private firm has proposed adding tolled express lanes to the 27-mile Airport Freeway between Dallas and Houston.

HOT/BRT Lanes & Networks

There can be real synergy between HOT or express toll lanes and bus rapid transit (BRT). The BRT concept has attracted much recent attention as a way of achieving service quality akin to that of rail transit, but at much lower capital cost thanks to the ability of buses to use already existing infrastructure. However, for the long-haul portions of express bus service, BRT proponents much prefer exclusive busways, in order to guarantee reliable high-speed service (giving BRT a speed advantage over driving). But except in very rare cases (where one or two buses per minute can be justified), an exclusive busway is enormously wasteful of the costly exclusive right of way. Some time-saving can be achieved by operating express buses in HOV lanes (as in Houston and on the El Monte Busway in Los Angeles), but since successful HOV lanes fill up with traffic, the speed and reliability gains for buses are not sustainable long-term.

A much better solution is to operate BRT service on HOT lanes, as proposed in Reason's 2003 report. Electronic market pricing can ensure that the number of vehicles per lane per hour is limited to an amount compatible with free-flow conditions (typically no more than 1,700 vehicles/lane/hour). Hence, the HOT lane becomes a "virtual exclusive busway"—from the transit operator's perspective, it obtains the service quality of an exclusive busway, but does not have to pay for it, thanks to the premium tolls paid by the automobiles that share the use of these lanes.

A number of metro areas are currently studying the possible creation of a network of such managed lanes, serving as both congestion-relievers for drivers and as BRT infrastructure. They include Dallas, Houston, Miami, Minneapolis-St. Paul, Phoenix, and the greater Washington, DC area. All the states involved have public-private partnership laws in place, which would permit such projects to be done under their auspices.

New Toll Roads

Many of America's fastest-growing metro areas have created toll road authorities over the last decade or two, since conventional highway funding sources and allocation processes were seen as not likely to provide sufficient funding to keep pace with their growth. These areas include Dallas, Denver, Houston, Miami, Orange County (CA), Orlando, and Tampa. These are all public-sector agencies, though some have contracted with private firms for functions such as electronic toll collection.

But the fiscal stress of the last several years has seen a renewed interest in private toll roads in fast-growing states. Both Colorado and North Carolina recently created state toll agencies, which will use the private sector to develop and operate new toll roads. Texas has enacted the most wide-ranging set of toll-road policies, empowering both the state-level Texas Turnpike Authority and regional mobility authorities to engage in developing new toll roads via public-private partnerships. Under Texas law, these projects can be carried out with a mix of conventional (gas tax) and toll funding. Georgia and Mississippi are the most recent states to enact toll road public-private partnership laws, bringing the total of such enabling laws to 21, encompassing nearly all the fast-growing states in the union.⁶

The newest toll road project in California broke new ground in U.S. toll road finance, departing significantly from the conventional model in which close to 100% of the capital cost is raised in the form of debt. A major disadvantage of this approach, for stand-alone, start-up toll roads, is that debt service must be paid on schedule, regardless of how well or poorly traffic is doing during the early ("ramp-up") years of the toll road. But the SR-125 toll road in San Diego was financed in 2003 via the method pioneered in Australia. About 25% of the capital cost is equity put in by the private franchise holder; 50% is bank loans that must be repaid within 10 years; and the balance is a subordinated loan from the federal government under the TIFIA program, with an extended repayment period. Hence, in the high-risk early years, only half of the usual amount of debt must be serviced, providing an important cushion in the event of lower-than-expected traffic. The company intends to replace the bank debt with long-term toll revenue bonds, but can

⁶ *Public Works Financing* keeps a running list of these projects.

select an opportune time to do so during the 10-year life of the bank loans. This financing model is more flexible and inherently lower-risk for start-up toll road projects.

Toll Truckways

Another type of specialized toll project is new lanes designed for exclusive use by trucks. Such lanes would be designed with heavy-duty, longer-lived pavement, less-steep grades, etc. to better match the physical features of heavy trucks. They would also be separated from general-purpose lanes by concrete barriers, increasing highway safety by reducing the likelihood of often-deadly car-truck collisions.

Historically, the trucking industry has staunchly opposed tolls and toll roads, considering it “double taxation” to pay both tolls and fuel taxes on the same highway. But one concept of toll truckway has won significant support in trucking circles. This is Reason’s proposal that long double- and triple-trailer rigs be allowed to operate on such barrier-separated lanes in states where they are otherwise forbidden by federal law. These larger rigs can in many cases allow a rig to haul double the payload at very little increase in operating cost, making it worth the operator’s while to pay a fairly hefty toll to gain these savings.

Three toll truckway projects are in various stages of consideration as of spring 2004. Furthest along is a private-sector proposal to add two toll truck lanes in each direction over the entire 325-mile length of I-81 in Virginia, at a cost of \$7 billion (most of it private bonds backed by toll revenues). Because this proposal does not provide for the more productive double and triple trailers, the trucking industry has opposed it. But truckway projects in California and Texas, though at an earlier stage, appear to have trucking industry support. The Southern California Association of Governments has included in their new 2030 long-range plan a \$16 billion system of toll truckways to link the ports of Los Angeles and Long Beach with the Inland Empire and Barstow. Its financing plan is based on the high toll rates justified by the operation of double and triple-trailer rigs. And as part of its Trans Texas Corridors program, the Texas Department of Transportation is reviewing unsolicited proposals for a new north-south corridor the length of the state, parallel to I-35, whose first component would be toll truckways.

Private Sector Participation in Road Maintenance

There is an increasing demand for our nations roads and highways. When measured by vehicle miles traveled, it has doubled in the past 25 years—some 2.7 million miles were traveled in 2000.⁷ However, new construction has not kept pace. Total road capacity, again measured in miles, has increased a mere 1.5 percent in the same time frame.⁸ Even more astounding though, dollars spent on maintenance (constant dollars) have increased less than 20 percent in the past two decades.⁹

Since our nation's reliance on the road network is unlikely to dissipate any time in the near future, governments at every level need to ensure that the current system operates to the highest extent possible. Maintenance is critical to ensure a reliable and safe transportation network. However, tax dollars are already stretched thin between maintenance and new construction. Unfortunately, over the years preventative maintenance has taken a back seat to new construction—in the long run, this proposition will be a losing one.

Governments are faced with the problem of doing more with less. Private sector participation offers a solution to improve quality (do more) and save money (with less).

Achieving Cost Savings

Achieving cost savings is a leading driver behind privatizing road and highway maintenance. When cost savings has been a motivation there is evidence of significant cost savings. For example, Florida's private sector participation initiatives generated cost savings between 15 and 20 percent.¹⁰

⁷ Infrastructure Corporation of America, www.ica-onramp.com

⁸ *Ibid.*, p. 2.

⁹ *Ibid.*, p. 2.

¹⁰ Bill Albaugh, Director of Highway Operations, Florida Department of Transportation, interview with authors, July 2002.

Improving Efficiency

Seeking to gain the “maximum utility from tax dollars”¹¹ some contracting agencies have privatized to improve overall system efficiency—achieved through competition and specialization.¹² Study after study shows that a competitive system is more efficient and effective than traditional single provider systems. For example when Massachusetts turned to private sector participation, nearly half of the contracts were won by employee groups who were being forced to compete. For the first time efficiency and effectiveness was introduced system-wide, producing tremendous improvements. The state was able to lower labor inputs and receive greater productivity, and this freed up additional resources that could be shifted to other needs.

Improving Quality

With the increased private responsibility inherent in private sector participation, there is increased incentive to produce high-quality work and to ensure high performance. One of the most important determining factors for the awarding of contracts is past performance, and delivering a low-quality product could prevent the contractor from procuring future work. In Florida the contractor is “performing at better levels and the quality is at least the same if not superior.”¹³

Case Studies*Massachusetts*

In the early 1990s, Massachusetts launched a pilot project, contracting for all routine highway maintenance in Essex County.¹⁴ The contract was quantity based—the state DOT continued to determine what work would be done and paid only for those specified tasks. The contract greatly improved highway conditions, delivering considerably more work for the same amount of money. The contract has saved \$2.5 million annually.¹⁵ According to a Kennedy School analysis, the contractor was 21 percent more cost-effective than the state had been.

¹¹ Adolfo Lucero, Deputy Secretary, New Mexico Department of Transportation, interview with authors, July 2002.

¹² Jack Traylor, President, Traylor & Sons, interview with authors, July 2002.

¹³ Bill Albaugh, interview with authors, July 2002.

¹⁴ Charles Kostro, Deputy Commissioner, Massachusetts Highway Department, interview with authors, June 2002.

¹⁵ *Ibid.*

On the heels of the pilot project's success, the DOT expanded the program to the entire eastern part of the state in 1993. Private firms and existing employees bid on seven contracts—private firms won four, public employees three. With the three union victories, the DOT was able to keep layoffs down to 150 people. The seven contracts save the state \$7.5 million the first year and delivered \$10 million more in additional services.¹⁶ Since the DOT pays only for services it specifies and the contracts made the firms and employees more productive, both sides won by getting more work done. The new highway maintenance system brought other improvements as well, as competition changed in-house management practices and workers' compensation claims fell 60 percent, overtime decreased 70 percent, and sick leave decreased 50 percent.¹⁷

The expanded program went so well that in 1996, the DOT moved to competitive contracting of highway maintenance statewide. It offered 14 contracts; public employees and private firms won half of each. In 1998, the DOT rebid the contracts, and is currently reviewing 5 additional contracts, with no media attention—it has become just a way of doing business. The bottom line for the DOT is that between 1991 and 1999, the annual highway maintenance budget fell from \$40 million to \$25 million while the amount of maintenance performed grew.

Virginia

A few years ago, the Virginia legislature passed the Public and Private Transportation Act (PPTA) mandating that the state DOT evaluate alternative proposals to maintain and reconstruction of roads. PPTA goals were simple: to improve efficiency and save valuable tax dollars.

In 1997 VMS Inc, a highway construction and maintenance firm based in Virginia, was awarded a total asset management VDOT maintenance contract. The initial contract was for six years with a value of \$131.6 million covering 251 miles of interstate. VMS maintains state highways in urban Richmond, rural West Virginia, and the southwest part of the state.

¹⁶ Ibid.

¹⁷ Based on a presentation by Charles Kostro at the AASHTO workshop "Contract Maintenance: Closing the Gap," Nashville, Tennessee, September 20-22 1999.

VMS is responsible for determining how they will maintain the road i.e., what type of materials, techniques, and procedures they will use. The contract requires VMS to maintain all fencing, mowing, snow plowing, pothole repair, cracking, and striping along the 251 miles of highway, to standards established by VDOT and VMS during contract negotiations. VDOT relies on a team of engineers and consultants set the standards, but they aggressively work with VMS since the product quality and liability are transferred to the contractor.

VDOT uses the same engineers and consultants to monitor the performance of VMS. An annual audit is conducted and a report card is issued describing VMS's progress toward the contract goals. Savings from competitive contracting were identified as \$23 million over five years using standard methodology and actual cost data.¹⁸ A second analysis performed by Virginia Tech found savings from contracting out of between \$16 and \$23 million, or 12 percent.¹⁹ Finally, the contractor completed an analysis showing contracting out saved Virginia taxpayers nearly \$8,000 per lane mile of maintenance.²⁰ Recently, VDOT exercised a five-year contract extension, evidence of their satisfaction with the product.

Florida

In each of the contracts the state administers annually, the state has saved several million dollars over what it would have cost under the state monopoly system. According to "Asset Management Program Summary," a report published by the Florida Department of Transportation in November 2003, the state has saved \$83.7 million, or 15.3 percent throughout the life of the contracts.²¹ Furthermore, an additional six contract awards for highway maintenance are planned in the next fiscal year (FY 2004). By July 2008, Florida expects to

¹⁸ Virginia Joint Legislative Audit and Review Commission, "Review of VDOT's Administration of the Interstate Asset Management Contract," Richmond, Virginia, October 2003, p. iv. Available at <http://jlarc.state.va.us/reports/rpt259.pdf>

¹⁹ *ibid.*, p. 12

²⁰ *ibid.*, p. 48.

²¹ Florida Department of Transportation, Asset Management Program, November 2003, available at: <http://www.dot.state.fl.us/statemaintenanceoffice/Asset%20Management%20Program%20November%202003.pdf>

have 28 active asset management contracts. At the local level, the two major toll operators in Orlando and Miami also successfully contract out road maintenance.²²

FDOT has experimented with several types of contracts that vary in length, magnitude, and quality. The parallels among all of these contracts are significant cost savings, private-sector reliability, enhanced safety for motorists, and improved maintenance conditions. The results and relationship that these two institutions have enjoyed in outsourcing road maintenance should be focal points for all considering this policy move.

District of Columbia

In 1998, The District of Columbia Department of Public Works (DC DPW/DDOT) and the Federal Highway Administration (FHWA) sought to establish a performance-based contract for the National Highway System (NHS). The contract covers 344 lane-miles, 2950 catch basins, seven miles of drainage ditches, 450,000 feet of curb and gutter, 109 bridge structures, 4 major tunnels, and traffic and weather control.²³ The DC project engineer monitors the contract using public surveys and monthly field inspections. Ratings of good, fair, and poor are given in relation to performance criteria including rideability, cracking, skid, public satisfaction, and other factors.²⁴ Payment includes incentives for performance and depends on compliance with the performance measures. The 5-year \$60 million contract was awarded on a best-value selection.²⁵ The project (The DC Street Initiative) is the largest transportation investment in DDOT's history and is also the first time that the FHWA has joined with a DOT on a program to preserve transportation assets.

The contract was awarded in 2000 to VMS who is responsible for rehabilitation and maintenance of 75 miles of major streets and highways in the District.

²² International Road Federation, Symposium on Road Maintenance Contracting, Orlando, Florida. October 21-22, 2003.

²³ James Sorenson, Senior Construction and Preservation Engineer, Office of Asset Management, Federal Highway Administration, *Performance-Based Asset Preservation for the District of Columbia National Highway System* (Washington D.C., 1999), p. 5.

²⁴ *Ibid.*, p. 7.

²⁵ "value" is a function of projected costs, product history, management, company experience, and technical approach.

Since the contract was let, DC has seen major improvements in the quality of their roads. In the first year, performance was the low 80's (out of 100).²⁶ This improvement is in part attributable to the specialization through subcontracting to smaller companies or companies that VMS creates for an area of maintenance. VMS has positively affected the neighborhood with new job hiring, community service participation, and subcontracting.²⁷ The DC government team is specifically satisfied with the progress on tunnels, which were dilapidated prior to the contract, snow removal, and emergency responses.²⁸ Overall, DDOT, FHWA, the DC public, and VMS are satisfied with the project in that the assets are generally in better condition than they were two years ago.²⁹

Conclusion and Recommendations

The success of existing private sector participation in transportation services highlights the potential benefits for the vast majority of transportation projects and services in which no private sector participation is sought.

The overarching recommendation is that DOT follow existing law that clearly requires the aggressive pursuit of private sector participation in transportation services wherever real benefits can be realized. That includes not only direct federal projects, but also more importantly more vigorous oversight of state and local analysis of opportunities for private sector participation in federal funded projects and services.

Recommendations with regard to infrastructure

Prior to the 1990s, a major federal impediment to private-sector involvement in highways was the federal ban on the use of tolls on federally aided highways (except for those grandfathered in, such as the Pennsylvania Turnpike and the New York Thruway). That policy has been liberalized, beginning with ISTEA in 1991 and then TEA-21 in 1997. The latter permitted tolling even on urban Interstates, if the Federal Highway Administration as part of its Value Pricing Pilot Program selected the projects. The Administration proposed to mainstream this permission

²⁶ Edward Sheldahl, Field Operations Engineer, Office of Asset Management, Federal Highway Administration, interview with authors, July 2002.

²⁷ Ibid.

²⁸ Ibid.

²⁹ Ibid.

in its 2003 SAFETEA bill, but the conference committee as of the time of this writing had not completed the final reauthorization bill. However, both House and Senate bills included 50-state provisions permitting congestion-relief toll lanes to be added to Interstates, suggesting much broader scope for tolling and public-private partnerships (at least in those states with PPP enabling legislation). In addition, both bills liberalized the basis for converting HOV lanes to HOT lanes.

There are still areas where federal policy appears in need of improvement, despite the advances likely to be included in the 2004 reauthorization.

New Starts and HOT/BRT. Although BRT on HOT networks is one of the most promising ideas in transportation, current federal transit policy does not create a level playing field between rail and BRT/HOT networks when it comes to Federal Transit Administration New Starts funding. As things stand, a BRT project on a fixed guideway can be funded if it is a dedicated busway. That would appear to mean an exclusive busway. This language needs to be clarified to include the “virtual exclusive busway” concept made possible by a HOT/BRT project.

Value Pricing. As this is written, only the Senate bill would continue an office within FHWA to assist state DOTs and Metropolitan Planning Organizations with the often difficult process of launching projects such as HOT lanes, by providing seed money grants for pre-project studies and funding post-implementation evaluations. These functions have been crucial to the growing interest in value pricing, but it is too soon to eliminate this catalytic assistance.

LCV Freeze. Although the House bill would permit states to add truck-only lanes to Interstates, it is silent on the crucial value-added issue of permitting the use of Longer Combination Vehicles (doubles and triples) on such new lanes. The obstacle is the federal freeze on truck sizes and weights enacted as part of ISTEA in 1991. In order for toll truckways to be a win-win proposition, higher-productivity trucking must be part of the package.

Private Activity Bonds. Public-private partnerships for toll roads have been relatively few, since the federal tax codes discriminates against the private sector when it comes to financing toll

roads. Public-sector toll agencies can issue tax-exempt toll revenue bonds, but a private franchisee can issue only taxable toll revenue bonds, at significantly higher interest rates (and hence higher debt-service costs). Both houses passed tax measures in 1999 to permit private toll firms to issue tax-exempt bonds for such projects, but the underlying tax bill was vetoed. Currently, the Senate reauthorization bill includes an Administration-backed provision authorizing such bonds, but it failed in the House because Davis-Bacon provisions were included. This reform is worth enacting, even if Davis-Bacon is part of the deal, since most of the large projects that would be likely to use these bonds would already have some degree of federal involvement and be subject to Davis-Bacon anyway.

Recommendations with Regard to Services

Private sector participation in transportation services will either take the form of market provision or of provision under contract with a government agency in a public-private partnership.

Government transportation services should not be allowed to compete with private services, nor should state or local governments ban or restrict private services to reduce competition with government services. This is most common in urban transit system typically created with federal funding.

As long as federal funds are not used for operation of state and local systems, federal policy is not concerned with how private sector participation is used in operation of those systems. However, I would hope the spirit of smart use of private sector participation would penetrate down to those services as well.

Mr. OSE. Thank you, Dr. Moore. Our next witness is the Herbert and Joyce Morgan senior research fellow at the Heritage Foundation, Dr. Ronald Utt. Sir, we have your testimony. It is very informative. We have read it. You are recognized for 5 minutes to summarize.

Mr. UTT. Thank you, Mr. Chairman. My name is Ron Utt. I am a research fellow at the—senior researcher at the Heritage Foundation, where I conduct research on transportation, housing, privatization, and public-private partnerships for infrastructure investment.

It is an honor and privilege to appear before the subcommittee today to discuss opportunities for the public sector to work cooperatively with the private sector to harness the resources, talents and creativity of the competitive marketplace to improve transportation.

Let me also add here that the views I express in this testimony are my own and should not be construed as representing any official position of the Heritage Foundation.

Until recently, in the United States, most surface transportation relied almost exclusively upon government spending and user fees to expand capacity, maintain infrastructure and cover operating costs. Much of the public revenue dedicated to those systems was derived from Federal and State fuel taxes and local property taxes, and as long as vehicle-miles traveled continued to rise, and fuel tax rates could be increased every couple of years, growth and dedicated revenues was adequate to meet the needs.

Around 2000, 2001 growth in vehicle-miles slowed, and many voters throughout the country made it clear they did not want State and Federal fuel taxes raised.

At the same time, many States saw their budget deficits widen, and money was often moved from deferrable transportation spending to other programs. As resources for service transportation fell or stagnated, a money shortage also created the willingness on the part of some public officials and private investors to take a serious look at greater private sector participation in surface transportation projects.

Although the United States is no stranger to innovative private sector solutions for transportation, it lags behind Europe and Asia in the scope of implementation, largely because these other countries confronted serious budget limitations decades before we did and thus were forced to begin thinking creatively in the 1980's.

Beginning with privatization of many of Japan's passenger rail lines in the 1980's, one country after another began to increase its reliance on private sector partners to help control costs, increase financial resources. The London bus system is now contracted out entirely to private operators, as is much of Copenhagen's and Stockholm's.

Although many countries in Europe and Asia are ahead of us in creating innovative arrangements, we have the advantage of being able to learn from their successes and also from their failures. With the likelihood that future public revenues for transportation will continue to be limited, partnerships with the private sector are certain to increase, especially at the State level where a number of major projects are already under serious consideration.

An interesting example of some of the opportunities being pursued now are those that are emerging in Virginia. Virginia has enacted one of the most accommodative public-private partnership laws in the country to encourage qualified private sector enterprises to propose to the State Transportation Department partnership opportunities for investment in new road and transit capacity.

Originally enacted in 1988 to permit the construction of a specific toll road in Loudon County, the law was subsequently amended in 1995 to allow any qualified partnership to be proposed for eligible transportation projects throughout the State. In response to the wide scope the law allowed, a private company proposed to use a partnership arrangement to fund and build the Pocahontas Parkway in Richmond.

That was completed and opened in 2002. But before that, in 1995, another proposal was received from a private company to take over the maintenance duties on a portion of Virginia's interstate highways. That contract was granted to the proposer, and is still in effect today. And in fact they were so successful that about a year and a half ago the District of Columbia picked up the same contractor to do the maintenance and repair work on its share of the interstate highways running through town.

More recently, largely a consequence of limitations on future and Federal highway funding, a number of new partnership proposals have been presented to Virginia DOT. Over the past 15 months, DOT has received five separate proposals to add capacity on three congested interstate segments. And recently a sixth proposal is being developed for the proposed rail line to connect Dulles Airport with the existing Metro system. Overall, these projects could attract new investment to Virginia in excess of \$10 billion.

This is about 10 times more than what Virginia gets from the Federal Highway Trust Fund each year. So we are talking about significant pools of money. \$6 billion for two competing proposals on Interstate 81, anywhere from a half a billion to a billion dollars of competing proposals to build a toll express HOT lane on 95, extending as far down as Fredricksburg, and a proposal to do toll express lanes, HOT lanes on the Virginia side of the Beltway.

These are significant projects which will vastly, if they go through, vastly increase the resources available for transportation projects in Virginia at very little claim on the public treasury, allowing what revenues they have from gas taxes and other sources to be used on projects that cannot be sustained with private sector interests or self-sustained on tolls and other forms of fees.

Virginia is not alone. Georgia adopted the Virginia law in 2003, and they already have two competing proposals on their project.

I think we are out of time, so let me wrap it up with that. Thank you, sir.

[The prepared statement of Mr. Utt follows:]



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Congressional Testimony

**Opportunities for Private Sector
Participation in Surface
Transportation Investment and Operations**

**Testimony before
House Committee on Government Reform
Subcommittee on Energy Policy, Natural
Resources, and Regulatory Affairs**

May 18, 2004

**Ronald D. Utt, Ph.D.
Herbert and Joyce Morgan Senior Research Fellow
The Heritage Foundation**

Mr. Chairman and Members of the Subcommittee:

My name is Ronald D. Utt. I am the Herbert and Joyce Morgan Senior Research Fellow at the Heritage Foundation where I conduct research in the areas of transportation, housing, community development, privatization, federal budget issues and public/private partnerships for infrastructure investment. It is an honor and a privilege to appear before the Subcommittee today to discuss opportunities for the public sector to work cooperatively with the private sector to harness the resources, talents and creativity of the competitive market place to improve surface transportation services in the United States. The views I express in this testimony are my own, and should not be construed as representing any official position of The Heritage Foundation.

From the Colonial era through the middle of the twentieth century, private sector participation in America's transportation system was extensive, and in many areas provided a much larger share of the service in comparison to today's level of involvement. Beginning in colonial times and continuing through independence, private toll roads – the Lancaster Turnpike being one of the most notable -- were organized by private investors in many parts of the country. They co-existed with a number of federally sponsored roads such as the Natchez Trace and the Cumberland Road, and the Federal Road connecting New Orleans with the Atlantic seaboard.

Many ferry services were organized as private businesses, as were freight and passenger railroads, many with government support, as was the case with land grants to spur western railroad development and create a transcontinental system. Late in the nineteenth century as the Industrial Revolution led to concentrations of workers and businesses in large cities, private urban transit systems beginning with horse-drawn omnibuses emerged, and soon evolved into electric rail, trolley and bus systems.

But as time passed, road building became increasingly concentrated under public control, and beginning in the years after World War II competition from autos and declining ridership left many private transit systems in financial trouble. In the years ahead, most were taken over by public authorities in order to preserve service. Likewise for many private ferry systems. And in the early 1970s private passenger rail service was consolidated into the publicly operated Amtrak system.

Similar trends occurred in Europe over the same period as the public sector became more active in the acquisition, development and operation of most surface transportation services. But beginning in the 1980s, and largely due to increasingly severe limits on public sector spending growth, countries in Asia and Europe began looking for alternative ways to control transportation costs and to finance improvements and capacity additions. In the process, many turned to private sector partners and/or investors to provide the funds and the cost saving management.

Beginning with the privatization of many of Japan's passenger rail lines in the 1980s and 1990s, one country after another began to increase its reliance on private sector partners. The London bus system is now contracted out to private operators, some Japanese passenger rail service is owned and operated by private investors, and the private sector operates the passenger rail systems in Britain, Argentina and elsewhere. Similarly, privately financed and owned highways are becoming more common in Europe and Asia. While America recognizes the Benetton company as a leading manufacturer and retailer of clothing, many Italians recognize it as the largest owner of highways in that nation.

Although many countries in Europe and Asia are well ahead of the United States in creating innovative financing arrangements for transportation infrastructure, we have the advantage of being able to learn from their successes and failures, and as a result, are beginning to close the gap. And with the likelihood that future public revenues for transportation will be severely limited in the near future, partnerships with the private sector are certain to increase at a rapid rate, especially at the state level where a number of major partnerships projects are under consideration.

Developments at the Federal Level and Bipartisan Presidential Endorsements

The reauthorization process for the expired TEA-21 has been characterized by a number of proposals to allow for greater private sector participation in surface transportation. The President's proposal included money to encourage and study partnership opportunities for highways, and legislation to extend the use of tax exempt private activity bonds to highway construction. The bond proposal was also included in the Senate's plan, while the House bill contains a toll express lane proposal that would allow for private sector participation in such capacity additions. Although the prospect for a new highway bill is uncertain at this time, and its final contents unknown, it is likely that funding constraints will move it in the direction of more reliance on private-public partnerships.

Importantly, and long before the development of the new highway bill, two recent U.S. Presidents have issued executive orders (that are still in effect) to encourage and permit private sector involvement with infrastructure investment. On April 30, 1992 President George H. W. Bush signed Executive Order 12803 to encourage infrastructure privatization:

- Section 2 (b) of the order states that "Private enterprise and competitively driven improvements are the foundation of our nation's economy and economic growth. Federal financing of infrastructure assets should not act as a barrier to the achievement of economic efficiencies through additional private market financing or competitive practices, or both."
- And Section 3 states "To the extent permitted by law, the head of each executive department and agency shall undertake...to modify those

procedures to encourage appropriate privatization of such assets consistent with this order...”

On January 26, 1994 President William Clinton issued Executive Order 12893 titled “Principles for Infrastructure Investment”.

- Private involvement was encouraged by Section 2(c) which states that “Agencies shall seek private sector participation in infrastructure investment and management. Innovative public-private initiatives can bring about greater private sector participation in the ownership, financing, construction, and operation of the infrastructure programs referred to in Section 1 of this order. Consistent with the public interest, agencies should work with State and local entities to minimize legal and regulatory barriers to private sector participation in the provision of infrastructure facilities and services.”

Despite these bipartisan endorsements from two recent presidents and executive orders that require executive branch agencies to adopt policies to facilitate private sector investment in infrastructure such as highways and passenger rail, little has been done to implement these good intentions.

International Experience: Private Roads in Europe and Asia.

In contrast to the handful of U.S. private road projects built or proposed, a number of European and Asian countries have moved aggressively to implement privatized road projects with government’s encouragement or cooperation. Beginning in 1995, Italy began selling to the investing public and to private investors shares in Autostrada SpA., until then a state-owned corporation going back to the Mussolini era. Autostrada operates 1,780 miles of toll roads in Italy, about half the roadway mileage of the country. With revenues of some \$2 billion per year, Autostrada is now fully owned by investors and its stock is actively traded on European exchanges. The Benetton retail group is the largest shareholder.

In 2000, the Canadian province of Ontario sold its toll road Highway 407 –ETR, which serves the Toronto metropolitan area for an estimated \$2 billion. Tolls are collected either electronically by an electronic debit card mounted in the car, or by a photo that matches license plate with owner, who is subsequently billed by mail. Either way, users are not slowed by having to stop at a toll booth.

In the Peoples Republic of China a modern highway system is being built entirely using toll financing, most commonly with toll authorities established by cities and provincial governments in partnership with private investors. Japan is actively considering the sale of its government-owned toll roads based upon campaign commitments by its Prime Minister Junichiro Koizumi. Australia uses the private sector to compete to build and operate its inter-city toll roads in accordance with plans developed by government transportation departments.

By utilizing the skills and resources of the private sector, countries in Europe and Asia have been able to expand and improve their surface transportation infrastructures in response to rising use. These expansions have been accomplished at little cost to the taxpayer or to government budgets because tolls paid by motorists fund the roads.

Recent United States Experience

Although private and private/public toll roads are becoming common in Europe, the U.S. has only a few privately financed and privately owned and/or operated toll roads and bridges. One of the oldest is the Ambassador Bridge connecting Detroit with Windsor, Canada, which has been in operation since the 1930s and serves an estimated 10,000 trucks per day, as well as thousands of autos. Another private venture spanning the northern border is the newer Detroit/Windsor Tunnel, privately owned by a separate investor group. Of the more recently completed private toll roads, the oldest is the Dulles Greenway in Northern Virginia, completed in 1995. The Greenway picks up where the public toll road ends at Dulles airport and extends service west into Loudoun County. The Greenway has since been joined by the Greenville Southern Connector, a private not-for-profit venture in South Carolina, the Pocahontas Parkway near Richmond, Virginia, and the Camino-Columbia Toll Road near Laredo, Texas. Getting under way in California is the construction of the San Miguel Parkway in the San Diego area (California State Route 125).

In addition to these general purpose toll roads are a number of “toll express” lanes that supplement existing public highways. In the Los Angeles area, the Route 91 toll express lanes were privately financed and built and operated successfully from 1995 to 2002. Many more such projects are contemplated, and summarized below are a few of the notable endeavors being discussed in several states.

Virginia: Virginia has enacted one of the most accommodative public-private partnership laws to encourage qualified private sector enterprises to propose to the state transportation department (VDOT) partnership opportunities for investment in new road or transit capacity. Originally enacted in 1988 to permit the construction of a specific, privately financed, built and operated toll road in Loudoun County – the Dulles Greenway, the law was subsequently amended in 1995 to allow any qualified partnerships to be proposed for eligible projects throughout the state. In response to the wide scope the law allowed, a private company proposed to use a partnership arrangement with VDOT to fund and build the Pocahontas Parkway in the Richmond Virginia area. In 1995 another proposal was received from a private company to take over the maintenance duties on a portion of Virginia’s interstate highways.

The Parkway was completed in 2002 – fifteen years ahead of the state’s funding schedule, and the tolls charged to users are sufficient to service the debt issued to build the road and the cost incurred to operate and maintain it. Although the project was presented to the state by a private builder, and was built in partnership, it is owned by the

not-for-profit created jointly by the state and the developer to issue the bonds and collect the tolls. In turn, the not-for profit is owned by VDOT. The interstate maintenance contract is still in effect today, and the contractor that performs the work has since been hired to provide the same services in the District of Columbia.

More recently, and largely a consequence of limitations on future state and federal highway funding, a number of new partnership proposals have been presented to VDOT. Over the past fifteen months, VDOT has received five separate proposals to add capacity on three interstate segments, and a sixth proposal is being developed to aid in the construction of the proposed rail line to connect Dulles Airport with the existing Metro system. These proposed projects include:

Two proposals – one for \$5.9 billion the other for \$6.3 billion -- from qualified design and build consortiums have been received to toll and reconstruct the 325 mile I-81. I-81 serves as a major north-south interstate shipping route, and heavy truck and car traffic combines to increase congestion, diminish safety, and wear down the roadbed. One proposal would create a toll express lane limited to trucks. In return for less congested travel, trucks would pay a toll that would help offset part of the cost of constructing the new lanes.

Two proposals have also been received to widen and extend the existing HOV lane located in the median of I-95 between the Potomac River at Washington DC and southern Prince William County. Both plans propose to turn the HOV lane into a HOT lane (High Occupancy/Toll), and use the tolls collected on single occupant vehicles to service the debt issued to expand capacity. One plan would spend an estimated \$500 million to widen the road from two to three lanes from the intersection with the beltway south, and extend the lanes another 20 miles south to a point just north of the city of Fredericksburg. The second proposal – estimated to cost a billion dollars -- would add the additional lane from the District of Columbia south, and extend the terminus of the HOT lane to a point just south of the city of Fredericksburg.

Finally, one proposal – estimated to cost more than \$600 million -- has been received to add HOT lanes to the very congested portion of the Virginia side of the beltway. The new lanes would be built on the beltway from the Dulles toll road south and east to where I-495 intersects with I-95 South at the Springfield interchange. Because of the extensive bridge and interchange work this route would entail, some estimate that tolls would only cover a portion the debt service costs and that funds may also be required from the state to complete the project.

With Virginia's highway upgrade plans moving to a final decision, public officials in Maryland have been discussing their participation in the beltway upgrade and expansion, and in May, 2004 Maryland's Secretary of Transportation announced plans to create a statewide system of toll-financed express lanes. One of those corridors was the Maryland portion of the I-95 beltway, presumably from one Potomac River crossing to the other, for a total distance of more than twice that contemplated on the Virginia side. At an estimated cost of \$2.3 billion, Maryland believes that tolls would have to be paid by all

users, and that car pools wouldn't be able ride for free or at a reduced rates because the state couldn't afford to forego the revenue. As such, the Maryland plan for I-95 beltway is for toll express lanes rather than HOT lanes.

In contrast to Virginia, Maryland law does not permit private/public partnerships for roads, so the state, or some public entity created to oversee and operate the project, would be required to fund these projects in their entirety. An effort had been made several years ago to enact partnership legislation but that effort failed. A toll express lane could also be built on the western portion of the Baltimore Beltway (I-695) from where it connects with I-95 in the south and north of the city. The estimated \$1.2 billion cost of the new express lane could be offset with tolls.

The construction of the long-discussed Inter County Connector (ICC) – running east/west in the Maryland suburbs of Washington, DC and connecting I 270 (at Gaithersburg) with I-95 about eighteen miles to the east – is expected to cost as much as \$1.7 billion, and the state believes that tolls on the new road can offset some of the costs. One proposal suggests that tolls could support \$450 million in borrowing, \$600 million would come from GARVEE bonds, while \$150 would come out of the state's transportation trust fund.

Thanks to its PPP law, Virginia has the opportunity to access as much as \$8.2 billion in private-sector-supported road investment, while Maryland, without such a law, would have to tap into some part of the public treasury to fund the prospective \$5.2 billion that it's new projects would cost.

Minnesota: In late December, 2003, Governor Tim Pawlenty of Minnesota unveiled a new plan to “form public-private partnerships to widen state highways and pay for the projects with a toll system”. He promised that in 2004 the Minnesota DOT will issue formal requests for interest from private-contractors to finance and build additional lanes in the Minneapolis-St. Paul area of the state. Although no cost estimates were provided, the governor lists six potential corridors in the congested Twin Cities area that would be considered for capacity expansion by way of new toll express lanes built and financed in partnership with private investors/developers. These include:

- Interstate 35W through much of the metro area.
- Interstate 94 from downtown Minneapolis to Woodbury.
- Interstate 394 in the western suburbs.
- Large sections of the Interstate 494 and 694 beltway.
- Interstate 35E from St. Paul to the north.
- Large portions of U.S. 10, U.S. 169 and Minnesota Highway 36.

Facilitating Minnesota's greater emphasis on the use of partnership toll roads for capacity expansion is a 1993 state law that allows Minnesota to engage in such arrangements. Although the law has been on the books for more than ten years, these six projects would be the first undertaken in the state under the law. In the recent past, political opposition to new road construction and ample fuel tax revenues deterred the use of this innovative approach. But since 2002, a change in political leadership in the state and budgetary shortfalls have encouraged the state to consider more road construction and seek alternative revenue sources to fund them.

Georgia: In November 2003 Georgia finalized and implemented a public-private transportation partnership act modeled after Virginia's 1995 Act. In January, 2004, the state received its first partnership proposal from a consortium of Georgia road builders -- called the Parkway Group, which in turn was organized by the Washington Group -- to fund and construct a new 39 mile toll road connecting I 85 in the northeastern Atlanta suburbs with the university town of Athens in the west. The new road would essentially substitute for the congested and accident-afflicted GA 316 that now connects the two cities.

Absent the proposal from the Parkway Group, Georgia DOT's future plans for Ga. 316 were limited to a series of intersection improvements scheduled to take place over the next 30 years. Instead, if a partnership agreement can be reached between the state and the consortium, the new road could be opened by 2011.

Estimated to cost about one billion dollars, preliminary press reports indicate that the Parkway Group would borrow the funds and build the road, and then relinquish ownership, possibly to a not-for-profit operator that would operate the road, charge tolls and service the debt. Because the partnership law permits a measure of confidentiality regarding many of the details of the proposal, it is not clear at this point whether the project is just a design-build proposal or would involve the creation of a not-for-profit operator by the Parkway Group.

Wisconsin: In August, 2003, Wisconsin's Secretary of Transportation proposed to state legislators that a system of electronic tolls be implemented to fund the estimated \$6.2 billion worth of repairs, improvements and expansion of Milwaukee's freeway system. Wisconsin is one of 18 states with public-private partnership laws, and some or all of the projects were proposed as part of it. Under the secretary's plan, all 270 miles of the system would be improved, and 127 miles of that amount would have new lanes added to increase capacity and reduce congestion. Among the affected roads would be I 94, I 43, and I -794. At the same time, a former state legislator testified in favor of \$810 million dollar toll financed, privately-funded partnership project for Milwaukee's Marquette Interchange.

Among the chief reasons for the proposal was the need to repair Milwaukee's aging and congested freeways, and the absence of any money in the department's budget to fund them. Although Wisconsin's fuel tax, at 27.3 cents per gallon, is the highest in the

nation, there are no funds available for these and other costly road projects throughout the state.

Wisconsin's law allows for tolled roads, but none have been built because of political opposition, which the secretary's proposal appears to have re-ignited. Political leaders in Milwaukee opposed the plan, and in response, the governor announced that he could not support it, but did leave the door open to using tolls for future capacity-enhancement projects.

Competitive Contracting Opportunities in Transit

In recent years, many transit systems have seen costs rise faster than revenues, leading to wider deficits and deeper public subsidies. But as state and local governments confront growing deficits in their own budgets, many transit systems have been raising fares frequently, and by large percentage increases. While fare increases and service reductions have been the response in many transit operations, several public systems here and abroad have turned to some form of competitive contracting with private sector operators to reduce costs and increase efficiencies. Information included in this section is summarized and updated from a lengthier 2000 Heritage report titled "Competition, Not Monopolies, Can Improve Public Transit".

The first large conversion of transit service to competitive contracting occurred in San Diego in the early 1980s. It might be expected that in the United States, with the world's strongest market economy, competitive contracting would have spread rapidly. However, the greatest progress toward incorporating competition in transit has occurred overseas.

International Experience

While most public transit service in North America is provided by government owned operators, the situation is considerably different in other parts of the world. Throughout the low-income world, most public transit is provided by private operators (except in former communist nations), without either capital or operating subsidy. In high and middle income Asia (Japan, Hong Kong, Singapore, Taiwan and South Korea), most rail and bus public transit service is owned and operated by the private sector and there is virtually no capital or operating subsidy. This includes the privately operated rail systems in the Tokyo-Yokohama area, which carry more passengers than all of the transit services in the United States. And, increasingly, transit services are being converted to competitive contracting elsewhere in the high-income world.

Some of the more successful conversion programs have been in London, Copenhagen and Stockholm.

London: Transport for London (formerly London Transport) manages the largest bus system in the world, with more than 6,000 vehicles (service area population: 7 million). From 1970 to 1985, bus costs per vehicle mile had risen 79 percent. In response, the British parliament enacted legislation that led to conversion of the entire bus system to

competitive contracting. By 1999, the conversion had been completed. The results are as follows:

- Costs per vehicle mile were reduced 48 percent from 1985 to 2001 (inflation adjusted).
- Overall annual expenditures, capital and operating, dropped 26 percent.
- Despite the lower expenditures, the lower operating costs per mile permitted service to be expanded 26 percent.
- Productivity --- measured by the level of service produced per unit of currency rose 91 percent, or 4.1 percent annually.

Eventually, the public monopoly transit assets were sold, generally at the operating division level, to the private sector, so that virtually all London service is provided by private carriers under competitive contract. But, before this sale, the public monopoly operator tended to improve its service quality on routes that it was awarded under competitive contracts. Through the years of competitive contracting, London Transport bus service has continued to be of high quality. Ridership has increase 30 percent since competitive contracting began, and is now at its highest point since the 1960s. At more than 1.5 billion annual boardings, London bus ridership is 1.5 times that of the New York City Transit Authority, which has a larger service area and is by far the largest bus operator in the United States.

If London Transport costs had continued at the rate prior to competitive contracting, the operated service levels would have required expenditure of \$12 billion more over the past 16 years.

Copenhagen: The Danish parliament required public transit bus services in Copenhagen to begin conversion to competitive contracting in 1989. Copenhagen is Denmark's largest metropolitan area, with a population of 1.5 million, somewhat smaller than metropolitan Orlando. The transit authority has a system with approximately 1,200 buses and annual ridership is approximately 260 million (more than all US transit systems except for New York, Los Angeles and Chicago). Because of a fear that the transit authority could not objectively evaluate proposals by private companies and its own internal operating department, the legislation did not allow the transit authority to compete for contracts. Later, the public bus operating division was sold to the private sector, and the prohibition was lifted, since there would be no possibility of a conflict of interest on the part of the transit authority in evaluating proposals. The conversion of all bus services was completed in 1995.

- Costs per vehicle mile were reduced 24 percent from 1989 to 1999. Overall capital and operating expenses declined eight percent from 1990, while service was expanded 14 percent. Management estimated savings at approximately \$250 million through 1999. The productivity improvement has been 32.2 percent.

- Ridership has risen nine percent after years of decline. Management attributes the higher ridership to expanded service levels from more cost efficient operations and high service quality.

Stockholm: An act of the Swedish parliament led to conversion of virtually all public transit service (bus and rail) in Sweden. Stockholm is Sweden's largest metropolitan area, with a population of 1.8 million, approximately the same as metropolitan Orlando. The Stockholm transit system has 1,700 buses and 1,200 rail cars, including a subway that carries more riders than the Washington Metro. Stockholm carries 600 million boardings annually --- approximately the same ridership as all of the transit services in the Chicago, Los Angeles or San Jose-San Francisco metropolitan areas. During the 1990s, the conversion of all bus and rail service (subway, light rail and commuter rail) to competitive contracting was accomplished in Stockholm.

From 1991 to 1999, costs per vehicle mile were reduced 20 percent. Overall capital and operating expenses declined seven percent, while service was expanded 16 percent. If costs had continued to rise at the rate of inflation, an additional \$900 million would have been required. The productivity improvement has been 25.0 percent.

Elsewhere: Bus systems have been competitively contracted in Adelaide and Perth, Australia. New Zealand implemented a national conversion to competitive contracting in 1991, while South Africa is beginning a similar conversion. In all cases, substantial cost savings have been achieved. The impetus for each of these conversions has come from national or state parliaments. The European Union is in the process of developing regulations for mandatory conversion of public transit systems in Europe. This conversion process is expected to take many years, but bus and rail services are already being competitively contracted in France, Belgium, Finland, Poland, Germany and Italy.

COMPETITIVE CONTRACTING IN THE UNITED STATES

US public transit competitive contracting began with the para-transit (door to door) services added during the 1960s and 1970s. These services were principally designed for senior citizens and the disabled. The quickest way to start these services was to seek competitive bids from the private sector. Today, 69 percent of para-transit services are provided through competitive mechanisms. Overall, approximately nine percent of transit bus service is competitively contracted in the United States.

San Diego, Denver and Las Vegas represent perhaps the most significant cases. In all three locations, there has been a strong commitment at the top policy level to competitive contracting. In San Diego, the transit policy organization, the Metropolitan Transit Development Board and local jurisdictions have pursued a deliberate policy of using competition. The impetus in Denver came from the Colorado state legislature, which passed landmark legislation requiring 20 percent of bus service to be competitively contracted in 1988, and has since more than doubled the requirement in two separate acts.

In Las Vegas, the transit authority established a new system in the early 1990s and recognized that it could carry many more passengers if unit costs were minimized.

San Diego: San Diego began what became the first of the world's major transit competitive contracting programs in 1980, five years before London Transport. The impetus was escalating costs. Between 1968 and 1979, new transit subsidies had permitted the service to be substantially expanded, but costs had risen even more. After adjusting for inflation, costs per service hour rose 49 percent from 1968 to 1979. By 2001, 44 percent of bus services were competitively contracted. The conversion was gradual enough that no public transit employee layoffs were required.

Cost savings have been substantial. As of 2001, competitively contracted costs were 40 percent lower per mile than non-competitive costs. If costs had continued at the pre-competitive contracting 1979 rate (inflation adjusted), San Diego would have needed to spend \$500 million more to produce the same amount of service through 2002.

But the greatest cost impact has been on the services still provided non-competitively. In the new competitive environment, San Diego Transit has been able to control its operating costs much more successfully. "Ripple effect" savings, the impact of competition on the costs of internally produced transit service, have reduced San Diego Transit's costs 16 percent (inflation adjusted) since 1979. By contrast, over the same period, US public transit operating costs per mile rose four percent. The following results were achieved from 1979 to 2001:

- Overall costs per mile were reduced 30 percent (inflation adjusted).
- Overall annual operating expenditures increased 20 percent.
- Service was expanded substantially more, 72 percent.
- Productivity rose 43 percent, or 1.6 percent annually.

Bus ridership has risen 50 percent. This is a considerable increase, in view of the fact that three light rail lines opened during the period, and replaced some of the most productive bus services in the area.

The impact on subsidies has been even greater. With the competitive contracting program, San Diego bus subsidies were \$59 million in 2001. If the competitive cost improvements had not occurred, the same level of bus service would have required \$103 million in subsidies in 2001. Thus, competition has been associated with a 43 percent lower level of subsidy overall.

Denver: In 1988, the Colorado legislature enacted the nation's only public service mandatory competitive contracting law. The act required Denver's public transit authority, the Regional Transportation District (RTD), to competitively contract 20 percent of its bus service within an 18-month period. The success of the program led to

an expansion of the legislative mandate to 35 percent and 50 percent in 2003. Both of the competitive contracting expansions were signed into law by Governor Bill Owens, who had been legislative co-author of the original 20 percent mandate in 1988. During 2002, 38 percent of bus service was provided through competitive contracting. During 2004, that amount will rise to 44 percent, with the mandated additional six percent accounted for by the competitively contracted demand responsive services.

As of 2002, competitively contracted bus costs were 48 percent lower than non-competitive costs. If costs had continued at the pre-competitive contracting 1988 rate (inflation adjusted), Denver would have needed to spend \$550 million more to produce the same amount of service through 2002.

Competitive contracting has been associated with a substantial improvement in RTD's overall productivity.

- Before competitive contracting (1978 to 1988), RTD's operating expenditures rose 16 percent, while its service level was reduced 13 percent. Costs per service hour increased 33 percent, and overall productivity (service per dollar) declined 2.8 percent annually.
- From 1988 (the last year before competitive contracting) to 2002, RTD operating expenditures rose 32 percent, while service levels were increased 90 percent. Costs per service hour declined 30 percent and there has been a 2.6 percent annual increase in productivity. RTD has recovered virtually all of the productivity losses of the pre-competitive contracting period.

Over the period, Denver's bus ridership increased 36 percent. As in San Diego, this is a considerable increase, because the transit agency opened a light rail line during the period, which replaced some productive bus services.

Denver represents the only case in the United States in which the rate of competitive contracting exceeded the rate of employee attrition. The 1988 legislation required RTD to achieve the 20 percent competitive contracting mandate without laying off any employees. As a result, RTD kept excess labor on staff. RTD employed skillful human resources techniques to minimize these extra costs, which were modest. Excess labor compensation peaked at approximately three percent of annual costs. Overall, excess labor compensation was estimated at 1.2 percent over a seven-year period. The approach of keeping excess staff on the payroll, rather than laying off employees removed any potential liability for labor protection payments under the Federal Transit Act. Overall, excess labor compensation was approximately \$8 million. During the same period, overall RTD costs dropped approximately \$150 million, after accounting for the excess labor compensation payments.

Las Vegas: Las Vegas is the only major US metropolitan area in which all service is operated through competitive contracting. This was possible because as late as the early 1990s, there had been no publicly subsidized transit system in Las Vegas. Some services

were provided by a franchised private operator principally in the casino corridor (“Las Vegas Strip”). Clark County established a transit system and determined to competitively tender the service. Ridership has grown at a rate unprecedented virtually anywhere else in the high-income world.

The former private operator served 10 million trips in its final year of operation. Today, Citizens Area Transit carries approximately 50 million passengers per year. From 1990 to 2000, the US Census reported that the Las Vegas metropolitan area had experienced by far the greatest increase in transit work trip market share, 100 percent. This was a particularly significant development, since Las Vegas was also the fastest growing major metropolitan area in the nation. Moreover, costs have been comparatively low. In 2001, operating costs per vehicle hour were the lowest among the 36 transit authorities operating more than 1,000,000 vehicle hours, and 41 percent below the average.

Other Areas: In other areas, competitive contracting has tended to be implemented by suburban jurisdictions seeking to obtain more service for the available funding than would be possible if the larger, central transit agency operated the service non-competitively. For example:

- **Los Angeles:** Los Angeles began competitively contracting services in the middle 1980s. By 2001, more than 900 buses were operating under competitive contracts, nearly 25 percent of service. Competitive contracting operating costs per vehicle hour in 2001 were approximately 45 percent below the rate for services produced in-house.
- **Seattle:** For more than 15 years, Snohomish County has competitively contracted an express bus network that principally feeds downtown Seattle and the University of Washington from the northern suburbs. This service had previously been provided by the Seattle transit agency under a negotiated contract. Nearly 100 buses are operated, at costs 41 percent below that of the agency’s in house service and 38 percent below the cost of the Seattle transit agency service.
- **San Francisco:** A number of transit agencies competitively contract service in the San Francisco Bay area (15 percent of service). The largest contract is administered by San Mateo County Transit, with services operating into downtown San Francisco. This includes what may be the only competitively contracted service in the nation using articulated buses. Competitively contracted costs were 44 percent lower than internal costs in 2001.
- **Washington:** A number of systems use competitive contracting in the suburbs of Maryland and Virginia. In 2001, competitively contracted costs per vehicle hour were 36 percent below the costs of the central transit agency.
- **Minneapolis-St. Paul:** Approximately 17 percent of bus service is competitively contracted in the Minneapolis-St. Paul area. In 2001, competitive contracting costs per vehicle hour were 30 percent below in-house costs.

Private Sector Participation in Passenger Rail

With annual operating losses averaging about a billion dollars a year, slightly less than revenue earned through ticket sales, Amtrak has required ever escalating federal and state subsidies to maintain the existing level of services. In response to these costly subsidies, some in Congress and the Administration have introduced legislation in recent years that would require or encourage Amtrak to use competitive contracting to provide many of its services, including the operation of an entire route. Although these reform proposals have varied somewhat year to year, those introduced by Rep. John Mica (R-FL) and Senator John McCain (R-AZ) would require Amtrak to implement some of the privatization techniques that Great Britain, Japan, Australia, Argentina, Sweden, Germany and New Zealand have applied with varying degrees of success beginning in the 1990s.

Japan, for example, began the privatization in the mid-1980s in response to soaring costs and subsidies. By the time privatization began in earnest, the Japanese passenger rail service had accumulated roughly \$600 billion in debt. After selling off portions of its passenger rail system, these privatized segments are now operating at a profit. Also in the 1990s, Australia and New Zealand privatized passenger rail service. Sweden has contracted out commuter rail service, and Germany is in the process of doing so in several of its metropolitan areas.

In reforming their inefficient rail systems, both Great Britain and Argentina adopted the “concession” or franchise approach under which the government maintains an ownership interest in the system but “sells” the right to operate service over specific routes for specific intervals of time. Private operators compete for these route rights by offering the highest lease payment, or the lowest subsidy. Britain’s rail privatization remains one of the most controversial of them all, and while many improvements have occurred, it has not been without increased subsidy costs and a number of significant restructurings and adjustments to the original plan.

On the positive side, British passenger rail service in 2003 experienced its highest level of “passenger kilometers traveled”, which at 40.1 billion is the highest level since 1947. Moreover, passenger kilometers traveled rose 40 percent since 1994/95, the year the rail privatization program was implemented. When measured by passenger boardings, 2003’s one billion plus boardings was the highest since 1961. Despite a widely publicized fatal accident in 2000 and the subsequent disruption in service that occurred in its aftermath as new safety measures were implemented, passenger boardings continued to increase during the fiscal year 2000-01. Significantly, the number of fatal train accidents per year is lower after privatization than before, and worker fatalities have also fallen. A 2003 report by a professor at University College London contends that in the nine years after privatization, passenger fatalities totaled 97, while in the nine years preceding privatization, passenger fatalities totaled 127. On the negative side, the road

bed privatization (RailTrak) was effectively withdrawn, and public subsidies to the system have increased since privatization.

While these transformations from public control to private sector contracting have not been without their problems, where it has been applied, costs have generally been reduced, losses sometimes turned to profits, service improved, and ridership increased. Even in Britain, where early mistakes on the nature of the infrastructure transfer contributed to a variety of service problems, the Labor Party Government, which inherited the newly privatized system from Conservative Party privatizers, has shown no inclination to reverse course.

Although much of the current discussion of rail privatization trends focus on recent activities occurring abroad, it should be remembered that the first successful rail privatization (and largest privatization up until that time) occurred in 1987 in the United States when the federal government sold its 85 percent ownership stake in the freight railroad Conrail to private investors for a combined payment of \$1.9 billion. As a result of the application of better management following its privatization, Conrail's value increased more than five fold between 1987 and 1998 when it was acquired by CSX and Norfolk Southern for \$10.3 billion.

Some contend that Amtrak would not receive the same level of investor interest as Conrail or as did the systems in Europe and Asia that were privatized, but there is every reason to believe that many serious proposals from qualified bidders would be received if the federal government expressed an equally serious interest in such proposals.

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Mr. OSE. Thank you, Dr. Utt. Our sixth witness, comes to us from the Economic Policy Institute, where he serves as an economist. That would be Dr. Max Sawicky.

Sir, we received your testimony. You are welcome to summarize in 5 minutes.

Mr. SAWICKY. Thank you, Mr. Chairman. I would like to thank the committee for the chance to present my views. You have my statement. I will spare you the reading of it or most parts thereof.

There is an old joke that involves a man, a woman who isn't his wife, and a clothes closet. It ends with the line: Everybody has to be some place. It is true, everybody has to be some place.

I am not sure we have to be here. We might better be regaling the city fathers and mothers of Sacramento about how to run their bus system. I am little puzzled by that.

I want to make four points. No. 1, I am not a lawyer. No. 2, buses are complicated. No. 3, research does not always make us smarter. And, No. 4, let Sacramento be Sacramento.

A lot of the discussion here has been about legal arrangements going to what the rights are of State and local governments in terms of contracting. I am not a lawyer so I can't evaluate them. There is rhetoric and even legislation to the effect that there is some inherent right of private sector operators to do public work. Now, again, although I am very dubious as to the Constitutionality of that, I am not a lawyer. What I can say with more confidence is from an economic standpoint there is no justification for that.

The public interest is having work done most efficiently, not necessarily by private operators. In fact, if it could be done privately, it doesn't mean it should be done privately from the standpoint of efficiency. There was legislation called Freedom from Government in Competition, which seemed to embody that principle, but fortunately the actual passage of it watered down the application of that significantly. So, that is point one.

Point two, buses are complicated. I would argue that the transportation function goes well beyond rolling a bus from Point A to Point B and picking up and dropping off people in between. There are other factors besides timeliness. There is courtesy, safety, comfort, environmental implications, the proper breadth of service, the extent to which you want to maintain unprofitable—routes that are unprofitable in and of themselves, and fitting all of that into a regional transportation system, which is really the public problem, I think is even more complicated.

I would argue that a narrow view of this kind of work is really inadequate.

No. 3, research does not always make you smarter. Literature on the cost savings, which seems to be the thing that is touted most often as the case for contracting always being better, or almost always, is actually very diverse.

There is a Transportation Research Board study. I will just quote one sentence that is also in my testimony. The committee recognized from the outset that a comprehensive review of past studies on contracting would in all probability have generated more questions than answers. My colleagues know about studies showing that contracting saves money. I can cite studies showing that is not always necessarily the case.

For instance, a study from the University of California at Berkeley said the effects of contracting on costs are examined for the years between 1989 and 1993. The findings show that bus services under contract are sometimes but not always less costly than directly operated services. We conclude the cost efficiencies can be achieved in many different ways, depending on local conditions, and contracting should not be assumed to be the most appropriate strategy in every situation. So research does not always tell you simply what to do.

In light of that complexity, that brings me to my last point. From a Federalist standpoint, again, the basis for us trying to determine here, or through Federal law or through rules, how Sacramento or any other local jurisdiction should conduct a fairly complicated decision whether or not to contract out, how much, where, how, when. I think the U.S. Congress, much less us here in Washington, are not well situated to make that decision. It is really more for local government.

There is a Federal interest in oversight of Federal dollars. But, of course, the question is where you draw the line. What is the reliable or the feasible extent of intrusion or management? I think that in light of the complexity of this kind of decision, even something like buses, it is not—the Federal Government is not well situated, is not better situated certainly than the people in Sacramento, CA, and in the States to make that decision.

Thank you very much.

[The prepared statement of Mr. Sawicky follows:]

TESTIMONY BEFORE THE SUBCOMMITTEE ON ENERGY POLICY,
NATURAL RESOURCES, AND REGULATORY AFFAIRS

COMMITTEE ON GOVERNMENT REFORM
HOUSE OF REPRESENTATIVES

Max B. Sawicky
Economic Policy Institute
May 18, 2004

This is an extraordinary hearing. Its title is “How Can We Maximize Private Sector Participation in Transportation?” It might also be entitled, “How can the U.S. Congress insert itself into the local affairs of the government of Sacramento, California?” Thomas Jefferson’s eternal sleep is bound to be disturbed today.

The memorandum by Chairman Doug Ose (2004) outlining the purpose of this hearing dwells on the statutory obligations of a local transit agency receiving Federal grant dollars. I am not an attorney and cannot evaluate the legal arguments. As an economist, however, I can react to the public policies in question.

The memo invokes legal language asserting that private sector participation in transportation should be maximized. From a practical standpoint, the obvious question is why? The answer is not obvious. I offer three points.

One school of thought holds that business firms, *as a matter of right*, should be assigned the actual delivery of public services. This point of view, if not its effective implementation, animated the “Freedom from Government Competition Act” in 1997.

It should go without saying that from a practical economic standpoint, the notion of a “right” residing in the private sector to perform any type of public work cannot be supported. Public work should be done by whatever means advances the public policy objectives in play. Such outcomes typically entail considerations of how the work is performed, what secondary effects are generated, the quality of the work, and its cost. Doing the work cheaply is not necessarily the only consideration, though it obviously ranks high in importance.

For the same reason, the fact that such a principle might be upheld in the law does not make it any more desirable from the standpoint of

economic efficiency. The government has been known to enact laws of dubious merit.

A second view is that private sector performance is always or usually superior to that of a public agency. Available empirical evidence does not support this belief. Sometimes public production of a service works out better, sometimes not. An example is the execrable record of privatization in the United Kingdom, in the area of passenger rail service (Sclar, 2003). Misguided efforts to exploit market resulted in serious declines in service quality and passenger safety.

A recent, comprehensive study on bus service states the following in its "Summary and Assessment":

"In any event, the committee recognized from the outset that a comprehensive review of past studies on contracting would in all probability have generated more questions than answers." (TRB, 2001)

This conclusion is striking: it implies that research does not provide firm guidance for policy, because the results are too inconsistent. The implication is that local knowledge and experience are more reliable than ill-informed instructions from distant places.

The Transportation Research Board statement does not support the premise that contracting is always or even usually preferred. The Bush Administration claims to have evidence that contracting saves 30 percent of costs. Until recent years, they failed to document their claim. When they did present evidence, it was found by this researcher (Sawicky, 2003) to be lacking in the extreme. The paper cited has been submitted for the record.

An important distinction lies between the involvement of the private sector, and the exercise of vigorous market competition. Work put out for bid often fails to draw sufficient responses to generate competitive pressure. The TRB study finds an average number of bidders for bus service in the range of two to three. This would not qualify under the economist's usual criterion of "many sellers and buyers" found in every textbook definition of a competitive market.

Third, finally, and most importantly, granting what the TRB found, that these considerations can be complicated, the question looms of why the U.S. Congress is better situated to resolve procurement issues than local governments that are in the ongoing business of providing services. This seems to be the worst sort of federalism. To be sure, Federal dollars merit

Federal oversight, but where to draw the line? Is the U.S. Congress able to gauge the merits of Regional Transit's decision to fold a particular service provided in Sacramento, California, into its own operations? Is this a wise use of time in Washington?

Grant recipients must be accountable for their use of Federal tax dollars. From an economic standpoint, this raises the issue of what the national interest is. It cannot reasonably be a requirement that local governments arbitrarily opt in favor of contracting, regardless of efficiency, cost, quality, reliability, and other local considerations. The national interest is for aid to be used fairly and efficiently. Fairness is not at issue here. Efficiency is, but the national government is in no position to decide upon it.

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Mr. OSE. Thank the gentleman for his testimony. OK. As in the previous panel, we will entertain questions both from Mr. Tierney and myself.

This is a question for all of you. We will just move across the panel from left to right. The Department of Transportation, to one degree or another, seeks to facilitate competitive contracting for building new infrastructure, for maintaining existing infrastructure, and for operating existing services.

Do you think that has been successfully implemented or not, and, if you think it has or has not, would you give us some feedback as to how we might improve? Mr. Allen.

Mr. ALLEN. Well, I can't see in our particular case in the Sacramento area how FTA has helped the infrastructure. RT has some really internal problems as far as operating. There was a big article in the paper just the other day about their see-through buses because they don't have very many riders. That comes back to the 21 percent return on their fare box.

They need to, I think, go out and find a way to do better service at less cost. So as far as the infrastructure, I am not sure what the FTA has done to help that. I don't know.

Mr. OSE. Mr. Tanaka.

Mr. TANAKA. In the case of Oahu, we are blessed by millions of dollars put by the tourists. As a result, therefore, we have plenty of private companies with equipment, vehicles, purchased on our own without Federal funds. Therefore, bringing private sector into carrying local residents, as well as tourists, certainly will result in greater savings, including those counties and States that need such funding more than Hawaii.

However, the playbook phrase in Hawaii is: it wouldn't cost us anything so long as we get Federal funding. So any Federal funding is greatly enjoyed by the State of Hawaii. With respect to ground transportation, yes, we have numerous excess capacity by private companies because the county of Honolulu has invaded our territory. As a result, many private companies have idle buses.

For Hawaii, and especially the Island of Oahu, we are in a very, very appropriate situation where we ask that the Federal Government and others enforce the existing laws. They will work; they are not enforced.

Mr. OSE. Mr. Thomas.

Mr. THOMAS. I have two comments. The answer is the FTA has not sought to include private involvement. The examples I have, No. 1, are in Cleveland, OH, where I operated a community circulator, a public transit service. A nice little circulator route. It was a pilot project for a few years back in late 1980's.

Once it was determined that there would be successful ridership, the RTA then concluded in its planning that they should expand it systemwide. They went from two circulators to about 30, and they sought competitive proposals. Then they threw them all out.

Years later, when I got to talk to the financial people on the inside of the RTA, it was the disparity, as Dr. Moore mentioned, the disparity between the cost of service that humiliated the transit property. They couldn't stand the fact that we were charging \$35 to \$40 an hour, including the cost of the bus, compared with \$70 to \$80 an hour excluding the cost of the bus for the service.

That changed the entire focus of my company, because I thought for sure we had it made. We were going to grow our service. Instead, we left the Cleveland market. Then, separately in my testimony, I talked about a much smaller example in Youngstown and then in Niles, OH, where it was another public entity that wanted to perform service in their own area that the current public transit grantee tried to prevent, and actually the mayor had to go through the appeals process at FTA. If the General Counsel in D.C. at the FTA's top legal office didn't intervene, that service still wouldn't be performed.

It seems like every time we try to get involved, at least in Ohio, it gets shut down. There is some contracting for public transit services in Ohio. It is very limited and very clear that it is undesirable.

Mr. OSE. Dr. Moore.

Dr. MOORE. I would reiterate the answer. The straight up answer to your question is no, the FTA has not sought. They see themselves as a grantmaking organization. As long as the requirements—their job is to give the money to these people, as long as they dot the Is and cross the Ts, basically asking for the money, they give them the money. That is obviously their role. They don't see their role as in any way shaping how these projects are done.

As to how they can improve that, I think there are two main areas. First of all, it is perfectly reasonable for them to have criteria that these grants are not used to put a private operation out of business. That should be fairly easy to determine and enforce and should be a simple requirement of making a grant.

A little bit more complex, but just as important in a broader context, is broader public-private sector participation in these things could be induced by FTA, or not induced, allowed I guess by FTA if they—if they had criteria, performance criteria, as I mentioned in my testimony, saying what is it you are going to accomplish? How many people are you going to serve? How much service are they going to get?

If private sector participation can help an agency to provide more, than it would get used. If it doesn't, and in many cases it may not, then it wouldn't get used. But, it would be an outcome based way of getting private sector participation folded into the decisionmaking which right now is generally not on the table.

Mr. OSE. Dr. Utt.

Mr. UTT. On a broader issue, on sort of the broader question you asked, since 1955, the Federal Government has been issuing edicts and Executive orders extolling the virtues of private market, encouraging bureaucracies to work more closely with them, and noting that it is a great source of money and cooperation and creativity. It is the purpose of our administration to change the way we do things. From now on, we will work more closely with the private sector.

There has been little effective action as a consequence of these edicts. They make everybody feel good, but nothing really much changes in the operation of those programs. On the issue of transportation, I am not sure that new edicts, new regulations, new intentions would make much of a difference on the kind of infrastructure we already have in existence, which brings me to the nature of the infrastructure.

The Federal Highway Program that we are dealing with today was created in the mid-1950's for a single, well-defined purpose. That was to build the interstate highway system. That was their only job, a border to border, coast to coast, connecting all of the major cities in the country. That was largely completed in the early 1980's, and it never adopted another objective that was quite as clear as that.

At the same time, the transportation problems we have today, as I think have been illustrated by everybody, are increasingly local and regional in nature. But, you have a national program here in Washington that is sort of trying to figure out how we do this on a local level, on different bus systems, and I think that what has come out of this is they are just not particularly well equipped to do that.

I suggest that the real issue is to review the Federal program we have, say has it outlived its usefulness, and are we better simply turning it back to the States, which is something we have advocated.

Mr. OSE. Dr. Sawicky.

Mr. SAWICKY. Well, I have been writing about federalism for about 20 years now. A theme that I think always comes up is the difficulties from the Federal Government of closely regulating what State and local governments do, either with money or without money. Both parties, all kinds of programs, there is a continual interest in Washington to try to do good and to do good through other people who have different motives, interests, possibly well motivated, possibly otherwise.

There is a chronic problem, I think, expecting the Federal Government to get very deeply involved in how any local entity is contracting now, or doing anything else for that matter. We might note at the same time that there are huge difficulties in Federal contracting, which I think Congress and the executive branch have yet to get a good handle on.

I think—to imagine that the Federal Government could clean up or regulate or significantly improve what State and local governments do in that realm, alongside a longstanding lack of success in greatly advancing the way Federal contracting is done is really problematic. So my vibe here is against over-reaching. Now, there is a case for money for Federal aid, even without too much oversight, which, you know, we can go into if you like.

I don't think that the lack of ability to closely regulate precludes any kind of Federal aid, contrary to Dr. Utt.

Mr. OSE. The gentleman from Massachusetts.

Mr. TIERNEY. I would like, Dr. Sawicky, for you to go into that a little further, on the last train of thought that you had, the benefit or possibility of giving Federal money, but having the oversight come from someplace else, which is where I suspect you were going.

Mr. SAWICKY. People are concerned, rightly so, with Federal aid being used inappropriately or in some kind of malfeasance at the local level. Well, once Federal aid is in the State and local coffers, it is no different from any dollar in principle. They have no interest in using a Federal dollar any differently than they would use their own money. We expect State and local political processes and the politics to regulate that.

Now, from a tax standpoint, which I also work on, there is advantage in some level of centralized finance of local operations. Local taxes have negative economic incentives. People have an incentive to run away from the tax to a neighboring jurisdiction or State. The Federal Government has a greater capacity to tax the economy as a whole. So there is—it is cheaper for the Federal Government to collect taxes than State and local governments. There is a case for some Federal leverage of State and local finances, even apart from any significant oversight.

There are also other motivations for Federal aid. There are considerations for economic development, for equalizing fiscal capacity across State and local jurisdictions. So there are a variety of justifications for Federal dollars absent a great amount of oversight in the use of those dollars when they are going to the State and local governments.

Mr. TIERNEY. I appreciate your comments. I don't want to get into a debate with you. I would have some problems about the money supplanting State money and local resources and their failure to use the money for the intended purpose.

But, I wanted to really hear what you had to say, and I appreciate that.

Mr. Allen, you made some comments during your testimony that you thought there were secret negotiations with the State. Do you have some empirical evidence that you would care to share with us about just who had those negotiations and when they occurred?

Mr. ALLEN. Yes, I would. We were in constant contact with General Services throughout the last year and a half, because our contract initially was in 1996 and went through 2001. It was a 5-year contract. This contract had been competitively bid for 25 years. We were just the last one in the mix.

I want to make clear that this is not an Amador issue, this is an industry issue.

Mr. TIERNEY. Thank you for that. But, in my limited time, my real question is, what was the secret negotiation and who were the parties involved in it?

Mr. ALLEN. OK. It was General Services and Regional Transit and their planning department.

Mr. TIERNEY. Do you have names you want to name here and dates that this happened?

Mr. ALLEN. Names? Oh, boy. I don't have the names off—I can get you the names if you would like.

Mr. TIERNEY. Do you know specifically who was involved in that?

Mr. ALLEN. Well—

Mr. TIERNEY. My point is, were you surmising this or do you have some hard evidence?

Mr. ALLEN. I know that we were talking to them every day about an extension or were they going to put it out to bid, because the time was running out. It took about 9 months to 12 months to get the vehicles. I was in constant contact with them, saying your time is getting short. What are you going to do?

They just said that this, you know, we are working on putting the bid package together. We are getting all of our "I"s dotted and "T"s crossed. They were stringing us out basically. In the mean-

time, from the information we have received through investigation, they had this other plan already in the works.

Mr. TIERNEY. I guess that is what I am looking for. What investigation? What other information have you got to convince us that there was this other track of negotiations going on in secret?

Mr. ALLEN. There were the meetings between ourselves and the California Bus Association and—

Mr. TIERNEY. That was not General Services—

Mr. ALLEN. No, after the fact. With General Services to ask them how this all went step by step. It was—actually it took three meetings at one point for them to finally acknowledge that there were meetings. So, I mean it was like pulling teeth because it was secret.

Mr. TIERNEY. I suspect—it is somewhat unfortunate that we don't have other people here to sort of put this whole picture together, because I appreciate that you have a perspective on that, and I would expect that you would.

But I would certainly like to hear what the State was doing and thinking and saying during that period of time as well as the RT people, whatever. The chairman tells me that we are going to have other hearings at some point in time. I would rather have seen it all together so we can have a little interplay here and get to the bottom of this.

But, you know, if you would submit to the committee, if you have hard evidence, empirical evidence that there were individuals and entities involved in secret negotiations improperly during the course of this situation, I would hope that you would submit that to us in writing.

Mr. ALLEN. I can do that.

Mr. TIERNEY. Thank you.

[The information referred to follows:]



California Bus Association

Promoting Professionalism, Safety & Integrity in the Motorcoach Industry

May 25, 2004 – Revised Request

Beverly A. Scott
 General Manager/CEO
 Sacramento Regional Transit
 PO Box 2110
 Sacramento, CA 95812-2110

Dear Ms. Scott,

This is a request under the California Public Records Act, California Government Code Sections 6250-6270.

I. The California Bus Association (CBA) is requesting:

- 1- Pre and post 7/1/2001 Standard Operating Procedure (SOP) notification in the "Sacramento Daily Recorder", "Nichi Bei Times", and "El Hispano" through 2002.
- 2- All other written documentation of Federally required "consultation with interested parties, including private transportation providers" (SOP) by Sacramento Regional Transit (SACRT) related to the development of the Program of Projects of 12 new buses earmarked for the State shuttle service to start in April 2003.
- 3- Public hearing notifications sent by SACRT to each local private bus operator and notifications to shuttle bus riders on shuttle buses through 2002.

II. CBA is also requesting information related to:

- A- Regional Transit ISSUE PAPER Agenda Item No. 15 Board Meeting Date 08/26/02, and;
- B- Regional Transit ISSUE PAPER Agenda Item No. 17 Board Meeting Date 1/27/03.

Both Agenda items of 8/26/2002 and 1/27/2003 state, in part, the following: *"The State currently contracts with Amador Stage lines to provide this service. A few years ago, the State expressed interest in having RT provide this service with CNG buses. (Amador's fleet runs on diesel fuel). At that time, RT did not have the required number of peak buses available to operate this service. Earlier this year, RT contracted with Orion for the procurement of about 100 new CNG buses, of which 67 will be replacement buses and 33 will be allocated for new service. Twelve (12) buses have been earmarked to operate the State shuttle service. (The last sentence was included in the 08/26/02 Board item only.)"*

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May 25, 2004
Beverly A. Scott - Sacramento Regional Transit
Page 2 of 2

Pursuant to above referenced Agenda Items dated 8/26/2002 and 1/27/2003, CBA is requesting the following written information:

- 1- Dates of meetings and telephone conversations with the Department of General Services (DGS) and SACRT starting with the first contact between both parties to the present and relating to the State Shuttle Service as stated above;
- 2- All written notes from meetings or telephone conversations and e-mails or written communications, summaries of communications, drafts of contract language or drafts of provisions in draft contracts or transcripts of meetings held with DGS, initial drafts of contracts between the two parties to review, written responses to different draft agreements from both parties, all draft maps and schedules, and additional appendixes and/or attachments to final contract agreement;
- 3- All internal SACRT departmental written or electronic memos reviewing, summarizing and critiquing the state of negotiations and proposed changes to draft contract agreements between SACRT and DGS from the start of negotiations to present;
- 4- All grant information submitted to funding entities including requests for additional information and responses from SACRT to these funding entity requests;
- 5- All written or electronic correspondences to and from all interested parties, written summaries or memos of telephone conversations generated by CBA's Emergency Protest of the State Shuttle service.

On behalf of the CBA we appreciate your continued assistance and please do not hesitate to contact my office if you have any questions regarding this request.

CBA looks forward to the opportunity to review these requested materials within the next two weeks.

All materials copied by CBA will be forwarded to the Chairman of the House Government Reform for Subcommittee on Energy Policy, Natural Resources, and Regulatory Affairs.

Sincerely,



Michael Waters, President
California Bus Association

CC: Congressman Doug Ose
Emil Frankel, Assistant Secretary for Transportation Policy



California Bus Association

Promoting Professionalism, Safety & Integrity in the Motorcoach Industry

July 6, 2004

Congressman Ose, Chair
 Subcommittee on Energy Policy, Natural Resources and Regulatory Affairs
 2157 Rayburn House Office Building
 Washington, DC 20515-0001

RE: May 18th Hearing – Private Sector Participation
 Testimony Follow-up

Dear Chairman Ose:

Subsequent to your May 18, 2004 hearing on private sector participation in transportation, the California Bus Association (CBA) sent a May 25, 2004 request for documents letter to Sacramento Regional Transit (SACRT) under the California Public Records Act (see enclosed). This request was based on the Department of Transportation's testimony during your hearing and certain questions you raised relating to Federal public notification and consultation requirements.

CBA recently received SACRT's response to CBA's detailed questions. They reveal:

Exactly when SACRT entered into private discussions with the State of California's Department of General Services (DGS) to succeed a privately contracted local bus shuttle service prior to SACRT's formal request for Federal capital funds to purchase the necessary expansion buses worth over \$2.4 million, and;

All notifications to private operators and shuttle bus riders starting from June 1999 to August 2003. This timeframe includes a 2000 FTA audit showing SACRT was not in statutory compliance throughout the grant-making process, as alleged in CBA's emergency complaint to FTA. This audit finding was disclosed in FTA's decision denying CBA's protest. This timeframe pre-dates and post-dates the FTA audit whereby SACRT was alleged to have cured this Federal deficiency.

CBA is also enclosing relevant correspondences that it has received so far, and it wishes to summarize what was discovered from its request for information:

1. SACRT staff and DGS staff were communicating as early as 2000 to enter into a sole source contract exclusive of private sector participation.

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Congressman Ose, Chair
July 6, 2004
Page 2 of 3

An e-mail communication on January 3, 2001 from DGS to SACRT requested a letter to confirm prior discussions about taking over shuttle operations. A February 2, 2001 letter from SACRT affirmed "*the discussions that you have had with regional Transit (RT) staff concerning the operation of the State's Downtown Peripheral Shuttle Bus service.*" The letter then makes the following statement, which explains why private operators were barred from the Federal process prior to this letter and subsequent to this letter: *We are in the process of purchasing additional buses that will be delivered during the latter part of 2002. We anticipate having sufficient buses to provide this service by January 2003.* The bus manufacturer had production problems; so, the start of service was delayed until April 2003.

2. The files submitted to CBA from June 1999 through August 2003 contain no notification in the general circulation newspaper, the Daily Recorder, regarding the shuttle bus expansion project. This timeline of documents covers the period that FTA's audit found a private sector participation breach, consistent with CBA's complaint. The timeline covers the development of a new Standard Operating Procedure (SOP), specifying notification in the Daily Recorder, that was to be implemented July 1, 2001, and the timeline includes the public notification process throughout 2002.

Further, on November 6, 2001, SACRT, before the public hearing on the shuttle bus takeover, published a notice of annual capital budget for Fiscal Year 2002 in the Daily Recorder. This fact alone proves that SACRT published notifications in this general circulation newspaper, except when SACRT was in the process of taking control over a privately operated bus service.

Therefore, the barring of private sector participation through the notification process occurred prior to FTA's deficiency finding and continued throughout the decision-making process despite the adoption of a new SOP guaranteeing proper notification and FTA's August 5, 2003 decision that no Federal violations had occurred.

3. As CBA's complaint stated, there was no evidence in the files submitted to CBA that SACRT consulted, involved or encouraged in any way local private operators as required by Federal statutes and regulations presented at your hearing on May 18, 2004.
4. There can be no doubt from review of documents that the core of discussions between SACRT and DGS leading up to a final agreement was a third party sole source agreement hinged on SACRT's preemptively taking over all state shuttle bus service.

Congressman Ose, Chair
July 6, 2004
Page 3 of 3

CBA would like to conclude by taking this opportunity to respond to certain issues raised at the May 18th hearing, including a response by DOT to one of your questions. For the record, during the complaint process, CBA presented evidence that the Amador's mass transit bus service was no different than "point to point" bus service offered by FTA recipients across the USA, i.e., it was not a charter service.

Finally, in the June 28, 2004 correspondence to your subcommittee, DOT cites a "Master Agreement" as a condition of funding as one of several ways DOT/FTA requires private sector participation.

This is correct, and CBA included the Master Agreement provisions in its complaint. This agreement is important in the Amador case because DOT/FTA has a vehicle to ensure 100 percent grantee compliance of private sector participation requirements. Section 13 of the Master Agreement requires full private sector participation in the development of plans requiring Federal grants and Section 11 gives DOT/FTA the right to require SACRT to pay back all or a portion of the \$2.4 million in funds for expansion buses if any of the requirements of the agreement are not implemented. DOT/FTA, therefore, has the right to resolve this issue with SACRT consistent with Federal statutes and regulations.

Sincerely,



Michael R. Waters
President
California Bus Association

Enclosures

Mark Lonergan - LETTER

From: "Bow, Tim" <Tim.Bow@dgs.ca.gov>
To: "Mark Lonergan" <mlonergan@sacri.com>
Date: Wed, Jan 3, 2001 12:45 PM
Subject: LETTER

Mark

Happy New Year... Hope you had a good holiday.

Just checking on the status of that letter. Please let me know, I'm getting a lot of pressure from our executive office of it.

Thanks

Tim



Sacramento Regional
Transit District
A Public Transit Agency
and Equal Opportunity Employer

Mailing Address:
P.O. Box 2110
Sacramento, CA 95812-2110

Administrative Office:
1400 29th Street
Sacramento, CA 95816
(916) 321-2800
29th St. Light Rail Station
Bus 36.38.50.67.88

Light Rail Office:
2700 Academy Way
Sacramento, CA 95815
(916) 648-9400

Public Transit Since 1973

February 2, 2001

Timothy Bow, Chief
Department of General Services
Office of Fleet Administration
802 Q Street
Sacramento, CA 95814

Dear Mr. Bow:

This is to affirm the discussions that you have had with Regional Transit (RT) staff concerning the operation of the State's Downtown Peripheral Shuttle Bus service.

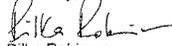
As a partner, RT is committed to working with the State to provide the existing peripheral parking lot shuttle service. We are also interested in opening discussions with the State and others over the development of a downtown circulator service that would better meet the changing travel patterns within Sacramento's downtown area.

At the present time, RT's bus fleet is committed to existing service. RT will not have sufficient equipment to operate the peripheral shuttle bus service in June when the State's current contract expires. We are in the process of purchasing additional buses that will be delivered during the latter part of 2002. We anticipate having sufficient buses to provide this service by January 2003.

We understand that this delay will not deter the State's commitment to continue with this partnership and we look forward to the opportunity of working with the State to provide the shuttle bus service. Our goal will be to have the needed agreements for this service approved by the RT Board of Directors no later than June 2002.

Although future planning and agreement discussions could transition to our Planning Department, Mr. Mark Lonergan, Deputy Chief Operating Officer, will continue as your contact with RT. We appreciate the State's desire to work with RT, and look forward to an expanding partnership focused on improving public transportation in Sacramento.

Sincerely,


Piika Robinson
General Manager

c: Mark Lonergan, Deputy Chief Operating Officer, RT

Timothy Bow

-2-

February 2, 2001

bc: Mike Wiley, Director of Customer Services, RT
Doug Wentworth, Director of Planning & IS, RT
Azadeh Doherty, Planning Manager, RT

Mr. OSE. Mr. Allen, I want to make sure—I keep trying to get the chronology correct. When the contract under which your company offered the transit service, if I understand correctly, and from my experience anyone who parked in a certain area or along the path of the service itself could effectively just walk on the buses, there was no charge?

Mr. ALLEN. This whole service was basically a union negotiated benefit for the State workers. So, as you would note, Mr. Chairman, the parking lots were underneath the freeways, they were remote from downtown. It was about a mile, a mile and a half route from the parking lots to downtown center.

I believe they paid \$20 a month when we first started for this parking spot plus transportation.

Mr. OSE. Who is they?

Mr. ALLEN. The State employees.

Mr. OSE. The State Employees Union or the State of California?

Mr. ALLEN. The State employees paid the State of California. It was probably a deduction out of their payroll.

Mr. OSE. Much like we have at the Federal level then with the transit benefit for State employees, priced at \$20 a month, they could have a deduction from their pay?

Mr. ALLEN. That is right. They would get parking, very reasonable parking, plus transportation in. And the idea was to keep the—Sacramento has a smog problem. So it was to keep the people from the city core with the cars.

Basically, they had their name, their name badge, their State card. They would show the card, and, if they didn't have a card, they paid a dollar. Now, anybody could pay a dollar. We asked them, you know, how do we know if they are a State employee versus a non-State employee. Because some of these State employees parked in the street versus parking in the parking lot to pay the \$20.

They would park in the street and walk in with their card. So, in any event, they said just take a dollar from whoever doesn't have a card. We don't care if they are Joe Public or they are State workers, it doesn't matter to us.

That is what we did. We had a fare box in the front of the bus. They paid a dollar if they didn't have their card. It was open to the public. We had—you know, we had stops along the way. We stopped actually at the regional transit stops. This was a service that—General Service gave us the maps. We had published schedules that went out to—all of the employees had schedules. They had—there were scheduled times. There was like 16 buses at the top end at one time working off of three different parking lots. It was regular mass transit service.

Mr. OSE. OK. Well, first of all, I need to admit that I owe you a dollar. I snuck onto your transit without paying.

All right. Someone parking underneath the freeways, they would walk over and show their State employee ID, or they would park in the street and get on showing their State employee ID. If they didn't have their State employee ID, they paid a dollar for the movement from the parking lot to the State office buildings that are in the core?

Mr. ALLEN. That is correct.

Mr. OSE. Now, you had 16 buses. How many stops along the way?

Mr. ALLEN. There were, from the parking lots inbound, there was probably not too many until you got to the city core. You would get right down to the east end. That would be the first stop. Then they would work their way down through the main part of town. On the way out would be more of the stops, because there were more State buildings to pick up at. Probably 8 to 10 stops.

Mr. OSE. But, the entire route was in the downtown core? Started at the freeway parking lots, looped in, and looped back out?

Mr. ALLEN. Right. And, they came in—no stops until the buildings. They hit all of the buildings, and no stops once they left the buildings.

Mr. OSE. Now, my understanding or my experience has been that, in addition to the transit service you were operating under this contract, RT was running buses up-down J Street and L Street and also north and south on 16th and 19th and the like.

So you are running a transit service, and RT is running a service at the same time?

Mr. ALLEN. We were, and we were actually using their bus stops.

Mr. OSE. You had permission, by virtue of a negotiation, to use RT's bus stops as a mutual collection point?

Mr. ALLEN. Yes.

Mr. OSE. Were they designated bus stops?

Mr. ALLEN. They were RT bus stops. They didn't say State employees bus stop.

Mr. OSE. Like any RT bus stop along the path?

Mr. ALLEN. There were designated RT bus stops at various points. We didn't hit every one of their bus stops, but we hit the ones that the State asked us to stop at.

Mr. OSE. My time has expired. The gentleman from Massachusetts.

Mr. TIERNEY. Well, I just want to cover one point, and maybe I am putting too fine a point on it. But, you had folks that had a card and they could get on your bus. You had folks who were without a card, and you got a dollar, so that was a penalty for having a card, I take it. But, you let people get on even if you weren't sure that they were employees. I guess, it sounds to me like morally a decision was made not to go through the cost or hassle of enforcing the provision, but rather just to take the occasional stray that got on there and let them ride for a buck, as opposed to go through a big, long, convoluted process of trying to keep other people off. It doesn't sound to me like there is some conscious decision to open up to the public and notice that everybody could ride these things.

Mr. ALLEN. There could have been partially what you said. But, realistically, we were starting and stopping at a parking lot, remote parking lot.

Mr. TIERNEY. It is unlikely that you were going to get people going there just to take your bus, unless they were working in part of that group?

Mr. ALLEN. The schedule that we operated is identical to what RT is running today.

Mr. TIERNEY. Well, I appreciate that added comment, although it wasn't even part of my question remotely. But, the idea is that

you were stopping there to pick up those employees, for the most part. That was your deal. You weren't there because you had a contract to pick up people that had negotiated that right or privilege or whatever it was—

Mr. ALLEN. Right. It is right.

Mr. TIERNEY. You wouldn't have been there without that deal?

Mr. ALLEN. There was free parking out there on the street if somebody caught wind of our service.

Mr. TIERNEY. I don't need to hear that. I am trying to narrow my points. You were there because you had negotiated an agreement to be there to pick up those employees. You would not have been there but for that?

Mr. ALLEN. Exactly. The same as RT today.

Mr. OSE. I think—

Mr. TIERNEY. That is fine.

Mr. OSE. I think the answer is yes.

Mr. TIERNEY. Right. I just would like to have the answers to my questions without the argument part of it. I understand where you are coming from. You have had ample time to present your case. This was really just looking for that answer.

Mr. OSE. Would the gentleman yield?

Mr. TIERNEY. In a second. You were there because someone gave you a contract to go to that spot and pick those people up. You weren't there as some independent person who just decided to stop there on your own?

Mr. ALLEN. That is correct.

Mr. TIERNEY. Thank you. Go ahead. I want to yield if you—

Mr. OSE. No, I was going to help.

Mr. TIERNEY. Thank you. Dr. Sawicky, as an economist, when you will look at the argument that some used about using private transit operators because they are more cost effective, do you think that is necessarily accurate? I think you answered that, that you see it going both ways.

How do you measure costs in situations? Is it just dollars and cents? What other factors are involved?

Mr. SAWICKY. Well, there are other factors. But, even in a narrow sense of cost one of the reasons that—results of studies seem to conflict is that people are using different cost models. The idea that has already been mentioned of fully allocated costs, where some proportion of overhead or fixed cost is added on to the—what you can call the marginal cost, or the cost of running the service.

So when you compare public and private, in that model, broadly speaking, not always, the private sector looks better in terms of simply narrow cost. Now, the problem people may gloss over there is that this idea of fully allocated cost is based on an unobservable sequence of events or an assumption; namely, that over the long run the government agency will be able to restructure itself economically and efficiently to narrow down its operations and costs proportionate to any change in its workload.

It is as if you cut the Transportation Department's budget 10 percent, you could cut the Secretary of Transportation's salary by 10 percent. In practice that is not necessarily what will happen for a variety of reasons. The alternative cost model, which—where the public sector tends to do better and often comes out ahead, is just

comparing marginal costs or what might be called the costs that can be escaped if you contract.

If I am a public agency, I contract out. There are some costs that I will retain associated with the service, even though I am contracting. There is some oversight cost. There is still some supervisory components. The question from the standpoint of savings of the public sector, in the short run, when you look at the marginal cost or the escapable cost, the public sector tends to do better. So, again, the complexity of this begs for the decision to be made closest to where the deal is going to go down, not here.

Mr. TIERNEY. I assume part of that is determining that certain routes get served, whether or not they are profitable?

Mr. SAWICKY. Well, that, again, the public service has more than—typically more than multiple objectives. Politicians are ambitious. They want to do a lot of good things. So when they propose a service or a program they have typically more than one goal for the program. And in the case of a transportation system, one of the thorny issues is the incorporation of routes that in and of themselves if you contracted them out would not be profitable and, therefore, would not exist.

This is sort of the same problem with the post office. It costs more to deliver a letter to somebody way out in the country than in the city. Do we charge that person in the country proportionate to that cost, or do we have this idea of universal service? Now, a local jurisdiction or a State has to face that question and may come out one way or the other.

But, to compare some isolated narrow view of a particular piece of a service to the usual array of public objectives in a program is really an apples to oranges comparison. In that exercise, once again it may be the public sector that looks more costly glossing over some of those external things that people, at least some people expect to result from the service being provided.

Mr. TIERNEY. Can I have one last question? What happens if it is privately contracted out and the private contractor goes bankrupt?

Mr. SAWICKY. Well, another difficulty with contracting is that, if you convert from public to private, and the public sector loses capital equipment, expertise and experience, there are some additional transition costs to taking it back in if that becomes necessary.

In fact, there have been cases where for one reason or another a private contract goes belly up. The public sector is faced with the job of taking that work in and rebuilding a capacity that it may have lost. There is a transaction cost there. For that reason, one of the leading advocates of contracting, Emanuel Savas, recommends that, when you have contracting, at the very least there always should be some reserve public sector capacity that is maintained, kept up and running in the event that there needs to be a reversion.

The other thing you can do is require performance bonds in the event of a real problem with the private operators. There is something that keeps the public sector whole in this exercise if it has to take the work back. There is risk involved. But, I am not one that says never try to contract. I am not one that is against competition. I think the way this is ordinarily viewed tends to simplify

the matter, and again there is a federalism, pretty good federalism argument for separating who is running whose contract.

Mr. TIERNEY. Thank you.

Mr. OSE. Well, Mr. Allen, I want to go back to this. I am trying to just make sure I get on the record the state of play at the time you had the contract. You are running a shuttle from the remote parking lots to the core, picking up people who either have a State ID card or a dollar at parking lot oriented stops.

You have, according to your testimony, the schedule you were running at the time you had the contract is identical to RT's today?

Mr. ALLEN. It is essentially identical. What they have done to make it a little different looking on a map, is they have added—there is a center core on their map of service that we did not do that is unrelated to this problem. It was service they already had. If you laid the two maps down together of what they show now, because they put a third one in there. If you take the third one out, the two are identical. The two that we had originally were identical.

Mr. OSE. Are the buses that are doing the shuttle today, from the remote parking lots to the—I think you said 8 or 10 stops, are they also being utilized to run this piece that has been added, or is that a different route?

You have a north-south route and an east-west route, and the north-south stops at a point where you can get off that bus and get on the east-west route?

Mr. ALLEN. Yes.

Mr. OSE. OK. Now, did the—I mean, your shuttle service, you were operating what I will call the north-south route, going from the parking lots to the core?

Mr. ALLEN. Exactly.

Mr. OSE. Now, on that schedule, you testified that you had at peak up to 16 buses operating on an 8 or 10-minute intermittent stop basis?

Mr. ALLEN. They were actually—we were on 5-minute headways.

Mr. OSE. Do you know whether or not, as compared to where this new east-west component now is part of this plan, did you have a stop at that location where RT currently stops its bus to connect the east-west component?

Mr. ALLEN. Yes.

Mr. OSE. OK. Now, do you have anything you can submit to the committee that would memorialize what your schedule was and what your contact was that you had to the shuttle?

Mr. ALLEN. Yes.

Mr. OSE. OK. We are going to ask you to do that.

Mr. ALLEN. OK.

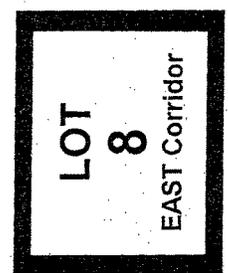
[The information referred to follows:]

STATE PERIPHERAL PARKING LOT SHUTTLE BUS SCHEDULE																
MORNING LOT 8						AFTERNOON LOT 8										
LOT #	16h 30m	16h 45m	17h 00m	17h 15m	17h 30m	LOT #	16h 30m	16h 45m	17h 00m	17h 15m	17h 30m					
555	6:01	6:02	6:05	6:10	6:11	6:12	6:17	244	2:50	2:51	2:54	2:55	2:59	3:00	3:01	3:06
600	6:06	6:07	6:10	6:15	6:16	6:17	6:22	249	2:55	2:56	2:59	3:00	3:04	3:05	3:06	3:11
605	6:11	6:12	6:15	6:16	6:20	6:21	6:22	254	3:00	3:01	3:04	3:05	3:09	3:10	3:11	3:16
610	6:16	6:17	6:20	6:21	6:25	6:26	6:32	259	3:05	3:06	3:09	3:10	3:14	3:15	3:16	3:21
615	6:21	6:22	6:25	6:26	6:30	6:31	6:32	304	3:10	3:11	3:14	3:15	3:19	3:20	3:21	3:26
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700	7:06	7:07	7:10	7:11	7:15	7:16	7:17	349	3:55	3:56	3:59	4:00	4:04	4:05	4:06	4:11
705	7:11	7:12	7:15	7:16	7:20	7:21	7:22	354	4:00	4:01	4:04	4:05	4:09	4:10	4:11	4:16
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725	7:31	7:32	7:35	7:36	7:40	7:41	7:42	414	4:20	4:21	4:24	4:25	4:29	4:30	4:31	4:36
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740	7:46	7:47	7:50	7:51	7:55	7:56	7:57	429	4:35	4:36	4:39	4:40	4:44	4:45	4:46	4:51
745	7:51	7:52	7:55	7:56	8:00	8:01	8:02	434	4:40	4:41	4:44	4:45	4:49	4:50	4:51	4:56
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755	8:01	8:02	8:05	8:06	8:10	8:11	8:12	444	4:50	4:51	4:54	4:55	4:59	5:00	5:01	5:06
800	8:06	8:07	8:10	8:11	8:15	8:16	8:17	449	4:55	4:56	4:59	5:00	5:04	5:05	5:06	5:11
805	8:11	8:12	8:15	8:16	8:20	8:21	8:22	454	5:00	5:01	5:04	5:05	5:09	5:10	5:11	5:16
810	8:16	8:17	8:20	8:21	8:25	8:26	8:27	459	5:05	5:06	5:09	5:10	5:14	5:15	5:16	5:21
815	8:21	8:22	8:25	8:26	8:30	8:31	8:32	504	5:10	5:11	5:14	5:15	5:19	5:20	5:21	5:26
820	8:26	8:27	8:30	8:31	8:35	8:36	8:37	509	5:15	5:16	5:19	5:20	5:24	5:25	5:26	5:31
825	8:31	8:32	8:35	8:36	8:40	8:41	8:42	514	5:20	5:21	5:24	5:25	5:29	5:30	5:31	5:36
830	8:36	8:37	8:40	8:41	8:45	8:46	8:47	519	5:25	5:26	5:29	5:30	5:34	5:35	5:36	5:41
835	8:41	8:42	8:45	8:46	8:50	8:51	8:52	524	5:30	5:31	5:34	5:35	5:39	5:40	5:41	5:46
840	8:46	8:47	8:50	8:51	8:55	8:56	8:57	529	5:35	5:36	5:39	5:40	5:44	5:45	5:46	5:51
845	8:51	8:52	8:55	8:56	9:00	9:01	9:02	534	5:40	5:41	5:44	5:45	5:49	5:50	5:51	5:56
850	8:56	8:57	9:00	9:01	9:05	9:06	9:07	539	5:45	5:46	5:49	5:50	5:54	5:55	5:56	6:01
855	9:01	9:02	9:05	9:06	9:10	9:11	9:12	544	5:50	5:51	5:54	5:55	5:59	6:00	6:01	6:06
900	9:06	9:07	9:10	9:11	9:15	9:16	9:17	549	5:55	5:56	5:59	6:00	6:04	6:05	6:06	6:11

LOT 8 (21st Street) morning and afternoon and midday

10	11	12	13	14	15	16	17	18	19	20	21	22
J	▲	▲	▲	▲	▲	▲	▲	▲	▲	▲	▲	▲
K	▲	▲	▲	▲	▲	▲	▲	▲	▲	▲	▲	▲
L	▲	▲	▲	▲	▲	▲	▲	▲	▲	▲	▲	▲
M	▲	▲	▲	▲	▲	▲	▲	▲	▲	▲	▲	▲
N	▲	▲	▲	▲	▲	▲	▲	▲	▲	▲	▲	▲
O	▲	▲	▲	▲	▲	▲	▲	▲	▲	▲	▲	▲
P	▲	▲	▲	▲	▲	▲	▲	▲	▲	▲	▲	▲
Q	▲	▲	▲	▲	▲	▲	▲	▲	▲	▲	▲	▲
R	▲	▲	▲	▲	▲	▲	▲	▲	▲	▲	▲	▲
S	▲	▲	▲	▲	▲	▲	▲	▲	▲	▲	▲	▲
T	▲	▲	▲	▲	▲	▲	▲	▲	▲	▲	▲	▲
U	▲	▲	▲	▲	▲	▲	▲	▲	▲	▲	▲	▲
V	▲	▲	▲	▲	▲	▲	▲	▲	▲	▲	▲	▲
W	▲	▲	▲	▲	▲	▲	▲	▲	▲	▲	▲	▲
X	▲	▲	▲	▲	▲	▲	▲	▲	▲	▲	▲	▲

▲ Indicates a bus stop



SCHEDULES EFFECTIVE APRIL 23, 2001
 ALL TIMES LISTED ARE APPROXIMATE
 Route and schedule variations may occur due
 to bus repairs or special event street closures.

- Coaches continue to Lot 8 then out of service -

10-09-1996 6:44AM FROM


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Bus Routes & Schedules**
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contact:

**Judy Parks, Worker/Driver
Supervisor
(360) 478-6222
JudyP@KitsapTransit.com**

*Unless otherwise noted, all
routes go to PSNS dayshift.*

South Kitsap County

- ♦ **Burley Bus**
- ♦ **Glenwood**
- ♦ **Horseshoe
Lake**
- ♦ **Long Lake**
- ♦ **Manchester
Beach**
- ♦ **Mile Hill
Express**
- ♦ **Salmonberry**
- ♦ **Parkwood**
- ♦ **Phillips /
Bielmeier**
- ♦ **Ponderosa**
- ♦ **Southworth**
- ♦ **Wye**
- ♦ **Lake/Sunnyslope
Special**

Central Kitsap County

- ♦ **Camp Union**
- ♦ **Fosterwood**
- ♦ **Illahee**
- ♦ **Parkwood East**
- ♦ **Ridge Runner**
- ♦ **Seabeck**
- ♦ **Woodmere**

10-09-1996 6:46AM FROM

P. 7

Kitsap Transit - Worker/Driver Bus Routes & Schedules

Page 2 of 4

North Kitsap County

- ◆ **Kingston**
- ◆ **Port Gamble**
- ◆ **Suquamish**
- ◆ **Winslow**

10-09-1996 6:46AM FROM

P. 8

WHEELS (LAVTA) Route 72: Weekday Schedule

Page 1 of 1

WHEELS (Livermore-Amador Valley Transit)

Main Menu : WHEELS (LAVTA) : Schedules : Route 72 : Weekday

Route 72 Santa Clara - Intel**Weekday Schedule**

Effective February 3, 2003

[\[Complete Schedule\]](#)**TO INTEL / SANTA CLARA:**

	LIVERMORE PARK&RIDE Leave	PLEASANTON FAIRGROUND Leave	SANTA CLARA INTEL Arrive
Bus #1	5:30 AM	5:45 AM	6:40 AM

TO THE TRI-VALLEY:

	SANTA CLARA INTEL Leave	PLEASANTON FAIRGROUND Arrive	LIVERMORE PARK&RIDE Arrive
Bus #1	4:10 PM	5:00 PM	5:25 PM

KEY TO STOPS:

LIVERMORE - Caltrans Park and Ride at Portola and P Street.
 PLEASANTON - Fairgrounds on the Pleasanton Avenue Side. Park
 in the dirt lot across from the Minutire Golf.
 SANTA CLARA - Intel in Santa Clara (2200 Mission College Blvd.)

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WHEELS (LAVTA) Route 71: Weekday Schedule

Page 1 of 2

WHEELS (Livermore-Amador Valley Transit)

Main Menu : WHEELS (LAVTA) : Schedules : Route 71 : Weekday

Route 71 Sunnyvale - Lockheed Martin**Weekday Schedule**

Effective February 3, 2003

[\[Complete Schedule\]](#)**TO SUNNYVALE:**

	LIVERMORE PARK&RIDE Leave	PLEASANTON FAIRGROUND Leave	SUNNYVALE LOCKHEED Arrive
Bus #1	4:43 AM	4:59 AM	5:39 AM
Bus #2	5:23 AM	5:39 AM	6:39 AM

TO THE TRI-VALLEY:

	SUNNYVALE LOCKHEED Leave	PLEASANTON FAIRGROUND Arrive	LIVERMORE PARK&RIDE Arrive
Bus #1	3:45 PM	4:45 PM	5:10 PM
Bus #2	4:45 PM	5:55 PM	6:15 PM

On Fridays, Bus #1 leaves Lockheed at 2:45 PM and
Bus #2 leaves at 3:45 PM.

KEY TO STOPS:

LIVERMORE - Caltrans Park and Ride at Portola and P Street.
PLEASANTON - Fairgrounds on the Pleasanton Avenue Side. Park
in the dirt lot across from the Miniature Golf.
SUNNYVALE - 5th and C. Then follows the Lockheed/Martin
star route.

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EXHIBIT 6

PROCEEDINGS

1

2 Mr. Niello: If the State had not been contemplating terminating - um - the contract

3 with Amador - um - would - would we have pursued these - all of these

4 route changes as they have - uh - as they exist now?

5 Mr. Wiley: Well certainly some of the services we have - um - uh - had in our planning

6 process for - for some time - um - for example, the circulator service that

7 connects with the Amtrak Station is a perfect example of something that

8 has -

9 Mr. Niello: But I mean specifically the service - the Amador Service that's being

10 displaced.

11 Staff I: Well back in - um - the mid-80s or it maybe late - I'm not sure, maybe early

12 - um - 90s, RT did a downtown study of downtown circulation services

13 and looking at those routes, they're not that much different tha - than what

14 we're proposing in terms of - um - downtown circulator services. This

15 isn't a plan that RT has had for many years in addition to their downtown

16 trolley services. We've always believed that there is - um - a need in

17 downtown for - um - having services to - to reduce the need - uh - for

18 parking in downtown and on also - uh - um - movement within the

19 downtown area. So that's a study that we did. We've always - um - been

20 looking forward to doing a - a similar service - uh - to what you're looking

21 at tonight. Now it may have not been exactly the same streets or - um -

22 what you're looking at in the map tonight, but certainly the concept is

23 nothing new.

24 Mr. Niello: What - what prevented us from pursuing that in the past?

25 Mr. Wiley: Just available resources systemwide and the priorities - um - for allocation

26 of the resources. Um - and in fact, if I could go back - we did offer a - um -

27 - and we do offer it today the - the J Street and L Street service (unclear)

28

1 had a unique scheme called DASH. Um - and that was service actually that
 2 was changed a number of years ago in - uh - in - uh - the early to mid-90s
 3 and we actually operated other - um - DASH type of services that
 4 connected in a circulatory fashion and we have always - um - had - um - as
 5 Ozzy has indicated, plans to - um - find means to fund a greater level of
 6 central city circulation services and provide access to more destinations in -
 7 uh - in the central city area. And what the - the limiting factor just is the
 8 same as a limiting factor anywhere in our service area and that's just - uh -
 9 available resources.

10 Mr. Niello: Do those available resources include the two million dollars from the state?
 11 Mr. Wiley: Uh - I guess I don't understand your -
 12 Mr. Niello: Well would - would the - uh - um - if the state was not - um - it - say it was
 13 gonna continue to do business with Amador and therefore was not gonna
 14 provide - not gonna be purchasing - um - at least that portion of passes
 15 from Amador, would you be entertaining the same level -
 16 Mr. Wiley: We would not have sufficient funds to operate these services.
 17 Mr. Dickinson: But - but we would be entertaining the - the services to the extent that we
 18 could afford to do so and one of the real -
 19 Mr. Wiley: Absolutely.
 20 Mr. Dickinson: - one of the real constraints has been a lack of equipment.
 21 Staff 2: Okay.
 22 Mr. Dickinson: So we can look at - at - it - frankly, if we had the - the same number of
 23 coaches - uh - today that - that we've had in previous times, it wouldn't
 24 have mattered whether the state offered us money or not because there
 25 would have been higher priority calls on where we would have provided
 26 service.
 27 Mr. Niello: I'm talking about now and - and I understand that point, but I have to say
 28

DGS Meet and Confer
Shuttle System
Page 1

Codioli's Notes
April 1, 2003

MEET AND CONFER WITH DGS REGARDING SHUTTLE SYSTEM
March 28, 2003

On March 28, 2003, PECG and the Department of General Services (DGS) met to discuss the impacts of the new Sacramento area State Shuttle System being implemented on April 7, 2003. The change involves the elimination of the private shuttle previously operated and contracted by DGS with a new system involving the Sacramento Regional Transit District incorporating and adding the previous shuttle routes into their system by utilizing their busses. In attendance were Debra Boulter and Beth Townsend from DGS, Jerry Radcliffe from the Department of Personnel Administration and Donald Coe, President of the River City Section, and myself representing PECG.

The current state shuttle system transports state employees from remote lots to their downtown offices with service every 5-7 minutes during the peak morning and afternoon hours. The shuttle would continue to run along designated routes throughout the day with service every 30 minutes. The service was provided through a contract between DGS and a private bus company. State employees were the only riders. The new system will have Sacramento Rapid Transit (RT) incorporating the existing routes into their schedule with additional busses with the service being provided every 10 minutes during the peak hours. The new system will allow both state employee and public riders with state employees being allowed to ride for free.

The meeting began with DGS providing an overview of the service. The shuttle has run for approximately 20 years with the service being expanded as new downtown offices were being added or utilized by various state departments. Approximately two years ago, DGS began looking at changing the existing system to one which would incorporate Sacramento RT and provided an expansion of service for state employees. As part of the contract with Sacramento RT, DGS will be purchasing 17,600 initially good for a 14 month period to be distributed to state employees at no cost to the employees. These passes will be good for any public transit (ex. Light Rail) operated by Sacramento RT.

DGS believes that the agreement with Sacramento RT can provide greater service to more employees for the same cost (approximately \$1.5 million per year). As for cost, PECG asked how the shuttle service is funded. DGS explained that the fees charged by DGS for all parking lots operated by DGS go into a "motor vehicle fund." From this fund the operating and

DGS Meet and Confer
Shuttle System
Page 2

maintenance costs for all the lots are paid with the remaining funds used to fund the shuttle system. DGS explained that all parkers in these lots from throughout the state pay for the shuttle service in Sacramento.

When asked to explain why the service with the current provider was not extended, DGS explained that there had been numerous complaints about the current provider not meeting the 5-7 minute intervals during the peak hours, they had only two CNG or natural gas busses for use which was a preference for air quality purposes, poor ridership numbers, and the provider's busses were not compliant with the Americans with Disabilities Act. An additional factor in DGS's decision was the results of a 2001 employee survey.

PECG asked for and was provided a copy of the survey. The survey of 50,000 state employees in over 130 departments in the Sacramento area (15,352 responses) found that 69% of the respondents would use public transit to commute if a free direct shuttle were available to their worksite. In addition, many indicated that they would use the passes to commute within the downtown area for meetings, shopping, lunches, etc.

DGS indicated that the new service will allow more state employees to utilize the free service and that service is being expanded at no additional costs. PECG pointed out that although those employees who do not park in the remote lots may get an increased benefit, those who do park in the remote lots will have a decreased benefit as a result of the loss of the private shuttle and increased interval times without a reduction in costs to them. DGS did not agree and pointed out that those who park in lots in Los Angeles, for example, have helped pay for the service and do not get any benefit.

The next topic involved a discussion regarding DGS's oversight of the system. DGS stated that they do have oversight and the contract to purchase passes does contain clauses to allow DGS to rescind the contract if Sacramento RT does not perform. DGS agreed to monitor the intervals and estimated travel times contained in the Sacramento RT schedules. DGS also indicated that they and Sacramento RT will be at the remote lots for the first week or two to monitor the system when it begins on April 7, 2003. DGS further stated that if Sacramento RT was unresponsive to issue, DGS will look to change the service.

The final topic of discussion involved security. PECG pointed out that with the new service and the fact that members of the public will also be riders on the busses, that employees may be at

greater risk when waiting to be picked up or dropped off at the remote lots. DGS agreed to review their security arrangements at the remote lots and provide PECG with the details of these security arrangements for further discussion.

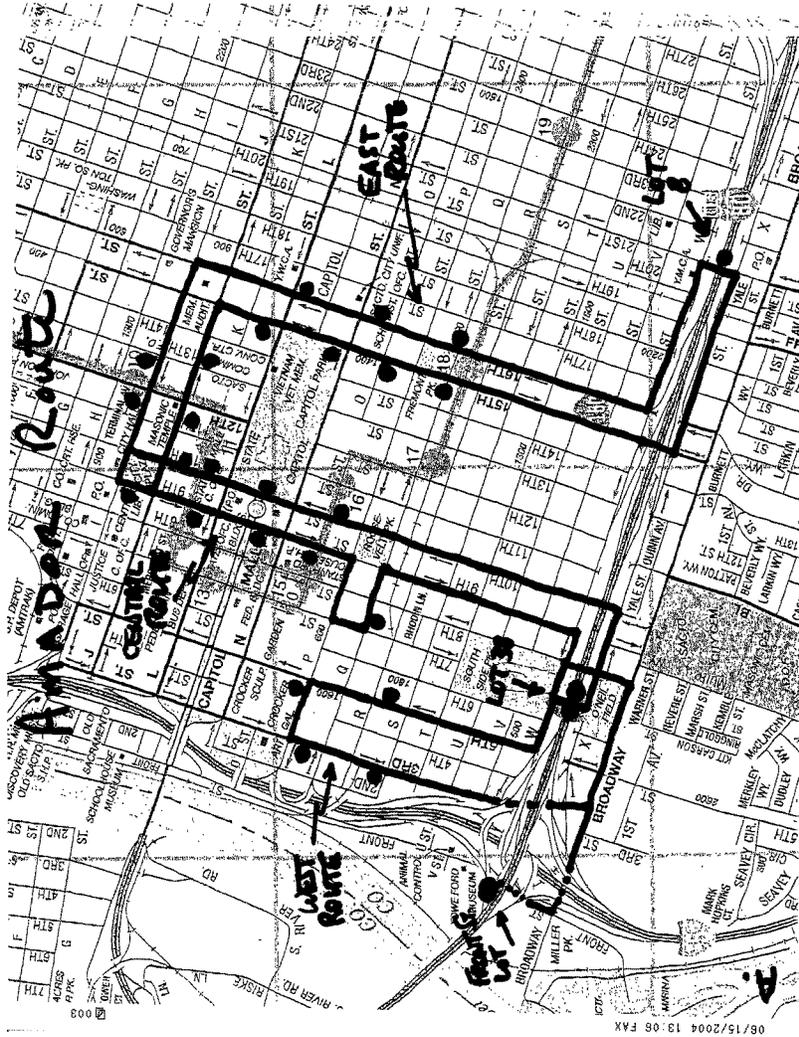
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P. 14

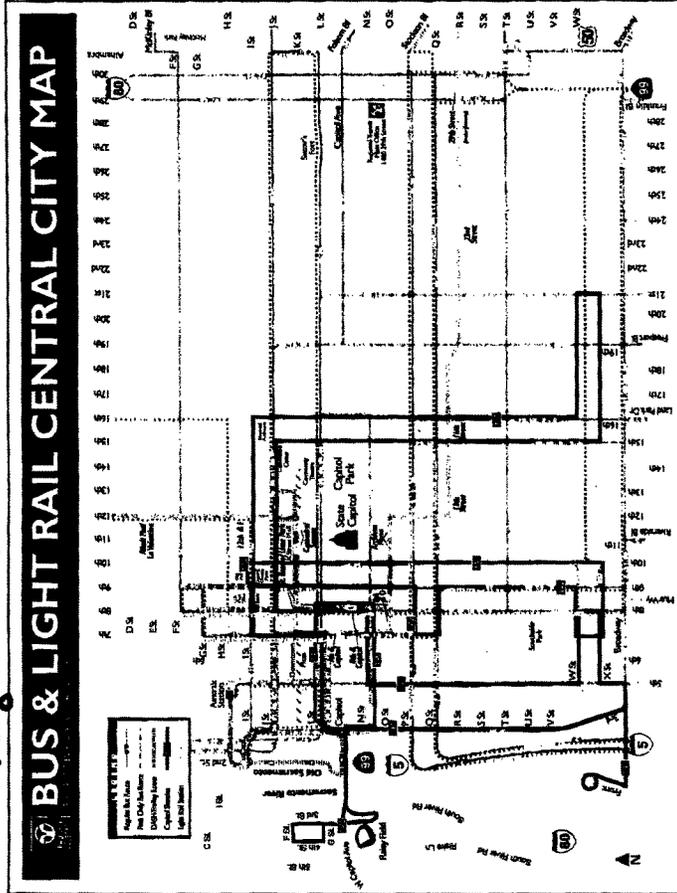
DGS Meet and Confer
Shuttle System
Page 3

In conclusion, PECG stated that PECG has been disadvantaged and concerned that DGS has implemented a change in terms and conditions of employment without giving proper notice prior to the implementation. PECG stated that DGS should have noticed PECG back when the concept of a change was being developed so that our concerns or issues could be considered then. As it stands now, a contract has already been executed regarding the new service and the routes determined including the intervals without input or discussion with PECG.

At this point, it was agreed that there are still some remaining issues that need to be followed up on. One is the security issues. DGS will review their security arrangements, specifically at the remote lots, and provide PECG with the level of security that should be present and, if necessary, discuss ways to improve security. Additionally, the issue of the current fees for the remote lots is still open to further discussions.



Regional Transit Route



004

05/15/2004 13:07 FAX

Mr. OSE. What I want to do is then go to RT and ask them for a copy of theirs. I am sorry to belabor the point. But, I just want to make sure that we get it right. You have buses running north-south. You have 8 or 10 stops along the way. You are being paid under contract with the Department of General Services somewhere around a million bucks a year.

Mr. ALLEN. About a million-two.

Mr. OSE. That service runs from the parking lots into the core. It makes stops along the way at various State buildings or other existing RT stops for which you have permission to use. Then, it runs back to the parking lots on a circular route?

Mr. ALLEN. That is right.

Mr. OSE. How is that different from what RT is doing today?

Mr. ALLEN. I frankly don't see any difference in what they are doing today. The only difference that I see is that the stops that they do—they have put some stops intermediate between actually the buildings and the parking lots, which I think is more for charade, because we have had people with their money hanging out to try to get on and they drive right by.

We don't think those are necessarily legitimate stops. They show as stops. But, basically, the function is the same. It goes to the parking lot. It goes to State buildings. It makes a circle, then it goes back to the parking lot.

Mr. OSE. Do they have more stops on their route than you had on yours?

Mr. ALLEN. Only the ones I just mentioned. There is one stop halfway between the parking lot and the buildings. But nobody could ever get on that.

Mr. OSE. Mr. Allen, I appreciate your—a review of the contract service that you provided.

Mr. Tanaka, DOT has not yet issued its implementing rules from the 1994 private sector participation requirements. Having been in business before I came here, it would seem to me that the certainty that would come with those rules would be a positive influence on what I might or might not be able to accomplish.

What is your view of that? Would you prefer having rules, or do you prefer—which is a specific word defined in law, or do you prefer guidance?

Mr. TANAKA. We prefer law over guidance. Moreover, I wanted to emphasize in these discussions, our law or our lifeline happens to be tourists, a significant component of which include foreigners, such as the Japanese. We are talking about using Federal funds as well as county taxes for which foreigners do not pay, and, yet, the county of Honolulu, once again, is about to use Federal funds to replace us.

Mr. OSE. Before you put that down, the money that was used to prepare that poster, where did the money come from that was used to prepare that poster?

Mr. TANAKA. Either from me or one of the lenders from which I borrow.

Mr. OSE. So this is your piece?

Mr. TANAKA. Yes.

Mr. OSE. Now, you also had a piece that had a statement from the mayor?

Mr. TANAKA. Yes.

Mr. OSE. Now, where did the money come from to prepare that piece?

Mr. TANAKA. This is either the Federal funds, but most likely local taxes.

Mr. OSE. Would you like to submit both pieces for the record?

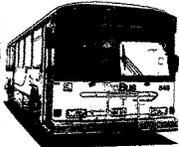
Mr. TANAKA. Yes.

[The information referred to follows, the remaining information may be found in subcommittee files:]

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The Bus

【'03年最新版】



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ホノルル市長を代表いたしまして、ハワイでのご滞在が素晴らしいものとなりますよう、心からお祈り申し上げます。

ホノルル市長
ジュレミー・ハリス



Jeremy Harris
JEREMY HARRIS, Mayor
City and County of Honolulu

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Mr. OSE. So that we will end up with possession of both?

Mr. TANAKA. Yes. But, to be accurate, the county of Honolulu created what is called Oahu Transit Service, described as, quote, instrumentality of the county of Honolulu to run public transportation. That entity, OTS, has a board of directors totally subjected to the mayor, and therefore I take it as an agent of the county of Honolulu, but that OTS using its logo, The Bus, contracted with a private Japanese printer for which the private Japanese printer pays royalties.

Mr. OSE. The question for us is whether or not the Federal funds are being used to frankly reduce private service providers from having an opportunity.

Mr. TANAKA. Definitely. Yes, that is our case.

Mr. OSE. You would prefer the certainty of a defined due process rule?

Mr. TANAKA. Yes.

Mr. OSE. Now, Mr. Thomas, from your perspective as an operator do you prefer the certainty of a rule or the flexibility of guidance?

Mr. THOMAS. Well, given the fact that we cannot go to court, you know there is no private right of action for us, there is no remedy at law here. We have to have an arm's-length, third party law statutory—

Mr. OSE. We have a statute.

Mr. THOMAS. But, it is not—and in my one testimony about the 10-year effort, it took 10 years and a ridiculously lengthy process on appeal to get the decision that was evident. We need clarification on that process. And we need it—it has to be a better law than it is today—

Mr. OSE. What you need is something that defines the rules?

Mr. THOMAS. In the law unfortunately.

Mr. OSE. Dr. Moore, your experience, rule or guidance?

Dr. MOORE. I might argue—a rule would bring—answer your setup, Mr. Chairman, of the certainty for the private sector, I think. Embedded in a rulemaking they could meet the goals that I have talked about.

Really to do better grantmaking, guidance would probably help them do better grantmaking. A rule would help them obey the law better. So, you know, assuming you made a reasonably good rule that would embed a lot of guidance in it, in terms of how they make their grants, you might wind up—that is a little bit of a mixed answer. There is more than one problem we are trying to solve, I guess.

I can make a guess of a rule is a better solution in one case and guidance is better in another. But, I think the question of justice here would be better served by a rule.

Mr. OSE. Dr. Utt.

Mr. UTT. I would like to go more toward performance based contracting, allocation grantmaking, where there are a series of goals that are supposed to be met, by any additional funds grants received by any community. That would make it difficult to do things that would otherwise seem to be a waste of money, in the sense that people who are already being severed by private sector money, public sector money comes in and simply displaces that, ultimately

no net new service to the community at an increase in Federal allocation.

It would seem to me that we would start with general goals of this money is for the purpose of enhancing the mobility of the particular community that gets it, the people of it. You can slice that differently. But, the question is—another way of looking at it, was everybody in the Honolulu transit market sufficiently served so that we could then begin to use additional money to displace service that was already being provided at no public expense?

I think what we need to do is simply have a criteria in which we try to use good judgment in terms of what things are there. One of it is to not try to make distinctions between public or private, but rather does this money enhance the mobility of the community? Will it be of general value to the broad transit users or potential users of the community rather than trying to regulate things that often have unintended consequences?

Mr. OSE. I am thinking about Dr. Utt's comment. I want to come back to that.

Dr. Sawicky.

Mr. SAWICKY. I won't beat to death the point I have been making, that there is some limited scope that ought to be observed here for Federal involvement in local decisions. I would say if the demand was to steer money to contractors rather than to public agencies, obviously law would work better than something less than law.

But, again, from the standpoint of looking at the way the Federal Government has tried to regulate or influence State and local government behavior over a long period, there is—there are limits of that even when there are laws. I think that needs to be kept in mind. As far as the justice of it, I don't see a mandate in any particular direction as just at all. In Washington we have an Air and Space Museum which caters to tourists. It is not air and space brought to you by McDonnell-Douglas. So the government, State, local or Federal has a perfect right to monopolize any type of business it chooses to from a legal standpoint as far as I know, and from an economic standpoint, there could be cases where that is beneficial to the taxpayers. Again, I think my biases on this are pretty obvious.

Mr. OSE. Almost libertarian in nature, which is fine by me. Alright.

Now we are going to go from the right to the left this time. Given that FTA makes grants, and different grantees receive grants, how does the Department of Transportation or FTA go about enforcing the terms and conditions of those grants with—we have seen one example where at best you can say the grant morphed from one purpose to another and, at least from my perspective, the FTA washed its hands of it.

But, how do you enforce the terms and conditions of the grant?
Dr. Sawicky.

Mr. SAWICKY. With great difficulty. I have done research on—specifically on Federal grants-in-aid in the most simple dimension, which is the effect of spending at the other end. The majority of grants and aid have no effect on spending at the other end. They replace local money.

It is very important—it is important to design a grant in a way that has that effect, if that is what you want. Typically in the political process, that is kept to a minimum. You have more apparent types of influence on State and local governments than actually pan out in the end. I think it is just a very difficult exercise.

I can't speak to the administrative law dimensions of it at all, because I have no background there. But, from my view of it, looking at the economics of it, it is just very hard—grants are a very blunt instrument. To try to get too far into how they are used takes a lot of effort and is difficult to do.

Mr. OSE. From the spending side, your point is the money is fungible?

Mr. SAWICKY. Right.

Mr. OSE. Dr. Utt, how do you enforce the spending?

Mr. UTT. By talking about terms and conditions, that is in fact very valuable. But it is—also turns it into a process driven approach to public policy rather than a goal oriented approach to public policy.

In the ideal world these things have a certain purpose, and we entrust local DOTs and local MTAs and so on and so on to sort of fulfill the will of whatever the Federal purpose is. I am not sure that in FTA grants we have a lot of conditions and a lot of processes and a lot of paperwork.

But, I am not sure that any of these grants require anything of value to happen at the end, other than that buses are bought—the appropriate contract is applied to all of the workers, and they sort of do what they claim they are going to do and buy the buses. But, whether there is any enhancement or advancement of mobility in the community is often something that nobody has any particular interest in, nor do we look at different modes.

I mean, we simply say this much is for transit, whether it is needed or not, or whether there is a better alternative someplace else, which goes back to the sort of clear goals of enhancing mobility for people and leaving as much discretion as possible to the people that we entrust to spend and allocate this money and, if goals aren't met, then have some recourse there.

Mr. OSE. What kind of recourse?

Mr. UTT. Maybe go back to a process oriented program, more Federal control. I don't know. I think an interesting case is the No Child Left Behind, which is one of the first Federal programs in which you give money, and you give people more discretion with that, but you expect in the end that the children would read better, do math better than they did before. If you don't achieve those goals, then there are presumably some penalties associated with it.

If you can do that with something as controversial and difficult as education, I think you can certainly do that with some things that are easily quantifiable like how many passengers did you pick up and how much of the community did you serve?

Mr. OSE. Now, Mr. Sawicky, let me just return to you. If a grant is made and the grantee does not comply with the terms and conditions of the grant and the grantor does not enforce the terms and conditions of the grant, what are you going to get?

Mr. SAWICKY. The grantee is going to do what they want with the money.

Mr. OSE. Are you going to get more of it or less of it?

Mr. SAWICKY. Well, chances are the grantee will do what they would have preferred to do in absence of the grant, but for relatively minor effect on their overall resources.

Mr. OSE. Dr. Utt, are you an economist also?

Mr. UTT. Yes.

Mr. OSE. If you have an incentive to do something and a disincentive to do another and you don't enforce the incentive, what do you get?

Mr. UTT. Well, you need some sort of enforcement at the end. But, I think what we are talking about is enforcement of goals so that people don't engage in counterproductive activities with the money that they get. That has to be—somehow those kind of performance standards have to somehow be included in whatever regulations, guidelines or criteria you adopt.

As I said, most Federal programs with the exception of parts of the Federal education program are devoid of any performance responsibilities. As long as you hire the people you are supposed to hire, as long as you do quarterly reports, as long as you don't steal the money, nobody really cares at the end of the day whether children get educated better or not or educated at all.

That is the way that many programs have operated. I think what we need to do is start using that as the model, and for things that are easily quantifiable subject to widely accepted engineering standards that we begin to say, hey, let's start doing it here.

In that case it would be very difficult for people to start willfully wasting money because there would be some obvious way to measure their failure to achieve goals. Then, at some point, various punishments would be devised or withdrawals of money or fines or something like that.

Mr. OSE. Dr. Moore, how do you enforce these things.

Dr. MOORE. Well, I would like in two places. The mechanism, the mechanism is to have as Dr. Utt pointed out some objectives and have some quantifiable information come back to say that those objectives are being met. The OMB has been working for the last couple of years trying to figure out how to measure the performance of Federal grantmaking programs. I don't know how much they have to discuss on the DOT grants, but I know, you know, everything from research grants to service grants, how do you measure whether you're getting what you're allegedly giving the grants for.

The other place to look would be the vast array of private foundations that are out there that give out grants to nonprofits like mine, and some of them just give money to people they like. Some of them are very performance driven, and, if you can't prove that you did everything you swore you were going to do with that money in terms of accomplishing things, you don't get any more money from them.

So there, you know the models are out there. This isn't rocket science. It's just fairly new to most Federal bureaucracies to try to do grants this way.

Mr. OSE. Mr. Thomas, on your private experience, if you contract to have something done, and the contracting party doesn't do it, and you don't enforce the provisions, what happens?

Mr. THOMAS. Ultimately, I would go to court.

Mr. OSE. Do you get more of the aberrant behavior or less?

Mr. THOMAS. Well, it depends on how it comes out; but if I win, I get less.

Mr. OSE. If nobody's enforcing it, you're guaranteed to get more?

Mr. THOMAS. That's right.

Mr. OSE. Would it be your conclusion that absent some means of enforcing terms and conditions, that you will not only have for instance this kind of behavior in Sacramento or Ohio or Hawaii, you'll have it in every single location?

Mr. THOMAS. Yes, it is.

Mr. OSE. Why?

Mr. THOMAS. Because it's too easy to get away with doing what you want to do.

Mr. OSE. OK. Mr. Tanaka, how do we enforce this stuff?

Mr. TANAKA. Yes, before answering directly, I wanted to answer the question that you formulated, which is the grantee is encumbered by conditions and terms, but the grantor doesn't enforce and then the grantor does not follow the law. The end result is Honolulu. In other words, I remember one of these economists mentioned how the ground transportation got federally funded. The word was welfare. From welfare, I deduce that essential services that are necessary in the ordinary life of residents, means welfare, and for welfare, Federal and local governments provide even if governments lost money. Moreover, welfare does not include tour operations.

The problem in Hawaii is, once again, using Federal funds and local taxes and now, at this very hour, the applicants, that is to say the county of Honolulu is applying for \$20 million, not for Oahu as an island, but in Waikiki, 2 miles, 2 squares miles. So that even today, the most-frequently run bus is called No. 22, which is called attractions and beaches.

So the tour 22 rotates from Waikiki hotels to Hanama Bay and Sealight path and returns. On the way from Waikiki, surfeit with tourists, the buses will stop where local residents are waiting, but they will be denied the service because these buses have no vacancy. Our problem is very, very acute. Once again, I want to remind, in about 36 hours, 38 hours, the FTA may grant \$20 million to provide frontal attack on private businesses. This goes to the very survival of tour operations. I fundamentally believe that none of these programs ever was intended to run tour operations.

Mr. OSE. You think it's mission creep?

Mr. TANAKA. Yes.

Mr. OSE. All right. Mr. Allen, how do we enforce the terms and conditions?

Mr. ALLEN. Well, I think we have to remember that these public operators are predators. They are not our friends. That is just because there has been no enforcement. I think you need to—if someone were found to be in violation, like regional transit is in this case, in our case, we believe they should be prohibited for a number of years from getting any future grants. They should have their purse strings cut because that's the only way you're going to wake these guys up. They're not going to—you know if there's no rules, they're not going to listen. They are going to continue or ask them for the money back. I don't know if that's practical, but you know

somehow you've got to get their attention on this. Don't take everything for face value. When they make an application, I mean they made an application back with this case in 1999, I believe it was.

Mr. OSE. My first year. Came right through my office.

Mr. ALLEN. OK. Anyway, in 1999—I'm not holding that against you now. In 1999 they made this application.

Mr. OSE. Call it what it is.

Mr. ALLEN. Nobody knew these buses were going to be used to put private enterprise out of that particular part of their business. If that were the case, I don't think you would have gone along with that. I know you wouldn't have gone along with that. So, I mean, they do things you know kind of below the periscope because they are, again they're predators. So I think it is very important that they are very specific on what their needs are. And before, in the case of buses for example, you need to know what they are going for, where are these buses going to be used for. If they're going to be used to go down, you know, down Watt Avenue in our particular town, that's great. That's a public service. If they're going to be going, you know competing with private industry, I think that's a big mistake.

Mr. OSE. I want to ask the operators in particular, when you look at the current code sections, and you read them, or your counsels read them, do public transit operators, if they are in a situation where there is a private operators, are they able to use capital assets acquired by virtue of these grants to compete with you? In other words, can they use Federal money to buy buses to compete with you where you're already providing a service, is it your understanding that they may or may not do that?

Mr. ALLEN. I would think, from the reading of the direct reading of regulations they would not be able to.

Mr. OSE. Mr. Tanaka.

Mr. TANAKA. The answer is we believe that we should not be wiped out by Federal funds and local taxes. Moreover, back in Honolulu, this phrase, maximum extent feasible is interpreted as we just have to try. But from our point of view, we just have to pretend. We just allege we have complied with these laws and then FTA says oh, that's a local decision, that must be correct. But, the Honolulu case was in violation of three fundamental rules. No. 1, did not exert itself to maximum extent feasible I believe to avoid negative financial impact upon existing providers of transportation. No. 2, Honolulu did not, to the maximum extent feasible include private sector participation in the planning.

In fact, if anything, we have been excluded. And No. 3, county of Honolulu did not exercise maximum extent feasible to make a genuine finding and then apply for certification that the services is essential, unless what is essential is tour operation. We are talking about not Hawaii, we are not talking about Oahu. We are talking about Waikiki, a dominant sector within Oahu, where virtually all tourists reside. That is the very geographic area and the only geographic area that the county of Honolulu is applying for \$20 million.

Mr. OSE. OK. Mr. Thomas.

Mr. THOMAS. In the SEAT example, the—it is very evident that the subsidized vehicles are out there competing with the private

sector. Actually, there is a nonprofit agency right in my operating area that provides contract service with subsidized vehicles that I am shut out of because of the artificial rate that they are able to provide. They get the buses for free. So, it's happening not only in Ohio, but it's happening everywhere. I can go into many examples of this. Is it clear in the statute that's a violation? It's crystal clear if you choose to read it. I mean, it's crystal clear that you are not supposed to use those against the private operators.

Mr. OSE. I want to touch on this appeal process too. Now, each of the three of you have had to actually go through appeals. Each of the three of you can probably give a much more refined analysis of how it works positively or negatively. We are just going to go through this. We are going to start with Mr. Tanaka. You filed an appeal for the decision of the local transit operator.

Mr. TANAKA. Well, I don't know what it meant by appeal. But we have expended hundreds of thousands of dollars to lawyers who have told me the following: No. 1, with respect to public transportation issues, we litigate on the basis of environmental statements, No. 1. No. 2, our "appeal" has been based on reading the law, interpreting them and then registering our complaints to FTA. The end result of which is FTA will say that's a local decision.

Mr. OSE. Was it your testimony that said that the local transit operator had dismissed all the other alternatives and accepted their own House driven one.

Mr. TANAKA. He never examined other alternatives. As I said earlier, a song in Hawaii that's sung most frequently is it wouldn't cost us anything because it's Federal funding. Then, apply for Federal funding and, instead of deploying the Federal funding for local residents who hunger for more transportation, deploy in Waikiki.

Mr. OSE. Mr. Thomas, your appeal process took, if I recall, more than—almost a year. What did it cost you?

Mr. THOMAS. Well, it cost—the city of Niles had to retain technical counsel, and it cost them \$38,000 to fight that. That was the 1-year appeal. But it was a 10-year problem. The county actually, the 9 years prior to the city getting involved, the county went through the same process and I funded that, and the cost of that was in the \$200,000 range. But, once the city of Niles became a grantee, an eligible grantee, they filed their own appeal, had their own counsel and it cost them \$38,000, and that was the 1-year process.

Mr. OSE. Are you aware of other private transportation providers who have gone through their appeal process?

Mr. THOMAS. I certainly am.

Mr. OSE. What has been, anecdotally—well, let me flip it around. If we sent you a letter asking you to cite chapter and verse, would you be able to share with us—

Mr. THOMAS. Well, one glaring example is the Flint, MI case.

Mr. OSE. If we sent you a letter, you'd be able to respond?

Mr. THOMAS. Yes.

Mr. OSE. Now, do you have anything you'd like to share with us anecdotally about Flint, MI?

Mr. THOMAS. Thank you. Flint, MI was a case that the Federal grantee wiped out the local private operator and started running service that eventually not only did the operator lose his business

and all of his money, but he had to appeal to the other operators in the country, who might be sympathetic to his cause, so it ended up costing literally hundreds of thousands of dollars for the group to get it to the point where we realized at that point in time that if there was no private right of action here, if there was no remedy through the courts, there were only two remedies left.

That was a Supreme Court decision and that was to fund a Supreme Court suit, or separately to do what we are doing today, take it to the Hill and get this rule specified. That's why I bring up the Flint decision. But, there are several other decisions like that across the country.

Mr. OSE. Mr. Allen, are you aware of other complaints protests or appeals in the California area?

Mr. ALLEN. Oh, yes. There is the one down in Palm Springs with Sun Line which was a major case that I know that the California Bus Association worked on quite extensively.

Mr. OSE. OK. So if we sent you a letter, much like we are contemplating sending Mr. Thomas, you'd be able to give us chapter and verse.

Mr. ALLEN. Yes.

Mr. OSE. All right. First of all, I want to thank you all for coming today. I appreciate the testimony. Mr. Allen, don't forget your dollar here.

Mr. ALLEN. I'll take it. I need it.

Mr. OSE. It's clear to me that we have a problem here with great respect to Dr. Sawicky, we make lots of decisions up here on this Hill about how to use Federal money, and when it's not used in the manner in which a grantee submits its application, I have every right, and I think my voters have every expectation that I will weigh in to make sure that it is complied with.

I am severely disappointed at the apparent attitude and the actions to date in terms of enforcing the terms and conditions for which capital assets acquired by use of Federal money are being utilized frankly in what appears to be a systematic effort to push private providers out. You might not have—you might have the best service, you might not. But, for the taxpayers in, for instance, Mr. Tierney's district to be asked to give money to people in Mr. Tiberi's district for the purpose of putting Mr. Thomas out of business is just simply—it simply needs to be reviewed. It needs to be reviewed thoroughly.

I thank all six of you for coming. Dr. Utt, I hope you make your meeting. I think we have you out of here in time. Again, thank you all for coming. This hearing's adjourned.

[Whereupon, at 2:10 p.m., the subcommittee was adjourned.]

[Additional information submitted for the hearing record follows:]

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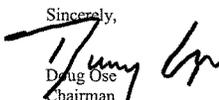
The Honorable Emil H. Frankel
 Assistant Secretary for Transportation
 Policy and Intermodalism
 Department of Transportation
 400-7th Street, S.W.
 Washington, DC 20590

Dear Mr. Frankel:

This letter follows up on the May 18, 2004 hearing of the Subcommittee on Energy Policy, Natural Resources and Regulatory Affairs, entitled "How Can We Maximize Private Sector Participation in Transportation?" As discussed during the hearing, please respond to the enclosed followup questions for the hearing record.

Please hand-deliver the agency's response to the Subcommittee majority staff in B-377 Rayburn House Office Building and the minority staff in B-350A Rayburn House Office Building not later than noon on June 21, 2004. If you have any questions about this request, please call Subcommittee Staff Director Barbara Kahlow on 226-3058. Thank you for your attention to this request.

Sincerely,



Doug Ose
 Chairman

Subcommittee on Energy Policy, Natural
 Resources and Regulatory Affairs

Enclosure

cc: The Honorable Tom Davis
 The Honorable John Tierney

- Q1. DOT's Private Sector Participation Initiatives. The 1966 law that established the Department of Transportation (DOT) identified six reasons to establish the Cabinet-level department. The second reason was to "facilitate the development and improvement of coordinated transportation service, to be provided by private enterprise to the maximum extent feasible" (Sec. 2(b)(1), P.L. 89-670). Since January 2001, what private sector participation projects, including public-private partnerships, has the Bush Administration's DOT initiated or facilitated? Please exclude any discussion of legislative initiatives.
- In highways?
 - In mass transit?
 - In rail?
- Q2. DOT's Evaluation of Private Sector Participation. DOT's rules assign responsibility to the Office of the Secretary for "Encouraging maximum private development of transportation services" (49 CFR §1.4(a)(4)). In addition, DOT's rules assign primary responsibility for "evaluation of private transportation sector operating and economic issues" to the Assistant Secretary for Transportation Policy (49 CFR §1.23(d)). Since your confirmation in March 2002, have you evaluated private transportation sector operating and economic issues?
- If so, what advantages and disadvantages did you find to private sector participation? And, what are the economic consequences?
 - If not, why not?
- Q3. DOT's Implementing Rules. In 1994, Congress passed amendments to the 1964 mass transit law requiring private sector participation to the maximum extent feasible (Sec. 5306(a) and 5307(c), P.L. 103-272). In your written discussion section entitled Transit and the Private Sector, you state, "FTA's ability to exert influence over the transit industry is limited to setting terms and conditions over the use of Federal grant funds" (p. 5).
- Does DOT intend to issue implementing rules for Sections 5306(a), Private Enterprise Participation, and 5307(c), Public Participation Requirements, as I requested in August 2003?
 - If so, what is the timetable for issuance of a proposed rule, followed by a final rule?
 - If not, why not? And, how can you ensure grantee compliance without specific DOT direction?
- Q4. DOT's Enforcement of Private Sector Participation Requirements. The government-wide grants management common rule provides various remedies for grantee noncompliance, including: (1) temporarily withholding cash payments pending correction of the deficiency, (2) disallowing all or part of the cost of the action not in compliance, (3) wholly or partly suspending or terminating the current award for the grantee's program, (4) withholding further awards for the program, and (5) taking other remedies that may be legally available (codified by DOT at 49 CFR §18.43(a)).

- a. Has DOT enforced Sections 5306(a) and 5307(c) under these provisions? For example, how many triennial audits included deficiency findings of noncompliance with the private sector participation requirements? And, of these, for how many did DOT take an enforcement action? Please provide a summary of each such deficiency finding and each enforcement action for the hearing record.
- b. In my opening statement for the Subcommittee's May 18, 2004 hearing, I briefly discussed my investigation of a public takeover by a local transit grantee - without prior compliance with the private sector participation requirements - of an over 25-year competitively awarded contract for mass transit services in Sacramento, California. As a result, both the public and the private sector provider (Amador Stage Lines) were adversely affected.
- In a July 2000 triennial audit, DOT found a "deficiency" by the grantee (abbreviated as SACRT, SRT, and RT) in its compliance with the private sector participation requirements and so notified the grantee in August 2000.
 - On October 1, 2000, DOT approved over \$2.4 million for this local transit grantee to purchase new buses.
 - In July 2001, the grantee adopted a new standard operating procedure (SOP), including promised notification in specific publications of general circulation, to ensure no future violation of the private sector participation requirements.
 - On March 6, 2003, the private sector provider filed an emergency protest.
 - On March 13th, I asked DOT to promptly review this protest.
 - On March 18th, a DOT regional office directed the grantee to stay its proposed takeover ("FTA further requests that SRT hold any action on the subject contract or service in abeyance pending the outcome of our review of SRT's response").
 - Nonetheless, on March 25th, the grantee acted without any consequence from DOT.
 - On August 5th, absent specific documentation of compliance with the July 2001 SOP and after the competitively-awarded contract was terminated, DOT issued a decision for the March 6, 2003 emergency protest, finding that the grantee met "minimum" compliance ("RT has met the minimum statutory requirements for public notice and comment in section 5307; and that while it appears that RT could have done more to explore the use of private sector providers in this situation, RT has met the minimum requirements of section 5306").
 - On August 6th, I asked DOT for evidence of specific compliance and requested DOT to initiate a rulemaking
 - In December, a DOT counsel justified DOT's not taking an enforcement action in this case by stating that compliance was a "purely operational" decision ("FTA no longer imposes prescriptive requirements for determining whether a grant applicant has made adequate efforts to integrate private enterprise in its transit operation" and "There is no

federal statutory compliance ... with respect to purely operational decisions”).

- i. Because of the deficiency finding, what followup actions did DOT take to ensure ongoing and full compliance with the July 2001 SOP?
- ii. What specific evidence underpinned DOT's August 5, 2003 judgment of “minimum” compliance?
- iii. Do you consider grantee compliance with Sections 5306(a) and 5307(c) to be operational decisions outside the purview of DOT's enforcement?

Q5. DOT Enforcement of Restrictions on Use of Equipment. The government-wide grants management common rule provides that a grantee “must not use equipment acquired with grant funds to provide services for a fee to compete unfairly with private companies that provide equivalent services” (codified by DOT at 49 CFR §18.32(c)(3)).

- a. Has DOT enforced this provision to ensure that local government mass transit providers do not unfairly compete with existing private sector mass transit providers? If so, please provide specific examples?
- b. If not, why not?
- c. Has DOT received any protests from existing private sector mass transit providers about such unfair competition? If so, how many? And, for the hearing record, please provide information about each such complaint and DOT's resolution.

Q6. Private Sector Complaints Filed with DOT. In your written discussion section entitled Transit and The Private Sector, you state, “Understandably, there will be occasions when private providers believe that the public sector is unfairly or illegally competing with them. During the past three fiscal years, FTA has received roughly a dozen charter bus complaints each year, a relatively small number” (p. 6). Besides the charter bus complaints, how many additional non-charter complaints, appeals, protests, etc. did DOT receive during the past three years and how were they resolved? Please provide a summary of each for the hearing record.

Q7. Youngstown Case. Panel II included testimony from the President of Community Bus Services in Youngstown, Ohio. He stated, “because of the actions of the Western Transit Authority and the regional office of the FTA, much needed [public transit] service was needlessly withheld from the people of Trumbull County for nearly a year” (p. 3). Is this an isolated case where the FTA General Counsel in DC had to overrule an erroneous decision by an FTA regional office that had interfered with private sector participation? If not, in how many other cases has the national office of DOT overruled a regional office?

- Q8. Amador/Sacramento Case. On March 10, 2004, Subcommittee staff met with you on private sector participation in transportation and provided you with my March 13, 2003 and August 6th letters to DOT about the Amador Stage Lines case.
- a. Will DOT now initiate an enforcement action against the Sacramento Regional Transit (SACRT) agency for its noncompliance with the statutorily-required private sector participation requirements?
 - b. What do you recommend to recover the excess Federal dollars expended?
 - c. Is Amador an isolated case or are there other examples of public takeovers with Federal funds of cost-effective private sector mass transit services?
- Q9. Honolulu Case. Has DOT initiated an enforcement action against the local government mass transit provider in Honolulu, Hawaii, which is unfairly competing - in violation of DOT's regulatory protections (codified by DOT at 49 CFR §18.32(c)(3)) - with E Noa Corporation's pre-existing mass transit service to tourists? If not, will it do so?
- Q10. DOT's Annual Performance Plan. DOT's Fiscal Year 2004 Performance Plan does not specifically mention private sector participation in transportation. Why not? And, does DOT intend to do so in its future performance plans?



**U.S. Department
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Office of the Secretary
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**Assistant Secretary Frankel's Responses
to Questions for the Record
Following the May 18, 2004 Hearing on
Private Sector Participation in Transportation
before the House Committee on Government Reform
Subcommittee on Energy Policy, Natural Resources,
and Regulatory Affairs**

Q1. DOT's Private Sector Participation Initiatives. The 1966 law that establishes the Department of Transportation (DOT) identified six reasons to establish the Cabinet-level department. The second reason was to "facilitate the development and improvement of coordinated transportation service, to be provided by private enterprise to the maximum extent feasible" (Sec. 2(b)(1), P.L. 89-670). Since January 2001, what private sector participation projects, including public-private partnerships, has the Bush Administration's DOT initiated or facilitated? Please exclude any discussion of legislative initiatives.

a. In highways?

Response: Generally, State, local, and tribal governments initiate highway construction projects, since the majority of our Nation's highways are owned and operated by the State, local, and tribal governments. The Federal Highway Administration (FHWA) provides financial and technical support to State, local, and tribal governments for the construction, improvement, and preservation of the highway system.

Over the past decade, the State departments of transportation (DOTs) have significantly increased their use of outsourcing for project delivery services. This outsourcing includes the use of private sector resources for design, construction, operations, and maintenance. The primary reasons for this outsourcing are the overall growth in State highway programs and declining staffing levels. The Transportation Equity Act for the 21st Century (TEA-21) authorized annual transportation funding at approximately \$30 billion a year from 1998-2002. This represented nearly a 50 percent funding increase for many State DOTs. At the same time, many State DOTs are being downsized. A 2001 survey of the States showed that 80 percent have either the same or declining staff levels. The challenge of administering a much larger program, with declining personnel resources, has necessitated the use of outsourcing for many contracting agencies.

Today, virtually all State DOTs are involved in the outsourcing of project delivery functions to some extent. Most importantly, the significant cost components associated with delivering highway projects, design and construction, are being outsourced extensively. The FHWA's Federal Lands Highway Division, September 2000 report, "Contracting Out – Benchmarking Study," documents the degree of outsourcing in the design and construction management areas (see the summary excerpt below).

Summary of Outsourcing for Design, Construction Administration from the FHWA Federal Lands Highway Division, September 2000, "Contracting Out – Benchmarking Study"

State	Outsourced Topic	Percent	Comment
AL	Design Construction Inspection	Most	
AK	Construction Contract Administration Design	10% 31%	
CO	Design & Construction Oversight	51%	
CT	Design Construction Inspection	72% 61%	
DE	Design Construction Inspection	60% 60%	
GA	Design	25%	
ID	Design Construction Management	67% 10%	
IA	Construction Inspection Roadway Design Bridge Design Planning (Location & Environmental)	25% 62% 41% 18%	Right-of-way 0%
KS	Design	70%	In-House Maintenance
KY	Professional Services Construction Services	80% 5%	Design, Environmental Studies, Planning, Underwater Bridge Inspections, Photogrammetry
ME	Highway Design Bridge Design Construction Engineering	30% 20% 13%	
MD	Plats, Surveys, Mapping Design	90%, 33%, 100% 60%	

MO	Highway Design Bridge Design	82% 16%	Construction Inspection 0%
NE	Design	35%	Construction Engineering 0%
NV	Design	99+%	
NH	Design	33%	
NJ	Design Construction	95% 30%	
NM	Design Services	40%	Pavement marking 100%, Signing 100%, Logo 100%, CM Services
ND	Construction Engineering Services Design	20% 50%	
OK	Design	70%	
	Construction Inspection Bridge Inspections	10% 75%	
OR			
PR	Engineering Services	90%	
TN	Design	50%	
	Construction Inspection	100%	
	ROW Appraisals	60%	
	Environmental Studies	60%	
TX	Preliminary Engineering Services	51% 2%	
	Construction Engineering		
UT	Design	45%	Construction Inspections
WA	Design & Construction Services	Most	EIS, Design & Construction Inspections
WV	Preliminary Engineering Services	75%	Environmental Documents, Plans, Construction & Bridge Inspections, Materials Inspection & ROW

Generally speaking, State DOTs rely on private sector resources for virtually 100 percent of their construction services, while the degree of outsourcing for design-related services ranges from 15 percent to 99 percent. State DOTs are also starting to utilize private firms for services that have traditionally been provided by State government, such as program management and maintenance. In addition, some State DOTs are implementing programs to outsource services such as planning, surveying, right-of-way purchasing, and even major program management.

The U.S. Department of Transportation (USDOT or "Department") is committed to providing a greater role for the private sector in transportation services and infrastructure investment to supplement Federal, State, and local spending for capital investment in our

nation's infrastructure. As one notable example, FHWA initiated Special Experimental Project-14 (SEP-14) in 1990 to identify, evaluate, and document innovative contracting practices that have the potential to reduce the life cycle cost of projects, while maintaining product quality. Because SEP-14 sought to utilize and evaluate innovative contracting methods, it provided an opportunity for the private sector to become more involved in transportation infrastructure investment. Under SEP-14, FHWA has approved over 300 design-build projects and other innovative projects to deliver transportation services. For instance, FHWA worked with the District of Columbia DOT to develop and implement a five-year asset management contract to maintain and improve the National Highway System in the District of Columbia. In addition, two projects involving private sector financing have been submitted formally as SEP-14 proposals and a preliminary request has been submitted.

An increasing number of surface transportation projects are being financed through some form of public credit assistance. One such credit assistance program – the Transportation Infrastructure Finance and Innovation Act (TIFIA) – has provided the type of flexible funding needed for some public-private partnerships. TIFIA objectives are well aligned with private sector involvement. TIFIA bridges the funding gap for secondary/subordinate capital for projects while encouraging private sector participation and reducing financial risk by enhancing senior financing. The SR 125 South Toll Road project is an example where TIFIA facilitated a significant public-private partnership. In May 2003, USDOT provided a \$140 million TIFIA loan to California Transportation Ventures (CTV), managing partner of San Diego Expressway Ltd. Partnership, a private, for-profit entity. The TIFIA loan, in conjunction with senior bank financing and private equity, will construct a 9.2-mile toll facility in San Diego County, CA. This, the first TIFIA project with private equity and bank debt, was approved by the California Department of Transportation in September 1990 as a privatization project under Assembly Bill 680. The SR 125 South Toll Road project represents a remarkable partnership between USDOT, senior bank financing, and Macquarie Infrastructure Group, the Australian investors in CTV.

FHWA is now working with State DOTs to facilitate three exciting examples of public-private partnerships. The first example is I-81 in Virginia where a private sector consortium will be reconstructing the entire length of I-81 in Virginia as a toll facility. This is being accomplished under the Interstate System Reconstruction and Rehabilitation Pilot Provisions of TEA-21, Section 1216(b). The second example is the King Coal Highway in West Virginia. FHWA has under final review the State DOT's application to enter into an agreement with a mining company to provide basic roadway grading for the highway. This approach will enable the project to be constructed at a substantial savings over the conventional low bid approach. This is being accomplished under the provisions of 23 CFR 635.104. The last example of innovative approaches to public-private partnerships involves one of the Trans-Texas Corridors. FHWA has been working closely with the Texas DOT to permit an alternative approach for engagement of the private sector in this major undertaking. Texas DOT will be evaluating proposals from the private sector. The evaluation will include cost and pricing, toll rates, and

projected usage of the facility. This is a significant departure from the normal low bid approach and is being advanced as a SEP-14 proposal.

Finally, as required by section 1307 of TEA-21, FHWA has promulgated regulations that govern, and explicitly allow for, design-build contracting methods in Federal-aid highway projects. 67 Fed.Reg. 75902-35 (Dec. 10, 2002). These rules will help facilitate the formation of public-private partnerships.

b. In mass transit?

Response: Like the Federal Highway Administration, the Federal Transit Administration (FTA) has encouraged public/private partnerships in developing transit infrastructure and local transit agencies' provision of services through a series of initiatives – innovative finance transactions, design-build programs, and joint development projects, in particular – that have led to hundreds of millions of dollars in private sector investment in mass transit. For example, on June 11, 2004, FTA approved a request by the Virginia Department of Rail and Public Transportation (VDRPT) to enter preliminary engineering for a proposed extension of the Washington, D.C. Metrorail system from West Falls Church through Tysons Corner to Wiehle Avenue in Reston, Virginia, and complete an environmental impact statement for a potential further extension of that system to Dulles International Airport in Loudon County. VDRPT intends to construct these extensions under a design-build contract with Dulles Transit Partners, a consortium of private engineering and transportation firms, in accordance with Virginia's Public Private Transportation Act ("PPTA"). (The Virginia State legislature enacted its PPTA in 1995 with the twin objectives of building transportation infrastructure more quickly and efficiently and encouraging private investment in that infrastructure.) Together, the two potential extensions would comprise approximately 23 miles of fixed rail public transit at a cost of \$4 billion. Under the contract being negotiated, the private consortium would build the extensions at a fixed price, including a built-in profit margin.

Additionally, FTA provides training and technical assistance to local transit agencies for fostering private sector participation in local programs of projects for mass transportation, as required both by the Federal transit statutes and the joint FTA/FHWA statewide and metropolitan planning regulations codified at 23 C.F.R. Part 450, and funds and assists research studies in the area of private sector participation, under the aegis of the Transit Cooperative Research Program (TCRP) of the Transportation Research Board (TRB), National Research Council. Five such studies have been produced since January 2001:

1. TCRP Project J-6, Task 30, "Supplemental Analysis of National Survey on Contracting Transit Service."
2. TCRP Project H-27, "Transit-Oriented Development and Joint Development in the United States: A Literature Review."
3. TCRP Project. J-3, "International Transit Studies Program: Design-Build Transit Infrastructure Projects in Asia and Australia."

4. TCRP Project B-16, "The Role of the Private-for-Hire Vehicle Industry in Public Transit."
5. TCRP Project B-21, "Effective Approaches to Meeting Rural Intercity Bus Transportation Needs."

c. In rail?

Response: One of the key aspects of our country's rail system is its foundation in the private sector. Freight railroads are privately owned, and they own, operate, and maintain their facilities, equipment and rights-of-way. Enactment of reform legislation, such as the Staggers Rail Act, has contributed significantly to the continued independence of the railroad industry and helped ensure a rate of return that supports the industry's economic viability.

FRA's primary mission is railroad safety, and the agency works in a close partnership with the railroads and their employees to achieve the safest possible operations. Important safety initiatives such as the Railroad Safety Advisory Committee (RSAC), which participates in the development of railroad safety regulations, and the Safety Assurance and Compliance Program (SACP), which seeks solutions to systemic safety issues, involve close coordination and cooperation between the private sector and the Federal Government.

FRA's principal financial assistance program that supports private sector initiatives is the Railroad Rehabilitation and Improvement Financing (RRIF) Program (created in the Transportation Equity Act for the 21st Century), through which FRA provides loans and loan guarantees to eligible private companies to acquire, improve or rehabilitate intermodal or rail freight or passenger equipment and facilities, refinance outstanding debt, and establish new intermodal or railroad facilities. FRA has financed a number of projects under the RRIF Program. Certain types of rail projects are also eligible for TIFIA assistance, as discussed in response to Question 1.a., above.

FRA has participated in several other recent initiatives in support of the private sector. For example, FRA participated in the Interstate-81 Truck Diversion Study, a groundbreaking study of the market potential for diverting truck traffic to rail, to reduce long-distance trucking traffic. This study identified costs of rail improvements, price differences needed to attract truck traffic, the potential for diversion, and related issues. This project may be used as a complement to, or a replacement for, highway improvements. The potential savings from reduced needs for highway capacity, improved air quality, enhanced safety, and reduced congestion could be significant. Highway expansion costs of several billion dollars could be avoided or delayed. This study is seen as a model for the potential for mitigation of the costs of highway expansion in long-distance corridors.

In another example, the Chicago CREATE Project, FRA, FHWA, FTA, and Office of the Secretary, together with State and city officials and the six largest privately owned North American railroads, have developed a plan to speed rail traffic through metropolitan Chicago, while reducing negative community impacts. The Chicago CREATE Project, which has already identified over \$100 million in contributions, will improve both freight and passenger traffic in the region, reduce grade crossing delays for motorists, and enhance rail capacity and efficiency.

Intercity rail passenger services, using existing railroad rights-of-way, provide an attractive, practical alternative to meeting present and future mobility demands in corridors connecting major urban areas up to 400 miles apart. A number of State DOTs are implementing or considering the implementation of such passenger rail systems on existing rights-of-way as a viable alternative to intercity highway and airport expansions or a supplement to investment in increased highway and airport capacity. FRA has been working with a number of State DOTs through the Next Generation High-Speed Rail Program (NGHSRP) by providing technical support and Federal cost sharing to develop these corridors. During the course of developing these systems, however, it has become obvious that further technology development and demonstration are needed to provide cost-effective, high-quality service. FRA has identified four program areas where development and demonstration activities have a high potential return on investment, when upgrade programs are implemented: (1) Advanced Train Control System for a cost-effective signaling system to enhance safety, (2) Non-Electric Locomotive to avoid the expensive infrastructure of railroad electrification and to allow the use of existing routes, (3) Grade Crossing Hazard Mitigation to provide the same security as grade separations, and (4) Enhanced Trace and Structures to permit shared heavy freight and passenger use with satisfactory ride quality.

FRA encourages the private sector to take advantage of technology, developed largely for defense applications, and to find new uses for this type of technology in the implementation of high-speed rail in these four program areas. The NGHSRP organizes and coordinates the partnerships among railroads, universities, State governments, the Federal Government, and suppliers of technologies. By linking the public agencies to work with the partners in the private sector, DOT and FRA are providing a real-world environment for the application of these technologies, preparing the way for a smooth introduction of improved rail services by States.

FRA has in place a Broad Agency Announcement (BAA) to solicit and support projects from the private sector and public agencies that will bring about advancements in improved rail technology. Eligible participants include universities, non-profit organizations, private individuals, corporations, businesses and commercial entities. FRA will make available up to \$6.5 million under the BAA during Federal fiscal years 2003 and 2004, through the BAA 2003-1 open period, for awards of proposal concept papers that are evaluated favorably and determined by FRA to be consistent with the objectives of this BAA. To ensure that the results of the projects supported under the BAA are utilized to maximize public benefit, FRA intends to make the results of the work and projects awarded under the BAA available to all interested parties within the

public domain. Concepts proposed by the applicants in the private sector and public agencies will only be accepted and awarded to the extent they help facilitate the deployment of improved rail service with the following benefits: (1) Enhance the revenue-generating capability of passenger rail operations by attracting greater ridership; (2) Bring about capital cost reductions and economy in producing equipment and facilities; (3) Reduce operating costs of improved intercity passenger rail service, by providing more efficient operations; (4) Improve the reliability of equipment and infrastructure components by reducing failures and false failure detections; (5) Improve safety by reducing human and technology failures; and (6) Enhance the social benefits and environmental aspects of such rail services. The principal purpose of these research, development and demonstration efforts is ultimate commercialization and utilization of the technologies by the private sector.

Finally, FRA partners with many states, universities, research centers, and private railroads on research and development projects that benefit freight and passenger rail. The Transportation Research Center (TRC), which is owned by FRA, is an example of this type of partnership. Over two dozen research and development projects are conducted at TRC that lead to products, testing systems, and knowledge that make railroads safer and more efficient. Many of the research and development projects conducted at TRC are jointly funded by FRA and the Association of American Railroads (AAR) on a 50-50 cost share basis. AAR also funds some research solely with its own resources. In addition to AAR's contributions at TRC, many railroad product and service suppliers contribute rails, ties, bridges, switches, locomotives, rail cars and testing systems.

Q2. DOT's Evaluation of Private Sector Participation. DOT regulations assign responsibility to the Office of the Secretary for "Encouraging maximum private development of transportation services" (49 CFR Sec. 1.4(a)(4)). In addition, these regulations assign primary responsibility for "evaluation of private transportation sector operating and economic issues" to the Assistant Secretary for Transportation Policy (49 CFR Sec. 1.23(d)). Since your confirmation in March 2002, have you evaluated private transportation sector operating and economic issues?

- a. If so, what advantages and disadvantages did you find to private sector participation? And, what are the economic consequences?
- b. If not, why not?

Response: Yes, I have evaluated such issues. In addition to the Federal Lands Highway Division study noted above, USDOT and FHWA have participated in several research studies conducted by TRB's National Cooperative Highway Research Program (NCHRP) that assess outsourcing and the use of private sector utilization. Through my participation in TIFIA Credit Council, I have an opportunity to review the manner in which Federal credit assistance can be used to promote private sector investment in transportation infrastructure projects.

1. Increasing private sector involvement in DOT programs is also evident in the Bush Administration's surface reauthorization proposal – the Safe, Accountable, Flexible, and Efficient Transportation Equity Act (SAFETEA). A key ingredient of this proposal is innovative financing -- in the context of increasing investment capital for transportation projects and better management of the system. USDOT is promoting a number of innovative financing initiatives in order to respond to the shortfall in conventional public funding, by supplementing traditional financing techniques and directing resources to transportation investments of critical importance. Specifically, this is accomplished by fostering public-private partnerships; drawing on the public's willingness to pay direct user charges for transportation benefits and services (e.g. tolling and value pricing); leveraging new sources of capital (e.g. private activity bonds); enabling additional transportation facilities to be developed more quickly and at less cost than would be possible under conventional public procurement, funding and ownership; and more flexible financing options (e.g. Transportation Infrastructure Finance and Innovation Act of 1998 (TIFIA) and State Infrastructure Banks (SIBs)).

As noted in response to question 1.b., above, a number of other studies have been performed for the transit industry.

It would be misleading, however, to limit arbitrarily the Department's evaluation of private sector participation in surface transportation, and its analysis of economic and operating issues, to a narrow time frame. In the instance of large highway and transit projects, for example, the fruits of private sector participation may not be visible for several years. A recent case in point is the development of the New Jersey Transit Corporation's Hudson-Bergen light rail system – the first public rail transit system in the United States constructed and deployed through a Design-Build-Operate-Maintain (“DBOM”) process.

[Sometimes called “super turnkey,” a DBOM approach is one whereby a public agency executes a single contract with a private firm for all stages of the project, which is structured to reward the cost-effectiveness of the contractor, with incentives given for superior performance. The hallmark of a DBOM is the partnering between the public agency and the private contractor; by cooperating with one another, they can build the project more quickly and cost effectively than through any other means. Specifically, within the framework of the mandatory contractual criteria, the contractor is allowed to make specific decisions regarding trade-offs between additional capital investment, operating costs, and ease of maintenance. This is unlike most conventional procurements, and even Design-Build contracts, where contractors sometimes look for “shortcuts” to reduce system development costs. In a DBOM, any “false economies” recognized by a contractor during the design/build phase would be the cause of additional costs to the same contractor during the operational phase. Moreover, the *single point of responsibility* in the DBOM method significantly lessens the burdens on a public agency to manage and coordinate a large construction project.]

In 1996, FTA executed a Full Funding Grant Agreement (FFGA) with the New Jersey Transit Corporation (NJT), pursuant to which FTA provided \$600 million in New Starts funds towards the total \$1 billion cost of construction of an initial ten-mile operating segment of a light rail line along the Hudson River in Hudson and Bergen counties. NJT then executed a DBOM contract with the Twenty First Century Rail Corporation, a consortium of American, Canadian, and Japanese companies headed by Raytheon Corporation, and FTA designated the Hudson-Bergen light rail as one of several design-build *demonstration* projects FTA would sponsor across the Nation. In 2000, FTA executed a second FFGA with NJT whereby FTA is providing \$500 million in New Starts funds towards the total \$1.2 billion cost of a six-mile extension to the Hudson-Bergen light rail, and NJT amended its DBOM contract with the Twenty First Century Rail Corporation to include the second operating segment. The initial operating segment was built and opened to revenue operations in April 2000, a mere 41 months after NJT had given the private consortium a Notice to Proceed. The second operating segment is scheduled to open in December 2005. Typically, it takes 60 to 84 months to build a comparable light rail system and open it to service through conventional public agency contracting methods. Thus, the 41-month experience of the first segment of the Hudson-Bergen light rail is remarkable by today's standards – USDOT and FTA are eager to see whether the second operable segment can be achieved with comparable timesavings.

Clearly, public-private partnerships can provide greater flexibility in the design, construction, and maintenance of transportation facilities through the use of innovative financing, design, and contracting techniques. As a result, a higher quality transportation project can be delivered faster and less expensively than through traditional contracting methods. Moreover, public-private partnerships can facilitate the construction of projects that have been sidelined due to fiscal constraints – the Virginia Department of Transportation's current exploration of High Occupancy/Toll lanes in northern Virginia is a current case in point.

However, while many, if not most, large transportation projects face financial, technical, environmental, and legal challenges, a public-private partnership in highway or transit development may face additional difficulties. The Federal-aid programs for financing and constructing transportation infrastructure are premised on the use of government funds and State or local ownership of the projects. As public-private partnerships are not the usual way of financing large highway and transit construction, many State and local agencies encounter legal, financial, political, and cultural resistance at "grass roots" levels to the formation of these partnerships. Currently, USDOT is preparing a report to Congress that will further examine the advantages and disadvantages of public-private partnerships. This report will soon be published, and we will provide you a copy upon publication.

Q3. DOT's Implementation Rules. In 1994, Congress passed amendments to the 1964 mass transit law requiring private sector participation to the maximum extent feasible (Sec. 5306(a) and 5307(c) of title 49, U.S.C., P.L. 103-272). In your written discussion section entitled Transit and the Private Sector, you state, "FTA's ability to exert influence over the transit industry is limited to setting terms and conditions over the use Federal grant funds" (p.5).

- a. Does DOT intend to issue implementing rules for Sections 5306(a), Private Enterprise Participation, and 5307(c), Public Participation Requirements, as I requested in August 2003?

Response: As a threshold matter, FTA notes that Public Law 103-272 was an act to codify the Federal transit law that had previously been set forth in an appendix to the United States Code, and made no substantive changes to the statutes governing FTA's programs and grant requirements.

FTA oversees grantees' compliance with the requirements of 49 U.S.C. Section 5306(a) through its administration of the requirements for public participation and outreach to private transportation providers codified in the joint FTA/FHWA planning regulations at 23 C.F.R. Part 450, and related planning reviews. 49 U.S.C. Section 5307(c) compels FTA to accept a grantee's annual certification of intent to comply with the statutory and regulatory requirements of the formula grant program, which certification is to be followed by a review of the grantee's compliance at least once every three years thereafter. FTA carries out the Section 5307(c) mandate through the agency's triennial review process. FTA's authority to set terms and conditions in grant agreements, coupled with the triennial review, is an appropriate process to ensure grantee compliance or to direct necessary corrective action in those instances where full compliance is not achieved. USDOT and FTA do not currently intend to conduct any rulemaking under these statutes.

- b. If so, what is the timetable for issuance of a proposed rule, followed by a final rule?

Response: Please see the previous response.

- c. If not, why not? And, how can you ensure grantee compliance without specific DOT direction?

Response: First, prior to 1987 FTA carried out the statutory mandates for private enterprise participation through a notice of policy published in the *Federal Register* and the agency's guidance circulars under the various grant programs. The notice of policy on "Private Enterprise Participation in the Urban Mass Transportation Program" was issued on October 22, 1984, at 49 *Fed.Reg.* 41310-12. The notice of policy and the circulars stated clearly that FTA would not condition grants on a precise level of private enterprise involvement. Rather, the policy statement and the circulars outlined certain elements and procedures relating to private enterprise participation that a grantee should

follow in its planning process (*e.g.*, opportunities for private operators to participate in planning and programming, opportunities for contracting out, and true comparisons of costs). Further, the policy statement and the circulars called upon both grantees and Metropolitan Planning Organizations (MPOs) to develop a local process for the resolution of disputes between grantees and private operators. Private operators could then appeal to FTA if they failed to resolve their disputes at the local level.

Thereafter, on two occasions, Congress acted to constrain explicitly FTA's administration of its policies promoting private enterprise participation in mass transportation. In 1987, the Congress admonished FTA that the agency had exceeded its discretion, by conditioning certain grant awards on private enterprise involvement in the projects that were the subject of the grants. Thereafter, through its enactment of the Intermodal Surface Transportation Efficiency Act of 1991 (ISTEA), Congress amended the Federal transit statutes to prohibit explicitly FTA from withholding certification of an MPO's planning procedures, based solely on an MPO's failure to encourage private enterprise participation in local planning for mass transportation services to the maximum extent feasible. In its report accompanying the enactment of ISTEA, the Conference Committee stated that local officials and transit agencies must be afforded wide flexibility in establishing the criteria they will use for determining the "feasibility" of private sector involvement in their local programs.

In 1994, in keeping with congressional intent that FTA carefully respect the prerogatives of local decisionmakers, regarding private operators' participation in local mass transit services, FTA rescinded the October 1984 notice of policy. FTA noted, at the time, that the policy had not been based on explicit statutory authority and had been adopted without previous notice and comment. FTA also found that the appeal process had not played a significant role in furthering the private enterprise provisions of the Federal transit statutes. Thus, FTA rescinded the appeal process.

The two pending bills for reauthorization of the Federal transit programs – H.R. 3550, the Transportation Act: A Legacy for Users, and S. 1072, the Safe, Accountable, Flexible, and Efficient Transportation Equity Act of 2004 – differ significantly in their provisions for private enterprise participation in the Federally-assisted transit programs. The Department and FTA will reexamine the agency's approach towards private enterprise participation once the next authorization is enacted.

Q4. DOT's Enforcement of Private Sector Participation Requirement. The government-wide grants management common rule provides various remedies for grantee noncompliance, including: (1) temporarily withholding cash payments pending correction of the deficiency, (2) disallowing all or part of the cost of the action not in compliance, (3) wholly or partly suspending or terminating the current award for the grantee's program, (4) withholding further awards for the program, and (5) taking other remedies that may be legally available (codified by DOT at 49 CFR Sec. 18.43 (a)).

- a. Has DOT enforced Sections 5306(a) and 5307(c) under these provisions? For example, how many triennial audits included deficiency findings of

noncompliance with the private sector participation requirements? And, of these, for how many did DOT take an enforcement action? Please provide a summary of each deficiency finding and each enforcement action for the hearing record.

Response: Through its oversight and triennial reviews during Federal Fiscal Years 2000 through 2003, FTA identified ten grantees that were deficient in their compliance with the requirements for private sector participation and outreach to private operators, as follows:

FY 2000:	Central Ohio Transit Authority (Columbus, Ohio) Sacramento Regional Transit District (Sacramento, California)
FY 2001:	City of Winston-Salem, North Carolina City of Pocatello, Idaho
FY 2002:	James City County (Virginia) Transit Company Lexington-Fayette (Kentucky) Urban County Government City of Waukesha Metro, Waukesha, Wisconsin Waukesha County, Wisconsin
FY 2003:	Saginaw Transit Authority Regional Services (Saginaw, Michigan) San Joaquin Regional Rail Commission (San Joaquin, California)

In all instances in which FTA identifies deficiencies during a triennial review, FTA makes recommendations for corrective action by the grantee and provides the grantee an appropriate amount of time to take action voluntarily to bring itself into compliance. Only in extreme cases in which there is a lack of good faith efforts by a grantee does FTA resort to formal enforcement measures. In all of the instances identified above, the grantees took actions voluntarily to bring themselves into compliance.

- b. In my opening statement for the Subcommittee's May 18, 2004 hearing, I briefly discussed my investigation of a public takeover by a local transit grantee -- without prior compliance with the private sector participation requirements -- of an over 25-year competitively awarded contract for mass transit services in Sacramento, California. As a result, both the public and the private sector provider (Amador Stage Lines) were adversely affected.
- In a July 2000 triennial audit, DOT found a "deficiency" by the grantee (abbreviated as SACRT, SRT, and RT) in its compliance with the private sector participation requirements and so notified the grantee in August 2000.
 - On October 1, 2000, DOT approved over \$2.4 million for this local transit grantee to purchase new buses.
 - In July 2001, the grantee adopted a new standard operating procedure (SOP), including promised notification in specific

publications of general circulation, to ensure no future violation of the private sector participation requirements.

- On March 6, 2003, the private sector provider filed an emergency protest.
- On March 13, I asked DOT to promptly review this protest.
- On March 18th, a DOT regional office directed the grantee to stay its proposed takeover (“FTA further requests that SRT hold any action on the subject contract or service in abeyance pending the outcome of our review of SRT’s response”).
- Nonetheless, on March 25th, the grantee acted without any further action being taken by DOT.
- On August 5th, absent specific documentation of compliance with the July 2001 SOP and after the competitively-awarded contract was terminated, DOT issued a decision for the March 6, 2003 emergency protest, finding that the grantee met “minimum” compliance (“RT has met the minimum statutory requirements for public notice and comment in section 5307; and that while it appears that RT could have done more to explore the use of private sector providers in this situation, RT has met the minimum requirements of section 5306”).
- On August 6th, I asked DOT for evidence of specific compliance and requested DOT to initiate a rulemaking.
- In December, a DOT counsel justified DOT’s not taking an enforcement action in this case by stating that compliance was a purely operational” decision (“FTA no longer imposes prescriptive requirements for determining whether a grant applicant has made adequate efforts to integrate private enterprise in its transit operation” and “There is no federal statutory compliance... with respect to purely operational decisions”).

- i. Because of the deficiency finding, what follow-up actions did DOT take to ensure ongoing and full compliance with the July 2001 SOP?

Response: FTA will continue to monitor Sacramento Regional Transit’s adherence to its standard operating procedure for public and private sector participation both informally and through the triennial review process. Additionally, FTA has addressed this subject with the grantee during FTA’s regular quarterly review meetings, and FTA has received assurances from the grantee’s chief executive officer that Sacramento Regional Transit is complying with its standard operating procedure, as part of its compliance with our metropolitan planning requirements, including the requirements for outreach to private operators and public participation in the development of the grantee’s program of projects.

- ii. What specific evidence underpinned DOT’s August 5, 2003 judgment of “minimum” compliance?

Response: FTA's finding that Sacramento Regional Transit "met the minimum statutory requirements for public notice and comment in section 5307" was based upon FTA's review of the entire administrative record compiled on the Amador protest, including the public hearing notices and transcripts of the hearings.

- iii. Do you consider grantee compliance with Sections 5306(a) and 5307(c) to be operational decisions outside the purview of DOT's enforcement?

Response: FTA oversees grantees' compliance with the requirements of 49 U.S.C. Section 5306(a) through its administration of the requirements for public participation and outreach to private transportation providers codified in the joint FTA/FHWA planning regulations at 23 C.F.R. Part 450, and related planning reviews. 49 U.S.C. Section 5307(c) requires that FTA accept a grantee's annual certification of intent to comply with the statutory and regulatory requirements of the formula grant program, to be followed by a review of the grantee's compliance at least once every three years thereafter. FTA carries out the Section 5307(c) mandate through the agency's triennial review process. FTA's authority to set terms and conditions in grant agreements coupled with the triennial review is sufficient to ensure grantee compliance or to direct necessary corrective action in instances where full compliance is not being achieved.

Q5. DOT Enforcement of Restrictions on Use of Equipment. The governmentwide grants management common rule provides that a grantee "must not use equipment acquired with grant funds to provide services for a fee to compete unfairly with private companies that provide equivalent services" (codified by DOT at 49 CFR Sec. 18.32(c)(3)).

- a. Has DOT enforced this provision to ensure that local government mass transit providers do not unfairly compete with existing private sector mass transit providers? If so, please provide specific examples?

Response: During the ten years that FTA's policy on "Private Enterprise Participation in the Urban Mass Transportation Program" was in effect (1984 to 1994), FTA received 12 complaints by private operators or associations. Eight of these complaints were dismissed since the grantees had not committed any procedural errors. In two instances the complaints were remanded to the grantees. In all but one instance the grantees' actions were upheld. The exception was as follows:

In 1988, Yellow Cab Co. alleged that JAUNT, Inc., a public recipient of FTA funds, had violated the private enterprise requirements when the grantee bid on a bus service in response to a solicitation for bids by the University of Virginia, to shuttle University employees between two branches of the University's hospitals. In ruling on the complaint, FTA held that: (1) In a bid solicitation, any rebidding for existing service is considered new or restructured service and is thus subject to the FTA private sector guidance; (2) when a recipient of FTA funds bids on service requested by third parties, the recipients must bid its fully allocated costs if the provision of that service will involve the use of FTA assistance; and (3) only the bids of public agencies and non-profit

agencies must reflect fully allocated costs. FTA held, specifically, that it does not intend that a private operator fully allocate its costs (or bid that figure in a procurement), but the price bid by the private operator is the figure against which the grantee's or non-profit agency's fully allocated cost is to be compared.

b. If not, why not?

Response: Please see the previous response.

c. Has DOT received any protests from existing private sector mass transit providers about such unfair competition? If so, how many? And, for the hearing record, please provide information about each such complaint and DOT's resolution.

Response: As of the date of this hearing, the recent complaint by the California Bus Association against Sacramento Regional Transit is the only private enterprise complaint that has been filed with FTA since 1994. We believe this is a strong indication that the concerns of private operators are satisfactorily addressed through the application of FTA's program requirements during the course of project planning, environmental reviews, and grant administration. Thus, the concerns of private operators rarely necessitate a formal complaint.

Q6. Private Sector Complaints Filed with DOT. In your written discussion section entitled Transit and The Private Sector, you state, "Understandably, there will be occasions when private providers believe that the public sector is unfairly or illegally competing with them. During the past three fiscal years, FTA has received roughly a dozen charter bus complaints each year, a relatively small number" (p. 6). Besides the charter bus complaints, how many additional non-charter complaints, appeals, protests, etc. did DOT receive during the past three years and how were they resolved? Please provide a summary of each for the hearing record.

Response: As of May 18, 2004 (the date of this hearing), in the last three years, FTA has received no private sector complaints other than charter bus complaints, including the California Bus Association complaint against Sacramento Regional Transit, which has been discussed at this hearing.

Q7. Youngstown Case. Panel II included testimony from the President of Community Bus Services in Youngstown, Ohio. He stated, "because of the actions of the Western Transit Authority and the regional office of the FTA, much needed [public transit] service was needlessly withheld from the people of Trumbull County for nearly a year" (p. 3). Is this an isolated case where the FTA General Counsel in DC had to overrule an erroneous decision by an FTA regional office that had interfered with private sector participation? If not, in how many other cases has the national office of DOT overruled a regional office?

Response: The circumstances of this case, as I understand them, are as follows: In accordance with 49 C.F.R. Part 18 and FTA's Third Party Contracting requirements, all

grantees are required to have, and to follow, bid protest procedures in all FTA-funded procurements. A bid protest against the City of Niles, Ohio, was lodged with FTA, alleging serious conflicts of interest. FTA determined that the City did not have bid protest procedures, as required. In order for the contract to be eligible for FTA funding, the City was required to establish formal procedures and to apply them to the protest. The City chose to do so, albeit over an extended period of time. Due to an extended leave of absence for the Regional Counsel in FTA's Chicago office (FTA Region 5), the Office of Chief Counsel in headquarters provided legal counsel to the deciding official, FTA's Regional Administrator.

Q8. Amador/Sacramento Case. On March 10, 2004, Subcommittee staff met with you on private sector participation in transportation and provided you with my March 13, 2003 and August 6th letters to DOT about the Amador Stage Lines case.

- a. Will DOT now initiate an enforcement action against the Sacramento Regional Transit (SACRT) agency for its noncompliance with the statutorily-required private sector participation requirements?

Response: As explained in detail in FTA's letter of October 2, 2003, the agency monitors compliance with statutory and regulatory private enterprise requirements, as part of its triennial review process, and FTA reviewed Sacramento Regional Transit's public participation process as part of our investigation of the complaint by the California Bus Association. FTA has determined through the triennial review process that Sacramento Regional Transit has fulfilled its public notice and participation requirements. Thus, there is no basis for a compliance action against Sacramento Regional Transit.

- b. What do you recommend to recover the excess Federal dollars expended?

Response: The California Bus Association asserted that taxpayers will pay an additional annual cost of approximately \$277,000 for the new service. The \$277,000 figure has not been substantiated, however. Even if FTA were to assume there is a difference in operating cost between Amador's previous charter service and the current transit service, such additional operating costs, if any, would be the responsibility of the locality. "Federal dollars" could not be involved.

- c. Is Amador an isolated case or are there other examples of public takeovers with Federal funds of cost-effective private sector mass transit services?

Response: As noted, Federal funds were not involved in California's decision not to renew the Amador contract. FTA has no record of any other examples of this type. Moreover, it is important to clarify that Amador was not providing mass transportation service; it was providing charter service. The State of California Department of General Services purchased the charter service from Amador to provide transportation limited to its State employees traveling to and from work at the Capitol from outlying parking lots.

The new service that Sacramento Regional Transit provides is mass transportation, since it is open to the general public and provides additional stops in the central business area.

Q9. Honolulu Case. Has DOT initiated an enforcement action against the local government mass transit provider in Honolulu, Hawaii, which is unfairly competing – in violation of DOT’s regulatory protections (codified by DOT at 49 CFR Sec. 18.32(c)(3)) – with E Noa Corporation’s pre-existing mass transit service to tourists? If not, will it do so?

Response: No, nor does FTA intend to do so. As a matter of law, the mass transportation service provided by the City and County of Honolulu FTA does not compete with the sightseeing service operated by the E Noa Corporation. In fact, a mass transportation service is inherently different from a sightseeing service, and it serves a different market. The relevant Federal statute, 49 U.S.C. Section 5302(a)(7), recognizes this fact by explicitly defining the term “mass transportation” (which is eligible for Federal financial assistance) to exclude school bus, charter, and sightseeing services, which are not eligible for Federal financial assistance. The statute provides in pertinent part:

“(7) Mass transportation.—The term ‘mass transportation’ means transportation by a conveyance that provides regular and continuing general or special transportation to the public, but does not include school bus, charter, or sightseeing transportation.”

From its own perspective, E Noa Corporation is concerned that the potential introduction of Bus Rapid Transit (BRT) – a type of bus service that offers quicker travel times, more frequent scheduling, and certain other types of conveniences for passengers more akin to a passenger rail service than a conventional bus service – will adversely affect its sightseeing business. Local planning is underway for a BRT service along a corridor within Honolulu in which E Noa operates sightseeing service for tourists, using trolleys in the vein of historic streetcars. This BRT service would serve residents of Oahu who commute daily to and from their places of work and business in downtown Honolulu at both morning and evening rush hours, at times of day, and at relatively high rates of speed, that are not conducive to leisurely tourist activity. Unlike a sightseeing service, the BRT would not entail tour guides, nor would it cater to tour groups. There might well be a limited number of tourists who would choose to patronize the BRT, at the same times and under the same conditions as the general public, but we have no basis for finding that there would be “unfair competition” between E Noa Corporation’s sightseeing operations and the BRT service the City and County of Honolulu intend to provide.

Q10. DOT’s Annual Performance Plan. DOT’s Fiscal Year 2004 Performance Plan does not specifically mention private sector participation in transportation. Why not? And, does DOT intend to do so in its future performance plan?

Response: The USDOT Strategic Plan indicates that the Department's strategies for all of its strategic goals include private sector participation and partnerships. Following is a brief description of selected initiatives of various modes to illustrate this private sector participation.

The Department's proposal for SAFETEA supports the use of public-private partnerships to finance transportation investments. Specifically, proposed Section 5506(a)(1) would allow the Secretary to explore public and private sector research advances; select and integrate technologies for transportation applications to ensure seamless and efficient multimodal transportation systems; analyze multimodal technology and system issues that require new solutions and technologies; establish a competitive process for selecting innovative and advanced technology development and applications projects to address multimodal transportation issues; develop, test, and evaluate new technologies; encourage market deployment and penetration of new technologies that support multimodal transportation; and use public-private partnership agreements to carry out these activities.

The Department has sponsored and will continue to support a series of nationwide workshops to demonstrate the benefits of public-private partnerships, with three workshops planned for the fall of 2004. One of the goals of this effort is to identify any obstacles to, and develop strategies to ensure, successful use of public-private partnerships.

Within the highway arena, FHWA already administers the Transportation Infrastructure Finance and Innovation Act (TIFIA), which leverages limited Federal resources and stimulates private capital investment in transportation infrastructure by providing direct loans, loan guarantees, and standby lines of credit to projects of regional or national significance. One of the key objectives of this program is to encourage new revenue streams and private participation. Accordingly, the TIFIA contribution is limited to 33 percent of the project cost, only applicable to projects that attain an investment-grade rating.

With specific reference to mass transit, several examples of FTA's efforts to encourage private sector participation exist in the area of the development and deployment of research and technology. FTA collaborates with the private sector to identify transportation needs, to develop its five-year research and technology strategic plan, and to implement and conduct research and technology development in areas such as fuel cells and lightweight composite structures. Specifically, FTA's International Mass Transit Program works closely with the private sector to engage in trade promotion activities that help U. S. companies enter foreign markets, promote and transfer American technology internationally, and develop expertise globally through such efforts as training of transit professionals from developing countries. FTA's Joint Partnership Program encourages private sector investment in transit through a 50-50 cost sharing arrangement with industry. Intellectual and Patent rights are retained by the developer, encouraging developers to deploy advanced technologies more quickly and with less risk. The program benefits large corporate entities, as well as Disadvantaged Business

Enterprise/Minority Business Enterprise firms. FTA also encourages the public sector to contract with the private sector in the delivery of mass transportation services. Furthermore, most capital projects are implemented by grantees, using third party contracts with the private sector.

DOT's Federal Railroad Administration (FRA) has been integrally involved in one of the most visible public-private partnership projects in railroading history, CREATE, a \$1.5 billion project designed to improve the flow of rail traffic, both freight and passenger, through the congested Chicago area. Chicago is the only city where the six largest privately owned railroads converge and exchange freight. The agreement is a groundbreaker in financial cooperation between the private railroad industry and public government entities and in operational cooperation and infrastructure assets sharing between competing railroads. The major railroads will contribute more than \$210 million to the plan and Metra will contribute \$20 million. The rest of the funds will have to come from public sources. FRA has been active in efforts to mitigate rail-related livability issues in the greater Chicago area.

DOT, a strong supporter of the CREATE Program, considers the Chicago Plan a significant landmark in private-public cooperation that could be used as a model for public-private cooperation elsewhere in the nation. The Chicago Plan marks an innovative cooperation between competing railroads to address public concerns through asset-sharing agreements. DOT has been working with Chicago and Illinois to identify funding sources for the Chicago Plan.

In addition to support for CREATE, FRA's research and development work is carried out not only through grants and contracts with public or private organizations, but also through cooperative agreements. This cooperative approach:

- Leverages outside resources, thus minimizing FRA funding requirements,
- Reduces the need for demonstration or deployment funding since partners in the development effort may often also be the end product users, and
- Affords FRA a better understanding of the safety needs of the railroad industry as new concepts and technologies are put into use in the railroad environment, and has assurance that a high level of concern for safety is included in their early consideration.

The Department's proposal to restructure Amtrak's intercity passenger rail service also embraces the concept of developing a partnership with State and local governments in a regional consortium to work with the Federal Government to maintain essential intercity passenger rail service, tailored to the needs of the region. After a reasonable transition period, the legislation would also allow for the creation of an effective private-public partnership to manage the capital assets of the Northeast Corridor.

Other operating administrations within DOT are similarly working with their partners in the private sector to form collaborative approaches to solving our Nation's transportation needs. As the private sector realizes how an efficient transportation system contributes to their economic growth, there is greater willingness to engage in private-public

partnerships. DOT's challenge is to identify and resolve any impediments or barriers that limit the use of this tool.

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July 9, 2004

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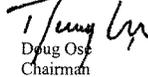
The Honorable Emil H. Frankel
 Assistant Secretary for Transportation
 Policy and Intermodalism
 Department of Transportation
 400-7th Street, S.W.
 Washington, DC 20590

Dear Mr. Frankel:

This letter follows up on your June 28, 2004 answers to my May 28th post-hearing questions after the May 18th hearing of the Subcommittee on Energy Policy, Natural Resources and Regulatory Affairs, entitled "How Can We Maximize Private Sector Participation in Transportation?"

Please hand-deliver the agency's response to the Subcommittee majority staff in B-377 Rayburn House Office Building and the minority staff in B-350A Rayburn House Office Building not later than noon on July 26, 2004. If you have any questions about this request, please call Subcommittee Staff Director Barbara Kahlow on 226-3058. Thank you for your attention to this request.

Sincerely,



Doug Ost
 Chairman
 Subcommittee on Energy Policy, Natural
 Resources and Regulatory Affairs

Enclosures

cc: The Honorable Tom Davis
 The Honorable John Tierney

- Q1. DOT's Enforcement of Private Sector Participation Requirements. Post-hearing Question 4 asked, "The government-wide grants management common rule provides various remedies for grantee noncompliance ... (codified by DOT at 49 CFR §18.43(a)). Has DOT enforced Sections 5306(a) and 5307(c) under these provisions?" Your answer stated, "Only in extreme cases in which there is a lack of good faith efforts by a grantee does FTA resort to formal enforcement measures. In all of the instances identified above [including the Sacramento Regional Transit District (SACRT)], the grantees took actions voluntarily to bring themselves into compliance."

In addition, with regard to SACRT, Question 4 asked, "Because of the deficiency finding, what follow-up actions did DOT take to ensure ongoing and full compliance with the July 2001 SOP?" Your answer stated, "FTA will continue to monitor Sacramento Regional Transit's adherence to its standard operating procedure for public and private sector participation both informally and through the triennial review process. Additionally, FTA has addressed this subject with the grantee during FTA's regular quarterly review meetings, and FTA has received assurances" and "FTA's finding that Sacramento Regional Transit 'met the minimum statutory requirements for public notice and comment in section 5307' was based upon FTA's review of the entire administrative record compiled on the Amador protest, including the public hearing notices and transcripts."

- a. What proof (i.e., beyond "assurances") does the Department of Transportation (DOT) have for specific compliance by SACRT with its July 2001 Standard Operating Procedure (SOP) to correct DOT's August 2000 triennial deficiency finding relating to compliance with the private sector participation requirements? Please provide all published notices in the specific publications of general circulation, as stipulated in the SOP. Please also provide the specific proof in the administrative record for the Amador protest.
 - b. What specifically is DOT doing to "monitor" SACRT's ongoing adherence beyond its quarterly review meetings?
- Q2. DOT Enforcement of Restrictions on Use of Equipment. Post-hearing Question 5 asked, "The government-wide grants management common rule provides that a grantee 'must not use equipment acquired with grant funds to provide services for a fee to compete unfairly with private companies that provide equivalent services' (codified by DOT at 49 CFR §18.32(c)(3)). Has DOT enforced this provision to ensure that local government mass transit providers do not unfairly compete with existing private sector mass transit providers?" Your answer merely referred to DOT policy from 1984 to 1994. What has the current Administration done to enforce this restriction?

- Q3. Public Takeovers. Post-hearing Question 8 asked, "Is Amador an isolated case or are there other examples of public takeovers with Federal funds of cost-effective private sector mass transit services?" Your answer stated, "FTA has no record of any other examples of this type?" What about the current proposal for a public takeover of the cost-effective Tourmobile service in Washington, DC? What is DOT's view of this proposal?
- Q4. Amador Case. In post-hearing followup, the California Bus Association (CBA) filed a May 25, 2004 California Freedom of Information Act (FOIA)-like request (under the California Public Records Act) of SACRT and found that, in fact, SACRT had not fully complied with its July 2001 SOP with regard to the proposed public takeover of Amador's mass transit contract. A copy of CBA's request and its July 6, 2004 findings are attached. What is your reaction to these documents? Does DOT have evidence of compliance that was not included in the documents provided by SACRT? If so, please provide it to the Subcommittee. If not, what do you recommend that Amador now pursue to remedy the harm it suffered?



California Bus Association

Promoting Professionalism, Safety & Integrity in the Motorcoach Industry

May 25, 2004 – Revised Request

Beverly A. Scott
 General Manager/CEO
 Sacramento Regional Transit
 PO Box 2110
 Sacramento, CA 95812-2110

Dear Ms. Scott,

This is a request under the California Public Records Act, California Government Code Sections 6250-6270.

I. The California Bus Association (CBA) is requesting:

- 1- Pre and post 7/1/2001 Standard Operating Procedure (SOP) notification in the "Sacramento Daily Recorder", "Nichi Bei Times", and "El Hispano" through 2002.
- 2- All other written documentation of Federally required "consultation with interested parties, including private transportation providers" (SOP) by Sacramento Regional Transit (SACRT) related to the development of the Program of Projects of 12 new buses earmarked for the State shuttle service to start in April 2003.
- 3- Public hearing notifications sent by SACRT to each local private bus operator and notifications to shuttle bus riders on shuttle buses through 2002.

II. CBA is also requesting information related to:

- A- Regional Transit ISSUE PAPER Agenda Item No. 15 Board Meeting Date 08/26/02, and;
- B- Regional Transit ISSUE PAPER Agenda Item No. 17 Board Meeting Date 1/27/03.

Both Agenda items of 8/26/2002 and 1/27/2003 state, in part, the following: "The State currently contracts with Amador Stage lines to provide this service. A few years ago, the State expressed interest in having RT provide this service with CNG buses. (Amador's fleet runs on diesel fuel). At that time, RT did not have the required number of peak buses available to operate this service. Earlier this year, RT contracted with Orion for the procurement of about 100 new CNG buses, of which 67 will be replacement buses and 33 will be allocated for new service. Twelve (12) buses have been earmarked to operate the State shuttle service. (The last sentence was included in the 08/26/02 Board item only.)

May 25, 2004
Beverly A. Scott – Sacramento Regional Transit
Page 2 of 2

Pursuant to above referenced Agenda Items dated 8/26/2002 and 1/27/2003, CBA is requesting the following written information:

- 1- Dates of meetings and telephone conversations with the Department of General Services (DGS) and SACRT starting with the first contact between both parties to the present date relating to the State Shuttle Service as stated above;
- 2- All written notes from meetings or telephone conversations and e-mails or written communications, summaries of communications, drafts of contract language or drafts of provisions in draft contracts or transcripts of meetings held with DGS, initial drafts of contracts between the two parties to review, written responses to different draft agreements from both parties, all draft maps and schedules, and additional appendixes and/or attachments to final contract agreement;
- 3- All internal SACRT departmental written or electronic memos reviewing, summarizing and critiquing the state of negotiations and proposed changes to draft contract agreements between SACRT and DGS from the start of negotiations to present;
- 4- All grant information submitted to funding entities including requests for additional information and responses from SACRT to these funding entity requests;
- 5- All written or electronic correspondences to and from all interested parties, written summaries or memos of telephone conversations generated by CBA's Emergency Protest of the State Shuttle service.

On behalf of the CBA we appreciate your continued assistance and please do not hesitate to contact my office if you have any questions regarding this request.

CBA looks forward to the opportunity to review these requested materials within the next two weeks.

All materials copied by CBA will be forwarded to the Chairman of the House Government Reform for Subcommittee on Energy Policy, Natural Resources, and Regulatory Affairs.

Sincerely,



Michael Waters, President
California Bus Association

CC: Congressman Doug Ose
Emil Frankel, Assistant Secretary for Transportation Policy



California Bus Association

Promoting Professionalism, Safety & Integrity in the Motorcoach Industry

July 6, 2004

Congressman Ose, Chair
Subcommittee on Energy Policy, Natural Resources and Regulatory Affairs
2157 Rayburn House Office Building
Washington, DC 20515-0001

RE: May 18th Hearing – Private Sector Participation
Testimony Follow-up

Dear Chairman Ose:

Subsequent to your May 18, 2004 hearing on private sector participation in transportation, the California Bus Association (CBA) sent a May 25, 2004 request for documents letter to Sacramento Regional Transit (SACRT) under the California Public Records Act (see enclosed). This request was based on the Department of Transportation's testimony during your hearing and certain questions you raised relating to Federal public notification and consultation requirements.

CBA recently received SACRT's response to CBA's detailed questions. They reveal:

Exactly when SACRT entered into private discussions with the State of California's Department of General Services (DGS) to succeed a privately contracted local bus shuttle service prior to SACRT's formal request for Federal capital funds to purchase the necessary expansion buses worth over \$2.4 million, and;

All notifications to private operators and shuttle bus riders starting from June 1999 to August 2003. This timeframe includes a 2000 FTA audit showing SACRT was not in statutory compliance throughout the grant-making process, as alleged in CBA's emergency complaint to FTA. This audit finding was disclosed in FTA's decision denying CBA's protest. This timeframe pre-dates and post-dates the FTA audit whereby SACRT was alleged to have cured this Federal deficiency.

CBA is also enclosing relevant correspondences that it has received so far, and it wishes to summarize what was discovered from its request for information:

1. SACRT staff and DGS staff were communicating as early as 2000 to enter into a sole source contract exclusive of private sector participation.

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831.633.1755 • 800.664.2877 • FAX 831.633.1934 • www.cbabus.com • e-mail: cbabus@redshift.com

Congressman Ose, Chair
July 6, 2004
Page 2 of 3

An e-mail communication on January 3, 2001 from DGS to SACRT requested a letter to confirm prior discussions about taking over shuttle operations. A February 2, 2001 letter from SACRT affirmed *"the discussions that you have had with regional Transit (RT) staff concerning the operation of the State's Downtown Peripheral Shuttle Bus service."* The letter then makes the following statement, which explains why private operators were barred from the Federal process prior to this letter and subsequent to this letter: *We are in the process of purchasing additional buses that will be delivered during the latter part of 2002. We anticipate having sufficient buses to provide this service by January 2003. The bus manufacturer had production problems; so, the start of service was delayed until April 2003.*

2. The files submitted to CBA from June 1999 through August 2003 contain no notification in the general circulation newspaper, the Daily Recorder, regarding the shuttle bus expansion project. This timeline of documents covers the period that FTA's audit found a private sector participation breach, consistent with CBA's complaint. The timeline covers the development of a new Standard Operating Procedure (SOP), specifying notification in the Daily Recorder, that was to be implemented July 1, 2001, and the timeline includes the public notification process throughout 2002.

Further, on November 6, 2001, SACRT, before the public hearing on the shuttle bus takeover, published a notice of annual capital budget for Fiscal Year 2002 in the Daily Recorder. This fact alone proves that SACRT published notifications in this general circulation newspaper, except when SACRT was in the process of taking control over a privately operated bus service.

Therefore, the barring of private sector participation through the notification process occurred prior to FTA's deficiency finding and continued throughout the decision-making process despite the adoption of a new SOP guaranteeing proper notification and FTA's August 5, 2003 decision that no Federal violations had occurred.

3. As CBA's complaint stated, there was no evidence in the files submitted to CBA that SACRT consulted, involved or encouraged in any way local private operators as required by Federal statutes and regulations presented at your hearing on May 18, 2004.
 4. There can be no doubt from review of documents that the core of discussions between SACRT and DGS leading up to a final agreement was a third party sole source agreement hinged on SACRT's preemptively taking over all state shuttle bus service.
-

Congressman Ose, Chair
July 6, 2004
Page 3 of 3

CBA would like to conclude by taking this opportunity to respond to certain issues raised at the May 18th hearing, including a response by DOT to one of your questions. For the record, during the complaint process, CBA presented evidence that the Amador's mass transit bus service was no different than "point to point" bus service offered by FTA recipients across the USA, i.e., it was not a charter service.

Finally, in the June 28, 2004 correspondence to your subcommittee, DOT cites a "Master Agreement" as a condition of funding as one of several ways DOT/FTA requires private sector participation.

This is correct, and CBA included the Master Agreement provisions in its complaint. This agreement is important in the Amador case because DOT/FTA has a vehicle to ensure 100 percent grantee compliance of private sector participation requirements. Section 13 of the Master Agreement requires full private sector participation in the development of plans requiring Federal grants and Section 11 gives DOT/FTA the right to require SACRT to pay back all or a portion of the \$2.4 million in funds for expansion buses if any of the requirements of the agreement are not implemented. DOT/FTA, therefore, has the right to resolve this issue with SACRT consistent with Federal statutes and regulations.

Sincerely,



Michael R. Waters
President
California Bus Association

Enclosures

Mark Lonergan - LETTER

From: "Bow, Tim" <Tim.Bow@dgs.ca.gov>
To: "Mark Lonergan" <mlonergan@sacrt.com>
Date: Wed, Jan 3, 2001 12:45 PM
Subject: LETTER

Mark

Happy New Year... Hope you had a good holiday.

Just checking on the status of that letter. Please let me know, I'm getting a lot of pressure from our executive office of it.

Thanks

Tim



Sacramento Regional
Transit District
A Public Transit Agency
and Equal Opportunity Employer

Mailing Address:
P.O. Box 2110
Sacramento, CA 95812-2110

Administrative Office:
1400 29th Street
Sacramento, CA 95816
(916) 321-2800
29th St. Light Rail Station
Bus: 50.35.50.67.48

Light Rail Offices:
2700 Academy Way
Sacramento, CA 95815
(916) 648-9400

Public Transit Since 1973

February 2, 2001

Timothy Bow, Chief
Department of General Services
Office of Fleet Administration
802 Q Street
Sacramento, CA 95814

Dear Mr. Bow:

This is to affirm the discussions that you have had with Regional Transit (RT) staff concerning the operation of the State's Downtown Peripheral Shuttle Bus service.

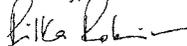
As a partner, RT is committed to working with the State to provide the existing peripheral parking lot shuttle service. We are also interested in opening discussions with the State and others over the development of a downtown circulator service that would better meet the changing travel patterns within Sacramento's downtown area.

At the present time, RT's bus fleet is committed to existing service. RT will not have sufficient equipment to operate the peripheral shuttle bus service in June when the State's current contract expires. We are in the process of purchasing additional buses that will be delivered during the latter part of 2002. We anticipate having sufficient buses to provide this service by January 2003.

We understand that this delay will not deter the State's commitment to continue with this partnership and we look forward to the opportunity of working with the State to provide the shuttle bus service. Our goal will be to have the needed agreements for this service approved by the RT Board of Directors no later than June 2002.

Although future planning and agreement discussions could transition to our Planning Department, Mr. Mark Longergan, Deputy Chief Operating Officer, will continue as your contact with RT. We appreciate the State's desire to work with RT, and look forward to an expanding partnership focused on improving public transportation in Sacramento.

Sincerely,


Pilka Robinson
General Manager

c: Mark Longergan, Deputy Chief Operating Officer, RT

Timothy Bow

-2-

February 2, 2001

bc: Mike Wiley, Director of Customer Services, RT
Doug Wentworth, Director of Planning & IS, RT
Azadeh Doherty, Planning Manager, RT



**U.S. Department of
Transportation**
Office of the Secretary
of Transportation

Assistant Secretary

400 Seventh St., S.W.
Washington, D.C. 20590

August 2, 2004

The Honorable Doug Ose
Chairman
Subcommittee on Energy Policy,
Natural Resources and Regulatory Affairs
Committee on Government Reform
U.S. House of Representatives
Washington, DC 20515

Dear Mr. Chairman:

Please find enclosed answers to your July 9, 2004, questions following the May 18, 2004 hearing before your subcommittee entitled "How Can We Maximize Private Participation in the Transportation Sector?".

I hope this information is helpful. Should you have further questions, please contact Jessie Torres in the Office of Governmental Affairs at (202) 622-4725.

Sincerely,

A handwritten signature in black ink, appearing to read "Emil H. Frankel".

Emil H. Frankel
Assistant Secretary for Transportation Policy

Enclosure

cc: The Honorable John Tierney

JULY 9, 2004 FOLLOW-UP QUESTIONS FOR THE RECORD
SUBCOMMITTEE ON ENERGY POLICY, NATURAL RESOURCES AND
REGULATORY AFFAIRS
COMMITTEE ON GOVERNMENT REFORM
U.S. HOUSE OF REPRESENTATIVES
MAY 18, 2004 HEARING

QUESTION 1. DOT's Enforcement of Private Sector Participation Requirements.

QUESTION 1.a.: What proof (i.e., beyond "assurances") does the Department of Transportation (DOT) have for specific compliance by SACRT with its July 2001 Standard Operating Procedure (SOP) to correct DOT's August 2000 triennial deficiency finding relating to compliance with the private sector participation requirements? Please provide all published notices in the specific publications of general circulation, as stipulated in the SOP. Please also provide the specific proof in the administrative record for the Amador protest.

RESPONSE: DOT has copies of approximately 28 notices SACRT had published in various newspapers. These cover the period from before the current SOP through January 2003 and prove compliance with the SOP with respect to public notice. These copies are attached. Also attached are the FTA decisions with respect to the charter complaint filed against SACRT.

QUESTION 1.b. What specifically is DOT doing to "monitor" SACRT's ongoing adherence beyond its quarterly review meetings?

RESPONSE: FTA's quarterly review meetings occur frequently enough to monitor SACRT (also abbreviated as SCRT, SRT and RT) compliance with its current SOP. Nonetheless, FTA is in communication with SACRT on a more frequent informal basis and FTA has inquired about compliance and other matters as part of these communications.

QUESTION 2. DOT Enforcement of Restrictions on Use of Equipment. Post-hearing Question 5 asked, "The government-wide grants management common rule provides that a grantee "must not use equipment acquired with grant funds to provide services for a fee to compete unfairly with private companies that provide equivalent services (codified by DOT at 49 CFR 18.32(c)(3)). Has DOT enforced this provision to ensure that local government mass transit providers do not unfairly compete with existing private sector mass transit providers? Your answer merely referred to DOT policy from 1984 to 1994. What has the current Administration done to enforce this restriction?"

RESPONSE: Yes, DOT has enforced this provision, although it is important to note that there remain very few private providers of public transportation beyond those that work for, or in a coordinated fashion with, public providers of public transportation. Regarding current efforts to enforce this restriction, this regulation was promulgated by the Office of Management and Budget (OMB). DOT has referred this Question to OMB's Office of Federal Financial Management (which has jurisdiction over this regulation) for a

response as to what the current Administration has done government-wide in terms of enforcement.

QUESTION 3. Public Takeovers. Post-hearing Question 8 asked, "Is Amador an isolated case or are there other examples of public takeovers with Federal funds of cost-effective private sector mass transit services?" Your answer stated, "FTA has no record of any other examples of this type?" What about the current proposal for a public takeover of the cost-effective Tourmobile service in Washington DC? What is DOT's view of this proposal?

RESPONSE: DOT notes that when Amador's charter service contract expired and SACRT expanded its fixed-route public transportation service, this was not an example "of public takeovers with Federal funds of cost-effective private sector mass transit services..." Please see prior response for further detail. With regard to the Tourmobile service, to the extent that DOT has been indirectly provided some of the information regarding changes to public transportation services in Washington, DC, it would appear that this is not an example of the type described in this question or in Question 8 of the last set of Questions for the Record. No party has brought these facts before DOT and sought information or opinion from DOT, so DOT has not yet the full compilation of facts and any possible allegations on which DOT could opine.

QUESTION 4: Amador Case. In post-hearing followup, the California Bus Association (CBA) filed a May 25, 2004 California Freedom of Information Act (FOIA)-like request (under the California Public Records Act) of SACRT and found that, in fact, SACRT had not fully complied with its July 2001 SOP with regard to the proposed public takeover of Amador's mass transit contract. A copy of CBA's request and its July 6, 2004 findings are attached. What is your reaction to these documents? Does DOT have evidence of compliance that was not included in the documents provided by SACRT? If so, please provide it to the Subcommittee. If not, what do you recommend that Amador now pursue to remedy the harm it suffered?

RESPONSE: DOT notes that the reference in the Question to "the proposed public takeover of Amador's mass transit contract" is incorrect as Amador provided charter service pursuant to a contract with California's Department of Government Services, not mass transit. DOT notes that the documents provided were limited to summaries of facts and resulting conclusions and not documents providing first hand evidence of conduct. DOT is unable to ascertain whether it has evidence of compliance that was not included in the documents provided to CBA by SACRT as DOT is not in receipt of these documents.

BEFORE THE FEDERAL TRANSIT ADMINISTRATION

California Bus Association,
On behalf of Amador Bus Lines,

Complainant

Charter Complaint #2003-01
49 U.S.C. Sections 5303, 5304,
5306, 5307, and 5323

v.

Sacramento Regional Transit District,

Respondent.

DECISION**INTRODUCTION**

On March 6, 2003, the California Bus Association (CBA) filed this complaint with the Federal Transit Administration (FTA) alleging that the Sacramento Regional Transit District (RT) has violated the conditions placed on the receipt of Federal assistance by the Federal transit laws (49 U.S.C. Chapter 53) by instituting the Downtown Circulator service, which among other things, replaced a service operated by a private operator, Amador Bus Lines, under contract to the State of California Department of General Services (DGS). After reviewing the allegations and the filings of the parties, FTA concludes as follows:

- that RT's Downtown Circulator is not impermissible charter service under FTA's charter service regulation at 49 CFR Part 604; that RT's Downtown Circulator is "mass transportation" within the meaning of the Federal transit laws; and, accordingly, that the requirements of 49 U.S.C. 5323(d)(1) regarding a public authority's provision of charter service in competition with a private operator of charter bus service do not apply to RT's service; and
- that since Amador's shuttle service contract with DGS was for charter service, not mass transportation service, the requirements of 49 U.S.C. 5323(a)(1) regarding a public authority's provision of mass transportation service in competition with a private operator of mass transportation service do not apply; that with regard to participation by the private sector, RT has met the minimum statutory requirements for public notice and comment in section 5307; and that while it appears that RT could have done more to explore the use of private sector providers in this situation, RT has met the minimum requirements of section 5306.

CBA's complaint

Under its contract with DGS, Amador provided shuttle service for the exclusive benefit of state employees parking in state lots. Sometime in 2002, the State contacted RT to determine whether RT could add new routes to its downtown service area that would meet the needs of its employees who travel between State parking lots and State office buildings. As a result of these discussions, RT developed the Downtown Circulator service (also referred to as the Capital Shuttle), which now consists of three fixed routes numbered 141, 142, and 143 within the Central City of Sacramento. As a part of this plan, RT also changed the frequency of its previously existing Route 140.

This expansion of RT's service is provided by FTA-funded CNG-powered buses. DGS and RT entered into an agreement whereby DGS compensates RT for the additional costs of increasing downtown service in consideration of RT's acceptance of the State employee ID card as proof of fare payment along these new routes. Passengers who do not possess a State ID card pay the applicable fare. DGS purchases Central City Passes for its employees at a discounted rate.

On January 28, 2003, DGS notified Amador that its contract would not be renewed when it expired on April 7, 2003. In its March complaint, CBA requested that FTA investigate, alleging that RT violated private sector participation requirements under 49 U.S.C. 5303 (j)(4), 5304(d), 5306(a) and 5307(c)(2) and (6) by failing to inform or involve the private sector in its plan to use Federal assistance to purchase expansion buses for the purpose of displacing the private operator.

CBA also cites 49 U.S.C. 5323(a)(1)(A) and (B) in arguing that RT's federally assisted expansion buses are being used, unlawfully, to prevent an existing private transportation operator from fairly competing to provide this service.

CBA also asserts RT's Downtown Circulator service violates FTA's charter regulations, arguing that the Downtown Circulator is not mass transportation service as defined by 49 U.S.C. 5302(a)(7) and 49 CFR Part 604. CBA cites the agreement with DGS for RT to provide shuttle service for DGS employees and the RT planning documents describing DGS' approaching RT to operate the service needed to replace the shuttle service performed by Amador.

RT's response

On March 20, 2003, RT responded to the complaint. RT related the history of its development of the Downtown Circulator service, including its public hearing in June 1999 for the program of projects that included expansion of its CNG fleet. At that time, RT did not have a specific plan for deploying these new buses, other than to meet growing demand for service in the region. In addition, RT anticipated that it might need more buses to accommodate the service changes that would be required with the opening of the South Sacramento and the Amtrak-Folsom Light Rail Corridor Light Rail Extension projects. Last year, RT developed the service plan to determine where to

deploy these new buses, which are only now being delivered to RT. RT argued it met the private enterprise consultation obligations regarding procurement of these buses with its published notices.

RT argued that it complies with the FTA public participation requirement by publishing a notice annually that solicits private enterprise participation in RT's development of its program of projects to be funded under FTA grants. RT also publishes a notice of its program of projects inviting comments before the program is adopted, combining this notice with its budget public hearing notice. It provided a copy of the notices for the last three years. The notice in June of 1999 included expansion of RT's bus fleet. In addition, RT published a public hearing notice in August 2002 for the new Downtown Circulator service. RT states that its public notice process was reviewed as part of FTA's 1997 and 2000 triennial reviews and that no deficiencies in the public participation process were noted.

RT states that although the new routes are designed to serve State employees, the Downtown Circulator service is part of RT's fixed route system of mass transportation and is not charter service as defined by the three factors cited by FTA: (1) open to the public and not closed door, (2) designed to benefit the public at large, and (3) under the control of the recipient.

In response to CBA's argument that section 5323 applies to this situation, RT argues that FTA funds are not used to operate the competing service and that the shuttle service operated by Amador was charter service, not "mass transportation service" protected by the statute.

Finally, RT argues that CBA's protest is untimely because Amador knew on January 27, 2003 that RT would be operating this service because it testified at RT's public hearing on that day but waited until March 8th to submit its protest.

RT believes the MPO for the Sacramento metropolitan urban area has properly provided the notice required by sections 5303(f)(4), 5304(d), and 5307(c)(2) and (6).

CBA's response to RT

On April 7, 2003, CBA responded to RT's March 20 and 25 responses, stating as follows:

1. RT is not in compliance with private sector participation requirements because it did not disclose that its 1999 program of projects bus expansion plan would include the Downtown Circulator service. Further, CBA states that RT's August 26, 2002 public hearings did not include the private sector in consultation regarding this new service.
2. RT is not excused from FTA private sector participation requirements because it does not receive FTA operating assistance.

3. Amador has standing to be protected under section 5323 because of its likelihood to be financially injured.
4. RT's Downtown Circulator is not mass transportation, but charter under contract to DGS. RT's 1992 Sacramento Downtown Shuttle Feasibility Study Draft Final Report does not support the new service in question. CBA maintains there is no demonstrable demand for the Downtown Shuttle other than to serve State employees. Further, all of RT's public notices in 2002 identify this service as "New Downtown State Shuttles." CBA argues that while the service agreement with DGS was converted into a purchase of Central City passes, the subsidy from DGS remains substantially the same.
5. CBA's complaint is not untimely because while RT approved the Downtown Shuttle Service on September 30, 2002, it was not until a February 14, 2003 meeting with DGS that CBA was told that DGS was not interested in pursuing discussions with CBA.

RT's second response

On June 3, 2003, RT provided additional information regarding its compliance with 49 U.S.C. sections 5306 and 5307 regarding private enterprise participation. RT responded that the requirement in section 5306(a) applies to plans and programs developed by the metropolitan planning organization, in this case the Sacramento Area Council of Governments. RT states it complied with section 5307(c) requirements for participation of interested parties, including private transportation providers.

DISCUSSION

1. Charter Service.

The threshold issue is whether the service provided by RT is impermissible charter service or permissible mass transportation. The definition of charter service found in FTA's regulations at 49 CFR 604.5(e) is as follows:

[T]ransportation using buses or vans, or facilities funded under the Acts of a group of persons who pursuant to a common purpose, under a single contract, at a fixed charge for the vehicle or service, have acquired the exclusive use of the vehicle or service to travel together under an itinerary either specified in advance or modified after having left the place of origin.

Charter service is usually a one-time provision of service over which the passenger, not the service provider, exercises control. 52 *Fed. Reg.* 11916, 11919 (April 13, 1987). In contrast, the Federal transit laws define "mass transportation" as transportation that provides regular and continuing general or special transportation to the public. 49 U.S.C. § 5302(a)(7). In the preamble to its charter service regulation, FTA has articulated other features that flow logically from this definition:

First, mass transportation is under the control of the recipient. Generally, the recipient is responsible for setting the route, rate, and schedule, and deciding what equipment is used. Second, the service is designed to benefit the public at large and not some special organization such as a private club. Third, mass transportation is open to the public and is not closed door. Thus, anyone who wishes to ride on the service must be permitted to do so.

52 Fed. Reg. 11920.

Given the many varying scenarios existing in the transportation industry, FTA has determined that a balancing test must be used to determine the nature of the service involved in any complaint filed with FTA. As the preamble to the charter regulation points out, there is no fixed definition of charter service, and the characteristics cited by FTA are illustrative, not exhaustive. *52 Fed. Reg. 11919-11920.*

Under the control of the recipient

The charter service criteria include bus transportation under a single contract at a fixed rate for the vehicle or service. FTA has previously determined that control of fares and schedules is the critical element in the balancing test FTA uses to distinguish charter service from mass transportation. *Seymour*, at 10. Compensation on the basis of hours of service is evidence of charter operations, whereas individual fares paid by each rider indicates the service is mass transportation. *Seymour*, at 9-10.

The RT and DGS arrangement, the Central City Pass Agreement, provides that RT retains control of routes and service. Such pass agreements are not features of charter service, instead constituting "group demand" service as contemplated by Q&A Number 27(e), "Charter Questions and Answers," *52 Fed. Reg. 42248, 42252* (November 3, 1987), which provides that group demand service is not charter service where groups such as employees of a common workplace contract with a transit authority for service and each individual pays his or her own fare, so long as the authority controls routes and service and the service is open door.

Designed to benefit the public at large

Service is designed to benefit the public at large when it serves the needs of the general public, instead of those of "some special organization such as a private club." *52 Fed. Reg. 11920* (April 13, 1987). *Annat Bus Lines v. City of Tallahassee, FL-TALTRAN/90-02-01* (April 28, 1992). In this regard, CBA has provided evidence that the Downtown Circulator service was structured to meet the needs of State employees to travel from parking lots to State office buildings, that it is a service designed to substitute for the State's contract service with

Amador, and that the service since instituted carries almost exclusively State employees. The record supports these assertions; however, none of these facts, taken into consideration with the information provided by RT, results in the conclusion that the Downtown Circulator service is anything but mass transportation.

While the service is designed to accommodate the State employees primarily, it is not restricted to their exclusive use, but is available to anyone wishing to board; moreover, this service has been integrated into RT's larger route structure, providing greater transportation connectivity in the downtown area for riders of the fixed route system. FTA finds that the service benefits the public at large.

(CBA argues that RT's 1992 study supports a different downtown service configuration, not the Downtown Circulator service. FTA is not willing to substitute its judgment for the grantee's in this regard.)

Open to the public and not closed door

In determining whether service is truly "open door," FTA looks both at the level of ridership by the general public, as opposed to a particular group, and at the intent of the recipient in offering the service. The intent to make service open door can be discerned in the attempts to make the service known and available to the public. FTA thus takes into account the efforts a recipient has made to market the service. Generally, this effort is best evidenced by publication of the service in the recipient's preprinted schedules. *Washington Motor Coach Association v. Municipality of Metropolitan Seattle*, WA-09/87-01 (March 21, 1988). FTA has also interpreted "open door" to mean a substantial public ridership and/or an attempt by the transit authority to widely market the service. *Blue Grass Tours and Charter v. Lexington Transit Authority*, URO-III-1987. The posting of bus stop signs and connections to other transportation routes are also considered indicators of "opportunity for public ridership." *Seymour Charter Bus Lines v. Knoxville Transit Authority*, TN-09/88-01 (November 29, 1989).

RT advises that the Downtown Circulator routes and schedules are set out in the pocket timetables that will be supplied in each bus assigned to these routes. In addition, the new routes are included in the June 2003 edition of SRT's Bus and Lightrail Timetable Book. FTA finds that SRT has demonstrated that the service is, in fact, open door.

Accordingly, FTA concludes that RT's Downtown Circulator is permissible mass transportation, not charter service, within the meaning of the Federal transit laws. We now turn to the question of RT's compliance with the private sector participation requirements in the Federal transit laws.

2. Private Sector Involvement.

Compliance with private sector participation requirements

The relevant provisions of 49 U.S.C. 5306 focus mainly on including the private sector in participating in local transit programs, ensuring that adequate compensation is provided a private provider when its transit facilities and equipment are acquired by a state or local government authority, and protecting private providers of transit from competition with federally assisted transit providers.

Federal transit law (49 U.S.C. 5303(f)(4)) and the joint FTA/Federal Highway Administration planning regulations direct special attention to the concerns of private transit providers in planning and project development, specifically requiring that private transit providers, as well as other interested parties, be afforded an adequate opportunity to be involved in the early stages of the plan development and update process (23 CFR 450.322).

FTA does not impose prescriptive requirements for determining whether a grant applicant has made adequate efforts to integrate private enterprise in its transit program, as explained in the FTA Notice "Private Enterprise Participation," dated April 26, 1994 (59 Fed. Reg. 21890 *et seq.* (1994)); FTA Circular 9030.1C, Page V-39, Para. 24. *Private Enterprise Concerns* (October 1, 1998).

FTA grantees must comply with rigorous planning and private enterprise requirements (49 U.S.C. 5303-5307) and the joint FTA/FHWA planning regulations. To determine the adequacy of a grant applicant's efforts to incorporate private enterprise in its transit program, FTA monitors compliance with statutory and regulatory private enterprise requirements as part of the triennial reviews. Indeed, FTA's Fiscal Year 2000 Triennial Review Report noted a deficiency in RT's public participation process. On July 3, 2001, RT took corrective action through adoption of a Standard Operating Procedure establishing a new coordination and consultation process in developing the annual federal program of projects. Upon review, FTA accepted this procedure and closed the finding.

Competition with the private sector

Federal law recognizes the special concerns of private transportation providers and affords them certain safeguards from competition with public agencies. Specifically, FTA is prohibited from providing Federal assistance to a governmental body that provides service in competition with, or supplementary to, mass transportation service provided by a private transportation company, unless FTA finds that the local transportation program developed in the planning process provides for participation of private mass transportation companies to the maximum extent feasible (49 U.S.C. 5323(a)(1)(B)).

RT argues that this restriction in section 5323(a)(1) applies only if FTA funds are used to operate the competition service and the program...

transportation" service and that neither condition is met here. RT states the Downtown Circulator service does not fall under this restriction. CBA has provided information to support its assertion that the Downtown Shuttle service was instituted to meet, at least in part, the needs of the State, as employer, to replace the service it had previously contracted for with Amador.

The term "mass transportation" is defined in section 5302(a)(7) as "transportation by a conveyance that provides regular and continuing general or special transportation to the public, but does not include school bus, charter or sightseeing transportation." Emphasis added. The term "charter" is defined in the FTA regulations at 49 CFR 604.5(e) as follows:

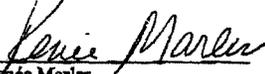
"Charter Service" means transportation using buses or vans, or facilities funded under the Act of a group of persons who pursuant to a common purpose, under a single contract, at a fixed charge (in accordance with the carrier's tariff) for the vehicle or service, have acquired the exclusive use of the vehicle or service to travel together under an itinerary either specified in advance or modified after having left the place of origin"

Under this standard, it is clear that the service Amador provided under contract with DGS was charter service; moreover, Amador is not a "private mass transportation company" to which the protections of section 5323 apply.

CONCLUSION

While it appears that RT could have done more to explore the use of private sector providers in this situation, RT has met the minimum requirements under the law. The service RT is providing, known as the Downtown Circulator, is not charter service, but permissible mass transportation service.

In accordance with 49 CFR 604.19, the losing party may appeal this decision within ten days of receipt of the decision. The appeal should be sent to Jennifer Dorn, Administrator, FTA, 400 Seventh Street, S.W., Room 9328, Washington, D.C. 20590.


Renee Marler
Regional Counsel

8/5/03
Date


Leslie Rogers
Regional Administrator

8/5/03
Date



US Department
of Transportation
**Federal Transit
Administration**

Administrator

400 Seventh St., S.W.
Washington, D.C. 20590

SEP 16 2003

Mr. Michael R. Waters
President
California Bus Association
11020 Commercial Parkway
Castroville, CA 95012

Re: Charter Service Docket Number 2003-01

Dear Mr. Waters:

In a charter service decision by Regional Administrator Leslie Rogers, dated August 5, 2003, the Federal Transit Administration (FTA) found that Sacramento Regional Transit District was providing mass transportation, not charter service, and, therefore, was not in violation of FTA's charter service regulation, 49 CFR Part 604. California Bus Association (CBA) appealed the decision to me on August 15, 2003.

The charter service regulation provides that the Administrator will only take action on an appeal if the appellant presents evidence that there are new matters of fact or points of law that were not available or not known during the investigation of the complaint, 49 CFR Section 604.19.

In accordance with the charter service regulation, I am not taking any action on the appeal since CBA presented no new matters of fact or points of law that were not available or not known during the investigation of the complaint, as required by Section 604.19 of the regulation; accordingly, the Regional Administrator's decision is administratively final.

Sincerely,

A handwritten signature in black ink, appearing to read "Jennifer L. Dorn".

Jennifer L. Dorn

cc: Beverly A. Scott, General Manager, CEO, Sacramento Regional Transit District
Mark W. Gilbert, Chief Legal Counsel, Sacramento Regional Transit District
William R. Allen, President, Amador Stage Lines
Leslie Rogers, Regional Administrator, TRO-IX
The Honorable Doug Ose, U. S. House of Representatives

Index of Exhibits

Publication	Date of Publication	Exhibit Number
<u>Fiscal Year 1998 - 1999</u>		
El Hispano	April 29, 1998	1
Nichi Bei Times	April 25, 1998	2
The Daily Recorder	April 27, 1998	3
Sacramento Observer	May 07, 1998	4
<u>Fiscal Year 1999 – 2000</u>		
El Hispano	June 2, 1999	5
Nichi Bei Times	June 4, 1999	6
Sacramento Observer	June 3, 1999	7
The Sacramento Gazette	June 4, 1999	8
<u>Fiscal Year 2000 – 2001</u>		
El Hispano	April 5, 2000	9
El Hispano	January 24, 2001	10
Nichi Bei Times	April 1, 2000	11
The Daily Recorder	January 25, 2001	12
Sacramento Observer	RT Letter Requesting Publication – March 29, 2000	13
The Sacramento Gazette	March 31, 2000	14
The Sacramento Gazette	January 26, 2001	15
<u>Fiscal Year 2001 – 2002</u>		
El Hispano	April 11, 2001	16
Nichi Bei Times	April 7, 2001	17
The Daily Recorder	April 9, 2001	18
The Sacramento Gazette	April 13, 2001	19
<u>Fiscal Year 2002 – 2003</u>		
El Hispano	November 7, 2001	20
Nichi Bei Times	November 7, 2001	21
The Daily Recorder	November 6, 2001	22
The Daily Recorder	May 16, 2002	23
The Sacramento Gazette	November 9, 2001	24
The Sacramento Gazette	May 17, 2002	25

PROOF OF PUBLICATION

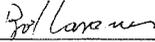
(2015.5 CCP)

STATE OF CALIFORNIA
S.S.
County of Sacramento

Notice of Public Hearing: FY 1998-1999 Budget

I am the principal clerk of the EL HISPANO, a newspaper of general circulation published in the City of Sacramento, County of Sacramento, and which newspaper has been judged a newspaper of general circulation by the Supreme Court of the County of Sacramento, State of California, on the date of October 8, 1968, Case Number 205413. The notice which the annexed is a printed copy, has been published in each regular and entire issue of said newspaper and not in supplement thereof on the following dates, to wit: 4/29,

I certify (or declare) under penalty of perjury that the foregoing is true and correct.



Signature

Dated: 4/29/98

El Hispano

P.O. BOX 2856
SACRAMENTO, CA 95812

Mail Proof of Publication to:

Sacramento Regional Transit District

P.O. Box 2110

Sacramento, CA 95812-2110

NOTICE OF PUBLIC HEARING

**SACRAMENTO REGIONAL TRANSIT DISTRICT
FY 1998-1999 FY BUDGET**

NOTICE IS HEREBY GIVEN that the Sacramento Regional Transit District (RT) will hold a public hearing on RT's FY 1998-1999 budget in the amount of \$70.2 million. The public hearing will be held in the RT Auditorium located at 1400 29th St, Sacramento, CA on May 27, 1998 at 6:30 pm.

Following is a listing of RT's proposed Program of Projects and FTA Allocations:

Sec. 5307:

City of Roseville Passthrough \$200K; Yolo Co Transp Authority Passthrough \$400K; Paratransit Vehicle Acq. \$674K; Paratransit Maint & Repair Equip \$97K; Radio Svs Backbone Pymt \$216K; COPS Pymt \$2,080K; Tire Lease \$264K; Soundwalls for Starterline \$400K; PC Hdwr & Sftwr \$131K; Shop Supt Equip Rail \$164K; Non-Revenue Veh \$324K; Purchase & Install Fare Vend Mach & Validators \$480K; Automated Trip Ping Sftwr \$240K; Metro Facil Space Impvmts \$320K; Vandalism Window Protectors \$190K; 29th St Bus Trnsfr & Turnaround \$160K; Bus Fleet Video Sec Cameras \$512K; Purchase Regulator \$160K; Doc Imaging \$40K; AS400 Upgrade \$72K; Lease P/Q Pkng Lot \$600K; City of Roseville Operating \$6K; Yolo Co Transp Authority Operating \$5K.

Section 5309:

Assoc Capital Maint Rail \$400K; Light Rail Station Rehab \$400K; Wayside Signaling Reconfig \$400K.

A copy of the budget and the Program of Projects are available for public inspection at the above address. Persons wishing to make written comments on the budget should contact John Broussard, (916) 321-2958 & comments on the FTA Program should contact Jim Jeary, 321-2968 or Box 2110, Sacramento 95812-2110.

At the May 27 hearing, RT will provide an opportunity for interested persons or agencies to make their views known with respect to the social, economic & environmental aspects of these projects.

RT intends to adopt its budget & the FTA Program of Projects at the RT Board meeting scheduled for June 22, 1998, at 6:30 pm at the above address. If the proposed FTA Program of Projects is revised or amended, a subsequent notice will be published.

DECLARATION of PUBLICATION

(CCP 2015.5)

Sacramento Regional Transit District
Post Office Box 2110
Sacramento, California 95812-2110

STATE of CALIFORNIA)
) : ss
COUNTY of SACRAMENTO)

I am a citizen of the United States and a resident of the County aforesaid; I am over the age of eighteen years, and not a party to or interested in the above-entitled matter. I am the Sacramento representative of the *Nichi Bei Times*, a Japanese American newspaper published in the city of San Francisco and circulated in the Sacramento and surrounding areas; that the notice of which the annexed is a printed copy, has been published in each issue thereof and not in any supplement thereof on the following dates to wit:

I certify (or declare) under penalty that the foregoing is true and correct and that this declaration was executed at Sacramento, California, on this date:

April 25, 1998
(Date)

[Signature]
(Signature)

SACRAMENTO REGIONAL TRANSIT DISTRICT
NOTICE OF PUBLIC HEARING
FOR 1998-1999 FTA BUDGET

NOTICE IS HEREBY GIVEN that the Sacramento Regional Transit District (RTD) will hold a public hearing on the FY 1998-1999 budget in the amount of \$70.2 million. The public hearing will be held in the RT Auditorium located at 1400 29th St, Sacramento, CA on May 27, 1998 at 6:30 pm.

Following is a listing of RT's proposed Program of Projects and FTA Allocations: Sac. \$307; City of Roseville Passthrough \$200K; Yolo Co. Transp. Authority Pass-through \$400K; Paratransit Vehicle Acq. \$674K; Paratransit Maint. & Repair Equip. \$97K; Radio Sys Backbone Fyml \$216K; COPS Fyml \$200K; Tire Base \$384K; Soundwalls for Startline \$300K; PC Howe & Silver \$121K; Shop Sign Equip Rail \$184K; Non-Revenue Equip \$224K; Purchase & Install Fair Vending Mach. & Validators \$480K; Automated Tick Png Show \$240K; Metro Facil Space Impvmnts \$200K; Vending/Info W/Show Displays \$190K; 29th St Bus, Transit, & Turnaround \$160K; Bus Fleets Video, Sec Cameras \$512K; Purchase Replaces \$160K; Doc Imaging \$40K; \$400K Upgrade \$72K; Lease P/C Pking tot. \$800K; City of Roseville Operating \$8K; Yolo Co. Transp. Authority Operating \$4K; Section 5009 Assoc Capital Maint Rail \$400K; Light Rail Station Refurb \$400K; Wayside Signaling Reconfig \$400K.

A copy of the budget and the Program of Projects are available for public inspection at the above address. Persons wishing to make written comments on the budget should contact John Grossard, (916) 321-2958 & comments on the FTA Program should contact Jim Jansy, 321-2968 or Box 2110, Sacramento 95812-2110.

At the May 27 hearing, RT will provide an opportunity for interested persons or agencies to make their views known with respect to the social, economic & environmental aspects of these projects.

RT intends to adjust the budget & the FTA Program of Projects at the RT Board meeting scheduled for June 22, 1998, at 6:30 pm at the above address. If the proposed FTA Program of Projects is revised or amended, a subsequent notice will be published.

THE DAILY RECORDER
...Since 1911...

1115 H Street P.O. Box 1048
Sacramento, California 95812
Telephone (916) 444-2355
Fax (916) 444-0636

This is for filing stamp

EXHIBIT 3

SHERYL PATTERSON
SAC. REG. TRANSIT (SAC)
P.O. Box 2110
Sacramento CA 95812 2110

DJC8920759

Proof of Publication
(2015.5 C.C.P.)

State of California)
County of Sacramento) ss

FY 1998-1999 FY BUDGET

I am a citizen of the United States; I am over the age of eighteen years, and not a party to or interested in the above entitled matter. I am the principal clerk of the printer and publisher of THE DAILY RECORDER, a daily newspaper published in the English language in the City of Sacramento, County of Sacramento, and adjudged a newspaper of general circulation as defined by the laws of the State of California by the Superior Court of the County of Sacramento, State of California, under date of May 2, 1913, Case No. 16,180. That the notice, of which the annexed is a printed copy, has been published in each regular and entire issue of said newspaper and not in any supplement thereof on the following dates, to-wit:

04/27/98

EXECUTED ON : 04/27/98
AT LOS ANGELES, CALIFORNIA

I certify (or declare) under penalty of perjury that the foregoing is true and correct.

C. Brantia
Signature

SACRAMENTO REGIONAL
TRANSIT DISTRICT
NOTICE OF PUBLIC
HEARING
FY 1998-1999 FY
BUDGET

NOTICE IS HEREBY GIVEN that the Sacramento Regional Transit District (RT) will hold a public hearing on RT's FY 1998-1999 budget in the amount of \$70.2 million. The public hearing will be held in the RT Auditorium located at 1400 28th St., Sacramento, CA on May 27, 1998 at 6:30 pm.

Following is a listing of RT's proposed Program of Projects and FTA Allocations: Sec. 5307: City of Roseville Passthrough \$200K; Yolo Co Transp Authority Passthrough \$400K; Paratransit Vehicle Acc. \$574K; Paratransit Main & Repair Equip \$87K; Radio Sys Backbone Maint \$210K; COPS Pymt \$2,080K; Tire Lease \$264K; Soundwalls for Starteline \$400K; PC Hdw & Svr. \$131K; Shop Supt Equip Rail \$164K; Non-Revenue Veh \$324K; Purchase & Install Fare Vend Mach & Validators \$488K; Automated Trip Ping Strvr \$240K; Metro Facil/Space Imprints \$320K; Vandalism Window Protectors \$180K; 28th St Bus Transf & Turnaround \$180K; Bus Fleet Video Sec Camera \$612K; Purchase Regulator \$180K; Doc Imaging \$40K; AS400 Upgrade \$72K; Lease P/B Ping Lot \$600K; City of Roseville Operating \$6K; Yolo Co Transp Authority Operating \$6K; Section 5309: Assoc Capital Maint Rail \$400K; Light Rail Station Rehab \$400K; Wayside Signaling Reconfig \$400K.

A copy of the budget and the Program of Projects are available for public inspection at the above address. Persons wishing to make written comments on the budget should contact John Brasseur, (916) 321-2956 & comments on the FTA Program should contact Jim Jarry, 321-2968 or Box 2110, Sacramento 95812-2110.

At the May 27 hearing, RT will provide an opportunity for interested persons or agencies to make their views known with respect to the social, economic & environmental aspects of these projects.

RT intends to adopt its budget & the FTA Program of Projects at the RT Board meeting scheduled for June 22, 1998, at 6:30 pm at the above address. If the proposed FTA Program of Projects is revised or amended, a subsequent notice will be published.

04/27 SAC-DJC8920769

PROOF OF PUBLICATION

STATE OF CALIFORNIA,
County of Sacramento

I am a citizen of the United States and a resident of the country aforesaid, I am over the age of 18 years and not a party to or interested in the above entitled matter. I am the principal clerk of the printer of THE OBSERVER NEWSPAPERS, a newspaper of general circulation printed in the city of Sacramento, County of Sacramento, and which newspaper has been adjudged a newspaper of general circulation by the Superior Court of the County of Sacramento, State of California, under date of January 17, 1972; Case Number 217,540, that the notice, of which the annexed is a printed copy (set in the type not smaller than non-parcil) has been published in each regular and not in any supplement thereof on the following dates, to wit:

4/23

All in the year 1998
I clarify (or declare) under penalty of perjury that the foregoing is true and correct:

Signature *Deanna Silva*
Date 5-7-98

THE OBSERVER NEWSPAPERS
P.O. BOX 209
SACRAMENTO, CALIFORNIA-95801

This space if for the County clerk's filing

Proof of Publication of:

THE OBSERVER NEWSPAPERS

Legal Notice

Paste

**SACRAMENTO REGIONAL
TRANSIT DISTRICT
NOTICE OF PUBLIC HEARING
FY 1998-1999 FY BUDGET**

NOTICE IS HEREBY GIVEN that the Sacramento Regional District (RT) will hold a public hearing on RT's FY 1998-1999 budget in the amount of \$70.2 million. The public hearing will be held in the RT Auditorium located at 1400 29th St., Sacramento, CA on May 27, 1998 at 6:30 pm.

Following is a listing of RT's proposed Program of Projects and FIA Allocations: Sec. 6307: City of Roseville Passthrough \$200K; Yolo Co. Transp. Authority Passthrough \$400K; Paratransit Vehicle Acq. \$674K; Paratransit Maint. & Repair Equip. \$97K; Radio Sys. Backbone Maint. & COPE Maint. \$2,080K; Tire Lease \$264K; Soundwalls for State Route \$400K; PC Hire & Stw. \$111K; Shop Suppl Equip. \$164K; Non-Rent Revenue Maint. \$324K; Shop Suppl Equip. Fire Vend. Mech. & Valves \$480K; Automated Trip Pkg. \$240K; Metro Fac. Space Improv. \$500K; Vandalism Window Protectors \$190K; 29th St. Bus Inlet & Turnaround \$160K; Bus Sign. Maint. Sec. Camera \$512K; Purchase Regulator \$160K; Doc. Imaging \$40K; AS400 Upgrade \$72K; Lease P/O Pkg. \$600K; City of Roseville Operating \$6K; Yolo Co. Transp. Authority Operating \$5K; Section 5309; Assoc. Capital Maint. \$400K; Light Rail Station Rehab. \$400K; Wayside Signaling/Recording \$400K.

A copy of the budget and the Program of Projects are available for public inspection at the above address. Persons wishing to make written comments on the budget should contact John Rousseau (916) 321-2968 & comments on the FIA Program should contact Jim Jeany, 321-2968 or Box 2110, Sacramento 95812-2110.

At the May 27 hearing, RT will provide an opportunity for interested persons or agencies to make their views known with respect to the social, economic & environmental aspects of these projects.

RT intends to adopt its budget & the FIA Program of Projects of the RT Board meeting scheduled for June 22, 1998, at 6:00 pm at the above address. If the proposed FIA Program of Projects is revised or amended, a subsequent notice will be published.

s.o. 36707
423

PROOF OF PUBLICATION

PROOF OF PUBLICATION

(2015.5 CCP)

STATE OF CALIFORNIA
S.S.
County of Sacramento

I am the principal clerk of the EL HISPANO, a newspaper of general circulation published in the City of Sacramento, County of Sacramento, and which newspaper has been adjudged a newspaper of general circulation by the Superior Court of the County of Sacramento, State of California, under date of October 8, 1968, Case Number 205413. The notice, of which the annexed is a printed copy, has been published in each regular and entire issue of said newspaper and not in any supplement thereof on the following dates, to wit: 6-2-99

I certify (or declare) under penalty of perjury that the foregoing is true and correct.

Lilly Lorenas

Signature

Dated: 6-2-99

El Hispano

P.O. BOX 2856
SACRAMENTO, CA 95812

Mail Proof of Publication to:

Sacramento Regional Transit District

P.O. Box 2110

Sacramento, CA 95812-2110



Public Notice:1999-2000 Capital Budget

Notice of Public Hearing

Sacramento Regional Transit District Notice of Public Hearing FY 1999-2000 Capital Budget

NOTICE IS HEREBY GIVEN that the Sacramento Regional Transit District (RT) will hold a public hearing on RT's proposed FY 2000 Capital Budget in the amount of \$42.2 million, and on the proposed FY 2000 Operating Budget in the amount of \$77.4 million. The public hearing will be held in the RT Auditorium located at 1400 291 Street, Sacramento, CA on June 14, 1999 at 6:30pm.

The following is a list of RT's proposed capital Program of Projects and FTA Allocations: Section 5307 - City of Roseville Capital Funds \$264,000 - Yolo County Capital Funds \$570,000 - ADA Improvements at LRT Stations \$640,000 - ADA Facilities Improvements \$60,000 - Paratransit Vehicles \$1,449,900 - Paratransit Maintenance/Repair Equipment \$160,000 - Radio System Backbone Payment \$252,000 - Certificates of Participation Payment \$2,870,000 - Tire Lease \$276,000 - Wayside Preventive Maintenance \$1,760,000 - LRV Preventive Maintenance \$3,743,600 - Bus Preventive Maintenance \$308,300 - Associated Capital Maintenance \$560,000 - LRV Fleet improvements \$160,000 - Surveillance Equipment \$60,000 - Information Systems Improvements \$170,000 - Reroof Bus Maintenance Building \$120,000 - On Time Performance Monitoring \$200,000 - Shop Equipment \$80,000 - Non-Revenue Vehicle Replacement \$248,000 - LRV Operator Seat Replacements \$69,600 - Facilities Management and Improvements \$20,000 - Section 5309 - First Series LRV Mid-Life Overhaul \$1,400,000 - CNG Bus Fleet Replacement and Expansion \$2,490,000 - LRV Fleet Improvements \$857,700.

A copy of the proposed operating and capital budgets and the Program of Projects are available for public inspection at the above address. Persons wishing to make comments on the proposed capital budget and Program of Projects should contact Ms. Teri Sheets, Senior Grants Analyst, 321-2868, or Box 2110, Sacramento 95812-2110. Persons wishing to make comments on the proposed operating budget should contact Mr. John Broussard, Budget Officer, 321-2958, at the same address.

At the June 14 hearing, RT will provided an opportunity for interested persons or agencies to make their views known with respect to the social, economic, & environmental aspects of these projects.

RT intends to adopt its operating and Capital budgets & the FTA Program of Projects at the RT Board meeting scheduled for June 28, 1999 at 6:30pm at the above address.

PROOF OF PUBLICATION

STATE OF CALIFORNIA,
County of Sacramento

I am a citizen of the United States and a resident of the country aforesaid, I am over the age of 18 years and not a party to or interested in the above entitled matter. I am the principal clerk of the printer of THE OBSERVER NEWSPAPERS, a newspaper of general circulation printed in the city of Sacramento, County of Sacramento, and which newspaper has been adjudged a newspaper of general circulation by the Superior Court of the County of Sacramento, State of California, under date of January 17, 1972; Case Number 217,540, that the notice, of which the annexed is a printed copy (set in the type not smaller than non-parcil) has been published in each register and not in any supplement thereof on the following dates, to wit:

6/3

All in the year 19⁹⁹
I clarify (or declare) under penalty of perjury that the foregoing is true and correct:

Signature [Handwritten Signature]

Date 7-15-99

THE OBSERVER NEWSPAPERS
P.O. BOX 209
SACRAMENTO, CALIFORNIA-95801

PROOF OF PUBLI

This space is for the County clerk's filing

Proof of Publication of:

THE OBSERVER NEWSPAPERS

Legal Notice

**SACRAMENTO REGIONAL
TRANSIT DISTRICT
Notice of Public Hearing
FY 1999-2000 Capital Budget**

NOTICE IS HEREBY GIVEN that the Sacramento Regional Transit District (RTD) will hold a public hearing on RTD proposed FY 2000 Capital Budget in the amount of \$42.2 million, and on the proposed FY 2000 Operating Budget in the amount of \$77.4 million. The public hearing will be held in the RT Auditorium located at 1400 29th Street, Sacramento, CA on June 14, 1999 at 6:30 p.m.

The following is a list of RTD's proposed capital Program of Projects and FIA Allocations: Section 5307 - City of Roseville Capital Funds \$264,000 - Yolo County Capital Funds \$570,000 - ADA Improvements of LRV Stations \$640,000 - ADA Facilities Improvements \$60,000 - Paratransit Vehicles \$1,449,900 - Paratransit Maintenance/Repair Equipment \$160,000 - Radio System Backbone Payment \$252,000 - Certificates of Participation Payment \$2,870,000 - Tire Lease \$276,000 - Wayside Preventive Maintenance \$1,760,000 - LRV Preventive Maintenance \$3,743,600 - Bus Preventive Maintenance \$308,300 - Associated Capital Maintenance \$560,000 - LRV Fleet Improvements \$160,000 - Surveillance Equipment \$60,000 - Information Systems Improvements \$170,000 - Bus Roof Bus Maintenance Building \$120,000 - On Time Performance Monitoring \$200,000 - Shop Equipment \$80,000 - Non-Revenue Vehicle Replacement \$248,000 - LRV Operator Seat Replacements \$69,600 - Facilities Management and Improvements \$20,000 - Section 5309 - First Series LRV Mid-Life Overhaul \$1,400,000 - CHS Bus Fleet Replacement and Expansion \$2,490,000 - LRV Fleet Improvements \$857,700.

A copy of the proposed operating and capital budgets and the Program of Projects are available for public inspection at the above address. Persons wishing to make comments on the proposed capital budget and Program of Projects should contact Mr. Jeff Sheets, Senior Grants Analyst, 321-2868, or Box 2110, Sacramento 95812-2110. Persons wishing to make comments on the proposed operating budget should contact Mr. John Broussard, Budget Officer, 321-2958, at the same address.

At the June 14 hearing, RTD will provide an opportunity for interested persons or agencies to make their views known with respect to the social, economic, & environmental aspects of these projects.

RTD intends to adopt its operating and capital budgets & the FIA Program of Projects at the RT Board meeting scheduled for June 28, 1999 at 6:30 p.m. of the above address.

AD 37441
6/3





1400 University Ave.
 Sacramento, CA 95825-6502
 Tel: 567-9654 • Fax: (916) 567-9653

Exhibit 8

FILING STAMP

Sacramento Regional Transit Dist
 Kathy Xanakis
 PO Box 2110
 Sacramento, CA 95812-2110

Proof of Publication
 (C.C.P. §2015.5)

State of California)
 County of Sacramento)
Public Hearing
FY 1999-2000 Capital Budget

I am a citizen of the United States; I am over the age of 18 years, I am the principal clerk of THE SACRAMENTO GAZETTE, a community newspaper printed and published in the English language, and adjudged to be a Newspaper of General Circulation for the City and County of Sacramento by the Sacramento County Superior Court on August 12, 1997. That the notice, of which the annexed is a printed copy, has been published in each regular and entire issue of THE SACRAMENTO GAZETTE and not in any supplement thereof on the following date(s), to wit:

06-04-99

Executed on: 06-04-99
 Sacramento, California

I certify under penalty of perjury that the foregoing is true and correct:

Sacramento Regional Transit District
 NOTICE OF PUBLIC HEARING
 FY 1999-2000 Capital Budget

NOTICE IS HEREBY GIVEN that the Sacramento Regional Transit District (RTD) will hold a public hearing on RTD's proposed FY 2000 Capital Budget in the amount of \$42.2 million, and on the proposed FY 2000 Operating Budget in the amount of \$77.4 million. The public hearing will be held in the RT Auditorium located at 1400 29th Street, Sacramento, CA on June 14, 1999 at 6:30 pm.

The following is a list of RTD's proposed capital Program of Projects and FTA Allocations: Section 5307 - City of Roseville Capital Funds \$264,000 - Yuba County Capital Funds \$570,000 - ADA Improvements at LRT Stations \$640,000 - ADA Facilities Improvements \$60,000 - Paratransit Vehicles \$1,493,900 - Paratransit Maintenance/Repair Equipment \$160,000 - Radio System Backbone Payment \$232,000 - Certificates of Participation Payment \$2,970,000 - Tire Lease \$276,000 - Wayside Preventative Maintenance \$1,760,000 - LRV Preventive Maintenance \$3,743,000 - Bus Preventive Maintenance \$208,300 - Associated Capital Maintenance \$560,000 - LRV Fleet Improvements \$160,000 - Surveillance Equipment \$60,000 - Information Systems Improvements \$170,000 - Retired Bus Maintenance Building \$120,000 - On Time Performance Monitoring \$200,000 - Shop Equipment \$80,000 - Non-Revenue Vehicle Replacement \$248,000 - LRV Operator Seat Replacement \$60,600 - Facilities Management and Improvements \$20,000 - Section 5309 - F541 Series LRV Mid-Life Overhaul \$1,400,000 - CNG Bus Fleet Replacement and Expansion \$2,490,000 - LRV Fleet Improvements \$657,700.

A copy of the proposed operating and capital budgets and the Program of Projects are available for public inspection at the above address. Persons wishing to make comments on the proposed capital budget and Program of Projects should contact Ms. Teri Sheets, Senior Grants Analyst, 321-2068, or Box 2110, Sacramento 95812-2110. Persons wishing to make comments on the proposed operating budget should contact Mr. John Broussard, Budget Officer, 321-2958, at the same address.

At the June 14 hearing, RT will provide an opportunity for interested persons or agencies to make their views known with respect to the social, economic, & environmental aspects of these projects.

RTD intends to adopt its operating and capital budgets & the FTA Program of Projects at the RT Board meeting scheduled for June 28, 1999 at 6:30 pm at the above address.

At 4:358 - Pub. 06-04-99

(2015.5 CCP)

Exhibit 9

STATE OF CALIFORNIA
S.S.
County of Sacramento

I am the principal clerk of the EL HISPANO, a newspaper of general circulation published in the City of Sacramento, County of Sacramento, and which newspaper has been adjudged a newspaper of general circulation by the Superior Court of the County of Sacramento, State of California, under date of October 8, 1968, Case Number 205413. The notice, of which the annexed is a printed copy, has been published in each regular and entire issue of said newspaper and not in any supplement thereof on the following dates, to wit: 4/5/2000

I certify (or declare) under penalty of perjury that the foregoing is true and correct.



Signature

Dated: 4/5/2000

El Hispano

P.O. BOX 2856
SACRAMENTO, CA 95812

Mail Proof of Publication to:

Sacramento Regional Transit District

P.O. Box 2110

Sacramento, CA 95812-2110

Public Notice: Public Hearing FY 2000-2001

SACRAMENTO REGIONAL TRANSIT DISTRICT

NOTICE OF PUBLIC HEARING FY 2000-2001 FY BUDGET

NOTICE IS HEREBY GIVEN that the Sacramento Regional Transit District (RT) will hold a public hearing on RT's FY 2000-2001 budget in the amount of \$78.5 million. The public hearing will be held in the RT Auditorium located at 1400 29th St, Sacramento, CA on May 22, 2000 at 6:30 pm.

Following is a listing of RT's proposed Program of Projects and FTA Allocations: Sec. 5307: City of Roseville Passthrough \$250K; Yolo Co Transp Authority Passthrough \$550K; Paratransit Vehicle Acq. \$609K; Paratransit Improv. \$400K; Radio Sys Backbone Pymt \$264; COPS Pymt \$2,880K; Midtown Dispatch Fac \$280K; Folsom LRV Maint Fac Equip \$944K; Metro Fac Parts Rm \$720K; Section 5309: LRV Retrofit Comm Kits \$2,300K; Central Train Trk/Pub Address Sys \$324K.

A copy of the budget and the Program of Projects are available for public inspection at the above address or www.sacrt.com. Persons wishing to make comments on the budget should contact John Broussard (916) 321-2958, or submit written comments on the web at BudgetComments@sacrt.com, and on the FTA Program should contact Teri Sheets 321-2868 or Box 2110, Sacramento 95812-2110.

At the May 22 hearing, RT will provide an opportunity for interested persons or agencies to make their views known with respect to the social, economic & environmental aspects of these projects.

RT intends to adopt its budget & the FTA Program of Projects at the RT Board meeting scheduled for June 12, 2000, at 6:30 pm at the above address. If the proposed FTA Program of Projects is revised

PROOF OF PUBLICATION

(2015.5 CCP)

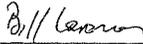
STATE OF CALIFORNIA

S.S.

County of Sacramento

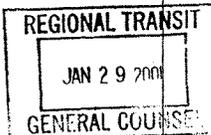
I am the principal clerk of the EL HISPANO, a newspaper of general circulation published in the City of Sacramento, County of Sacramento, and which newspaper has been adjudged a newspaper of general circulation by the Superior Court of the County of Sacramento, State of California, under date of October 8, 1968, Case Number 205413. The notice, of which the annexed is a printed copy, has been published in each regular and entire issue of said newspaper and not in any supplement thereof on the following dates, to wit: 1/24/2001

I certify (or declare) under penalty of perjury that the foregoing is true and correct.



Signature

Dated: 1/24/2001



El Hispano

P.O. BOX 2856
SACRAMENTO, CA 95812

Mail Proof of Publication to:

Sacramento Regional Transit District

P.O. Box 2110

Sacramento, CA 95812-2110

Notice of Public Hearing



DECLARATION of PUBLICATION

(CCP 2015.5)

Sacramento Regional Transit District
Post Office Box 2110
Sacramento, California 95812-2110

STATE of CALIFORNIA)
) : ss
COUNTY of SACRAMENTO)

I am a citizen of the United States and a resident of the County aforesaid; I am over the age of eighteen years, and not a party to or interested in the above-entitled matter. I am the Sacramento representative of the *Nichi Bei Times*, a Japanese American newspaper published in the city of San Francisco and circulated in the Sacramento and surrounding areas; that the notice of which the annexed is a printed copy, has been published in each issue thereof and not in any supplement thereof on the following dates to wit:

I certify (or declare) under penalty of perjury that the foregoing is true and correct and that this declaration was executed at Sacramento, California, on this date:

April 1 2000
(Date)

Edith Yamada
(Signature)

SACRAMENTO REGIONAL
TRANSIT DISTRICT NOTICE
OF PUBLIC HEARING
FY 2000-2001 FY BUDGET

NOTICE IS HEREBY GIVEN that the Sacramento Regional Transit District (RT) will hold a public hearing on RT's FY 2000-2001 Budget in the amount of \$78.5 million. The public hearing will be held in the RT Auditorium located at 1400 29th St, Sacramento, CA on May 22, 2000 at 6:30 pm.

Following is a listing of RT's proposed Program of Projects and FTA Allocations: Sec. 5307; City of Roseville Passthrough \$250K; Yolo Co. Transp. Authority Passthrough \$550K; Paratransit Vehicle Acq. \$603K; Paratransit Improv. \$400K; Radio Sys Backbone Pymt \$264; COPS Pymt \$2,890K; Midtown Dispatch Fac. \$280K; Folsom LRV Maint Fac Equip \$944K; Metro Fac Parts Rm \$720K; Section 5309; LRV Retrofit Comm Kits \$2,300K; Central Train Trk/Hub Address Sys \$324K.

A copy of the budget and the Program of Projects are available for public inspection at the above address or www.sacrt.com. Persons wishing to make comments on the budget should contact John Broussard (916) 321-2558, or submit written comments on the web at Budget.Comments@sacrt.com, and on the FTA Program should contact Ten Sheets 321-2868 or Box 2110, Sacramento 95812-2110.

At the May 22 hearing, RT will provide an opportunity for interested persons or agencies to make their views known with respect to the social, economic & environmental aspects of these projects.

RT intends to adopt its budget & the FTA Program of Projects at the RT Board meeting scheduled for June 12, 2000, at 6:30 pm at the above address. If the proposed FTA Program of Projects is revised or amended, a subsequent notice will be published.

THE DAILY RECORDER

- SINCE 1911 -

1115 H Street, P.O. Box 1048, Sacramento, California 95812
Telephone (916) 444-2355 • Fax (916) 444-0636

This space for filing stamp only

SAC. REGIONAL TRANSIT
P.O. BOX 2110
SACRAMENTO, CA 95812

SC#: 200337

PROOF OF PUBLICATION

(2015.5 C.C.P.)

State of California)
County of Sacramento) ss

Notice Type: GOV GOVERNMENT PUBLICATION

Ad Description: AMENDED CAPITAL BUDGET

SACRAMENTO REGIONAL TRANSIT DISTRICT
NOTICE OF PUBLIC HEARING
FY 2000-2001 AMENDED CAPITAL BUDGET

NOTICE IS HEREBY GIVEN that the Sacramento Regional Transit District (RT) will hold a public hearing to amend RT's FY 2000-2001 capital budget in the amount of \$35.1 million. The public hearing will be held in the RT Auditorium located at 1400 29th St., Sacramento, CA on February 12, 2001 at 6:30 pm. Following is a listing of RT's proposed Program of Projects and FTA Allocations: Sac. 3307, City of Roseville Passthrough \$259K, Yolo Co. Transp. Authority Passthrough \$620K, Mid Life LRV Overhaul \$719K, LRV Fleet Improvs \$400K, Arden/Clayton Jctn/Station Improvs \$180K, Trk & Grade Line Improvs \$250K, 30th Pedestrian Traffic Signal \$140K, Midtown Dispatch Fac. \$250K, RT Pac Rehab/Replacement Proj \$372K, Folsom LRV Maint Fac Equip \$877K. RT intends to adopt its amended capital budget at the RT Board meeting scheduled for February 12, 2001, at 6:30 pm at the above address. At the February 12, 2001 public hearing, RT will provide an opportunity for interested persons or agencies to make their views known with respect to the social, economic, and environmental aspects of these projects. If no significant comments are received on the proposed capital budget, the RT Board will be asked to adopt the proposed budget at the February 12, 2001 meeting. 01/25/01

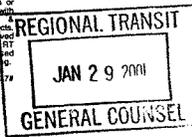
I am a citizen of the United States; I am over the age of eighteen years, and not a party to or interested in the above entitled matter. I am the principal clerk of the printer and publisher of the DAILY RECORDER, a daily newspaper published in the English language in the City of Sacramento, County of Sacramento, and adjudged a newspaper of general circulation as defined by the laws of the State of California by the Superior Court of the County of Sacramento, State of California, under date May 2, 1913, Case No. 16,180. That the notice, of which the annexed is a printed copy, has been published in each regular and entire issue of said newspaper and not in any supplement thereof on the following dates, to-wit:

01/25/01

Executed on: 01/25/01
At Los Angeles, California

I certify (or declare) under penalty of perjury that the foregoing is true and correct.

C. Brambila
Signature



SC-2000-17



Sacramento Regional
Transit District
A Public Transit Agency
and Equal Opportunity Employer

Mailing Address:
P.O. Box 2110
Sacramento, CA 95812-2110

Administrative Office:
1400 29th Street
Sacramento, CA 95816
(916) 321-2900
29th St. Light Rail Station/
Ext. 3035, 3037, 3038

Light Rail Office:
2700 Accademy Way
Sacramento, CA 95815
(916) 648-8400

Public Transit Since 1973

March 29, 2000

Via Facsimile: 452-7744

Velma Sykes
SACRAMENTO OBSERVER
2330 Alhambra Boulevard
Sacramento, CA 95817

Public Notice: Public Hearing FY 2000-2001 FY Budget

Please publish the above-referenced Notice immediately. This ad should run ONE TIME ONLY.

Please typeset the Notice as presented to you, i.e., include abbreviations, capitalizations, etc.

Please publish our ads in one column, the typesize shall be no larger than 7 point for the body and 9 point for the heading, indent each paragraph, and do not insert a blank line between paragraphs.

Along with your invoice, we will require a PROOF OF PUBLICATION affidavit. We will be unable to process an invoice for payment without this document. Payment will be expedited if all documents are received at the same time and the invoice is sent to my attention.

If you have any questions, please do not hesitate to contact me at 321-2972. Thank you.

Sincerely,

Kathy Xenakis
Administrative Assistant

Enclosure

c: John Broussard, Budget Officer, RT
Teri Sheets, Senior Grants Analyst, RT

THE SACRAMENTO
Gazette
 555 University Ave., Suite 126
 Sacramento, CA 95825-6584
 (916) 567-9654 • Fax: (916) 567-9653

_____ FILING STAMP

Sacramento Regional Transit Dist.
 Kathy Xenakis
 PO Box 2110
 Sacramento, CA 95812-2110

Proof of Publication
 (C.P. §2015.5)

State of California)
 County of Sacramento)

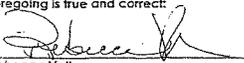
Notice of Public Hearing
FY 2000-2001 Budget

I am a citizen of the United States; I am over the age of 18 years. I am the principal clerk of The SACRAMENTO GAZETTE, a community newspaper printed and published in the English language, and adjudged to be a Newspaper of General Circulation for the City and County of Sacramento by the Sacramento County Superior Court on August 12, 1997. That the notice, of which the annexed is a printed copy, has been published in each regular and entire issue of THE SACRAMENTO GAZETTE and not in any supplement thereof on the following date(s), to wit:

03-31-2000

Executed on: 03-31-2000
 at Sacramento, California

I certify under penalty of perjury that the foregoing is true and correct:


 Rebecca Volk

SACRAMENTO REGIONAL TRANSIT DISTRICT
 NOTICE OF PUBLIC HEARING
 FY 2000-2001 FY BUDGET

NOTICE IS HEREBY GIVEN that the Sacramento Regional Transit District (RT) will hold a public hearing on RT's FY 2000-2001 budget in the amount of \$78.5 million. The public hearing will be held in the RT Auditorium located at 1400 29th St, Sacramento, CA on May 22, 2000 at 6:30 pm. Following is a listing of RT's proposed Program of Projects and FTA Allocations: Sec. 5307; City of Roseville Pass-through 5309C; Yolo Co. Transp. Authority Pass-through 5309C; Paratransit Vehicle Acq. 5603K; Paratransit Improv. 5400K; Radio Sys. Backbone 5604; CDRS 5605; 52,800K; Midtown Dispatch Fac. 5280K; Folsom LRV Maint Fac. Equip 5944K; Metro Fac. Train Rm 5720K; Jackson 5309; LRV Refurb. Com Kils 52,300K; Central Train TripPub address Sys 5224K.

A copy of the budget and the Program of Projects are available for public inspection at the above address or www.sart.com. Persons wishing to make comments on the budget should contact John Grossard (916) 321-2556, or submit written comments on the web at Budget_Comments@sart.com, and on the FTA Programs should contact Paul Sheets (916) 321-2568 or Box 2110, Sacramento 95812-2110.

At the May 22 hearing, RT will provide an opportunity for interested persons or agencies to make their views known w.r.t. respect to the social, economic & environmental aspects of these projects.

RT intends to adopt its budget & the FTA Program of Projects at the RT Board meeting scheduled for June 12, 2000, at 6:30 pm at the above address. If the proposed FTA Program of Projects is revised or amended, a subsequent notice will be published.

ART 502 - Pub. 03-31-00



555 University Ave., Suite 128
Sacramento, CA 95825-6584
(916) 567-9654 • Fax: (916) 567-9653

_____ FILING STAMP

Sacramento Regional Transit Dist.
Nelda Jones-Raymond
PO Box 2110
Sacramento, CA 95812-2110

Proof of Publication
(C.C.P. §2015.5)

State of California)
County of Sacramento)
Public Hearing
FY 2000-2001 Amended
Capital Budget

I am a citizen of the United States; I am over the age of 18 years. I am the principal clerk of THE SACRAMENTO GAZETTE, a community newspaper printed and published in the English language, and adjudged to be a Newspaper of General Circulation for the City and County of Sacramento by the Sacramento County Superior Court on August 12, 1997. That the notice, of which the annexed is a printed copy, has been published in each regular and entire issue of THE SACRAMENTO GAZETTE and not in any supplement thereof on the following date(s), to wit:

01-26-01

Executed on: 01-26-01
at Sacramento, California

I certify under penalty of perjury that the foregoing is true and correct:

David A. Fong

● SACRAMENTO REGIONAL TRANSIT DISTRICT ●
NOTICE OF PUBLIC HEARING
FY 2000-2001 AMENDED CAPITAL BUDGET

NOTICE IS HEREBY GIVEN that the Sacramento Regional Transit District (RT) will hold a public hearing to amend RT's FY 2000-2001 capital budget in the amount of \$35.1 million. The public hearing will be held in the RT Auditorium located at 1400 29th St, Sacramento, CA on February 12, 2001 at 6:30 pm.

Following is a listing of RT's proposed Program of Projects and FTA Allocations: Sec. 5307: City of Roseville Passthrough \$259K; Yolo Co Transp Authority Passthrough \$603K; Mid-Life LRV Overhauls \$719K; LRV Fleet Imprvs \$400K; Arden/Oakland Xing/Station Imprvs \$180K; Trk & Grade Xing Imprvs \$280K; 30/R Pedestrian Traffic Signal \$140K; Midtown Dispatch Fac \$280K; RT Fac Rehab/Replacement Proj \$372K; Folsom LRV Maint Fac Equip \$817K.

RT intends to adopt its amended capital budget at the RT Board meeting scheduled for February 12, 2001, at 6:30 pm at the above address. At the February 12, 2001 public hearing, RT will provide an opportunity for interested persons or agencies to make their views known with respect to the social, economic & environmental aspects of these projects. If no significant comments are received on the proposed capital budget, the RT Board will be asked to adopt the proposed budget at the February 12, 2001 meeting.

ADR 965 - 0136-01

PROOF OF PUBLICATION

(2015.5 CCP)

STATE OF CALIFORNIA
S.S.

County of Sacramento

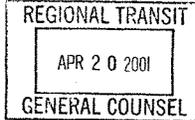
I am the principal clerk of the EL HISPANO, a newspaper of general circulation published in the City of Sacramento, County of Sacramento, and which newspaper has been adjudged a newspaper of general circulation by the Superior Court of the County of Sacramento, State of California, under date of October 8, 1968, Case Number 205413. The notice, of which the annexed is a printed copy, has been published in each regular and entire issue of said newspaper and not in any supplement thereof on the following dates, to wit: 4/11/2001

I certify (or declare) under penalty of perjury that the foregoing is true and correct.

Bill Gorman

Signature

Dated: 4/11/2001

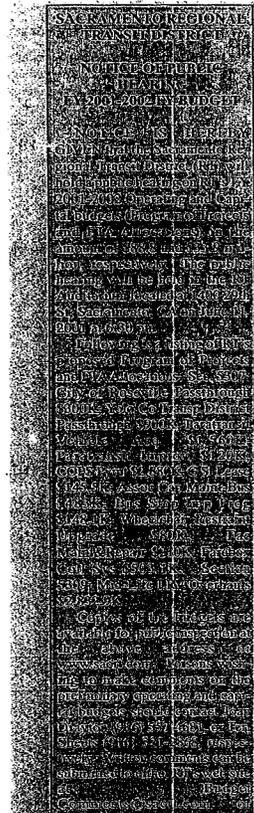


El Hispano
P.O. BOX 2856
SACRAMENTO, CA 95812

Mail Proof of Publication to:

Sacramento Regional Transit District
P.O. Box 2110
Sacramento, CA 95812-2110

Notice of Public Hearing FY 2001-2002



DECLARATION of PUBLICATION

(CCP 2015.5)

Sacramento Regional Transit District
Post Office Box 2110
Sacramento, California 95812-2110

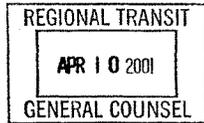
STATE of CALIFORNIA)
 : ss
COUNTY of SACRAMENTO)

I am a citizen of the United States and a resident of the County aforesaid; I am over the age of eighteen years, and not a party to or interested in the above-entitled matter. I am the Sacramento representative of the *Nichi Bei Times*, a Japanese American newspaper published in the city of San Francisco and circulated in the Sacramento and surrounding areas; that the notice of which the annexed is a printed copy, has been published in each issue thereof and not in any supplement thereof on the following dates to wit:

I certify (or declare) under penalty of perjury that the foregoing is true and correct and that this declaration was executed at Sacramento, California, on this date:

April 7, 2001
(Date)

Sibo Kimura
(Signature)



This space for filing stamp only

01
2006/07/02

SAC. REGIONAL TRANSIT
P.O. BOX 2110- LEGAL DIVISION
SACRAMENTO, CA 95812

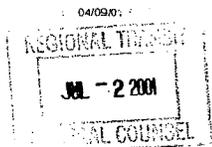
SC#: 233206

PROOF OF PUBLICATION

(2015.S.C.C.P.)

State of California)
County of Sacramento) ss.
Notice Type: GOV GOVERNMENT PUBLICATION
Ad Description: FY 2001-2002 FY BUDGET

I am a citizen of the United States; I am over the age of eighteen years, and not a party to or interested in the above entitled matter. I am the principal clerk of the printer and publisher of the DAILY RECORDER, a daily newspaper published in the English language in the City of Sacramento, County of Sacramento, and adjudged a newspaper of general circulation as defined by the laws of the State of California by the Superior Court of the County of Sacramento, State of California, under date May 2, 1913, Case No. 16,180. That the notice, of which the annexed is a printed copy, has been published in each regular and entire issue of said newspaper and not in any supplement thereof on the following dates, to-wit:



Executed on: 04/09/01
At Los Angeles, California

I certify (or declare) under penalty of perjury that the foregoing is true and correct.

David S. Beasley
Signature

SACRAMENTO REGIONAL TRANSIT DISTRICT
NOTICE OF PUBLIC HEARING
FY 2001-2002 FY BUDGET
NOTICE IS HEREBY GIVEN that the Sacramento Regional Transit District (RTD) will hold a public hearing on RTD's FY 2001-2002 Operating and Capital budgets (Programs of Projects and FTA Allocations) in the amount of \$88.5 and \$33.9 million, respectively. The public hearing will be held in the RT Auditorium located at 1400 29th St., Sacramento, CA on June 11, 2001 at 6:30 pm. Following is a listing of RT's proposed Program of Projects and FTA Allocations: Sec. 5301, City of Roseville Passthrough \$300K; Yolo Co. Transp. District Passthrough \$500K; Paratransit Vehicle Acq. \$1,500K; Paratransit Inspec. \$120K; COPS' Permit \$2,000K; G St. Lease \$145.5K; Assoc. Cap. Maint. \$485K; Bus Stop Imp. Prog. \$148.1K; Wheelchair Restroom Upgrade \$80K; Fac. Maint. Equip. \$210K; Farebox Coll. Sys. \$200.1K; Section 5309: M4-Life LRV Overhead \$2,022,298. Copies of the budgets are available for public inspection at the above address or www.sact.com. Persons wishing to make comments on the preliminary operating and capital budgets should contact Joan Drayton (916) 507-4581, or Teri Stevens (916) 311-2858, respectively. Written comments can be submitted to either RT's web site at Budget Comments@sact.com, or mailed to attention: Joan Drayton, Box 2110, Sacramento 95812-2110. At the June 11 hearing RT will provide an opportunity for interested persons or agencies to make their views known with respect to the social, economic, & environmental aspects of these projects. RT intends to adopt its budget & the FTA Program of Projects at the RT Board meeting scheduled for June 15, 2001, at 8:30 pm at the above address. If the proposed FTA Program of Projects is revised or amended, a subsequent notice will be published.
04/09/01 SC-2332068

THE SACRAMENTO
Gazette
 555 University Ave., Suite 126
 Sacramento, CA 95825-6584
 (916) 567-9654 • Fax: (916) 567-9653

 FILING STAMP

Sacramento Regional Transit Dist.
 Nelda Jones-Raymond
 PO Box 2110
 Sacramento, CA 95812-2110

Proof of Publication
 [C.C.P. §2015.5]

State of California)
 County of Sacramento)
2001-2002 FY BUDGET

SACRAMENTO REGIONAL TRANSIT DISTRICT
 NOTICE OF PUBLIC HEARING
 FY 2001-2002 FY BUDGET

NOTICE IS HEREBY GIVEN that the Sacramento Regional Transit District (RT) will hold a public hearing on RT's FY 2001-2002 Operating and Capital budgets (Program of Projects and FTA Allocations) in the amount of \$08.8 and \$33.9 million, respectively. The public hearing will be held in the RT Auditorium located at 1602 29th St, Sacramento, CA on June 11, 2001 at 6:30 pm.

Following is a listing of RT's proposed Program of Projects and FTA Allocations: Sec. 5307: City of Roseville Passthrough \$300K; Yolo Co Transit District Passthrough \$900K; Paratransit Vehicle Acq. \$1,500K; Paratransit Improv. \$120K; CoPS Fyrm. \$2,880K; S. St. Lease \$145.5K; Assoc. Cap. Maintenance \$403K; Bus Stop Improv. \$148K; Wheelchair Restraint Upgrade \$80K; Fac. Maint. Repair \$270K; Farebox Coll Sys \$500.1K; Section 5309: MidLife LRV Overhaul \$2,832.9K

Copies of the budgets are available for public inspection at the above address or www.sart.com. Persons wishing to make comments on the preliminary operating and capital budgets should contact Joan Drayton (916) 557-4661, or Teri Sheatts (916) 521-0268, respectively. Written comments can be submitted to either RT's web site at BudgetComments@sart.com, or mailed to attention: Joan Drayton, Box 2110, Sacramento 95812-2110.

At the June 11 hearing, RT will provide an opportunity for interested persons or agencies to make their views known with respect to the social, economic & environmental aspects of these projects.

RT intends to adopt its budget & the FTA Program of Projects at the RT Board meeting scheduled for June 11, 2001, at 8:30 pm at the above address. If the proposed FTA Program of Projects is revised or amended, a subsequent notice will be published.

ADR 10375 - Pub 04-13-01

I am a citizen of the United States; I am over the age of 18 years. I am the principal clerk of THE SACRAMENTO GAZETTE, a community newspaper printed and published in the English language, and adjudged to be a Newspaper of General Circulation for the City and County of Sacramento by the Sacramento County Superior Court on August 12, 1997. That the notice, of which the annexed is a printed copy, has been published in each regular and entire issue of THE SACRAMENTO GAZETTE and not in any supplement thereof on the following date(s), to wit:

04-13-01

Executed on: 04-13-01
 at Sacramento, California

I certify under penalty of perjury that the foregoing is true and correct:


 David A. Fang

REGIONAL TRANSIT
 APR 16 2001
 GENERAL COUNSEL

PROOF OF PUBLICATION

(2015.5 CCP)

STATE OF CALIFORNIA

S.S.

County of Sacramento

I am the principal clerk of the EL HISPANO, a newspaper of general circulation published in the City of Sacramento, County of Sacramento, and which newspaper has been adjudged a newspaper of general circulation by the Superior Court of the County of Sacramento, State of California, under date of October 8, 1968, Case Number 205413. The notice, of which the annexed is a printed copy, has been published in each regular and entire issue of said newspaper and not in any supplement thereof on the following dates, to wit: 11/7/2001

I certify (or declare) under penalty of perjury that the foregoing is true and correct.

Bill Love

Signature

Dated: 11/7/2001

El Hispano

P.O. BOX 2856
SACRAMENTO, CA 95812

Mail Proof of Publication to:

Sacramento Regional Transit District

P.O. Box 2110

Sacramento, CA 95812-2110

**Public Notice: Preparation of Annual
Capital Budget**



his space

DECLARATION of PUBLICATION

(CCP 2015.5)

Sacramento Regional Transit District
Post Office Box 2110
Sacramento, California 95812-2110

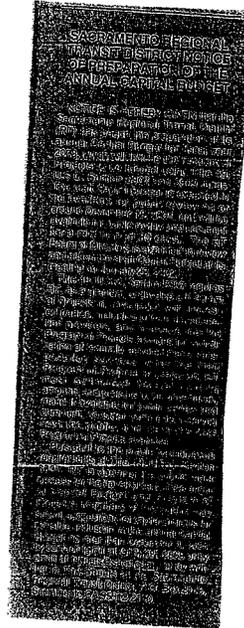
STATE of CALIFORNIA)
 : ss
COUNTY of SACRAMENTO)

I am a citizen of the United States and a resident of the County aforesaid; I am over the age of eighteen years, and not a party to or interested in the above-entitled matter. I am the Sacramento representative of the *Nichi Bei Times*, a Japanese American newspaper published in the city of San Francisco and circulated in the Sacramento and surrounding areas; that the notice of which the annexed is a printed copy, has been published in each issue thereof and not in any supplement thereof on the following dates to wit:

I certify (or declare) under penalty of perjury that the foregoing is true and correct and that this declaration was executed at Sacramento, California, on this date:

Nov. 7, 2001
(Date)

Sibo Komura
(Signature)



THE DAILY RECORDER

- SINCE 1911 -

1115 H Street, P.O. Box 1048, Sacramento, California 95812
Telephone (916) 444-2355 / Fax (916) 444-0636

This space for filing stamp only

SAC. REGIONAL TRANSIT
P.O. BOX 21110- LEGAL DIVISION
SACRAMENTO, CA 95812

SC#: 316959

PROOF OF PUBLICATION

(2015.5 C.C.P.)

State of California)
County of Sacramento) ss

Notice Type: GOV GOVERNMENT LEGAL NOTICE

Ad Description: NOTICE OF PREPARATION OF THE ANNUAL CAPITAL BUDGET

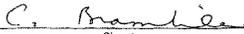
I am a citizen of the United States; I am over the age of eighteen years, and not a party to or interested in the above entitled matter. I am the principal clerk of the printer and publisher of the DAILY RECORDER, a daily newspaper published in the English language in the City of Sacramento, County of Sacramento, and adjudged a newspaper of general circulation as defined by the laws of the State of California by the Superior Court of the County of Sacramento, State of California, under date May 2, 1913, Case No. 18,190. That the notice, of which the annexed is a printed copy, has been published in each regular and entire issue of said newspaper and not in any supplement thereof on the following dates, to-wit:

11/06/01

SACRAMENTO REGIONAL TRANSIT DISTRICT
NOTICE OF PREPARATION OF THE ANNUAL CAPITAL BUDGET
NOTICE IS HEREBY GIVEN that the Sacramento Regional Transit District (RT) has begun the preparation of its annual Capital Budget for fiscal year 2002, which will include the Program of Projects to be funded using Title 49, U.S.C. Section 5307 and 5309 funds. The draft Capital Budget is expected to be available for public review on or around December 15, 2001, and will be available for public review and comment for a minimum of 30 days. The RT Board of Directors is expected to review and act on the draft Capital Budget at its meeting on January 22, 2002.
Title 49, U.S.C. Section 5307 requires RT, as a grantee, to develop a Program of Projects in consultation with interested parties, including private transportation providers, and to ensure that the Program of Projects provides for concentration of federally assisted mass transportation services. After the draft Program of Projects is prepared, RT must summarize federal funding amounts and projects to be undertaken, make it available for public review and comment, consider comments received from the public, and make the final Program of Projects available.
Pursuant to the public participation requirements of Title 49, U.S.C. Section 5307, RT is opening the public input process for the development of the annual Capital Budget and Program of Projects. Members of the public may submit suggestions for capital projects for possible inclusion in the annual Capital Budget no later than December 1, 2001 by contacting RT at (916) 321-2868 or by email at projects@srtd.net or by writing to "The Streets" at the Sacramento Regional Transit District, P.O. Box 2110, Sacramento, CA 95812-2110 11/06/01 SC-3169599

Executed on: 11/06/01
At Los Angeles, California

I certify (or declare) under penalty of perjury that the foregoing is true and correct.


Signature

THE DAILY RECORDER

This space for filing stamp only

- SINCE 1911 -

1115 H Street, P.O. Box 1048, Sacramento, California 95812
Telephone (916) 444-2355 • Fax (916) 444-0636

VIRGYNYA CHAVEZ
SAC. REGIONAL TRANSIT/LEGAL
DIVISION
P.O. BOX 2110
SACRAMENTO, CA - 95812

SC#: 394847

PROOF OF PUBLICATION

(2015.5 C.C.P.)

State of California)
County of Sacramento) ss
Notice Type: GOV GOVERNMENT LEGAL NOTICE
Ad Description: FY 2002-2003 FY BUDGET

I am a citizen of the United States; I am over the age of eighteen years, and not a party to or interested in the above entitled matter. I am the principal clerk of the printer and publisher of the DAILY RECORDER, a daily newspaper published in the English language in the City of Sacramento, County of Sacramento, and adjudged a newspaper of general circulation as defined by the laws of the State of California by the Superior Court of the County of Sacramento, State of California, under date May 2, 1913, Case No. 16,180. That the notice, of which the annexed is a printed copy, has been published in each regular and entire issue of said newspaper and not in any supplement thereof on the following dates, to-wit:

05/16/02

Executed on: 05/16/2002
At Los Angeles, California

I certify (or declare) under penalty of perjury that the foregoing is true and correct.

C. Brambila
Signature

SACRAMENTO REGIONAL TRANSIT DISTRICT
FY 2002-2003 FY BUDGET
NOTICE IS HEREBY GIVEN that the Sacramento Regional Transit District (RTD) will hold a public hearing on RTD's FY 2002-2003 budget in the amount of \$64.4 million. The public hearing will be held in the RTD Auditorium located at 1400 20th St., Sacramento, CA on June 10, 2002 at 6:30 p.m.
Following is a listing of RTD's proposed Program of Projects and FTA Allocations:
Sec. 5307: Paratransit/Capital Equipment \$150K; Bus Maintenance Facility Repairs \$135K; General Facility Upgrades \$280K; General Facility Repairs \$429K; City of Roseville Pass-through \$320K; Volv. Co. Transit Authority Pass-through \$4 M; Sub-grade, drainage and trackbed improvements \$47K; New Revenue Vehicle Replacement \$240K; Title Lease \$20K; Fiber Optic Switches \$120K; Sec. 5309: Major Light Rail Station Rehabilitation Project \$45 \$12M; LRV Mobile Overhaul \$1.4M; Crossing Protection Modifications \$29K; Bus Maintenance/Transportation Facility #2 \$18.9M
A copy of the budget and the Program of Projects are available for public inspection at the above address or www.sacrt.com. Persons wishing to make comments on the operating budget should contact Bill Collins (916) 507-4503, or submit written comments on the web at www.sacrt.com. Comments on the FTA Program should be directed to Teri Sheeta (916) 507-2666 or mailed to Box 2110, Sacramento 95812-2110.
At the June 10, 2002 hearing, RTD will provide an opportunity for interested persons or agencies to make their views known with respect to the social, economic & environmental aspects of these projects.
RTD intends to adopt its budget & the FTA Program of Projects at the RTD Board meeting scheduled for June 10, 2002, at 6:30 p.m. at the above address. If the proposed FTA Program of Projects is revised or amended, a subsequent notice will be published.
05/16/02 SC-394847#

THE SACRAMENTO
Gazette
 555 University Ave., Suite 126
 Sacramento, CA 95825-6584
 (916) 567-9654 • Fax: (916) 567-9653

_____ FILING STAMP

Sacramento Regional Transit Dist.
 Virgynya Chavez
 PO Box 2110
 Sacramento, CA 95812-2110

Proof of Publication
 (C.C.P. §2015.5)

State of California)
 County of Sacramento)
Annual Capital Budget

I am a citizen of the United States; I am over the age of 18 years. I am the principal clerk of THE SACRAMENTO GAZETTE, a community newspaper printed and published in the English language, and adjudged to be a Newspaper of General Circulation for the City and County of Sacramento by the Sacramento County Superior Court on August 12, 1997. That the notice, of which the annexed is a printed copy, has been published in each regular and entire issue of THE SACRAMENTO GAZETTE and not in any supplement thereof on the following date(s), to wit:

11-09-01

Executed on: 11-09-01
 at Sacramento, California

I certify under penalty of perjury that the foregoing is true and correct:



 David A. Fong

SACRAMENTO REGIONAL TRANSIT DISTRICT
 NOTICE OF PREPARATION OF THE ANNUAL CAPITAL BUDGET
 NOTICE IS HEREBY GIVEN that the Sacramento Regional Transit District (RTD) has begun the preparation of its annual Capital Budget for fiscal year 2002, which will include the Program of Projects to be funded using Title 49, U.S.C. Section 5307 and 5309 funds. The draft Capital Budget is expected to be available for public review on or around December 15, 2001, and will be available for public review and comment for a minimum of 30 days. The RT Board of Directors is expected to review and act on the draft Capital Budget at its meeting on January 22, 2002.
 Title 49, U.S.C. Section 5307 requires RTD, as a grantee, to develop a Program of Projects in consultation with interested parties, including private transportation providers, and to ensure that the Program of Projects provides for coordination of federally assisted mass transportation services. After the draft Program of Projects is prepared, RTD must summarize financial findings, strengths and projects to be undertaken, make it available for public review and comment, consider comments received from the public, and make the final Program of Projects available.
 Pursuant to the public participation requirements of Title 49, U.S.C. Section 5307, RTD is opening the public input process for the development of the annual Capital Budget and Program of Projects. Members of the public may submit suggestions for capital projects for possible inclusion in the annual Capital Budget no later than December 1, 2001 by contacting RT at (916) 321-2958 or by email at ishaw@srtd.com, or by writing to Text Sheets at the Sacramento Regional Transit District, P.O. Box 2110, Sacramento CA 95812-2110.
 Ad # 1256-Pub 11-09-01

THE SACRAMENTO
Gazette
555 University Ave., Suite 126
Sacramento, CA 95825-6584
(916) 567-9654 • Fax: (916) 567-9653

FILED STAMP

Sacramento Regional Transit Dist.
Virgynya Chavez
PO Box 2110
Sacramento, CA 95812-2110

Proof of Publication
(C.C.P. §2015.5)

State of California)
County of Sacramento)

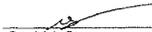
PUBLIC HEARING
FY 2002-2003 BUDGET

I am a citizen of the United States; I am over the age of 18 years. I am the principal clerk of THE SACRAMENTO GAZETTE, a community newspaper printed and published in the English language, and adjudged to be a Newspaper of General Circulation for the City and County of Sacramento by the Sacramento County Superior Court on August 12, 1997. That the notice, of which the annexed is a printed copy, has been published in each regular and entire issue of THE SACRAMENTO GAZETTE and not in any supplement thereof on the following date(s), to wit:

05-17-02

Executed on: 05-17-02
at Sacramento, California

I certify under penalty of perjury that the foregoing is true and correct.


David A. Fong

SACRAMENTO REGIONAL TRANSIT DISTRICT
NOTICE OF PUBLIC HEARING
FY 2002-2003 FY BUDGET
NOTICE IS HEREBY GIVEN that the Sacramento Regional Transit District (RT) will hold a public hearing on RT's FY 2002-2003 budget in the amount of \$94.8 million. The public hearing will be held in the RT Auditorium located at 1400 ZIP St, Sacramento, CA on June 10, 2002 at 6:00 pm. Following is a listing of RT's proposed Program of Projects and FTA Allocation. Sec. 5307: Paratransit Capital Equipment \$120K; Bus Maintenance Facility Repairs \$135K; General Facility Upgrades \$700K; General Facility Repairs \$428K; City of Roseville Passthrough \$325K; Yolo Co Transit Authority Passthrough \$1.1M; Sub-grade, drainage and finished improvements \$67K; Non-Revenue Vehicle Replacement \$240K; Tire Less & S&S;K; Floor Opatic Backbone \$1.02M; Sec. 5302: Major Light Rail Station Rehabilitation Project \$45 \$1.2M; LRV midline Overhead \$1.4M; Crossing Protection Mod/Catwalks \$200K; Bus Maintenance/Transportation Facility #2 \$10.9M.
A copy of the budget and the Program of Projects are available for public inspection at the above address or www.sactrt.com. Persons wishing to make comments on the operating budget should contact Bill Griffin, (916) 567-4253, or submit written comments on the web at www.sactrt.com. Comments on the FTA Program should be directed to Teri Shew, 521-2868 or mailed to Box 2110, Sacramento 95812-2110.
At the June 10, 2002 hearing, RT will provide an opportunity for interested persons or agencies to make their views known with respect to the social, economic & environmental aspects of these projects.
RT intends to adopt its budget & the FTA Program of Projects at the RT Board meeting scheduled for June 10, 2002, at 6:30 pm at the above address. If the proposed FTA Program of Projects is revised or amended, a subsequent notice will be published.
ADR 14882 - Pub 05-17-02

TOM DAVIS, VIRGINIA,
CHAIRMAN
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CHRISTOPHER SHAYS, CONNECTICUT
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MARSHA BLACKBURN, TENNESSEE
PATRICK J. TIBERI, OHIO
KATHERINE HARRIS, FLORIDA

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Congress of the United States

House of Representatives

COMMITTEE ON GOVERNMENT REFORM
2157 RAYBURN HOUSE OFFICE BUILDING

WASHINGTON, DC 20515-6143

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FACSIMILE (202) 225-5074
MINORITY (202) 225-5051
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www.house.gov/reform

August 4, 2004

HENRY A. WAXMAN, CALIFORNIA,
RANKING MEMBER

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MAJOR R. OWENS, NEW YORK
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MARYLAND
ELEANOR HOLMES NORTON,
DISTRICT OF COLUMBIA
JIM COOPER, TENNESSEE
DETTY MCCOLLUM, MINNESOTA

BERNARD SANDERS, VERMONT,
INDEPENDENT**BY FACSIMILE**

The Honorable Emil H. Frankel
Assistant Secretary for Transportation
Policy and Intermodalism
Department of Transportation
400-7th Street, S.W.
Washington, DC 20590

Dear Mr. Frankel:

This letter follows up on your August 3, 2004 answers to my July 9th second set of post-hearing questions for your personal reply after the May 18th hearing of the Subcommittee on Energy Policy, Natural Resources and Regulatory Affairs, entitled "How Can We Maximize Private Sector Participation in Transportation?"

Question 1, DOT's Enforcement of Private Sector Participation Requirements, asked for "published notices in the **specific** publications of general circulation, as stipulated in the SOP" (emphasis added). The Standard Operating Procedure (SOP) for Sacramento Regional Transit (SACRT) stated that publication would be in The Daily Recorder. Your attachment is proof positive that SACRT routinely publishes notices in The Daily Recorder, as it did for Fiscal Years (FYs) 1998-99, 2000-01, 2001-02, and 2002-3 but not for the key year (FY 1999-2000) in which the notices in other publications included "CNG Bus Fleet Replacement and Expansion \$2,490,000." Such a notice in The Daily Recorder would surely have triggered a response by private sector transportation operators. An obvious question now is what did you find about SACRT's decision for this one year only not to include notice in The Daily Recorder?

Also, the notices in your reply solely relate to SACRT's proposed operating and capital budgets, i.e., none are provided for SACRT's proposed Program of Projects (POP). As SACRT's FY 02-03 notices state, "Title 49, U.S.C. Section 5307 requires RT, as a grantee, to develop a Program of Projects in consultation with interested parties, including private transportation providers ... After the draft Program of Projects is prepared, RT must summarize federal funding amounts and projects to be undertaken, make it available for public review and comment, consider comments received from the public, and make the final Program of Projects available." Therefore, please provide a

copy of each of SACRT's POP published notices relating to the proposed "CNG Bus Fleet Replacement and Expansion \$2,490,000" in the **specific** publications of general circulation, as stipulated in the SOP.

Lastly, your answer to Question 1 inaccurately asserts, "attached are the FTA decisions with respect to the charter complaint filed against SACRT." As I previously indicated to the Department of Transportation (DOT), the emergency protest filed by the California Bus Association (CBA) principally related to SACRT's noncompliance with the private sector participation requirements and, thus, was not a charter complaint per se.

Question 2, DOT Enforcement of Restrictions on Use of Equipment, asked, "What has the current Administration done to enforce this restriction [codified by DOT in 1988 at 49 CFR §18.32 (c)(3)]?" Your answer inaccurately stated, "this regulation was promulgated by the Office of Management and Budget (OMB)." Since OMB did not issue a codified regulation but, instead, coordinated a government-wide common rule in which DOT participated and then codified its own implementation, it is DOT, not OMB that would be enforcing its own rule. As a consequence, your reply stating, "DOT has referred this Question to OMB ... for a response" is inappropriate and nonresponsive. Please provide an answer about DOT's enforcement during the current Administration of its codified regulatory provision.

Question 4, Amador Case, asked, "Does DOT have evidence of compliance that was not included in the documents provided by SACRT? If so, please provide it to the Subcommittee. If not, what do you recommend that Amador now pursue to remedy the harm it suffered?" Your partial answer stated, "DOT is unable to ascertain whether it has evidence of compliance that was not included in the documents provided to CBA by SACRT as DOT is not in receipt of these documents." How could DOT opine that SACRT was in "minimum" compliance without evidence of any published notices in The Daily Recorder? Also, what do you recommend that Amador now pursue?

Please hand-deliver your response to the Subcommittee majority staff in B-377 Rayburn House Office Building and the minority staff in B-350A Rayburn House Office Building not later August 19, 2004. If you have any questions about this request, please call Subcommittee Staff Director Barbara Kahlow on 226-3058. Thank you for your attention to this request.

Sincerely,



Doug Ost

Chairman

Subcommittee on Energy Policy, Natural
Resources and Regulatory Affairs

cc: The Honorable Tom Davis
The Honorable John Tierney

604 8/25/04



**U.S. Department of
Transportation**
Office of the Secretary
of Transportation

400 Seventh St., S.W.
Washington, D.C. 20590

AUGUST 25, 2004

The Honorable Doug Ose
Chairman
Subcommittee on Energy Policy,
Natural Resources and Regulatory
Committee on Government Reform
U.S. House of Representatives
Washington, DC 20515

Dear Mr. Chairman:

We have recently received a third round of questions, subsequent to my appearance of May 18, 2004, before the House Government Reform Subcommittee on Energy Policy, Natural Resources and Regulatory Affairs. It is the understanding of the U. S. Department of Transportation that you are not fully satisfied with our responses to your previous questions. I believe that we have done the best we can to answer fully and accurately your questions.

In light of these circumstances, I believe that it would be appropriate for us to meet to discuss this ongoing inquiry, so that we do not waste your time, and to ensure that we fully answer your remaining questions. Therefore, we are refraining from responding to this latest round of questions until we have an opportunity to meet and obtain a better understanding of what further information you may be requesting from the Department.

Please contact me or have your staff contact my assistant, Yvonne Brown, at 202-366-4540 to set up a meeting at your earliest convenience. I look forward to speaking with you soon.

Sincerely,

Emil H. Frankel
Assistant Secretary for Transportation Policy



**U.S. Department of
Transportation**
Office of the Secretary
of Transportation

400 Seventh St., S.W.
Washington, D.C. 20590

September 29, 2004

The Honorable Doug Ose
Chairman
Subcommittee on Energy Policy,
Natural Resources and Regulatory Affairs
Committee on Government Reform
U.S. House of Representatives
Washington, DC 20515

Dear Mr. Chairman:

Please find attached answers to your August 4, 2004 questions following the May 18, 2004 hearing before your subcommittee entitled "How Can We Maximize Private Participation in the Transportation Sector?"

I hope this information is helpful. Should you have further questions, please contact Jessie Torres in the Office of Governmental Affairs at (202) 622-4725.

Sincerely,

A handwritten signature in black ink, appearing to read "E. H. Frankel".

Emil H. Frankel
Assistant Secretary for Transportation Policy

Enclosure

AUGUST 4, 2004 FOLLOW-UP QUESTIONS FOR THE RECORD
SUBCOMMITTEE ON ENERGY POLICY, NATURAL RESOURCES AND
REGULATORY AFFAIRS
COMMITTEE ON GOVERNMENT REFORM
U.S. HOUSE OF REPRESENTATIVES
MAY 18, 2004 HEARING

Regarding QUESTION 1: DOT's Enforcement of Private Sector Participation Requirements, asked for "published notices in the **specific** publications of general circulation, as stipulated in the SOP" (emphasis added). The Standard Operating Procedure (SOP) for Sacramento Regional Transit (SACRT) stated that publication would be in The Daily Recorder. Your attachment is proof positive that SACRT routinely publishes notices in The Daily Recorder, as it did for Fiscal Years (FYs) 1998, 2000-01, 2001-02, and 2002-3 but not for the key year (FY 1999-2000) in which the notices in other publications included "CNG Bus Fleet Replacement and Expansion \$2,490,000." Such a notice in The Daily Recorder would surely have triggered a response by private sector transportation operators. An obvious question now is what did you find about SACRT's decision for this one year only not to include notice in The Daily Recorder?...please provide a copy of each of SACRT's POP published notices relating to the proposed "CNG Bus Fleet Replacement and Expansion \$2, 490,000" in the specific publications of general circulation, as stipulated in the SOP.

RESPONSE: In 2000, FTA's Triennial Review found a deficiency in how SACRT notified the public on proposed projects. This deficiency was corrected on July 3, 2001, when SACRT adopted a Standard Operating Procedure that mandated satisfactory levels and means of public notification. FTA did not inquire as to why SACRT did not publish notice in The Daily Recorder or other specific newspapers of general circulation as such analysis was not needed either to support the Triennial Review finding of deficiency or to implement the correction. Attached are the Proof of Publication documents requested in addition to a listing of these and other Proof of Publication documents related to proposed service level changes.

Regarding QUESTION 2: DOT Enforcement of Restriction on Use of Equipment, asked, "What has the current Administration done to enforce this restriction [codified by DOT in 1988 at 49 CFR [Sec.]18.32(c)(3)]?" Your answer inaccurately stated, "this regulation was promulgated by the Office of Management and Budget (OMB)." Since OMB did not issue a codified regulation but, instead, coordinated a government-wide common rule in which DOT participated and then codified its own implementation, it is DOT, not OMB that would be enforcing its own rule. As a consequence, your reply stating, "DOT has referred this Question to OMB...for a response" is inappropriate and nonresponsive. Please provide an answer about DOT's enforcement during the current Administration of its codified regulatory provision.

RESPONSE: As a threshold matter, please note that this regulatory subsection does not apply to the situation in Sacramento, and, therefore, enforcement of it is not at issue. Section 18.32(c)(3) expressly provides that it does not apply when an exemption of its

prohibition is “specifically provided or contemplated by Federal statute”. Section 5302 of Title 49 of the United States Code specifically defines mass transportation service to exclude charter service. Therefore, FTA’s statute supersedes this regulatory provision, and it is inapplicable in the Sacramento situation. With respect to DOT’s enforcement of 49 CFR Part 18, DOT investigates allegations of violations and determines if a violation has occurred and, if so, takes appropriate remedial action to cure the violation.

Regarding QUESTION 4: Amador Case, asked, “Does DOT have evidence of compliance that was not included in the documents provided by SACRT? If so, please provide it to the Subcommittee. If not, what do you recommend that Amador now pursue to remedy the harm it suffered?” Your partial answer stated, “DOT is unable to ascertain whether it has evidence of compliance that was not included in the documents provided to CBA by SACRT as DOT is not in receipt of these documents.” How could DOT opine that SACRT was in “minimum” compliance without evidence of any published notices in The Daily Recorder? Also, what do you recommend that Amador now pursue?

RESPONSE: With respect to the first question, DOT was provided proof that SACRT was in compliance with the Federal requirement to notify the public of its plan to expand its service to include public transportation service that included mobility service previously provided under a contract for charter service. Attached are the Proof of Publication documents as referenced in the Response to Question 1, above. With respect to the second question, Amador may bring new facts or other evidence before the FTA and the FTA has the authority to continue to investigate. In the alternative, Amador could consider filing a new complaint with the FTA based on new facts.

01/14/04
7/15/2004
rec'd 6/14/04

かつみ
Katsumi Tanaka

425 South Street, Suite 340;
Honolulu, HI 96813, U.S.;
Phone: 808-524-0832;
Fax: 808-524-0837
ktanaka@hoikenetworks.com
CELLULAR 808-478-2222

MAY 26, 2004

TO: BARBARA KAHLW
FROM: KATSUMI TANAKA
RE: GRATITUDE, URGENCY FOR ASSISTANCE

DEAR BARBARA:

GRATITUDE

I AM AN IMMIGRANT AND A NATURALIZED AMERICAN CITIZEN. I AM EXCEEDINGLY GRATEFUL TO YOU FOR ACCORDING ME THE OPPORTUNITY OF PROVIDING TESTIMONY ON MAY 18, 2004.

URGENCY FOR ASSISTANCE

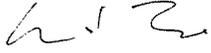
HAWAII'S OAHU METROPOLITAN PLANNING ORGANIZATION (OMPO) MET ON MAY 20, 2004, TO VOTE ON HONOLULU COUNTY'S REQUEST TO APPLY FOR FEDERAL FUNDING OF APPROXIMATELY \$20 MILLION TO BRING A CIRCULATOR WITHIN WAIKIKI TO DIRECTLY COMPETE AGAINST US. MOST, IF NOT ALL, MEMBERS OF OMPO DESIRE FEDERAL FUNDING IRRESPECTIVE OF DEVASTATING PRIVATE SECTOR GROUND TRANSPORTATION BUSINESS. THE MEMBERS ARE ALL OFFICIALS, STATE DIRECTOR OF TRANSPORTATION, COUNTY DIRECTOR OF TRANSPORTATION, STATE LEGISLATORS AND CITY COUNCIL MEMBERS. THE WITNESSES FOR THE SUPPORT INCLUDE COUNTY EMPLOYEES AND COMMISSIONS APPOINTED BY THE MAYOR. THE TESTIMONIES ARE NOT PROVIDED UNDER OATH. AS A RESULT, MANY TESTIFIERS ENGAGE IN NON-TRUTHS. FURTHER, THESE OFFICIALS (MEMBERS OF OMPO) ARE IGNORANT OF PRIVATE SECTOR PARTICIPATION LAWS AND WHEN TUTORED THEY CHOOSE TO IGNORE. THEY ARE ALL HUNGRY FOR FEDERAL FUNDS. AMONGST OUR CONGRESSIONAL DELEGATION (CONGRESSMAN ABERCROMBIE, CONGRESSMAN CASE, SENATOR INOUE, SENATOR AKAKA), I HAVE BEEN ABLE TO SOLICIT THE ATTENTION OF ED CASE ONLY.

THE MAY 20TH OMPO WAS CONTINUED UNTIL SUCH TIME AS OMPO RECEIVES INFORMATION FROM FTA THAT THE APPLICATION FOR \$20 MILLION DOES NOT JEOPARDIZE FUTURE FEDERAL FUNDING FOR GREATER MONETARY AMOUNTS. IN OTHER WORDS, OMPO MEMBERS PAY NO HEED TO VIOLATIONS OF FEDERAL LAWS RELATING TO PRIVATE SECTOR PARTICIPATION.

THE HONOLULU COUNTY'S TO APPLICATION FOR \$20 MILLION, IF PROCURED AND DEPLOYED, WILL RESULT IN AN ASSAULT UPON OUR BUSINESS TO COURT TOURISTS.

WE SEEK YOUR ASSISTANCE. THANK YOU.

425 South Street, Suite 3402 • Honolulu, HI 96813, U.S.A • Phone: 808-524-0832 • Fax: 808-524-0837 • ktanaka@hoikenetworks.com



かとう
Katsumi Tanaka

425 South Street, Suite 340
Honolulu, HI 96813, U S,
Phone: 808-524-0832
Fax: 808-524-0837
ktanaka@hoikenetworks.com

MAY 20, 2004

TO: MEMBERS OF OAHU METROPOLITAN PLANNING ORGANIZATION
FROM: KATSUMI TANAKA
C.E.O., E NOA CORPORATION
RE: OMPO POLICY COMMITTEE

TODAY, I CAME TO TESTIFY AGAINST THE SUBJECT REQUEST. HEREINBELOW, I PROVIDE MY REASONING TOGETHER WITH SUPPORTING MATERIALS AND INVOCATION OF FEDERAL STATUTES. ALSO, I WISH TO INFORM YOU MY FULL SUPPORT FOR IMPROVEMENT OF PUBLIC TRANSPORTATION.

PRIVATE SECTOR PARTICIPATION

"PRIVATE ENTERPRISE CONCERNS. The concerns of Federal transit law regarding private enterprises focus mainly on including the private sector in participating in local transit program..and protecting private providers of transit from competition with federally assisted transit providers."

"Plans and programs required for Federal transit assistance must encourage the participation of private enterprise to the maximum extent feasible."

WE BELIEVE AND CONTEND THAT THE COUNTY OF HONOLULU HAS NOT INCLUDED THE PARTICIPATION OF PRIVATE SECTOR.

CONGRESSMAN ED CASE HAS RAISED THESE CONCERNS TO THE FEDERAL TRANSIT ADMINISTRATION.

PLEASE REFER TO EXHIBIT "A" CONGRESSMAN ED CASE'S LETTER OF MAY 19, 2004.

ELECTED OFFICIALS (STATE AND COUNTY) OPPOSE THE IOS

IN ADDITION TO THE PRIVATE SECTOR, OPPONENTS TO THE IOS ALSO INCLUDE ALL ELECTED OFFICIALS REPRESENTING THE IOS IMPACTED DISTRICTS. STATE LEGISLATORS CAROL FUKUNAGA, GORDON TRIMBLE, KENNETH HIRAKI, SCOTT SAIKI AND GALEN FOX AND COUNCIL MEMBERS CHARLES DJOU, ANN KOBAYASHI AND ROD TAM. PLEASE REFER TO EXHIBIT "B".

We are unanimous in our opposition to the In-Town BRT, and its current manifestation, the IOL or Initial Operating Segment.

STATEMENT OF ADMINISTRATOR OF FEDERAL TRANSIT ADMINISTRATION, APRIL 28, 2004

PLEASE REFER TO THE FOURTH (4TH) PAGE OF EXHIBIT "C" WHERE MARKED.

"First, we ask that the current exemption from project evaluation and rating for projects seeking less than \$25 million in New Starts funds be eliminated, as in the Senate bill. We have learned from experience that this exemption encourages project sponsors to artificially define projects into smaller segments in order to avoid being subject to FTA assessment, and can lead to the expenditure of Federal taxpayer dollars on projects that would not meet minimum financial or project justification standards. "

TRANSIT ATTORNEY, STEVEN A. DIAZ'S OPINION

ATTORNEY STEVEN A. DIAZ' OPINION "is based upon my 30 years of experience as a transit lawyer, including 11 years as a deputy city attorney of the City and County of San Francisco, California who was responsible, among other assignments, for transit matters, and as a former chief counsel of the Federal Transit Administration ("FTA") in the administration of President George H.W. Bush from 1989-1993. I have also served as the founding chairman of the Transit and Intermodal Transportation Law Committee of the Transportation Research Board of the National Academy of Science ("TRB").

MR. DIAZ THEN OPINED, REFERRING TO TODAY'S SUBJECT MATTER, "It is therefore my opinion, as one who has served as the chief legal officer of the FTA and third-ranking policy officer of that agency, that the proposed TIP amendment to include the IOS does a direct disservice to the credibility of OMPO and the larger and long-term interests of the OMPO program of projects.

PRIVATE ENTERPRISE CONCERNS (EXHIBIT "E")

THE IOS IS WHERE THE COUNTY OF HONOLULU COLLIDES AGAINST FEDERAL LAWS REGARDING PRIVATE SECTOR CONCERNS. THE COUNTY IN EFFECT HAS NOT EXERCISED MAXIMUM EXTENT FEASIBLE EFFORTS TO INCLUDE PRIVATE SECTOR PARTICIPATION. IN FACT, THE COUNTY'S PLANS, IF IMPLEMENTED, WILL RESULT IN SEVERE ECONOMIC DAMAGE TO PRIVATE SECTOR GROUND TRANSPORTATION, INCREASE CONGESTION, INFLICT PERILS UPON DRIVERS AND PEDESTRIANS AS WELL AS CAUSING COST INCREASES IN THE OPERATIONS OF BOTH PASSENGER AND PROPERTY CARRIERS.

I INVITE YOU TO READ THE PROVISIONS OF TWO EXHIBITS, "E" AND "F".

I THANK YOU FOR THE OPPORTUNITY YOU ACCORDED US IN BEING ATTENTIVE TO OUR VIEWS.


KATSUMI TANAKA

WASHINGTON OFFICE
128 CANNON HOUSE OFFICE BUILDING
WASHINGTON, DC 20515
(202) 225-4906
FAX: (202) 225-4987

HONOLULU OFFICE
5104 PRINCE KUAOI FEDERAL BUILDING
HONOLULU, HI 96850-4874
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NORTHWEST ISLAND TOLIA FREE NUMBERS:
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KAUAI / NIIHAU 249-1851
MAUI 242-1818
LANAI 955-7188
MOLOKAI 882-0180

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www.house.gov/case



CONGRESSMAN ED CASE
SECOND DISTRICT, HAWAII

ISLANDS OF HAWAII, MAUI, KAUAI, OAHU, LANAI,
MOLOKAI, OAHU (WINDWARD, NORTH SHORE,
CENTRAL, LEeward), KAUAI AND NIIHAU,
AND NORTHWESTERN HAWAIIAN ISLANDS

May 19, 2004

COMMITTEES
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AND FISCAL MANAGEMENT
SMALL BUSINESS
RURAL ENTERPRISES, AGRICULTURE
AND TECHNOLOGY
WORKFORCE EMPLOYMENT
AND GOVERNMENT PROGRAMS
REGULATORY REFORM
AND OVERSIGHT

Mr. Gordon Lum
Executive Director
Oahu Metropolitan Planning Organization
Ocean View Center
707 Richards Street, Suite 200
Honolulu, Hawaii 96813

Dear Mr. Lum:

Yesterday I met with Mr. Katsumi Tanaka of E Noa Corporation in my Washington D.C. office in connection with his testimony on private sector involvement in transportation before the House Government Reform Committee Subcommittee on Energy Policy, Natural Resources, and Regulatory Affairs. In connection with your Thursday, May 20th meeting regarding the In-Town Bus Rapid Transit (BRT) system, Mr. Tanaka asked me to confirm the inquiry I made to the Federal Transit Administration (FTA) that appears to be relevant to your discussion on this issue.

I enclose my inquiry and Mr. Tanaka's communication for your reference. I called the FTA yesterday afternoon to determine when a response will forthcoming, and have not yet received a call back.

Should you need additional information or have any questions, please do not hesitate to contact me or Tim Carson of my staff.

With aloha,

ED CASE
United States Congressman
Hawaii, Second District

11 A 11

05/19/04 17:50 FAX 202 225 4887

CONGRESSMAN ED CASE

05/03/006

WASHINGTON OFFICE:
126 CANNON HOUSE OFFICE BUILDING
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HONOLULU OFFICE:
5104 PRINCE KUNO FEDERAL BUILDING
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FAX: (808) 539-0233

HONOLULU ISLAND TOLL FREE NUMBERS:
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KAUAI / NIIHAU 245-1251
MAUI 245-1818
LANAI 555-7199
MOLOKAI 552-0180
ed.case@mail.house.gov
www.house.gov/edcase



CONGRESSMAN ED CASE

SECOND DISTRICT, HAWAII

ISLANDS OF HAWAII, MAUI, KAUAI, LANAI,
MOLOKAI, OAHU (WINDWARD, NORTH SHORE,
CENTRAL, LEEWARD), KAUAI AND NIIHAU,
AND NORTHWESTERN HAWAIIAN ISLANDS

May 4, 2004

COMMITTEES:
EDUCATION AND THE WORKFORCE
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RURAL DEVELOPMENT AND RESEARCH
GENERAL FARM COMMODITIES
AND RISK MANAGEMENT
SMALL BUSINESS
RURAL ENTERPRISES, AGRICULTURE
AND TECHNOLOGY
WORKFORCE EMPOWERMENT
AND GOVERNMENT PROGRAMS
REGULATORY REFORM
AND OVERSIGHT

The Honorable Jennifer L. Dorn
Administrator
Federal Transit Administration
U.S. Department of Transportation
400 7th Street, SW
Washington, D.C. 20590-0001

Dear Ms. Dorn:

I have recently been contacted by private mass transportation companies (MTC) with their concerns about the City and County of Honolulu's (C&C) recent certification and assurance to the Federal Transit Administration as required for compliance with the FTA's Grant Programs for FY 2004. I enclose copies of their correspondence for your reference.

Specifically, the MTC are concerned that the C&C has not provided for the participation of the MTC in its Bus Rapid Transit system to the maximum extent possible. I would very much appreciate it if you would address their concerns.

Additionally, I would also greatly appreciate it if you would answer the questions on page two of their letters.

Thank you very much for your attention to this matter and to your prompt response. Should you have any questions or need additional information, please do not hesitate to contact me or have your staff contact my legislative assistant Tim Carson.

With aloha,

ED CASE
United States Congressman
Hawaii, Second District

E NOA CORPORATION

Operator of E Noa Toun & Waikiki Trolley Tours "The Tour & Trolley People"

March 26, 2004

Representative Ed Case
128 Cannon House Office Building
Washington, DC 20515-1101
and
Prince Kuhio Federal Bldg
Room 5-104
Honolulu, Hawaii 96850

Dear Representative Case,

The City Council adopted Resolution 04-14 on February 14 authorizing the Director of the Department of Transportation Services and the Corporation Counsel to submit certifications and assurances required for the compliance with the Federal Transit Administration Grant Programs for Federal Fiscal Year 2004. Section 03 of these certifications and assurances, based on 49 U.S.C. chapter 53, relates to the private mass transportation companies. (See Appendix A.) More specifically, the DTS Director and Corporation Counsel is certifying that if it "operates mass transportation equipment or facilities in competition with... transportation service provided by an existing mass transportation company," then it must have "provided for the participation of private mass transportation companies (in its system) to the maximum extent feasible consistent with applicable FTA requirements and policies."

The City and County has not provided for the participation of mass transit companies in its proposed BRT system with one exception. It has stated in the Final Federal EIS that tour buses will be allowed to use semi-exclusive lanes designated in the IOS portion of the In-Town BRT. No other participation has been provided for.

FTA Circular C 9300.1A, Section 4, Subsection 9 (See Appendix B), which supplements 49 U.S.C. chapter 53, states in part that:

"PRIVATE ENTERPRISES CONCERNS. The concerns of Federal transit law regarding private enterprises focus mainly on including the private sector in participating in local transit program... and protecting private providers of transit from competition with federally assisted transit providers."

It also states: "Plans and programs required for Federal transit assistance must encourage the participation of private enterprise to the maximum extent feasible."

It continues: "Specifically, FTA is prohibited from providing Federal assistance to a governmental body that provides service in competition with, or supplementary to, service currently provided by a private transportation company, unless FTA finds that the local transportation program developed in the planning process provides for participation by private transportation companies to the maximum extent feasible."

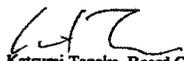
The private passenger carriers in Honolulu provide mass transportation services for visitors to Hawaii, particular Waikiki. The Initial Operating Segment (IOS) of the In-Town BRT, now under construction, is specifically designed to serve in part, visitors to Waikiki and thus is in direct competition with the private passenger carriers. In fact, the very first segment of the BRT is anchored in Waikiki, with over 70,000 visitors a day, and not in the primary areas where Oahu residents reside. Furthermore, the Final Federal EIS emphasizes that the IOS will service a variety of major attractions.

This situation, in light of the FTA requirements, raises serious questions as to whether the City and County certifications and assurances can be accepted as valid by the FTA. We suggest that it would be very helpful if you could put the following questions to Jennifer Dorn, FTA Administrator:

1. If a portion of the certifications and assurances provided by the City and County of Honolulu to qualify for FTA Grant Programs for FY 2004 proves to be invalid and/or inaccurate, what measures will you take?
2. If the City and County of Honolulu is proceeding with the construction of the Initial Operating Segment (IOS) of its In-Town BRT, for which it has received a ROD, and the IOS will be in direct competition with the private passenger carriers who serve the visitor industry, what measures will you take to protect "private providers of transit from competition with federally assisted transit providers?" (Circular C 9300)
3. If you find that the City and County of Honolulu is in violation of 49 U.S.C. 5323(a)(1) and FTA Circular C 9300, 1A, Section 4, Subsection 9, will you take steps to revoke the ROD approving the IOS?
4. What additional data do you desire from the passenger carriers substantiating that the IOS, which is to be funded in utilizing federal funds, will be in direct competition with those carriers?

If we can provide further elaboration or clarification, please let us know. We appreciate your assistance.

Sincerely Yours,



Katsumi Tanaka, Board Chair, E Noa Corporation

Appendix A. Section 03, Private Mass Transportation Companies, of Federal Fiscal Year 2004 Certifications and Assurances for Federal Transit Administration Assistance Programs

Appendix B. Federal Transit Administration Circular C9300.1A, Section 4, Subsection 9

Appendix A

03. PRIVATE MASS TRANSPORTATION COMPANIES

A State of local government Applicant seeking Federal assistance authorized by 49 U.S.C. chapter 53 to acquire the property or an interest in the property of a private mass transportation company or to operate mass transportation equipment or facilities in competition with, or in addition to, transportation service provided by an existing mass transportation company must provide the following certification. FTA may not award Federal assistance for that type of project until the Applicant provides this certification by selecting Category "03."

As required by 49 U.S.C. 5323(a)(1), the Applicant certifies that before it acquires the property or an interest in the property of a private mass transportation company or operates mass transportation equipment or facilities in competition with, or in addition to, transportation service provided by an existing mass transportation company, it has or will have:

- A. Found that the assistance is essential to carrying out a program of projects as determined by the plans and programs of the metropolitan planning organization;
- B. Provided for the participation of private mass transportation companies to be maximum extent feasible consistent with applicable FTA requirements and policies;
- C. Paid just compensation under state or local law to a private mass transportation company for its franchises or property acquired; and
- D. Acknowledged that the assistance falls within the labor standards compliance requirements of 49 U.S.C. 5333(a) and 5333(b).

Appendix B
Federal Transit Administration (FTA)
Circular C 9300.1A, Section 4, Subsection 9

9. PRIVATE ENTERPRISE CONCERNS. The concerns of Federal transit law regarding private enterprise focus mainly on including the private sector in participating in local transit programs, ensuring that adequate compensation is provided a private provider when its transit facilities and equipment are acquired by a state or local governmental authority, and protecting private providers of transit from competition with federally assisted providers.

a. Participation by Private Enterprise. Both Federal transit law and joint FHWA/FTA planning regulations (discussed in Appendix A of the circular) impose strong requirements for private as well as public sector participation as transportation programs are developed. Plans and programs required for Federal transit assistance must encourage the participation of private enterprise to the maximum extent feasible.

Federal law recognizes the special concerns of private transportation providers that compete with public mass transit authorities. By law, existing private transportation providers are afforded certain safeguards from competition. Specifically, FTA is prohibited from providing Federal assistance to a governmental body that provides service in competition with, or supplementary to, service currently provided by a private transportation company, unless FTA finds that the local transportation program developed in the planning process provides for participation by private transportation companies to the maximum extent feasible.

Accordingly, Federal transit law and the joint FHWA/FTA planning regulations direct special attention to the concerns of private transit providers in planning and project development. Joint FHWA/FTA planning regulations specifically require that private transit providers, as well as other interested parties, be afforded an adequate opportunity to be involved in the early stages of the plan development and update process. While FTA supports the participation of private transit providers in local mass transportation programs, FTA no longer imposes prescriptive requirements for determining whether a grant applicant has made adequate efforts to integrate private enterprise in its transit program, as explained in the FTA Federal Register Notice "Private Enterprise Participation," of April 26, 1994.

FTA relies on the local planning process, which comply with rigorous planning and private enterprise requirements, and the joint FHWA/FTA planning regulations. To determine the adequacy of a grant applicant's efforts to incorporate private enterprise in its transit program, FTA monitors compliance with statutory and regulatory private requirements as part of the annual audits and the triennial reviews (discussed earlier) under the urbanized area formula program.

Attachment I

OCT 21 2003 ^{CS}



City and County of Honolulu • State of Hawaii

October 22, 2003

Legislative Statement Opposing the In-Town BRT and Supporting a Regional Public Transit System

We represent the vast majority of the residents of urban Honolulu in whose neighborhoods the proposed In-Town BRT is to be built.

• We are members of the City Council, the House of Representatives and the State Senate; and span all party affiliations.

We unanimously support a regional public transit system that provides the residents of West Oahu, especially those living in the Kapolei and Milliani areas, with an efficient, modern and speedy means of transportation from their homes to downtown Honolulu and environs. Such a system can save these residents about an hour a day in commute time.

We are unanimous in our opposition to the In-Town BRT and its current manifestation, the IOS or Initial Operating Segment. This system, which takes scarce traffic lanes away from private automobiles and commercial vehicles, is a potential disaster for the residents in the areas we represent and for all the people of Oahu.

• The congestion that the In-Town BRT will create along Ala Moana and Kapiolani Boulevards, among other major thoroughfares, for drivers of passenger vehicles, trucks, commercial vans, taxis, private buses and limousines is mind-boggling.

• The time savings that the In-Town BRT will yield are negligible, almost non-existent.

• The vast amount of scarce resources, namely taxpayer money, that is required to build and maintain the proposed In-Town BRT can be better devoted to financing a regional public transit system that serves the people presently suffering the longest traffic delays and the worse congestion of any major population group on Oahu.

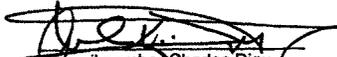
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We therefore call upon the members of the City Council to terminate the currently planned In-Town BRT and to devote the resources that are saved to providing a public transit system that serves the people most in need of relief, namely, the residents of West and Central Oahu. We further call upon the Governor, the Mayor, the members of the State Legislature, and the members of the City Council to work with one another in the creation of such a regional system.

Respectfully submitted:

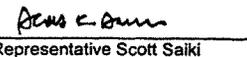

Councilmember Ann Kobayashi
District 5


Councilmember Rod Tam
District 6


Councilmember Charles Djou
District 4


Rep. Gaiem Fox
District 23


Representative Kenneth Hiraki
District 28


Representative Scott Saiki
District 22


Senator Carol Fukunaga
District 11


Senator Gordon Trimble
District 12



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FROM THE ADMINISTRATOR

NEWS & EVENTS

SAFETY & SECURITY

STRATEGIC BUSINESS PLAN

GRANT PROGRAMS

RESEARCH & TECHNICAL ASSISTANCE

GOVERNMENT & LEGAL

TRANSIT DATA & INFO

Hearing on the Rating and Evaluation of New Fixed Guideway Systems
04-28-04

Statement of
Jennifer L. Dorn
Administrator
Federal Transit Administration
U.S. Department of Transportation
Before the
U.S. House of Representatives
Committee on Appropriations
Subcommittee on Transportation and Treasury, and Independent Agencies
Hearing on the Rating and Evaluation of New Fixed Guideway Systems
April 28, 2004

Thank you, Mr. Chairman, for the opportunity to testify today on FTA's New Starts program. We appreciate your continued strong interest in ensuring that the projects funded through this program are appropriately justified and well managed. America's taxpayers have a right to expect that the investments made on their behalf are cost-effective, delivered on time and within budget, and produce the benefits that were promised.

I am pleased that FTA has achieved significant progress in recent years to improve the New Starts project evaluation and oversight program. This progress has already earned noteworthy recognition. It has been praised by GAO^[1] and cited as an example for other Federal grant programs to follow.^[2] In fact, the FTA New Starts Program is one of the few programs across the Federal government that has been removed from the Government Accounting Office's (GAO) "High Risk" list.^[3]

This progress was also reflected in the ratings received by FTA's New Starts program under Office of Management and Budget's (OMB) Program Assessment Rating Tool (PART). OMB uses PART to assess and evaluate programs across a wide range of issues related to performance, including purpose and design, planning, management, and results. Among the 62 competitive grant programs across the Federal government that were subject to PART ratings last year, the New Starts program achieved the highest score (63 out of a possible 100). Further, the New Starts program was one of only seven competitive grant programs that received a score of 100 in the program management category, which assesses agency management of the program, including financial oversight and program improvement efforts.

Despite this success, FTA continues to focus on finding new and better ways to help project sponsors develop good projects and manage them effectively. I particularly want to thank you, Mr. Chairman, for your continued interest in strengthening FTA's project evaluation and oversight program.

The Fiscal Year 2005 New Starts Budget Request

The President's FY 2005 budget provides \$1.5 billion for the New Starts program. This budget is a reflection of the Administration's strong commitment to continued Federal investment in major transit projects that are cost-effective, locally supported, delivered on time and within budget, and achieve their promised transportation benefits. It is a \$216 million (16 percent) increase over the FY 2004 enacted level and reflects the specific project funding recommendations found in FTA's Annual New Starts Report for FY 2005.

In addition to funding the 28 existing and one pending full funding grant agreements (FFGA), the budget funds seven additional projects -- five that are expected to be ready for a new FFGA before the end of FY 2005 and two meritorious projects in Raleigh and Charlotte, North Carolina. Although we are not

11 0 11

LAW OFFICE
STEVEN A. DIAZ

BY FACSIMILE

May 19, 2004

Katsumi Tanaka
President and CEO
E Noa Corporation
Pier 31
791 N. Nimitz Highway
Honolulu, HI 96817

Re: Initial Operating Segment ("IOS") of the In-Town Bus Rapid
Transit ("BRT") Project, Honolulu, HI.

Dear Mr. Tanaka:

You have asked me for my opinion regarding the likely administrative impact upon future requests for Federal funding of mass transit projects in Honolulu of the Initial Operating Segment ("IOS") of the In-Town Bus Rapid Transit ("BRT") Project. My opinion is based upon my 30 years of experience as a transit lawyer, including 11 years as a deputy city attorney of the City and County of San Francisco, California who was responsible, among other assignments, for transit matters, and as a former chief counsel of the Federal Transit Administration ("FTA") in the administration of President George H. W. Bush from 1989 - 1993. I have also served as the founding chairman of the Transit and Intermodal Transportation Law Committee of the Transportation Research Board of the National Academy of Science ("TRB").

As I understand the facts, the City and County of Honolulu has asked the Oahu Metropolitan Planning Organization ("OMPO") to amend the Transportation Improvement Plan ("TIP") to include the IOS of the BRT to facilitate a quick application for a Federal transit grant of \$19,750,000.00. The IOS has been carved out of a larger total project in order to obtain quick Federal funding for a short service segment between

2300 M STREET NW, SUITE 800 • WASHINGTON, D.C. 20037
TELEPHONE: (202) 416-1633 • FAX: (202) 633-3843 • EMAIL: SDIAZ@OUAZLAW.NET

''D''

Katsumi Tanaka

Page 2

May 19, 2004

Iwelei and Waikiki. The purpose of this truncated request is to avoid the FTA's \$25,000,000.00 threshold for project evaluation and rating.

As a matter of policy, the FTA is very concerned with the negative results which have been realized in projects which have avoided the Federal evaluation and rating procedures. Examples recently cited by FTA Administrator Jennifer Dorn in sworn testimony to Congress of projects which have had poor results which could have been avoided with full evaluation and rating under the FTA's protocols include the San Francisco BART extension to the airport and the Hiawatha Corridor Project in Minneapolis. Administrator Dorn has cited these examples in support of the Federal Administration's request for a change in law eliminating the \$25,000,000.00 threshold, a proposal already adopted by the Senate.¹

The FTA evaluation and rating criteria include evaluation of such project justification standards, *inter alia*, as: travel time saving, operating cost per passenger mile, incremental cost per new rider, stability and reliability of capital and operating financing plans, etc. It is no secret to the FTA that the IOS is a reduced proposal which is actually part of a larger plan that would, in its entirety, exceed the \$25,000,000.00 threshold.

The purpose of such project evaluation is to assure that every federally funded project's transportation benefits justify its cost; that every project is finished on time; that every

¹ See Testimony of FTA Administrator Jennifer Dorn before the Subcommittee on Transportation, Treasury and Independent Agencies of the Committee on Appropriations of the U.S. House of Representatives on April 28, 2004, at pp. 1 and 5.

Katsumi Tanaka

Page 3

May 19, 2004

project is finished within budget; and that every project delivers the benefits it promises.² Skirting this requirement with a truncated plan for immediate implementation is clearly not a favored approach with the FTA. Future, larger projects are therefore likely to be greeted with some skepticism and a very close scrutiny to assure that the larger projects are not merely added on top of a flawed and unexamined IOS.

Administrator Dorn has told Congress that the practice of presenting grant applications for small parts of larger projects thereby avoiding project evaluation is a disfavored practice and should be banned in statute. Her sworn testimony on the subject states:

First, we ask that the current exemption from project evaluation and rating for projects seeking less than \$25 million in New Start funds be eliminated, as in the Senate bill. We have learned from experience that this exemption encourages project sponsors to artificially define projects into smaller segments in order to avoid being subject to FTA assessment and can lead to the expenditure of Federal taxpayer dollars on projects that would not meet minimum financial or project justification standards. Under TEA-21, approximately \$360 million of Federal New Start funds have been spent on projects that were exempt from FTA's project evaluation and rating system.³

It is therefore my opinion, as one who has served as the chief legal officer of the FTA and the third-ranking policy officer of that agency, that the proposed TIP amendment to include the IOS does a direct disservice to the credibility of OMPO and the larger and long-term interests of the OMPO program of projects.

² *Id.*

³ *Id.*

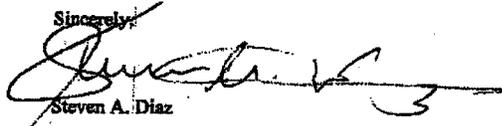
Katsumi Tanaka

Page 4

May 19, 2004

I trust this responds to your inquiry. Please let me know if I may provide any further information.

Sincerely,



Steven A. Diaz

Cliff/Private sector participation research

<http://www.fta.dot.gov/librarv/policv/circ9300/9300ch6.html#c6n45>

PRIVATE ENTERPRISE CONCERNS. The concerns of transit law regarding private enterprise focus mainly on including the private sector in participating in local transit programs, ensuring that adequate compensation is provided a private provider when its transit facilities and equipment are acquired by a state or local governmental authority, and protecting private providers of transit from competition with federally assisted transit providers.

- a. Participation by Private Enterprise. Both Federal transit law and joint FHWA/FTA planning regulations (35) (discussed in Appendix A of the circular) impose strong requirements for private as well as public sector participation as transportation programs are developed. Plans and programs required for Federal transit assistance must encourage the participation of private enterprise to the maximum extent feasible. (36)

Federal law recognizes the special concerns of private transportation providers that compete with public mass transit authorities. By law, existing private transportation providers are afforded certain safeguards from competition. Specifically, FTA is prohibited from providing Federal assistance to a governmental body that provides service in competition with, or supplementary to, service currently provided by a private transportation company, unless FTA finds that the local transportation program developed in the planning process provides for participation by private transportation companies to the maximum extent feasible. (37) Accordingly, Federal transit law (38) and the joint FHWA/FTA planning regulations direct special attention to the concerns of private transit providers in planning and project development. Joint FHWA/FTA planning regulations specifically require that private transit providers, as well as other interested parties, be afforded an adequate opportunity to be involved in the early stages of the plan development and update process. (39) While FTA supports the participation of private transit providers in local mass transportation programs, FTA no longer imposes prescriptive requirements for determining whether a grant applicant has made adequate efforts to integrate private enterprise in its transit program, as explained in the FTA Federal Register Notice "Private Enterprise Participation," of April 26, 1994. (40)

FTA relies on the local planning process, which must comply with rigorous planning and private enterprise requirements, (41) and the joint FHWA/FTA planning regulations. To determine the adequacy of a grant applicant's efforts to incorporate private enterprise in its transit program, FTA monitors compliance with statutory and regulatory private enterprise requirements as part of the annual audits and the triennial reviews (discussed earlier) under the Urbanized Area Formula Program. (42)

"E"

- b. Acquisition of Private Mass Transportation Facilities. Although acquisition of a private transit provider's property takes place less often than when Federal transit assistance was first established, Federal law recognizes the special concerns of private transportation providers whose property is acquired by public transit authorities. First, no Federal transit assistance authorized by 49 U.S.C. chapter 53 (43) may be expended to acquire equipment or facilities currently being used in service in an urban area unless the transportation improvement program demonstrates that the acquired property will be so improved that the transportation needs of the area will be served better. (44) Second, FTA is prohibited from awarding Federal assistance to a governmental body to acquire property from a private transportation provider unless just and adequate compensation under state or local law will be paid to the private provider for acquisition of its franchises or property. (45)
- c. Charter and School Bus Operations. By law, private providers of charter and school bus service are afforded certain protections from competition with public transit authorities. Grant applicants that operate bus or van services should refer to Chapter III, paragraph 8c, for a full explanation of the limits these protections place on federally assisted transit operators.

1. 49 U.S.C. § 5306(a), formerly Section 8(o)
2. 49 U.S.C. § 5323(a)(1)(B), formerly Section 3(e)
3. 49 U.S.C. § 5303(f)(4), formerly Section 8(g)(4)
4. 23 C.F.R. § 450.322(c)
5. 59 Fed. Reg. 21890 (1994)
6. 49 U.S.C. § § 5303 - 5306, formerly Section 8
7. 49 U.S.C. § 5307, formerly Section 9
8. formerly the Federal Transit Act, as amended, and related laws
9. 49 U.S.C. § 5306(a), formerly Section 8(o)
10. 49 U.S.C. § 5323(a)(1)(C), formerly Section 3(e)(3)

Sec. 5306. - Private enterprise participation in metropolitan planning and transportation improvement programs and relationship to other limitations

(a) Private Enterprise Participation. -

A plan or program required by section 5303, 5304, or 5305 of this title shall encourage to the maximum extent feasible the participation of private enterprise. If equipment or a facility already being used in an urban area is to be acquired under this chapter, the program shall provide that it be improved so that it will better serve the transportation needs of the area.

(b) Relationship to Other Limitations. -

Sections 5303-5305 of this title do not authorize -

(1)

a metropolitan planning organization to impose a legal requirement on a transportation facility, provider, or project not eligible under this chapter or title 23; and

(2)

intervention in the management of a transportation authority

Sec. 5323. - General provisions on assistance

(a) Interests in Property. -

(1)

Financial assistance provided under this chapter to a State or a local governmental authority may be used to acquire an interest in, or buy property of, a private mass transportation company, for a capital project for property acquired from a private mass transportation company after July 9, 1964, or to operate mass transportation equipment or a mass transportation facility in competition with, or in addition to, transportation service provided by an existing mass transportation company, only if -

(A)

the Secretary of Transportation finds the assistance is essential to a program of projects required under sections 5303-5306 of this title;

(B)

the Secretary of Transportation finds that the program, to the maximum extent feasible, provides for the participation of private mass transportation companies;

(C)

(4)

Before approving a long-range plan, each metropolitan planning organization shall provide citizens, affected public agencies, representatives of mass transportation authority employees, freight shippers, providers of freight transportation services, private providers of transportation, representatives of users of public transit, and other interested parties with a reasonable opportunity to comment on the plan in a way the Secretary of Transportation considers appropriate.

Available at <http://www4.law.cornell.edu/uscode/49/5303.html>

<http://www4.law.cornell.edu/uscode/49/5307.html> Search on "private"

Selective Statutory and Regulatory Provisions Governing DOT & DOT/FTA
(emphases added)

DOT
STATUTORY PROVISION
49 USC §101

"(b) A Department of Transportation is necessary in the public interest and to –

...
(2) make easier the development and improvement of coordinated transportation service to be provided by **private enterprise to the greatest extent feasible**"

DOT
REGULATORY PROVISIONS
49 CFR §1.4 General responsibilities

"(a) Office of the Secretary. Provides for:

...
(4) Encouraging **maximum private development of transportation services**"

49 CFR §1.23 Spheres of primary responsibility

"(d) Assistant Secretary for Transportation Policy. ... evaluation of private transportation sector operating and economic issues"

49 CFR §18.32 Equipment *[Note: This section in DOT's codification of the Grants Management Common Rule applies to all of the Department's assistance programs]*

"(c) Use. (1) Equipment shall be used by the grantee or subgrantee in the program or project for which it was acquired as long as needed, whether or not the project or program continues to be supported by Federal funds. When no longer needed for the original program or project, the equipment may be used in other activities currently or previously supported by a Federal agency.

...
(3) Notwithstanding the encouragement in Sec. 18.25(a) to earn program income, the grantee or subgrantee **must not use equipment acquired with grant funds to provide services for a fee to compete unfairly with private companies that provide equivalent services, unless specifically permitted or contemplated by Federal statute.**"

DOT/FTA
STATUTORY PROVISIONS
49 USC §5306

"(a) Private Enterprise Participation. - A plan or program required by section 5303, 5304, or 5305 of this title shall encourage to the **maximum extent feasible the participation of private enterprise**. If equipment or a facility already being used in an urban area is to be acquired under this chapter, the program shall provide that it be improved so that it will better serve the transportation needs of the area."

"F"

49 USC §5307

"(c) Public Participation Requirements. - Each recipient of a grant shall -

...

(2) develop, in consultation with interested parties, including private transportation providers, a proposed program of projects for activities to be financed;

...

(6) consider comments and views received, especially those of private transportation providers, in preparing the final program of projects"

49 USC §5323

"(a) Interests in Property. - (1) Financial assistance provided under this chapter to a State or a local governmental authority may be used to acquire an interest in, or buy property of, a private mass transportation company, for a capital project for property acquired from a private mass transportation company after July 9, 1964, or to operate mass transportation equipment or a mass transportation facility in competition with, or in addition to, transportation service provided by an existing mass transportation company, only if -

(A) the Secretary of Transportation finds the assistance is essential to a program of projects required under sections 5303-5306 of this title;

(B) the Secretary of Transportation finds that the program, to the maximum extent feasible, provides for the participation of private mass transportation companies"

DOT/FTA

REGULATORY PROVISION

49 CFR §604.9 Charter Service

"(a) If a recipient desires to provide any charter service using FTA equipment or facilities the recipient must first determine if there are any private charter operators willing and able to provide the charter service which the recipient desires to provide. To the extent that there is at least one such private operator, the recipient is prohibited from providing charter service with FTA funded equipment or facilities unless one or more of the exceptions in Sec. 604.9(b) applies."

E NOA CORPORATION

Operators of E Noa Tours & Waikiki Trolley Tours "The Tour & Trolley People"

May 27, 2004

TO: Honorable Chairman Doug Ose
 Congress of the United States
 House of Representatives
 Committee on Government Reform

FROM: Katsumi Tanaka

RE: Public Sector Transportation

Dear Chairman Ose:

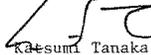
Firstly, I thank you heartily for holding hearings for the purposes of fidelity to Federal laws and to improve upon them Private Secot Participation.

Secondly, I wish to inform you that my company, fully supported bu Hawaii Transportation Association (Association of Private Carriers), has decided to register a formal Appeal to the Federal Transit Administration. This Appeal has been necessitated by Honolulu (Hawaii) County Administration that has not followed the requirements of Federal Law. Indeed, the current Honolulu County Administration has abandoned efforts for public transportation for a larger segment of Oahu's population. In fact, the Initial Operating Segment (IOS) is the only effort for which the Oahu Administration is exerting its efforts to procure Federal Funding. This IOS in effect is to procure Federal Funding through the Federal Transit Administration (FTA) to operate transportation services for tourists principally and then incidentally also the local residents. Thus, we Private Sector Transportation Industry continues to suffer unfair competition originating from the Oahu Administration. IOS' Trasit Project is focused upon Waikiki, a small acreage on the Island of Oahu where 95% of tourists to the island stay at the hotels. Were the Federal Funds be granted (\$20 million) by FTA, Private Sector will suffer devastating damage to its business and existence.

Congressman Ose, we implore upon you for assistance. At this very hour the County of Honolulu (Oahu Island) is applying for the \$20 million for its IOS Project. Oahu Metropolitan Planning Organization (OMPO) is about to vote on that \$20 million application.

There are no bona fide indicators that warrant nor indicate rush into procurement of Federal Funds (\$20 million) to implement the mayor's project. Here in Hawaii, it is commonly assumed and believed that the rush is related to the expiration at the end of this year of his mayoral term. All of the elected officials (State Legislators and City Council members) that represent the districts impacted by the IOS have registered their opposition to the IOS as well as members of the Hawaii Transportation Association.

Thank you for your due consideration and seeking your assistance, I remain,



Katsumi Tanaka

Pier 31, 791 North Nimitz Highway. Honolulu, Hawaii 96817 TELEPHONE (808) 593-8073 FAX (808) 593-8752

SC 15 6/30/04

E Noa Corporation
Pier 31
791 North Nimitz Highway
Honolulu, Hawaii 96817

Phone: 593-8073 Fax: 593-8752 e-mail:
ktakenami@waikikitrolley.com

May 27, 2004

Mr. Leslie Rogers, Regional Administrator
Federal Transit Administration, Region IX
301 Mission Street, Suite 2210
San Francisco, CA 94105

Dear Mr. Rogers:

The E Noa Corporation, a privately-owned passenger carrier providing mass transportation services [as defined by 49USC §5302(a)(7)] in Honolulu, Hawaii, is hereby filing a formal protest with the Federal Transit Administration, Region IX, relating to:

- (1) the lack of consultation of E Noa Corporation and other private carriers in the development of the plans for the Initial Operating Segment (IOS), and the BRT of which the IOS is a part, as described in the Federal Environmental Impact Statement, which you approved on July 25, 2003;
- (2) the lack of consideration of the economic impact on E Noa and other private carriers of implementing the proposed IOS and the BRT, of which the IOS is a part, to the detriment of a coordinated transportation system for Honolulu; and
- (3) the lack of provision for participation of private transportation companies in the proposed IOS and the BRT, of which the IOS is a part, to the maximum extent feasible to the detriment of a coordinated transportation system for Honolulu.

A. The Basis in Law, Regulation, and Circular for the Appeal

1. Of the five purpose clauses set forth in 49USC §5301(f), three of them emphasize the importance of involving private transportation companies:

Letter to Leslie Rogers, FTA Regional Administrator May 27, 2004

"(f) General Purposes.--The purposes of this chapter are--
 (1) to assist in developing improved mass
 transportation
 equipment, facilities, techniques, and methods with the
 cooperation
 of public and private mass transportation companies;
 (2) to encourage the planning and establishment of
 areawide
 urban mass transportation systems needed for economical
 and
 desirable urban development with the cooperation of
 public and
 private mass transportation companies;
 (3) to assist States and local governments and
 their authorities
 in financing areawide urban mass transportation systems
 that are to
 be operated by public or private mass transportation
 companies as
 decided by local needs."

2. The section of the law relating to "private enterprise participation in metropolitan planning and transportation improvement programs and relationship to other limitations" states that: "(a) Private Enterprise Participation. - A plan or program required by section 5303, 5304, or 5305 of this title shall encourage to the maximum extent feasible the participation of private enterprise. " [49USC §5306(a)]

3. The section of the law relating to public participation requirements states in part that: "Each recipient of a grant shall... (2) develop, in consultation with interested parties, including private transportation providers, a proposed program of projects for activities to be financed..... and (6) consider comments and views received, especially those of private transportation providers, in preparing the final program of projects." [49USC §5307(c)(2) and (6)]

4. The General Provisions on Assistance, which states in part that: "Financial assistance provided under this chapter to a State or local governmental authority may be used ...to operate mass transportation equipment or a mass transportation facility in competition with, or in addition to, transportation services provided by an existing mass transportation company, only if

Letter to Leslie Rogers, FTA Regional Administrator May 27, 2004

- a. The Secretary of Transportation finds the assistance is essential to a program of projects required under sections 5305-5306 of this title; (and)
 - b. The Secretary of Transportation finds that the program, to the maximum extent feasible, provides for the participation of the private mass transportation companies. [49USC §5323(a)(1)(A) and (B)]
5. The portion of Federal Transit Administration (FTA) Circular C 9300.1A, Chapter VI, relating to private enterprise , states in part that:

"PRIVATE ENTERPRISE CONCERNS . The concerns of Federal transit law regarding private enterprise focus mainly on including the private sector in participating in local transit programs...and protecting private providers of transit from competition with federally assisted transit providers.

- a. Participation by Private Enterprise. Both Federal transit law and joint FHWA/FTA planning regulations (discussed in Appendix A of the circular) impose strong requirements for private as well as public sector participation as transportation programs are developed. Plans and programs required for Federal transit assistance must encourage the participation of private enterprise to the maximum extent feasible.

Federal law recognizes the special concerns of private transportation providers that compete with public mass transit authorities. By law, existing private transportation providers are afforded certain safeguards from competition. Specifically, FTA is prohibited from providing Federal assistance to a governmental body that provides service in competition with, or supplementary to, service currently provided by a private transportation company, unless FTA finds that the local transportation program developed in the planning process provides for participation by private transportation companies to the maximum extent feasible.

Accordingly, Federal transit law and the joint FHWA/FTA planning regulations direct special attention to the concerns of private transit providers in planning and project development. Joint FHWA/FTA planning regulations specifically require that private transit providers, as well as other interested parties, be afforded an adequate

Letter to Leslie Rogers, FTA Regional Administrator May 27, 2004

opportunity to be involved in the early stages of the plan development and update process."

B. The Basis in Fact for the Appeal

1. **Development of the Plan.** Neither the IOS nor the BRT, of which the IOS is a part, was developed in consultation with private passenger transportation carriers.
 - a. There were no meetings with the members of the Private Passenger Carrier Division of the Hawaii Transportation Association (HTA) with respect to the planning of the IOS nor the BRT
 - b. There were no individual meetings with private passenger carriers that we know of with respect to the planning of the IOS nor the BRT, with the exception of a meeting in September 2000, requested by TransHawaiian (no longer in operation) at which Ms. Soon, Director of the City and County Department of Transportation Services, explained to Ray Miyashiro, Katsumi Tanaka and Tom Dinell the constituent elements of the BRT Plan. This was not a planning session at which the views of the private passenger carriers were solicited.
 - c. There were community meetings, but in no sense were these designed to be consultative sessions with the private passenger carriers.
 - d. The City and County did convene five geographical working groups, to address operational details of the proposed BRT, subsequent to the selection of the preferred alternative by the City Council. Two or three representatives of the private passenger carriers were members of the Waikiki Working Group, among 30 to 40 other members. This group met a couple of times in the fall of 2001 and, after a five month hiatus, a couple of times in Spring 2002.
 - e. There may have been consultation with Oahu Transit Services (OTS), but OTS is a captive corporation of the City and County, which operates the public transit system for the Department of Transportation Services. It is not a private provider of transit as referred to in the federal statutory and regulatory authority.

Letter to Leslie Rogers, FTA Regional Administrator May 27, 2004

2. **The Competition with E Noa Corporation and Other Private Passenger Carriers.** The BRT Plan does not examine in any degree of detail whether implementation of the Plan would have a deleterious impact on the private transportation providers as well as on the provision of a coordinated transportation system for Honolulu, which would involve private carriers to the maximum extent feasible.
- a. The Federal Final Environmental Impact Statement (FFEIS) does assert that, "It is expected tourists will use the public transit system that includes the IOS at the same proportion as they do today, which is estimated at five to ten percent system-wide and 20-25 per cent in Waikiki." (IOS-35) There are no detailed data and analyses in the FFEIS to support this assertion. This statement was not developed in consultation with E Noa Corporation or the other private passenger transportation carriers. Neither E Noa Corporation nor the other private passenger transportation carriers were interviewed to obtain their input as to the number of tourists expected to use the IOS or the BRT nor were they solicited for their input as to the services the private carriers could provide in a cost efficient manner as part of a coordinated transportation system for Honolulu.
 - b. The City makes clear in the FFEIS that the IOS will serve tourist attractions. It states that: "Existing attractions that will be served by the IOS include Chinatown, the Central Business District, Aloha Tower Market Place, Hawaii Maritime Museum, Pier 10 and 11 cruise ship terminal, Restaurant Row, Kakaako Waterfront Park, Children's Discovery Center, Ward Centre and Entertainment Complex, Ala Moana Center, Ala Moana Beach Park, Fort DeRussy, Kapiolani Park, and major hotels, high-rise residences, offices and commercial/recreational destinations in Waikiki." (IOS-11) The E Noa Corporation currently serves the majority of these attractions including all the major hotels in Waikiki.
 - c. In the State Final Environmental Impact Statement (SFEIS) the City went further than in the FFEIS, stating that, "It is not expected that tour bus operators will be adversely affected due to the relatively low number of tourists that are expected to choose BRT for their travel needs." (p. 5-31) There

Letter to Leslie Rogers, FTA Regional Administrator May 27, 2004

are no detailed data and analyses in the SFEIS to support this assertion. This statement was not developed in consultation with E Noa Corporation or the other private passenger transportation carriers. Neither E Noa Corporation nor the other private passenger transportation carriers were interviewed to obtain their input as to the economic impact of the IOS or the BRT on them nor were they solicited for their input as to the services the private carriers could provide in a cost efficient manner as part of a coordinated transportation system for Honolulu.

- 3. Participation of E Noa Corporation and Other Private Passenger Carriers in the Proposed Public Transit System.**
The Plan put forth for the IOS in the FFEIS makes no provision whatsoever for the participation of the private passenger transportation carriers in providing the services to be furnished, other than that tour buses and trolleys may use the semi-exclusive lanes for travel (but not for pick-up and discharge of passengers). No solicitation was made by the City to E Noa Corporation nor to the other private passenger transportation carriers as to how they might participate in providing the services to be furnished in the proposed IOS or BRT public transit system.

C. The Violations of Law, Regulation, and Circular

Federal laws, regulations and circulars have been blatantly violated in the process of: (1) developing the plan for the IOS and its parent, the BRT, in a manner that ignored the requirements to consult with private providers of transportation services; (2) creating the IOS, which will openly competes with the E Noa Corporation; and (3) excluding E Noa Corporation and other private providers from participating in the proposed transit system.

1. Development of the Plan

- The City is in violation of 49USC §5307(c)(2) and (6) and Circular C9300.1A, Chapter 6 as it relates to private enterprise concerns.
- Further, the City has ignored the spirit and the intent of 49USC 5301(f).

2. The Competition with E Noa Corporation and Other Private Passenger Carriers

Letter to Leslie Rogers, FTA Regional Administrator May 27, 2004

- The City is in violation of 49USC §5323(a)(1)(A) and (B), no finding from the Secretary of Transportation having been sought or obtained, and of Circular C9300.1A, Chapter 6 as it relates to private enterprise concerns.

3. Participation of E Noa Corporation and Other Private Transportation Carriers in the Proposed Public Transit System

- The City is in violation of 49USC §5306(a) and Circular C9300.1A, Chapter 6 as it relates to private enterprise concerns.
- Further, the City has ignored the spirit and intent of 49USC 5301(f).

D. The Proper Remedy in View of the Violations of Law, Regulation, and Circular

In view of egregious violations of federal laws, regulations and circulars, E Noa Corporation requests the immediate implementation of the following remedies:

1. The Record of Decision for the IOS, granted by FTA on October 23, 2003, be rescinded; and
2. The City and County of Honolulu be instructed that in all future transportation projects seeking federal funding that it be certain to comply with all the provisions of laws, regulations, and DOT circulars, especially as they relate to: (a) development of plans in cooperation with private transportation companies; (b) competition of publicly subsidized transit systems with private transportation companies to the detriment of a coordinated transportation system for Honolulu; and (3) participation of private passenger carriers in proposed public transit systems to promote the development of a coordinated transportation system for Honolulu.

In Conclusion

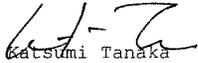
We look forward to your enforcing of the laws, regulations, and circulars cited in this appeal and the granting of the remedy we are seeking.

Letter to Leslie Rogers, FTA Regional Administrator May 27, 2004

Thank you very much for receiving our appeal. We anticipate your speedy response to this appeal.

Speed is of the essence since the City is already moving ahead with the implementation of the IOS on Kuhio Avenue. Construction commenced at the end of February. Furthermore, the City has segmented the IOS into two segments: (1) the Kuhio Avenue improvements now underway, which are being funded from City monies; and (2) what the City terms the "federalized portion of the 5.6 mile Iwilei to Waikiki initial operating segment," to be funded from New Starts (\$11,880,000) and Bus Capital funds (\$7,870,000) and to be matched by local funds being used to acquire hybrid electric 40 foot replacement buses. Currently, the City is seeking approval of the Oahu Metropolitan Planning Organization (OMPO) to add the "federalized portion" of the IOS to the TIP.

Sincerely yours,



Katsumi Tanaka
Chairman of the Board and CEO

Cc: Representative Doug Ose, Chairman, Government Reform Subcommittee on Energy Policy, Natural Resources and Regulatory Affairs, U.S. House of Representatives

Emil H. Frankel, Assistant Secretary for Transportation Policy, U.S. Department of Transportation

E NOA CORPORATION

Operators of E Noa Tours & Waikiki Trolley Tours "The Tour & Trolley People"

May 31, 2004

Ms. Lauren Jacobs
Clerk
Congress of the United States
House of Representatives
Committee on Government Reform

Re: "How Can We Maximize Private Sector Participation in Transportation?"

Dear Ms. Jacobs,

Firstly, I thank you for your diligent assistance in connection with the efforts of the Committee.

Secondly, I acknowledge receipt of your letter dated May 21, 2004; I thank you for it accordingly.

Thirdly, I followed the guidelines as enumerated and delineated by the said letter from you. Please note on page 7 of my enclosed testimony, I have added a paragraph with the caption, Imminent Danger. This addition, I believe, is in compliance with the guidelines, including guideline 22. I trust and hope that this addition serves to notify how imminent the danger is confronting private sector transportation companies in Honolulu (island of Oahu). I have learned of the referenced OMPO meeting shortly after my Washington, D.C. testimony of May 18th, 2004. On behalf of private sector transportation companies, I wish to inform the Committee Members of this imminent danger.

Fourthly, I am enclosing the brochure of "The Bus", which is the Honolulu City's municipal bus service. The enclosed is in the Japanese language soliciting riders to reach destinations, such as major tourist attractions and shopping centers for Japanese tourists. In other words, the County of Honolulu is currently running tour operations with federal subsidies. Moreover, the County of Honolulu is currently applying for federal funds to further its appetite for tourists as a significant base of ridership. This circumstance constitutes grave and imminent threat upon us, private sector transportation companies in Honolulu. Note the Japanese language greetings of Honolulu mayor appearing on the preface.

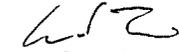
Fifthly, during the hearing of May 18th 2004, I requested to put on record the Japanese language brochure as well as Waikiki Trolley map. The County of Honolulu is

Pier 31, 791 North Nimitz Highway, Honolulu, Hawaii 96817 . TELEPHONE (808) 593-8073 FAX (808) 593-8752

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attempting to use federal funds to duplicate our service. Please alert the Committee Members of this threat that could become a devastating blow upon us.

Sincerely Yours,



E Noa Corporation
Katsumi Tanaka, CEO

Testimony of
Katsumi Tanaka, Chairman of the Board and CEO
of
E Noa Corporation, Honolulu, Hawaii
Before the
Subcommittee on Energy Policy, Natural Resources
And Regulatory Affairs,
Committee on Government Reform,
House of Representatives,
Congress of the United States

Hearing on Private Sector Participation
In Transportation

May 18, 2004



I am Katsumi Tanaka, Chairman of the Board and CEO of E Noa Corporation, operator of the Waikiki Trolley and E Noa Tours in Honolulu, Hawaii. Thank you for providing me with this opportunity to discuss how the federally-subsidized mass transit provider in Honolulu, namely, the City and County of Honolulu, and its captive corporation, Oahu Transit Service (OTS), stifle private sector competition at every turn, regardless of the intent of the federal laws and regulations.

I will cite three specific instances of such unfair competition: (1) The Hanauma Bay monopoly; (2) The aggressive recruiting of visitors; and (3) The formulation of the Bus Rapid Transit proposal.

The primary business of the private passenger carriers in Honolulu is serving the visitors to Hawaii.¹ We employ a variety of vehicles including buses of all sizes, trolleys, vans, and trams. The core of our business is in Waikiki, a compact urban resort area of less than two square miles where approximately 95% of the visitors to Oahu stay. On an average day, Waikiki houses 72,000 visitors. Also, about 19,000 residents live in Waikiki.²

Waikiki and its visitors are the alpha and omega of existence for the privately owned passenger carriers in Honolulu. Take the visitors, who are our customers, away, as the City and County seeks to do, and there is no more major private ground transportation industry in Hawaii.

The Hanauma Bay Monopoly

The City and County monopolizes pick-up and delivery service to a very popular visitor destination, namely, Hanauma Bay, partially under the guise of avoiding overcrowding.³ Visitors carried by private tour operators may only stop at the overlook for a few minutes, but none of their passengers may stay at Hanauma Bay and be picked-up later. Visitors arriving by the federally subsidized TheBus, namely, Route 22, can get off TheBus at Hanauma Bay and stay as long as they wish, enjoying the beach, the water and the marine life, and return to Waikiki on a later bus at a time of their

6-7

own choosing.⁴ In fact, the vast majority of passengers on Route 22, which runs from Waikiki to Sea Life Park and return, are tourists. The City chooses to ignore two facts: (1) there are private sector passenger carriers ready and prepared to bring visitors to and from Hanauma Bay; and (2) there are alternative means available for achieving the valuable goal of preserving the fragile environment of the Bay, without, in effect, banning customers of the private tour operators from enjoying the beach, the water and the marine life.

The City in this instance is acting as an entrepreneur, seeking to: (1) maximize its revenues; (2) use its power as a regulator to eliminate potential participation by private transportation carriers; and (3) maximize the federal tax dollars it receives as a federal grantee. The City receives federal funds, which it then uses to compete unfairly with private carriers while simultaneously using its regulatory power to make sure private carriers cannot compete with the City. The injustice of the arrangements for serving Hanauma Bay has been called to the attention of City officials many times, but no changes have been made.

The Aggressive Recruiting of Visitors

The fundamental problem is that the City is simultaneously regulator and entrepreneur, a basic conflict of interest, which it has not been able to resolve, as noted in the paragraphs relating to Hanauma Bay. As entrepreneur, the City desire to maximize ridership and revenues for its highly subsidized public transportation service, TheBus. As regulator the City is responsible for creating a level playing field in which subsidized public transit services do not unfairly compete with private transportation carriers.⁵ What has happened in Honolulu is that the City's desire to promote the well-being of its own highly subsidized transportation service has taken precedence over other choices in a manner that is detrimental to privately-owned passenger carrier companies. The combination of federally subsidized City buses serving primarily tourist destinations plus the City's anti-private sector regulatory schemes harm the private carriers and hurt their ability to

Testimony of Katsumi Tanaka, E Noa Corporation May 18, 2004 4

survive economically.

The City's determination to recruit visitors to the subsidized TheBus is further evidenced by the authorized publication of two guides to the City's bus service, one in English and one in Japanese, The Bus Map and Guide Book. The emphasis in the Guides is on how to travel to attractive tourist destinations using TheBus. The guides, promoted on the OTS web site, are widely available for purchase in Waikiki. They include a glowing invitation from the Mayor to visitors to ride TheBus.

The City and County's fare structure includes a \$20 "Visitor Pass," which allows unlimited use of TheBus for four consecutive days and which is sold throughout Waikiki. Furthermore, a visitor may circle Oahu on TheBus for just \$2.

Finally, the City is seeking to commence its BRT system, not by providing additional service to rural and suburban customers, who have the fewest public transit options and are badly in need of public transportation, but by adding to services that are already available in Waikiki, with its high concentration of visitors, a group well served by the private transportation carriers. Obviously, the revenue per passenger mile will be higher in Waikiki than in rural and suburban Oahu, but a primary purpose of public transportation is to provide subsidized services to those most in need, especially low-income families, youth and the elderly living on limited means. These are not the residents of Waikiki nor are they the tourists visiting Waikiki.

The Formulation of the Bus Rapid Transit Proposal

On July 22, 2002, E Noa Corporation wrote to Jennifer Dorn, FTA Administrator, protesting the bypassing of the private transportation carriers by the City and County of Honolulu in the planning and development of its BRT Proposal, for which federal funds are being sought.⁶ In that letter we cited what appeared to us to be violations of FTA Circular C9300.1A, section

4, subsection 9, USC 5307 re urbanized area formula grants, and 49 USC 5323(a), all of which emphasize the importance of consultation with private transportation companies in the development of plans and programs requiring federal assistance as well as protecting private providers of transit against competition from federally assisted transit providers.

The BRT Plan was not developed in consultation with private passenger transportation carriers. Just briefly: (1) There were no meetings with the members of the Private Passenger Carrier Division of the Hawaii Transportation Association (HTA) with respect to the planning of the BRT; (2) There were community meetings, but in no sense was these designed to be consultative sessions with the private passenger carriers; (3) The City and County did convene five geographical working groups, to address operational details of the proposed BRT, subsequent to the selection of the preferred alternative by the City Council. Two or three representatives of the private passenger carriers were members of the Waikiki Working Group, among 30 to 40 other members representing a variety of interests. The five meetings of this group, mostly dedicated to power point presentations by the City and its consultants, did not constitute consultation with the private transportation carriers; and (4) The BRT Plan does not examine whether implementation of the Plan would have a deleterious impact on the private transportation providers. The Supplemental Draft Environmental Impact Statement (SDEIS) asserts that, "The number of tourists expected to use the public transit system with the BRT is forecast to be no greater proportionally than today." (p. 5-20) There are no detailed data and analyses in the SDEIS or any subsequent EIS to support this assertion. This statement was not developed in consultation with the private passenger transportation carriers.

On September 9, 2002, Williams Sears, Chief Counsel, FTA, responded, on behalf of Ms. Dorn, stating that with respect to the EIS process there is no provision for involvement or access by a private company greater than that afforded the general public.⁷ The response was a bit frustrating because, in

Testimony of Katsumi Tanaka, E Noa Corporation May 18, 2004 6

the development of the BRT, the EIS is in essence both the plan and the assessment document. There is no separate, stand-alone plan.

Let me note that 49 USC 5323(a) states very specifically that: "Financial assistance provided under this chapter to a State or local governmental authority may be usedto operate mass transportation equipment or a mass transportation facility in competition with, or in addition to, transportation services provided by an existing mass transportation company, only if

- a. The Secretary of Transportation finds the assistance is essential to a program of projects required under sections 5305-5306 of this title;
- b. The Secretary of Transportation finds that the program, to the maximum extent feasible, provides for the participation of the private mass transportation companies."

There was no request to the Secretary of Transportation for such a finding nor did the Secretary issue such a finding in the case of the Honolulu BRT proposal or its truncated version, the Honolulu IOS proposal. In our case, participation of the private sector passenger carriers in the program to the "maximum extent feasible" proved to be a fiction.

In conclusion, the private passenger carriers were not consulted in any special way in the development of the BRT proposal, nor were the assessment made by the City in its EIS documents about the economic impact of the BRT on private transportation carriers anything more than mere assertions.

In Conclusion

I hope that these few examples -- (1) The Hanauma Bay monopoly; (2) The aggressive recruiting of visitors; and (3) The formulation of the Bus Rapid Transit proposal --will prove useful to you as you seek to assist FTA in providing increased opportunities for private sector participation in furnishing local transportation services and protecting private carriers against unfair competition from publicly subsidized mass transit providers. On behalf of all the private passenger carriers in Honolulu, I urge you to require FTA to engage in meaningful rule making so that what has happened

to us and is still happening will not happen to others and will not happen to us in the future.

Imminent Danger

Furthermore, in Honolulu, the private sector ground transportation companies are facing imminent devastating blow. The Oahu Metropolitan Planning Organization (OMPO) is about to convene by June 14th to vote on the \$20 million application by the County of Honolulu. Should OMPO approve the application and then make the request upon Federal Transit Administration and the FTA grants the federal funds, private sector will suffer devastating damage. Honolulu County's use of the \$20 million is to run transportation services in Waikiki with the result of instituting unfair competition by offering services principally to tourists and only incidentally to local residents. Moreover, private sector is currently running those services to tourists without subsidies. The County of Honolulu plans to duplicate those services with subsidies and charge fares well below those private sector charges to tourists. Therefore, we urge you to intervene and intercede to prevent such misuse and unlawful use of federal funds.

¹ One of the private passenger carriers does not provide school bus service under a contract with the State of Hawaii.

² Data drawn from Wilson Okamoto Corporation, Waikiki Livable Community Project: a Report Prepared for the City and County of Honolulu, December 2003.

³ See Section 8 of Amended Rules and Regulations Relating to Visitor Use Level and Controls at Hanauma Bay Nature Preserve, Department of Parks and Recreation, City and County of Honolulu, adopted July 1, 1998.

⁴ To the best of our knowledge, the City and County of Honolulu has never sought an exemption under the provisions of 49 USC 5323(a) to provide this "mass transportation facility in competition with, or in addition to, transportation services provided by an existing mass transportation company."

⁵ See 49 USC 5323(a) and Federal Transit Administration (FTA) Circular C 9300.1A, Section 4, Subsection 9a.

⁶ See Letter of Tom Dinell, Consultant to E Noa Corporation, to Jennifer Dorn, FTA Administrator, dated July 22, 2003.

⁷ See Letter of William P. Sears, Chief Executive, FTA, to Tom Dinell, dated September 9, 2002.

/s/ Emiko I. Kudo
EMIKO I. KUDO, Director
Department of Parks and Recreation
City and County of Honolulu

APPROVED AS TO FORM:

/s/ Maria C. Aviante-Tanaka
Deputy Corporation Counsel

APPROVED this 23rd day of
September, 19 83.

/s/ Eileen R. Anderson
EILEEN R. ANDERSON, Mayor
City and County of Honolulu

CERTIFICATION

I, EMIKO I. KUDO, in my capacity as Director of Parks and Recreation, City and County of Honolulu, do hereby certify that the foregoing is a full, true and correct copy of the Rules and Regulations relating to the limited vehicular traffic on the access road between the upper and lower portions of Hanauna Bay Beach Park which were adopted on September 23rd, 19 83, following a public hearing held on August 31, 1983, after public notice was given on July 31, 1983, in the Sunday Star-Bulletin and Advertiser.

/s/ Emiko I. Kudo
EMIKO I. KUDO, Director
Department of Parks and Recreation
City and County of Honolulu

Received this 26th day of
September, 1983.

/s/ Raymond K. Pua
RAYMOND K. PUA, City Clerk

Department of Parks and Recreation

Wednesday, March 06, 2002

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<http://www.co.honolulu.hi.us/parks/rules/hb-cars.htm>

Page 3 of 3

Attachment #3

P.11/21

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CITY AND COUNTY OF HONOLULU
DEPARTMENT OF PARKS AND RECREATION

Pursuant to and by virtue of the authority set forth in Section 13-14.3, Revised ordinances of Honolulu 1978, Article VI, Chapter 13 of the Revised Charter of the City and County of Honolulu (1978), and Chapter 91, HRS, the Director of the Department of Parks and Recreation, subject to the approval of the Mayor of the City and County of Honolulu, hereby adopts the following rules and regulations relating to the use and defining the specific users of the access road between the upper and lower portions of Hanauma Bay Beach Park.

RULES AND REGULATIONS
RELATING TO THE LIMITED VEHICULAR TRAFFIC
ON THE ACCESS ROAD BETWEEN THE UPPER AND
LOWER PORTIONS OF HANAUMA BAY BEACH PARK

PART I

Section 1. Findings and Purpose. The Department of Parks and Recreation finds that the indiscriminate use of access road by vehicular traffic between the upper and lower portions of Hanauma Bay Beach Park creates a dangerous mix of pedestrian and vehicular traffic. It further causes undue delay in the ability of emergency vehicles in the performance of their duty and that a system is necessary to ensure the orderly and safe use of the access road.

Section 2. Applicability and Scope. These rules shall apply to the access road between the upper and lower portions of Hanauma Bay Beach Park. The purpose of these rules is to govern the use and to protect the health, safety and welfare of the park users and define the specific users authorized the use of the access road. It also provides through a concessionaire a means for the handicapped, elderly and others who choose to ride rather than negotiate the steep access road on foot.

Section 3. Definitions. As used in these rules, unless the context requires otherwise:

"Concessionaire" means a private individual, partnership, or corporation who is granted, in accordance with Chapter 30, ROH 1978, the privilege of providing the shuttle bus service on the access road between the upper and lower portions of Hanauma Bay Beach Park for a fee and the operator of the sack shop located at the lower portion of Hanauma Bay n Beach Park.

Attachment #3

"Delivery vehicles" means vehicles utilized to deliver goods to the food concession located at the lower end of the bay.

"Director" means the Director of Parks and Recreation, City and County of Honolulu.

"Emergency vehicles" means ambulances, fire engines, fire rescue vehicles, police cars or other vehicles responding to emergency situations.

"Food concessionaire vehicles" means vehicles operated by the concessionaire or his employees on contract with the City to operate the food concession located in the pavilion building at the lower end of the bay.

"Lifeguard vehicles" means vehicles operated by the lifeguards of the Department who are on duty and assigned to Hanauma Bay Beach Park.

"Other authorized vehicles" means vehicles granted the use of the access road by the Director of the Department.

"Resident vehicles" means vehicles owned and operated by the Department of Parks and Recreation employee and his family who reside at Hanauma Bay.

"Service maintenance vehicles" means public utilities vehicles and governmental vehicles used in the performance of official business.

Section 4. Penalties. Any person found in violation of these rules may be subjected to a fine of up to Two Hundred Fifty Dollars or by imprisonment for up to thirty days, or by both fine and imprisonment, for each violation.

Section 5. The following limitations shall apply to the usage of the access road.

(a) The concessionaire by the terms and conditions of the concession agreement shall provide shuttle bus service on the access road between the upper and lower portions of Hanauma Bay Beach Park.

Fees for the shuttle bus service shall be as approved by the terms of the concession agreement.

(b) The concessionaire shall provide controls at the upper gate to ensure that only emergency, service maintenance, resident, concessionaire, lifeguards, delivery vehicles and other vehicles as authorized by the Director and as defined in Section 3 of these rules utilize the access road.

(c) Individuals may negotiate on foot the access road between the upper and lower portions of Hanauma Bay Beach Park and shall have the right of way at all times.

(d) All other vehicles are not permitted to utilize the access road between the upper and lower portions of Hanauma Bay Beach Park.

ADOPTED this 23rd day of September 19 83, by the Director of Parks and Recreation, City and County of Honolulu, State of Hawaii.

Attachment #3

**The Governing Federal Statutory and Regulatory
Authority relating to BRT**

May 2, 2001

**Federal Transit Administration (FTA)
Circular C 9300.1A, Section 4, Subsection 9 states in part:**

"PRIVATE ENTERPRISE CONCERNS . The concerns of Federal transit law regarding private enterprise focus mainly on including the private sector in participating in local transit programs, ensuring that adequate compensation is provided a private provider when its transit facilities and equipment are acquired by a state or local governmental authority, and protecting private providers of transit from competition with federally assisted transit providers.

a. Participation by Private Enterprise. Both Federal transit law and joint FHWA/FTA planning regulations (discussed in Appendix A of the circular) impose strong requirements for private as well as public sector participation as transportation programs are developed. Plans and programs required for Federal transit assistance must encourage the participation of private enterprise to the maximum extent feasible.

Federal law recognizes the special concerns of private transportation providers that compete with public mass transit authorities. By law, existing private transportation providers are afforded certain safeguards from competition. Specifically, FTA is prohibited from providing Federal assistance to a governmental body that provides service in competition with, or supplementary to, service currently provided by a private transportation company, unless FTA finds that the local transportation program developed in the planning process provides for participation by private transportation companies to the maximum extent feasible.

Accordingly, Federal transit law and the joint FHWA/FTA planning regulations direct special attention to the concerns of private transit providers in planning and project development. Joint FHWA/FTA planning regulations specifically require that private transit providers, as well as other interested parties, be afforded an adequate opportunity to be involved in the early stages of the plan development and update process. While FTA supports the participation of private transit providers in local mass transportation programs, FTA no longer imposes prescriptive requirements for determining whether a grant applicant has made adequate efforts to integrate private enterprise in its transit program, as explained in the FTA Federal Register Notice "Private Enterprise Participation," of April 26, 1994.

FTA relies on the local planning process, which must comply with rigorous planning and private enterprise requirements, and the joint FHWA/FTA planning regulations. To determine the adequacy of a grant applicant's efforts to incorporate private enterprise in its transit program, FTA monitors

Attachment #5

(c) In general. - In cooperation with the chief executive officer of the State and any affected mass transportation operator, a metropolitan planning organization designated for a metropolitan area shall develop a transportation improvement program for the area. In developing the program, the metropolitan planning organization, in cooperation with the chief executive officer of the State and any affected mass transportation operator, shall provide citizens, affected public agencies, representatives of transportation authority employees, other affected employee representatives, freight shippers, providers of freight transportation services, other affected employee representatives, private providers of transportation, representatives of users of public transit, and other interested parties with a reasonable opportunity to comment on the proposed program. The program shall be updated at least once every 2 years and shall be approved by the organization and the chief executive officer of the State.

(d) Notice and Comment. - Before approving a transportation improvement program, a metropolitan planning organization shall provide citizens, affected public agencies, representatives of transportation agency employees, private providers of transportation, and other interested parties with reasonable notice and an opportunity to comment on the proposed program." (underlining added)

49 USC 5306(a) re Private Enterprise Participation in Metropolitan Planning and Transportation Improvement Programs and Relationships to other limitations* states in part:

"Private Enterprise Participation. - A plan or program required by section 5303, 5304, 5305 of this title shall encourage to the maximum extent feasible the participation of private enterprise."

Attachment #5

E NOA CORPORATION

Operators of E Noa Tours & Waikiki Trolley Tours "The Tour & Trolley People"

July 22, 2002

Ms. Jennifer Dorn, Administrator
Federal Transit Administration
U.S. Department of Transportation
400 Seventh Street, SW
Washington, DC 20590

Dear Ms. Dorn:

This letter is to protest the bypassing of the private transportation carriers by the City and County of Honolulu in the planning and development of its BRT Proposal, for which federal funds are being sought.

We believe that the City and County is in violation of the following federal requirements:

1. The Federal Transit Administration (FTA) Circular C 9300.1A, Section 4, subsection 9, which states in part that:
 - a. The concerns of Federal transit law regarding private enterprise focus mainly on including the private sector in participating in local transit programs.....and protecting private providers of transit from competition with federally assisted transit providers.
 - b. Plans and programs required for Federal transit assistance must encourage the participation of private enterprise to the maximum extent feasible.
 - c. Specifically, FTA is prohibited from providing Federal assistance to a governmental body that provides service in competition with, or supplementary to, service currently

1141 WAIMANU STREET # 105, HONOLULU, HAWAII 96814 TELEPHONE (808) 593-8073 FAX (808) 593-8752

Attachment #6

MAY-31-2004 14:57 FROM: E NOA CORP 8085249837 10:12022253974 P.16/21

LETTER TO JENNIFER BOHRE RE ORA 11/22/04

provided by a private transportation company, unless FTA finds that the local transportation program developed in the planning process provides for participation by private transportation companies to the maximum extent feasible.

- d. Joint FHWA/FTA planning regulations specifically require that private transit providers, as well as other interested parties, be afforded an adequate opportunity to be involved in the early stages of the plan development and update process.

2. USC 5307 re Urbanized Area Formula Grants, which states in part that:

- a. Each recipient of a grant shall.....(2) develop, in consultation with interested parties, including private transportation providers, a proposed program of projects for activities to be financed.
- b. Each recipient of a grant shall.....(6) consider comments and views received, especially those of private transportation providers, in preparing the final program of projects.

2. 49 USC 5323(a) re General Provisions on Assistance, which states in part that: "Financial assistance provided under this chapter to a State or local governmental authority may be usedto operate mass transportation equipment or a mass transportation facility in competition with, or in addition to, transportation services provided by an existing mass transportation company, only if

- a. The Secretary of Transportation finds the assistance is essential to a program of projects required under sections 5305-5306 of this title;
- b. The Secretary of Transportation finds that the program , to the maximum extent feasible, provides for the participation of the private mass transportation companies.

The set of circumstances, which leads us to the conclusion that the City and County of Honolulu is in violation of the federal requirements, is as follows:

Attachment #6

- 1. The BRT Plan was not developed in consultation with private passenger transportation carriers
 - a. There were no meetings with the members of the Private Passenger Carrier Division of the Hawaii Transportation Association (HTA) with respect to the planning of the BRT
 - b. There were no individual meetings with private passenger carriers that we know of with respect to the planning of the BRT, with the exception of a meeting in September 2000, requested by TransHawaiian (no longer in operation) at which Ms. Soon explained to Ray Miyashiro, Katsumi Tanaka and Tom Dinell the constituent elements of the BRT Plan. This was not a planning session at which the view of the private passenger carriers were solicited.
 - c. There were community meetings, but in no sense was these designed to be consultative sessions with the private passenger carriers.
 - d. There may have been consultation with Oahu Transit Services (OTS), but OTS is a captive corporation of the City and County, which operates the public transit system for the Department of Transportation Services. It is not a private provider of transit as referred to in the federal statutory and regulatory authority.
- 2. The BRT Plan does not examine whether implementation of the Plan would have a deleterious impact on the private transportation providers.
 - a. The Supplemental Draft Environmental Impact Statement (SDEIS) does assert that, "The number of tourists expected to use the public transit system with the BRT is forecast to be no greater proportionally than today." (p. 5-20) There are no detailed data and analyses in the SDEIS to support this assertion. This statement was not developed in consultation with the private passenger transportation carriers.

Attachment #6

Letter to Jennifer Dorn re BRT 11/22/02

- b. The SDEIS also asserts that, "It is not expected that tour bus operators will be adversely affected due to the relatively low number of tourists that are expected to choose BRT for their travel needs." (p. 5-20) There are no detailed data and analyses in the SDEIS to support this assertion. This statement was not developed in consultation with the private passenger transportation carriers.
- c. DTS has stated informally that currently between 22% and 25% of the riders of TheBus in Waikiki are visitors.
3. The Plan put forth for the BRT in the MIS/DEIS and the SDEIS makes no provision whatsoever for the participation of the private passenger transportation carriers, other than that tour buses and trolleys may use the semi-exclusive lanes for travel (but not for pick-up and discharge of passengers).
4. The DTS has not responded as of this date in writing addressed to the private carriers to any of the written critiques of the BRT provided by private passenger carriers at public hearings and in commentaries on the draft EIS documents. It is assumed that the DTS will respond in the final EIS to the issues raised by private passenger carriers in the same way that they respond to all comments submitted in accordance with EIS review procedure.

Our analysis leads us to put forth the following questions to you:

1. What are the consequences for the City and County of Honolulu and its proposed BRT Plan, given that the City and County neither provided for nor sought the participation of the private passenger transportation carriers in the planning of BRT, at any stage, early or late?
2. Does the fact that DTS has failed to demonstrate in documented research and analysis that the BRT will not be in competition with the private passenger transportation carriers constitute a violation of federal statutory and regulatory authority relating to the BRT? If yes, what are the potential remedies at this time?

Attachment #6

Letter to Jennifer Doherty
11/22/01

- 3. Does the fact that the City and County has not sought to respond to the concerns raised about BRT by the private passenger carriers in testimony at public hearings or in commentaries submitted in response to the draft environmental impact statements or sought in any way to engage in dialogue with the private passenger carriers constitute a violation of federal statutory and regulatory authority relating to the BRT? If yes, what are the potential remedies at this time?

In conclusion:

We are looking to you to advise us as to the next steps we should take. Should we be filing a formal protest with your agency at this time or does this letter constitute such a protest sufficient to lead to the initiation of action on the part of the FTA? If we should be filing a formal protest, are there particular guidelines as to the procedures governing the filing of such a protest and the form which the protest should take? If so, would you be good enough to provide us with such guidelines?

We appreciate the actions you have already taken with respect to charter services and responsibilities of FTA grant recipients. We are encouraged by your December 27, 2001, statement that, "As public transit agencies move to expand service, it is important to respect the needs of private sector agencies to operate effectively in a competitive marketplace for services that do not receive subsidies."

We look forward to hearing from you.

Sincerely yours,

Tom Dinell

Cc: Leslie Rogers, Regional Administration,
Federal Transit Administration

Attachment #6

Feb 30/04

Katsumi Tanaka

425 South Street, Suite 3402
Honolulu, HI 96813, U S A
Phone: 808-524-0832
Fax: 808-524-0837
ktanaka@hoikenetworks.com

JUNE 1, 2004

Chairman Doug Ose
Subcommittee on Energy Policy, Natural Resources and Regulatory Affairs
Congress of the United States, House of Representatives
Committee on Government Reform
2157 Raybur House Office Building
Washington, D.C. 20515-6143

Dear Chairman Ose:

Again, I take this occasion to thank you for your efforts in enforcing laws regarding Private Sector Participation as well as to improve upon them.

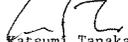
Today, I am sending a copy of the following:

- a) a letter to Leslie Rogers and providing him a copy of my testimony of May 18, 2004; and
- b) a copy of my company's protest to FTA (Region IX).

Chairman Ose, we seek you assistance while we private sector in Honolulu confront menace from the City-County Administration. Should the Federal Transit Administration grant the \$20 million, we would be devastated.

Chairman Ose, please guide us as to what steps and actions we might take against this impending peril.

Sincerely yours,


Katsumi Tanaka
E Noa Corporation, its C.E.O.

Operators of E Noa Tours & Waikiki Trolley Tours "The Tour & Trolley People"

June 1, 2004

Mr. Leslie Rogers, Regional Administrator
Federal Transit Administration, Region IX
301 Mission Street, Suite 2210
San Francisco, CA 94105

Dear Mr. Rogers:

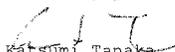
The E Noa Corporation filed a formal protest with you on May 27, 2004, relating to the proposed IOS in Honolulu, Hawaii. Today I am forwarding to you the testimony that I presented before the House of Representatives Subcommittee of the Committee on Government Reform responsible for regulatory affairs.

In the testimony I discuss how the federally-subsidized mass transit provider in Honolulu, namely, the City and County of Honolulu, and its captive corporation, Oahu Transit Service (OTS), stifle private sector competition at every turn, regardless of the intent of the federal laws and regulations.

I cite three specific instances of such unfair competition: (1) The Hanauma Bay monopoly; (2) The aggressive recruiting of visitors; and (3) The formulation of the Bus Rapid Transit proposal.

I believe that by reading my testimony you will gain an appreciation of what is occurring in Honolulu that necessitated my filing the appeal of May 27, 2004. I hope you find the discussion useful. If you have any questions about the matters I have put forth in the testimony or would like further details, please let me know.

Sincerely yours,


Katsumi Tanaka
Chairman of the Board and CEO

Testimony of
Katsumi Tanaka, Chairman of the Board and CEO
of
E Noa Corporation, Honolulu, Hawaii
Before the
Subcommittee on Energy Policy, Natural Resources
And Regulatory Affairs,
Committee on Government Reform,
House of Representatives,
Congress of the United States

Hearing on Private Sector Participation
In Transportation

May 18, 2004



Testimony of Katsumi Tanaka, E Noa Corporation May 18, 2004 2

I am Katsumi Tanaka, Chairman of the Board and CEO of E Noa Corporation, operator of the Waikiki Trolley and E Noa Tours in Honolulu, Hawaii. Thank you for providing me with this opportunity to discuss how the federally-subsidized mass transit provider in Honolulu, namely, the City and County of Honolulu, and its captive corporation, Oahu Transit Service (OTS), stifle private sector competition at every turn, regardless of the intent of the federal laws and regulations.

I will cite three specific instances of such unfair competition: (1) The Hanauma Bay monopoly; (2) The aggressive recruiting of visitors; and (3) The formulation of the Bus Rapid Transit proposal.

The primary business of the private passenger carriers in Honolulu is serving the visitors to Hawaii.¹ We employ a variety of vehicles including buses of all sizes, trolleys, vans, and trams. The core of our business is in Waikiki, a compact urban resort area of less than two square miles where approximately 95% of the visitors to Oahu stay. On an average day, Waikiki houses 72,000 visitors. Also, about 19,000 residents live in Waikiki.²

Waikiki and its visitors are the alpha and omega of existence for the privately owned passenger carriers in Honolulu. Take the visitors, who are our customers, away, as the City and County seeks to do, and there is no more major private ground transportation industry in Hawaii.

The Hanauma Bay Monopoly

The City and County monopolizes pick-up and delivery service to a very popular visitor destination, namely, Hanauma Bay, partially under the guise of avoiding overcrowding.³ Visitors carried by private tour operators may only stop at the overlook for a few minutes, but none of their passengers may stay at Hanauma Bay and be picked-up later. Visitors arriving by the federally subsidized TheBus, namely, Route 22, can get off TheBus at Hanauma Bay and stay as long as they wish, enjoying the beach, the water and the marine life, and return to Waikiki on a later bus at a time of their

cut

own choosing.⁴ In fact, the vast majority of passengers on Route 22, which runs from Waikiki to Sea Life Park and return, are tourists. The City chooses to ignore two facts: (1) there are private sector passenger carriers ready and prepared to bring visitors to and from Hanauma Bay; and (2) there are alternative means available for achieving the valuable goal of preserving the fragile environment of the Bay, without, in effect, banning customers of the private tour operators from enjoying the beach, the water and the marine life.

The City in this instance is acting as an entrepreneur, seeking to: (1) maximize its revenues; (2) use its power as a regulator to eliminate potential participation by private transportation carriers; and (3) maximize the federal tax dollars it receives as a federal grantee. The City receives federal funds, which it then uses to compete unfairly with private carriers while simultaneously using its regulatory power to make sure private carriers cannot compete with the City. The injustice of the arrangements for serving Hanauma Bay has been called to the attention of City officials many times, but no changes have been made.

The Aggressive Recruiting of Visitors

The fundamental problem is that the City is simultaneously regulator and entrepreneur, a basic conflict of interest, which it has not been able to resolve, as noted in the paragraphs relating to Hanauma Bay. As entrepreneur, the City desire to maximize ridership and revenues for its highly subsidized public transportation service, TheBus. As regulator the City is responsible for creating a level playing field in which subsidized public transit services do not unfairly compete with private transportation carriers.⁵ What has happened in Honolulu is that the City's desire to promote the well-being of its own highly subsidized transportation service has taken precedence over other choices in a manner that is detrimental to privately-owned passenger carrier companies. The combination of federally subsidized City buses serving primarily tourist destinations plus the City's anti-private sector regulatory schemes harm the private carriers and hurt their ability to

LTB

survive economically.

The City's determination to recruit visitors to the subsidized TheBus is further evidenced by the authorized publication of two guides to the City's bus service, one in English and one in Japanese, The Bus Map and Guide Book. The emphasis in the Guides is on how to travel to attractive tourist destinations using TheBus. The guides, promoted on the OTS web site, are widely available for purchase in Waikiki. They include a glowing invitation from the Mayor to visitors to ride TheBus.

The City and County's fare structure includes a \$20 "Visitor Pass," which allows unlimited use of TheBus for four consecutive days and which is sold throughout Waikiki. Furthermore, a visitor may circle Oahu on TheBus for just \$2.

Finally, the City is seeking to commence its BRT system, not by providing additional service to rural and suburban customers, who have the fewest public transit options and are badly in need of public transportation, but by adding to services that are already available in Waikiki, with its high concentration of visitors, a group well served by the private transportation carriers. Obviously, the revenue per passenger mile will be higher in Waikiki than in rural and suburban Oahu, but a primary purpose of public transportation is to provide subsidized services to those most in need, especially low-income families, youth and the elderly living on limited means. These are not the residents of Waikiki nor are they the tourists visiting Waikiki.

The Formulation of the Bus Rapid Transit Proposal

On July 22, 2002, E Noa Corporation wrote to Jennifer Dorn, FTA Administrator, protesting the bypassing of the private transportation carriers by the City and County of Honolulu in the planning and development of its BRT Proposal, for which federal funds are being sought.⁶ In that letter we cited what appeared to us to be violations of FTA Circular C9300.1A, section

Testimony of Katsumi Tanaka, E Noa Corporation May 18, 2004 5

4, subsection 9, USC 5307 re urbanized area formula grants, and 49 USC 5323(a), all of which emphasize the importance of consultation with private transportation companies in the development of plans and programs requiring federal assistance as well as protecting private providers of transit against competition from federally assisted transit providers.

The BRT Plan was not developed in consultation with private passenger transportation carriers. Just briefly: (1) There were no meetings with the members of the Private Passenger Carrier Division of the Hawaii Transportation Association (HTA) with respect to the planning of the BRT; (2) There were community meetings, but in no sense was these designed to be consultative sessions with the private passenger carriers; (3) The City and County did convene five geographical working groups, to address operational details of the proposed BRT, subsequent to the selection of the preferred alternative by the City Council. Two or three representatives of the private passenger carriers were members of the Waikiki Working Group, among 30 to 40 other members representing a variety of interests. The five meetings of this group, mostly dedicated to power point presentations by the City and its consultants, did not constitute consultation with the private transportation carriers; and (4) The BRT Plan does not examine whether implementation of the Plan would have a deleterious impact on the private transportation providers. The Supplemental Draft Environmental Impact Statement (SDEIS) asserts that, "The number of tourists expected to use the public transit system with the BRT is forecast to be no greater proportionally than today." (p. 5-20) There are no detailed data and analyses in the SDEIS or any subsequent EIS to support this assertion. This statement was not developed in consultation with the private passenger transportation carriers.

On September 9, 2002, Williams Sears, Chief Counsel, FTA, responded, on behalf of Ms. Dorn, stating that with respect to the EIS process there is no provision for involvement or access by a private company greater than that afforded the general public.⁷ The response was a bit frustrating because, in

the development of the BRT, the EIS is in essence both the plan and the assessment document. There is no separate, stand-alone plan.

Let me note that 49 USC 5323(a) states very specifically that: "Financial assistance provided under this chapter to a State or local governmental authority may be usedto operate mass transportation equipment or a mass transportation facility in competition with, or in addition to, transportation services provided by an existing mass transportation company, only if

- a. The Secretary of Transportation finds the assistance is essential to a program of projects required under sections 5305-5306 of this title;
- b. The Secretary of Transportation finds that the program, to the maximum extent feasible, provides for the participation of the private mass transportation companies."

There was no request to the Secretary of Transportation for such a finding nor did the Secretary issue such a finding in the case of the Honolulu BRT proposal or its truncated version, the Honolulu IOS proposal. In our case, participation of the private sector passenger carriers in the program to the "maximum extent feasible" proved to be a fiction.

In conclusion, the private passenger carriers were not consulted in any special way in the development of the BRT proposal, nor were the assessment made by the City in its EIS documents about the economic impact of the BRT on private transportation carriers anything more than mere assertions.

In Conclusion

I hope that these few examples -- (1) The Hanauma Bay monopoly; (2) The aggressive recruiting of visitors; and (3) The formulation of the Bus Rapid Transit proposal --will prove useful to you as you seek to assist FTA in providing increased opportunities for private sector participation in furnishing local transportation services and protecting private carriers against unfair competition from publicly subsidized mass transit providers. On behalf of all the private passenger carriers in Honolulu, I urge you to require FTA to engage in meaningful rule making so that what has happened

to us and is still happening will not happen to others and will not happen to us in the future.

Imminent Danger

Furthermore, in Honolulu, the private sector ground transportation companies are facing imminent devastating blow. The Oahu Metropolitan Planning Organization (OMPO) is about to convene by June 14th to vote on the \$20 million application by the County of Honolulu. Should OMPO approve the application and then make the request upon Federal Transit Administration and the FTA grants the federal funds, private sector will suffer devastating damage. Honolulu County's use of the \$20 million is to run transportation services in Waikiki with the result of instituting unfair competition by offering services principally to tourists and only incidentally to local residents. Moreover, private sector is currently running those services to tourists without subsidies. The County of Honolulu plans to duplicate those services with subsidies and charge fares well below those private sector charges to tourists. Therefore, we urge you to intervene and intercede to prevent such misuse and unlawful use of federal funds.

¹ One of the private passenger carriers does not provide school bus service under a contract with the State of Hawaii.

² Data drawn from Wilson Okamoto Corporation, Waikiki Livable Community Project: a Report Prepared for the City and County of Honolulu, December 2003.

³ See Section 8 of Amended Rules and Regulations Relating to Visitor Use Level and Controls at Hanauma Bay Nature Preserve, Department of Parks and Recreation, City and County of Honolulu, adopted July 1, 1998.

⁴ To the best of our knowledge, the City and County of Honolulu has never sought an exemption under the provisions of 49 USC 5323(a) to provide this "mass transportation facility in competition with, or in addition to, transportation services provided by an existing mass transportation company."

⁵ See 49 USC 5323(a) and Federal Transit Administration (FTA) Circular C 9300.1A, Section 4, Subsection 9a.

⁶ See Letter of Tom Dinell, Consultant to E Noa Corporation, to Jennifer Dorn, FTA Administrator, dated July 22, 2003.

⁷ See Letter of William P. Sears, Chief Executive, FTA, to Tom Dinell, dated September 9, 2002.



U.S. Department
of Transportation
Federal Transit
Administration

Headquarters

400 Seventh St., S.W.
Washington, D.C. 20590

SEP 9 2002

Mr. Tom Dinell
E NOA Corporation
1141 Waimanu Street #105
Honolulu, Hawaii 96814

Dear Mr. Dinell:

This is in response to your letter of July 22 to Administrator Jennifer L. Dorn concerning planning and development of the City and County of Honolulu's bus rapid transit proposal.

My staff and I carefully reviewed the issues you raise in your letter and considered whether they may be appropriate topics for a protest of an environmental impact complaint. Unfortunately, it does not appear that either provides an avenue to air your grievance with the Federal Transit Administration (FTA).

Regulations related to drafting environmental impact statements (EIS) are at 23 CFR 771. Although public involvement in the EIS process is both encouraged and required, I find no provision there for involvement or access by a private company greater than that afforded the general public. It appears from your letter that you have already submitted comments on the draft EIS documents to the City and County of Honolulu and are awaiting their response in the final EIS. This is consistent with the regulatory process.

You ask whether this would be appropriate for a protest. FTA's protest provisions at 49 CFR 18.36(b) look solely to procurement issues and, as such, are inapplicable here.

I regret that I am unable to assist you in this matter and encourage you to remain involved in the EIS process so that the concerns you raise in your letter might be addressed by the Honolulu officials responsible for this action.

Any requests for additional information concerning this protest should be directed to James LaRusch of my office. He can be reached at (202) 366-1936.

Sincerely,

William P. Sears
Chief Counsel

Attachment #7



California Bus Association

Promoting Professionalism, Safety & Integrity in the Motorcoach Industry

May 28, 2004

VIA FACSIMILE 202-225-2441

Congressman Doug Ose
B-377 Rayburn House Office Building
Washington, DC 20515

Dear Congressman Ose:

The hearing you held on May 18th exploring the Department of Transportation (DOT's) record of enforcing the numerous private enterprise statutes and regulations highlighted real examples of enforcement failures. If left unchecked, more taxpayer dollars than necessary will be misspent and less transit service will be delivered and we are sure more examples of abuses will surface.

As you brought forth at the hearing, the California Bus Association (CBA) complaint against Sacramento Regional Transit (SACRT), documenting a pattern of Federal Statutory violations, was summarily dismissed by the Federal Transit Administration (FTA) despite an independent audit produced by FTA corroborating CBA's core arguments in the case.

The testimony regarding this case and your subsequent questioning of DOT Assistant Secretary of Transportation Policy and Intermodalism, Emil Frankel, highlighted some important details that should be part of the official record especially since the DOT will be responding to several of your pointed questions.

CBA believes the facts of this case demonstrate not only a failure of Federal enforcement, the Federal Government is sending an unmistakable signal to grantees that the statement, "*FTA grantees must comply with rigorous planning and private enterprise requirements (49 U.S.C. 5303-5307)*" in the CBA vs. SACRT decision, is a meaningless phrase and there will be no consequences for grantees who circumvent the law.

Based on your questions to DOT, CBA is providing you with additional information addressing some of the questions raised at the hearing.

1. Charter vs. Mass Transit

CBA is enclosing public schedules from Amador's shuttle and comparable FTA/DOT funded operators providing the same point-to-point bus service.

2. Third Party Service

CBA is enclosing a transcript of the March 10th SACRT Board public meeting where SACRT staff person responds to a board member question as to whether SACRT could provide the shuttle service without the \$1.9 million.

CBA is also providing minutes of a California employee union negotiating meeting with the state on the shuttle service which is a negotiated employee benefit and it was stated that the state contract "...does contain clauses to allow DGS to rescind the contract if Sacramento RT does not perform."

3. Notification and Consultation

Under California's open government record act, CBA has sent a request to SACRT for all notification and consultation documents as required by Federal law and SACRT's adopted Standard Operating Procedures (SOP). CBA also requested all negotiation information between SACRT and the State of California that resulted in the third party agreement to operate the shuttle bus service. All materials will be forwarded to your Subcommittee as soon as CBA receives them.

On behalf of all the members of the California Bus Association we believe that the May 18th hearing marks a major step forward to achieving accountability with respect to how Federal transit grantees spend Federal taxpayers dollars.

Sincerely,



Michael Waters
CBA President



GOLD LINE/GRAY LINE

5500 Tuxedo Road - Tuxedo, Maryland 20781 - 1-800-862-1400 301-386-8300 Fax: 301-386-3668
 www.graylinedc.com - email: csmith@martzgroup.com

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Congressman Doug Ose
 Chairman
 Subcommittee on Energy Policy, Natural Resources and Regulatory Affairs
 B-377 Rayburn House Office Building
 Washington DC 20515

Dear Congressman Ose:

Martz Gold Line-Gray Line of Washington DC operates local bus service in the District and our company is hereby on the record supporting the leadership role you have exerted in convening a long overdue hearing on how the US Department of Transportation (DOT) can maximize private sector participation in transportation. Unfortunately, as you have stated quite succinctly, for too long DOT has allowed its grantees to disregard federal law with impunity.

Our company also wants to submit for the record with your Subcommittee another example right here in our Nation's Capital: a proposed new Washington DC Bus Circulator network, mainly to serve tourists, to be operated by the public bus operator, Washington Area Metropolitan Transit Authority (WMATA), at an exorbitant cost to national and local taxpayers.

All local private bus operators and DC-based bus associations have been excluded from a planning process that may result in the startup of a redundant, taxpayer-subsidized local bus network that could ultimately discourage many of the hundreds and thousands of tourists and other bus riders from traveling directly to Washington DC.

Our company and other local bus companies have developed an extensive local fixed route bus network that complements other vital services provided by the private bus industry nationwide. The successful partnership of private bus companies, local and Federal government and local businesses will be severely damaged by WMATA's plans to monopolize as much as possible all bus travel in the Washington DC area.

Just the first phase of the proposed DC Bus Circulator would add 87 unnecessary WMATA jobs estimated to cost over \$4.5 million per year to be paid for by the District and the Federal Government in perpetuity. This ongoing burden to taxpayers excludes an additional \$12 million to \$15 million to pay for the new buses.

The proposal claims that approximately 12,000 daily riders (4.8 million a year) would pay for 45% of the operating costs by paying only 50 cents a ride. This 45% return will not only be impossible to achieve due to inadequate demand and low fares but the few riders that will be attracted to the Bus Circulator routes will be diverted from existing bus and rail riders.

For example, WMATA already has an extensive rail network with 39 stations within the District serving local travel needs throughout the day. WMATA also has an extensive bus network in the Central DC area. The Bus Circulator will mainly divert revenues and riders from existing WMATA bus and rail services and private bus operator services.

The \$4.5 million annual subsidy could easily be doubled in the near term and the lost revenue from diverted riders will add to WMATA's budget deficit in the short term. Further, the Circulator Bus system is expected to almost double in size thereby requiring even more taxpayer dollars to maintain the service.

To make matters worse for taxpayers and riders, WMATA's escalating bus and rail operating expenses (7% increase in FY 05 budget over previous year) has created a significant budget deficit of least \$20 million for the next fiscal year and riders and taxpayers throughout the region will be forced to pay more for a public service even before the new subsidized Bus Circulator starts operating.

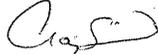
If the Bus Circulator service starts as planned without significant revisions in scope and method of operation, WMATA will be forced to reduce existing transit service or demand that Congress divert more transit subsidies on top of subsidies already generously allocated to WMATA annually.

From Hawaii to Washington DC public transit operators are increasingly circumventing Federal law to the detriment of taxpayers, riders and private bus providers. Pursuant to the statutory and regulatory provisions you have summarized for members of your subcommittee, our industry will be filing a complaint with WMATA in the near future.

Our industry is requesting any assistance or direction you can provide to local operators. At a time when vital transit services are being reduced or fares and government budgets increased, the DC Bus Circulator service should be put back on the drawing board immediately to allow meaningful consultation with private bus operators. Our industry can save the Federal and District government millions of dollars if Federal statutes are enforced.

Thank you for all your efforts on behalf of transit riders and taxpayers.

Sincerely,

A handwritten signature in black ink, appearing to read "Craig Smith".

Craig Smith
General Manager
Martz Gold Line/Gray Line

Green Bus Lines, Inc.
Triboro Coach Corporation
Jamaica Buses, Inc.
Command Bus Company, Inc.

MA 6/2/04
SEC 6/14/04
FAASA 1/25/04

Jerome Cooper
Chairman of the Board

114-15 Guy R. Brewer Blvd., Jamaica, New York 11434
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May 28, 2004

By Fax & Regular Mail

The Honorable Douglas Ose
Chairman
Subcommittee on Energy Policy,
Natural Resources and Regulatory Affairs
U.S. House of Representatives
Washington, D.C. 20515

Attention: Barbara Kahlow

Re: Private Sector Abuses in New York City

Dear Congressman Ose:

I am the Chairman of the Board of Green Bus Lines, Inc., Triboro Coach Corp., Jamaica Buses and Command Bus Company, Inc. (the "Companies"). The Companies are privately operated and provide commuter bus transportation principally to the residents of Queens and Brooklyn. I write to you out of a sense of enormous frustration and concern both for our Companies and the people of New York City. The current administration has embarked on a dangerous course of action in blatant disregard of the rights of the Companies and federal law.

On April 19, 2004, the Bloomberg administration announced a takeover of the private bus lines by the New York State Metropolitan Transportation Authority ("MTA") effective July 1, 2004. Neither the administration nor the MTA discussed the terms of the proposed takeover with either the Companies or the local unions representing our transit employees prior to making this announcement. While we have had limited discussions with the City and the MTA in recent weeks, the details of the proposed takeover remain shrouded in secrecy. We simply do not know what will happen to the Companies or our union and non-union employees on July 1, 2004.

It is clear to us, however, that the City has no desire to utilize longstanding and very efficient private transit providers, preferring instead to enforce a public monopoly of the transit system, notwithstanding our more than 75 year record of exceptional service.

May 28, 2004
Page 2 of 7

The City has received millions of dollars in federal grant money to purchase buses currently operated by the Companies. The City has indicated that it will transfer ownership, operation, management and maintenance of these buses to the MTA in connection with the proposed takeover. Both the City and the MTA, however, have disavowed any obligation to pay for the intangible value of our business. The City intends to transfer the benefits of this federal assistance to the MTA without any of the corresponding obligations, eviscerating the private sector requirement of the Transit Act in the process. If the City is permitted to succeed in its current course of conduct, the policy of leveraging public infrastructure investment with private equity will be rendered meaningless.

The City's reckless takeover plan is even more troubling in light of its conduct and treatment of the Companies over the past decade. The City has consistently ignored its contractual obligations to the Companies and refused to renegotiate these contracts despite the fact that it has required increased and uninterrupted service from the Companies. Furthermore, the City has manipulated the subsidy funding system under which the Companies operate in an attempt to shift the costs of providing public transportation to the Companies.

The City has also refused to purchase new buses to be operated by the Companies. Many of the buses currently operated by the Companies are ancient by industry standards. These buses are extremely costly to repair and maintain. The City has refused to either purchase new buses or increase the subsidies provided to the Companies to reflect the true costs of operating the buses. This is particularly troubling in light of the fact that the City apparently obtained over \$150,000,000 in federal assistance to purchase new buses for the Companies. This money remained unspent for at least two years and now the City intends to use this money to purchase new buses for the MTA.

The following is a brief synopsis of the history of the Companies and our difficulties with the City.

The History of the Companies

The Companies provide local and express bus transportation in Queens County, Kings County and New York County and carry approximately 82,000,000 passengers each year. In many of the areas they serve, the Companies provide the only bus transportation, and in some areas the only public transportation of any kind, and are a vital part of the City's mass transportation system. In addition to their other routes, the Companies operate express service between Queens, Brooklyn and Manhattan that thousands of passengers depend upon each weekday and Saturday to get to work or elsewhere. The Companies provide such service at fares fixed by the City and over the last thirty years the public has come to expect that fares will be subsidized to keep them well below the actual cost of a ride.

May 28, 2004
Page 3 of 7

The Companies have a long and rich history in New York. In 1933, World War I veterans who had been operating their own buses across lower and midtown Manhattan under the jurisdiction of the then extant City Department of Plants and Structures, banded together, exchanged their buses for Green Bus stock and risked their futures by accepting a franchise to operate several lines in Queens County. They took the chance, worked hard and the company prospered. That company still exists and its stock is now held by the second and third generation descendants of those veterans. We came to Queens when there were Vineyards in Forest Hills, goat farms in Cornell Park and grassy knolls sharing the service islands with the trolley tracks along Queens Boulevard.

When Triboro Coach slid into financial difficulty in 1948, the City called on the Green Bus management for help. Management responded by risking personal funds to finance and takeover the ailing company and Triboro's fortunes were quickly reversed. When in 1952 the same fate befell Jamaica Buses, the City again asked for help and management responded by breathing new life into this venerable company, which looked back on more than a century of uninterrupted service to and for the residents of Queens County.

In 1979 Pioneer Bus Company, operating in Brooklyn's Mill Basin, discontinued service for a multitude of reasons. There was a storm of criticism directed at the City. To stem that criticism the City again turned to Green Bus for assistance. The Command Bus Company was created and has been operating ever since.

It is not without pride that we can say that whenever the City or the communities the Companies serve have called upon management for help, the Companies have risked their resources, directed their energies and given the best of their management skills in response to those calls.

The City's Harsh Treatment of the Companies

The financing of the Companies has changed dramatically over the years. At one time the Companies kept a certain proportion of their fare box revenue and turned the balance back to the City in accordance with their franchise obligations: an arrangement, under which the Companies paid their expenses, invested in facilities and equipment and returned a reasonable profit. However, because of spiraling expenses and fare restrictions the Companies now operate pursuant to "Operating Authority" which expires on July 1, 2004 and receive funding pursuant to some of the terms of an Operating Assistance Agreement (OAA) which expired on September 30, 1997. I say some of the terms because the New York City Department of Transportation ("DOT") under whose jurisdiction the Companies operate applies the terms inconsistently and only when to do so is beneficial to the agency. It has been the administration's position that the instrument on the whole is unenforceable.

The private bus program operated efficiently and reasonably well under the OAA until the DOT unilaterally modified the funding arrangement in 1995. The recast funding arrangement, Mayor Giuliani's "One City, One Fare" program, the

May 28, 2004
Page 4 of 7

Metrocard system, and astronomical increases in fuel costs and fleet repairs coalesced to impact adversely upon the Companies so that their financial health became and remains precarious. Some of these problems could have been alleviated by innovative use of the allowance accounts provided for in the OAA, which are funds earned by the Companies through efficiencies in operations. The City, however, through the DOT and its Office of Management and Budget ("OMB") has taken steps to reduce the allowance accounts in violation of the OAAs and has not permitted the Companies to use these funds to meet expenses when needed.

Over the last few years costs have risen and the program as modified is incapable of dealing with them. The confluence of aging bus fleets requiring increased maintenance to accommodate burgeoning passenger loads, the ballooning costs of fuel, parts, health benefits and other operating expenses are incompatible with the present funding program.

It is to be noted that because of the modified funding practice imposed on them by the City, the Companies experience a repetitive cash shortfall each month. Accordingly, the Companies must regularly borrow against their credit lines. The interest costs are not reimbursed. So, in reality the City is able to gain the benefit of an interest free loan while the Companies are compelled to absorb the expense. The City's repeated pronouncements in December 2002 that the MTA would take over the private lines sparked a reaction from our banking institution. Since then our credit lines and borrowing ability have been gravely restricted.

Service Issues

The City has justified the proposed takeover by the MTA by claiming that it will improve service. Despite the claim by some that our service is poor and inadequate, it has been documented that in many respects and by many yardsticks the private lines operate less expensively than the New York City Transit Authority. This, in spite of the fact that the Companies are burdened with a shortage of equipment and that which it has is woefully outdated. While the industry standard for buses is eight years, 60% of the Green Bus fleet is more than 16 years old and the Jamaica fleet averages 14 years.

A few years ago the media was especially harsh in its assessment of our operations. We really wanted an objective evaluation of our service as viewed by the riding public. We sought out a well-recognized service to poll our riders. There were several areas that the riders believed needed improvement. Most rider complaints concerned matters which were beyond our control, but when asked "Would you recommend this service to a friend?", the overwhelming response of passengers on all lines was "Yes."

To determine our relative merit when compared to similar service providers, including the MTA, we sought out a well-respected transportation-engineering firm often retained by the New York City DOT, as well as, the MTA. We requested that

May 28, 2004
Page 5 of 7

it inspect and evaluate every department of the Companies. It was an exhaustive and helpful study. There were areas that needed change and management has addressed and changed them. However, their overall assessment was that as against other service providers we compare favorably and moreover, we did it less expensively.

Elimination of Express Bus Service

At the present time, the seven private operators provide daily express bus service to 60,000 passengers from the Bronx, Queens and Brooklyn. On many occasions, the MTA has opposed the continuation of express bus service, and the City has done everything it can to eliminate this service. The MTA is interested in moving people from the bus to a subway stop, but has no interest in continuing this service for some who have need of it six days a week. Many express bus riders, the majority of whom use this service to go to work, will have no way to get into the City; and considering they are people of modest income, they will suffer great hardship. The MTA has not revealed its plans for express service once it takes over the private lines.

Labor Negotiations

In the past when labor contracts required negotiation and renewal the City gave us guidance and support. Today, our collective bargaining agreements with the TWU and the ATU have expired and notwithstanding that it is a violation of law and an interference with our rights to do so the City has unilaterally met with the unions to discuss terms and conditions of their collective bargaining agreements and the pending MTA takeover. This has made it impossible for us to bargain effectively with the unions on any terms other than those dictated by the City.

The Proposed Transfer to the MTA Will Not Save the City Money

The City has argued that the MTA takeover would save the City nearly \$150,000,000 dollars in subsidies it currently provides to the Companies. These funds, however, are necessary to continue operations under the City's regulated fare structure. The City never explained who would meet these costs in the event of an MTA takeover. Predictably, the City has since conceded that it will now shift these funds to the MTA rather than the private bus lines. Unless the City and the MTA significantly reduce the service currently provided by the Companies it is likely that it will cost the MTA as much or more than the Companies to operate these routes.

In fact, in its most recent proposed budget, the City has allocated more money to the MTA than it does to the Companies for the operation of the same routes. It has also stated that it will transfer additional \$150,000,000 in federal funds it has been holding to the MTA to purchase new buses. The only conclusion to be drawn is that the City did not effectuate this transfer to save money or improve service, but for some other hidden purpose such as eliminating the right of the Company's private employees to strike by forcing them to become public employees.

May 28, 2004
Page 6 of 7

Tangible and Intangible Rights

The Companies have a present and existing property right in their tangible and intangible assets. The Companies intangible assets have been developed, in some cases, over the course of seventy years and include but are not limited to the development of routes, scheduling, training of employees, the value of its operating authority and a myriad of associated matters. These intangible assets partially comprise the Companies' "going concern" value. The City and the MTA, however, have indicated that they do not intend to reimburse the Companies for these intangible assets in connection with the MTA takeover.

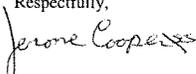
Compliance Power of the FTA

For many years, the Companies also operated a school bus company known as Varsity, a business that has since been sold. It is important that the members of the Subcommittee know that violations of competition requirements are routinely not remedied by the Federal Transit Administration ("FTA"). This has been seen even in the case of serial violations by the same grantee. Examples of lack of enforcement in the context of school bus operations, a business from which my company has withdrawn, are to be found from Green Bay, Wisconsin, Flint, Michigan and Buffalo, New York. Even when the FTA finds a violation, or a series of violations, it does nothing to remedy the damage done. So-called compliance plans, which are not closely monitored and often are accompanied by continuing or new violations, are all the FTA imposes after a private operator spends much time and money to prove a violation to the agency. However, contracts which violate the competition rules are not ordered to be terminated and no restitution is ever ordered for companies which are the victims of unfair and unlawful government subsidized competition.

Although the FTA claims that it has no power to punish violations of competitive requirements other than to defund grantees, this is not the case. The agency can, and does, impose conditions on the receipt of Federal grants. It can enforce those conditions in many ways. Simply delaying further grant funding until compliance is proved is one very effective way to obtain compliance, but has not been used since the early 1990's when over \$170 million in grant funds to New York were held in abeyance pending conformity with the requirements of the St. Germain Amendment (the "School Bus Regulation") in the Administration of President George H. W. Bush. The FTA has the legal duty to declare a grantee ineligible for future funding until it comes into compliance with whatever competitive regulation it may have violated. It is not a question of under which Constitutional power an appropriation is made, it is a question of requiring compliance with the explicit conditions of receiving Federal assistance.

May 28, 2004
Page 7 of 7

I would be happy to meet with the Committee or its staff to discuss these matters further. I would also be happy to provide you with any additional information you deem necessary to investigate these matters.

Respectfully,

Jerome Cooper
Chairman

2813252

Kahlow, Barbara

From: Hal Morgan [hmorgan@tlpa.org]
Sent: Friday, May 28, 2004 2:24 PM
To: Kahlow, Barbara
Subject: Testimony - May 18, 2004 hearing



House Testimony 5/
28/04.doc Ms. Kahlow

I had the pleasure of attending Congressman Ose's May 18 hearing on "How Can We Maximize Private Sector Participation in Transportation?"

The Taxicab, Limousine & Paratransit Association would like to submit the attached remarks for the hearing record. A copy was also faxed to the Committee on Government Reform's office earlier this afternoon.

Thank you for all your efforts in this matter.

Sincerely,

Hal Morgan

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Hal Morgan
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**Testimony on How to Maximize Private Sector Participation in Transportation
to the
Subcommittee on Energy Policy, Natural Resources and Regulatory Affairs
of the
House Committee on Government Reform
by
Judy Swystun, President
Taxicab, Limousine & Paratransit Association
May 28, 2004**

On behalf of our country's private taxicab, paratransit, and contract transportation service providers, we appreciate the opportunity to submit this testimony on the benefits of reinvigorating private sector participation in the provision of public transportation services funded by the Federal Transit Administration. The Taxicab, Limousine & Paratransit Association commends Congressman Ose for holding this hearing to explore the Department of Transportation's record in encouraging private sector participation in public transportation and its record in faithfully implementing the various private sector participation statutory provisions through its codified rules, oversight, enforcement, and other initiatives.

Industry Overview

The Taxicab, Limousine & Paratransit Association (TLPA), formed in 1917, is the national organization that represents the owners and managers of taxicab, limousine, sedan, airport shuttle, paratransit, and non-emergency medical fleets. TLPA has over 1,000 member companies that operate 124,000 passenger vehicles. TLPA member companies transport over 2 million passengers each day — more than 900 million passengers annually.

The taxicab, limousine, and paratransit industry is an essential part of public transportation that is vital to this country's commerce and mobility, to the relief of traffic congestion, and to improving the environment. The private taxicab, limousine, and paratransit industry transports 2 billion passengers annually, compared with the 9 billion passengers transported by public transit; provides half of all the specialized paratransit services furnished to persons with disabilities; serves as a feeder service to major transit stations and airports; and provides about half of its service to transportation disadvantaged people, such as the elderly, who are either not able to drive or do not have a car.

Background of the Federal Transit Act and Its Private Sector Participation Provisions

The Urban Mass Transit Act of 1964 was the congressional response to the dismal condition of the private sector transit industry in the 1960s. In the decade just prior to its enactment, 243 transit companies were sold and another 194 were abandoned. These sales and abandonments had a profound effect on transit labor and transit services. Between 1945 and 1960, transit employment decreased from 242,000 employees to 156,000 employees. Although mass transit had generally been viewed as a local, rather than national issue, many members of Congress viewed the federal mass transportation program as a necessary step to preserve both transit jobs and services. One of the principal features of the 1964 Act was to provide federal funding for local public bodies to acquire financially troubled private transit companies.

Private Enterprise Requirements in the Federal Transit Act

Since its inception, the Federal Transit Act has recognized the importance of private sector participation in Federal mass transportation program. Section 5323(a)(1)(B) [formerly 3(e)]; Section 5303(e) and 5303(f) [formerly 8(e)]; Section 5304(d) [formerly 8(h)]; Section 5306(a) [formerly 8(o)]; and Section 5307(c) [formerly 9(f)] mandate private sector participation in programs assisted by federal transit grants. (When discussing the Federal Transit Act, it is sometimes confusing because one person may refer to Section 16(b)(2), Section 8(o), or Section 13(c), while another person may refer to Section 5310(d), Section 5306 (a), or Section 5333(b). Both are referring to the same provisions of the Act, but the citations are different because in July 1994, after 30 years, Public Law 103-272 repealed the Federal Transit Act and related transit provisions and reenacted them as chapter 53 of title 49, United States Code.)

Although the private enterprise participation requirements had been the law for nearly two decades (1964-1984), contracting of services to private operators was a minimal \$10 million per year in the early 1980s. Then in 1984, in response to President Reagan's call for a greater private sector role in addressing community needs, the Federal Transit Administration issued the Private Enterprise Participation (PEP) Policy that called for the use of private providers in transportation wherever practical. The reason given for this policy was that injecting competition into the provision of public transit services would result in lower costs for quality services. It was also thought that in addition to real cost savings, contracting out some services would limit the growth in transit agencies' own costs for providing services.

Success of the PEP Policy is well documented. From 1984 through 1990, the amount of privately contracted transit bus service increased by 62.5%. From 1984 to 1991, amount of privately contracted paratransit

service increased by 135%. The FTA Private Enterprise Participation Policy helped encourage competition and provided a framework for the transit community to meet the requirements in the Federal Transit Act of 1964, as amended, that private transportation companies are included, to the maximum extent feasible, in the planning and delivery of transit services. The FTA PEP Policy was very successful in that competitive contracting reduced public costs in three ways:

- Directly through lower service costs that typically ranged from 20 percent to 40 percent
- Indirectly through "ripple effect" impacts on services that had not been competitively contracted. For example, San Diego began contracting in 1979, and as a result of the PEP Policy has converted 38 percent of its bus system to competitive contracting at an average cost saving of 30 percent. "Ripple effect" savings have reduced the costs of non-competitive service by 25 percent per vehicle hour. In fact, through 1996, as a result of competitive contracting, San Diego systemwide bus costs per vehicle hour were \$475 million less than if costs had risen at the industry rates experienced by those agencies that do not contract.
- Private sector contractors pay local, state and federal taxes and the taxes paid by private operators benefit the public good.

There are numerous examples in addition to San Diego Transit where the impetus of the FTA PEP Policy resulted in innovative services utilizing private operators. A few follow below.

- In Phoenix, AZ, the transit agency saved a significant amount of money by eliminating Sunday bus service and replacing it with a shared-ride taxi service.
- The Ann Arbor Area Transit Authority eliminated its late-night bus service and replaced it with a shared-ride taxi service.
- Transit Authorities in Dallas and Houston expanded service to growing suburban areas by contracting for express bus service.
- The Denver Regional Transit District is required by state law to contract out 35 percent of its fixed route service, which it does at a cost savings of 41 percent. (The testimony submitted by the ATU used Denver as an example of contracting that failed, quoting a January 2002 article about troubles with a private operator that had to be replaced. Despite Amalgamate Transit Union's claims, Denver remains a positive example of the benefits of contracting.)
- Indianapolis contracts 70 percent of its bus system, experiencing a cost-per-hour reduction of 22 percent.

TLPA Testimony for the House Subcommittee on Energy Policy, Natural Resources and Regulatory Affairs
May 28, 2004
Page 4

- The City of Las Vegas contracts out its entire system. Costs per vehicle hour dropped by 33.3 percent.
- Foothills Transit outside Los Angeles contracts out its entire system to private operators. Its ridership has risen by over 50 percent, it has added 57 percent more service, and its fares have dropped by 37 percent.

An oft-quoted fallacy is that the savings to the transit agency are because the contract workers are paid a lower wage than the public transit employees. However, studies have shown that the lower contractor costs result from administrative efficiencies, improved management of the work force, more productive work rules, better utilization of equipment and facilities, improved maintenance practices and labor compensation consistent with competitive market rates.

Rescission of the PEP Policy

In 1993, in the early days of the Clinton/Gore Administration, a great deal of administration governmental reform policy was based on a book entitled *Reinventing Government* by David Osborne and Ted Gaebler. Incredibly, the new administration rescinded the Private Enterprise Participation Policy, although *Reinventing Government* specifically cited the FTA Private Enterprise program for its efforts to achieve competition and efficiency in the delivery of government services. In a letter protesting the rescinding of the PEP Policy, Osborne stated, "I believe the Private Enterprise Policy is indeed a model program. It simply requires local authorities to determine and consider the alternatives, public and private, in reaching transit objectives." He continued, "The injection of competition into public monopolies is a fundamental principle not only of 'Reinventing Government,' but of the Administration's National Performance Review, run by Vice President Al Gore. I serve as a senior advisor on the Performance Review. We are actively trying to increase, not decrease, the amount of competition in federally funded services."

Since the rescission of the PEP Policy in 1994, there have been no significant incentives to continue the more effective use of resources that result from the consideration of competitive contracting in the provision of public transportation. For this reason alone, this hearing being conducted by Congressman Ose is a welcome opportunity for private operators to recommend steps that could be taken to maximize private operator participation in the provision of transit.

One of the barriers to more competitive contracting is the adversarial attitude with which public operators and their unions seem to regard private operators. A number of myths have arisen regarding private operators, chief among them is the notion of "cream skimming" (e.g., private operators will only accept profitable public transit routes). Robert Cervero is a distinguished professor in the Department of City and Regional Planning at the University of California-Berkeley. He has published at least four books and many journal articles concerned with public transport. In 1988, he wrote the report, *Transit Service Contracting: Cream-Skimming or Deficit-Skimming?* This report is more than 110 pages in length but Cervero's findings can be summarized in the following four short paragraphs taken from his Executive Summary.

- There are very, very few profitable fixed route bus services in the U.S. from which any "cream" could possibly be skimmed. Even when only the direct operating portions of the total costs are considered, less than one percent of all fixed route bus services currently operated by medium and large size transit agencies in the U.S. make a profit or break even.
- There is little evidence of any significant economies of scale in the transit industry, particularly for large transit agencies, meaning there is no real economic justification for protecting transit properties from competition. This and other research shows consistently that unit costs of delivering bus services rise when vehicle miles increase. Thus, private firms that assist in serving high-deficit peak loads should help reduce the scale of public operations to a more cost-efficient level.
- In all instances to date, public agencies control which routes private bidders are given an opportunity to take over, meaning that agencies have retained their best performing routes for in-house operation. By remaining the funding sponsors, public authorities are in a position to hold back any routes they so choose from possible bidding. Experience shows that only the highest deficit, poorest performing routes are ever contracted.
- Overall, it is concluded that competitive contracting of fixed-route transit services, as practiced today and in the foreseeable future, actually results in deficit-skimming. Rather than ruthless predators, contractors are actually friends of the public transit sector. They take over the least productive routes and usually deliver a comparable or better quality service at a lower deficit rate.

There are a number of other myths regarding contracting between public transit agencies and private operators that I would like to bring to your attention. These include:

- **Myth:** *Public transit agencies have a responsibility to provide all services themselves since transit is a public service.*
Reality: A transit agency's mission is to provide mobility, not operate vehicles, and an agency fulfills its mission by making cost-effective mobility available.
- **Myth:** *The public sector loses control of services when they are provided under contract.*
Reality: The public sector increases its control over the service and the provider(s) through a legally enforceable agreement regarding services to be rendered and associated costs.
- **Myth:** *Contracts are difficult to develop and enforce, resulting in a loss of government accountability and control.*
Reality: Public managers are skilled in writing legally binding contractual agreements for countless goods and services. Transit services agreements are no different.
- **Myth:** *Contracting fosters an undesirable dependence on contractors and leaves the public sector vulnerable to one provider.*
Reality: A competitive approach reduces the dependence on a single supplier (i.e., a government monopoly), since any contract may be terminated and multiple providers may be used. This reduces the vulnerability of a service to labor actions, poor service quality, inadequate management, etc.
- **Myth:** *Competition limits the flexibility of government in responding to emergencies.*
Reality: A competitive approach permits a quicker response to meet new needs and facilitates experimentation in new services. Agencies have increased flexibility in adjusting a transit program's size in response to changing ridership, financial constraints, and other factors.

- **Myth:** *A competitive approach is more expensive because of the potential for corruption, existence of the profit motive, and the costs of managing the contract and monitoring the contractor.*
Reality: Competition is more efficient as it streamlines the service and eliminates inefficiencies. Productivity is a paramount concern. By contracting some service, an agency can measure the productivity of their in-house employees against that of a contractor's employees and can choose the lowest cost mode of service delivery.

- **Myth:** *Service contracting is a threat to organized labor and a de facto violation of the Federal Transit Act's labor protection provisions [Section 5333(b)].*
Reality: There is not a single case of a transit employee having been furloughed as a direct result of service contracting.

- **Myth:** *As service contracting becomes more widespread, the overheads and labor costs of private firms will eventually rise, as their workers become unionized.*
Reality: In general, periodic rebidding of contracts has provided an effective safety valve for controlling costs. Moreover, rather than the private sector costs rising, it is more often the case that the public sector costs moderate or fall in order to be more competitive.

The public private partnership approach to providing transit services is a proven tool to achieve various public objectives, including cost control, enhancements of service quality and quantity, and access to capital funding. "Cream-skimming" is an urban myth. Since few if any routes are profitable, there is no cream to skim. However, as there are ever-increasing demands for limited transit funds, the competitive approach offers a means to provide current or new services at a reduced cost and utilizing the savings for existing transit services. The public-private competitive approach may be used for numerous services, including:

- Paratransit services for the elderly and people with disabilities
- Social service agency transportation
- Bus services (commuter, express, and local)
- Peak period overloads
- Evening and weekend services
- Employer and developer shuttle and vanpool services

- Customized service, such as "guaranteed ride home" programs.

The private sector has a very important role to play in the delivery of safe, efficient and productive public transit services in this country.

TLPA Legislative Program to Revitalize the Participation of Private Transportation Providers to the Planning and Delivery of Public Transit Services

The current reauthorization of public transit legislation that is being considered by Congress offers legislators a tremendous opportunity to enact legislation that will go a long way to "maximize private sector participation in transportation." TLPA recommends that the following legislative actions be included in the final transportation reauthorization bill to advance the public policy benefits that would be derived from a significant expansion of the role private operators play in the delivery of public transportation services.

The infusion of competition into the provision of public transit services is important for a number of reasons including: (1) the need to guard against inequitable government subsidized competition, (2) to guarantee efficiency and effectiveness in the expenditure of Federal mass transportation assistance through competition, and (3) to prevent duplicative expenditures. The following five legislative initiatives are designed to increase the participation of private operators to the maximum extent feasible as is called for in the statute.

1. Repeal the Anti-Private Sector Federal Transit Planning Certification Provision

The Planning Program provisions applicable to transit and metropolitan planning agencies are found in Sections 5303 to 5306 of Title 49 United States Code - Transportation. Section 5306(a) states: "A plan or program required by Section 5303, 5304, or 5305 of this title shall encourage to the maximum extent feasible the participation of private enterprise." Under Section 5306(c), the private enterprise participation requirements are defined as:

- Section 5306(c)(2) requires each recipient of a grant shall develop, in consultation with interested parties, including private transportation providers, a proposed program of projects or activities to be financed;
- Section 5306(c)(3) requires each grant recipient to publish a proposed program of projects in a way that affected citizens, private transportation providers, and local elected officials, have the

opportunity to examine the proposed program and submit comments on the proposed program and the performance of the recipient;

- Section 5306(c)(6) requires each grant recipient to consider comments and views received, especially those of private transportation providers, in preparing the final program of projects.

Unfortunately, the experiences of private operators with transit agencies and Metropolitan Planning Organizations (MPOs) for the past twelve years under ISTEA and TEA-21 are that these private enterprise participation provisions are being ignored, because Section 5305(e)(3) of the title states that:

The Secretary may not withhold certification [that each metropolitan planning organization in each transportation management area is carrying out its responsibilities under applicable laws of the United States] based on the policies and criteria a metropolitan planning organization or mass transportation grant recipient establishes under Section 5306(a) of this title for deciding the feasibility of private enterprise participation.

Section 5305(e)(3) discriminates directly against private transportation operators. The power and role of MPOs were greatly enhanced with the enactment of ISTEA in 1991 and even more so with the enactment of TEA-21 in 1998. In the transit portion of TEA-21, the MPO is required to be certified at least every three years, and it has to certify that it complies with all applicable laws and regulations except one. That one exception is the private sector provision of the Federal Transit Act.

This anti-competitive, anti-private sector provision should be repealed from the Federal Transit Act because the only sections of the Act that save the taxpayers' money are the private sector provisions of the statute that require grant recipients to consider the utilization of the private sector in the provision of public transit service. In addition, the enforcement of Section 5305(e)(3) effectively neutralizes the private sector participation requirement and removes the likelihood that the MPO will make a decision that allows for competition in public transit.

After the passage of TEA-21, the Federal Transit Administration and Federal Highway Administration issued a memorandum on how their field offices should proceed with the planning requirements of the law.

The document serves as a reminder to transit operators, state DOTs, and Metropolitan Planning Organizations to ensure a basic level of compliance with TEA-21's statutory language. There are eight requirements covered in the memorandum including the following:

Consultation with transit users and freight shippers and service providers: "Before approving a long-range transportation plan, each metropolitan planning organization shall provide citizens, affected public agencies, representatives of transportation agency employees, freight shippers, providers of freight transportation services, **private providers of transportation**, representatives of public transit, and other interested parties with a reasonable opportunity to comment on the long-range transportation plan, in a manner the Secretary deems appropriate." (Emphasis added)

The law mandates a role for the private sector, yet at the same time, Section 5305(e)(3) explicitly withdraws any enforcement of the mandate. Both the ATU in its testimony and Congressman Tierney in his statement at the hearing indicated that the repeal of 5305(e)(3) would be unfair to public transit agencies and tilt the playing field in favor of private operators. Nothing could be further from the truth. By hiding behind Section 5305(e)(3), many agencies do not even consider the role the private sector could play in improving the quality and cost effectiveness of transportation services in their area. The study published by the Transportation Research Board in 2001, *Contracting for Bus and Demand-Responsive Transit Services*, reported that 40 percent of all federal transit aid recipients do not currently contract at all. TLPA urges that the House/Senate Conference reauthorization bill adopt the language used by the Senate in S. 1072, its reauthorization legislation, and repeal this provision.

2. Issue Private Participation Requirements

There is ample, indisputable evidence that the Private Sector Participation Guidance, developed and promoted by the Reagan and Bush Administrations, was a great success raising the amount of contracting, in just ten years, from \$10 million per year to over \$500 million per year. Public transit agencies, private operators, local governments, and most importantly, the public itself can realize significant benefits from contracting some public transportation services to private operators.

- Benefits for the riding public include increased levels of transportation services, increased convenience, and improved service quality.

TLPA Testimony for the House Subcommittee on Energy Policy, Natural Resources and Regulatory Affairs
May 28, 2004
Page 11

- Private operators typically realize increased income, productivity and exposure in their communities.
- Benefits for public transit agencies typically include cost savings, the ability to serve a greater number and type of trip needs, and allow a more productive allocation of union labor.
- Local governments typically realize cost savings and a higher level of public transit services.

However, since the rescission of the Reagan-Bush Private Enterprise Participation policies in 1994 by the Clinton-Gore Administration, the private sector has been relegated to the back burner and is not even an afterthought in the minds of many transit and government officials.

- The testimony of the three private operators: Mr. Allen, Mr. Tanaka, and Mr. Thomas at the hearing was ample evidence of the need for rulemaking as called for by Congressman Ose. Other evidence includes the following:
- Currently, 40 percent of all public transit agencies do not contract any services. Even though there is a legislative requirement to utilize private operators to the maximum extent feasible, a very alarming 30 percent of these transit agencies are led by general managers who state unequivocally that they never consider contracting.
- Only three of the Federal Transit Administration Regional Administrators were regional administrators when the guidance was in place, so even high-placed FTA officials have basically dropped private operators from their purview. It has been many years since FTA officials have been instructed to assure consideration of the private sector in leveraging public transportation investment and to assure cooperation, not unfair subsidized competition, in the efficient use of federal transit grants.
- After FTA rescinded the Private Enterprise Participation Policy, it withdrew the private sector guidance for its Capital Program, Urbanized Area Program, Nonurbanized Area Program, Elderly and Persons with Disabilities Program, and its Competition Policy for Paratransit Activities. As the years have passed and new employees have come into transit management positions, consideration of private operators for contracting purposes is ending. Just as consideration of private operators

was virtually non-existent for 20 years after the Federal Transit Act of 1964 became law (until the Private Enterprise Participation Policy was introduced in 1984); utilization and even consideration of the private sector is now declining. Also, many states have revised their guidance to operators and dropped private sector inclusion in the planning process as a result of FTA backing away from enforcing the private sector provisions in the Federal Transit Act.

- While it is true that the requirements of providing complementary paratransit service required by the ADA has increased the dollar volume of contracted transit services, the trend is for transit agencies, under union pressure, to take contracts back in-house. Altogether, contractors provide about 15 percent of all bus and demand-responsive vehicle hours, a percentage that has changed very little during the past five or six years.

The public private partnership approach to providing transit services is a proven tool to achieve various public objectives including cost control, enhancements of service quality and quantity, and access to capital funding. However, as there are ever-increasing demands for limited transit funds, the competitive approach offers a means to provide current or new services at a reduced cost utilizing the savings for existing transit services. TLPA urges the House/Senate transit reauthorization bill conferees to require FTA to conduct a rulemaking to reestablish a Private Sector Participation Policy. The end result would be an increase in the efficiency and effectiveness of public transit operations in this country, which would benefit transit riders.

3. Amend DOL Administration of the Federal Transit Labor Protection Provisions

In April 2001, the House Subcommittee on Highways and Transit of the Committee on Transportation and Infrastructure heard testimony from Anthony Downs, a senior fellow at the Brookings Institution who was asked to provide a report on the "Future of U.S. Ground Transportation from 2000 to 2020." In his testimony, Downs stated:

To a great extent, two types of archaic institutional structures hamper approaching future ground transportation rationally and efficiently. First, existing means of governance in most metro areas are not capable of managing regional growth so as to create consistently higher densities in new-growth areas ... **The second major institutional roadblock lies in the regulations that govern public transit. Existing authorities bolstered by transit unions want to maintain monopolies of very inefficient large-**

scale systems that cannot achieve flexible approaches to serving low-density residential areas. Yet such areas will comprise the vast majority of all new areas we are likely to build in the next two decades ... Imaginative management of public transit funds would encourage bidding for new types of services by private entrepreneurs. But the political power of transit unions and established institutions makes that unlikely ..." (emphasis added)

Mr. Downs is not the first individual to recognize the role unions play in stifling innovation in public transit because of the hold that Section 5333(b)-transit labor protection (formerly Section 13(c)) gives them over transit agency management. Section 5333(b) adversely impacts transit operations in a variety of ways, but two are of particular concern to private operators, including paratransit operators:

- Restrictions on delivering transit services in a manner that makes the most business sense, particularly the roadblocks that 5333(b) present to any legitimate competitive contracting efforts; and
- Financial liability for 5333(b) claims, often in connection with changes in contractors, regardless of whether the action involved has any real connection to a Federal project or grant.

Private operators' concerns about Section 5333(b) arise not out of its original intent, but rather out of how it has evolved and been expansively interpreted by the Department of Labor over the years. As the legislative history reflects, the original Section 13(c) was designed by Congress to protect transit workers from adverse impacts in employment that might result from Federal grants and to protect the collective bargaining rights of employees of private transit companies when those companies were purchased by public entities with Federal funds. Clearly, given these congressional objectives, Section 5333(b) has been interpreted and applied far beyond its original intent. Transit operators are being repeatedly frustrated in their efforts to provide additional and cost effective transit for the people they serve due to the threat of labor protection impediments and costs. Some unions have used Section 5333(b) to block contracting action, and to impose large costs that reduce or eliminate the efficiencies in contracting for services. In April 2001, the Subcommittee on Highways and Transit heard testimony from public transit officials representing Sacramento, Little Rock, Las Vegas, Boston, New York, and Chicago — six dissimilar cities, but all burdened and asking for relief from the Section 5333(b) labor protections. Peter Stangl, Chairman and CEO

of the New York Metropolitan Transit Authority, summed up the concerns of these six public transit representatives by stating:

"Current labor protection requirements, the "13(c)" provisions of the Federal Transit Act, apply to both capital and operating budgets. A grant recipient's union must approve both our capital and operating assistance requests before FTA can proffer grants. Such sign-off provisions give extraordinary control over a transit organization to the unions and can be used to undermine more traditional channels for resolving labor/management disputes. The net effect of 13(c) is to deprive transit operators of the ability to achieve reasonable productivity. Most critically, the regulations do nothing to advance legitimate federal interests."

The scope and nature of the 5333(b) protections required in "change in contractor" cases have continued to be a subject of major debate. The Department of Labor has become increasingly sympathetic to the efforts of the transit unions to include in 5333(b) protections a requirement that contractors providing transit services for a Federal grantee hire the workforce of the preceding contractor, and adopt the terms of the existing collective bargaining agreements. The provisions sought essentially provide a guaranteed right of continued employment, a "carryover" of the then-effective collective bargaining agreement, and if read literally, recognition of the existing union representative.

Compounding the difficulty with the Department of Labor's position is the fact that FTA grantees are faced with inconsistent, and sometimes directly conflicting, imperatives from the Federal agencies that play a major role in their funding. Specifically, grantees are being told by FTA that they must conduct periodic competitive procurements for transit services and award to the successful proposer under FTA's procurement principles, only then to be told by the Department of Labor that they cannot take any action that would change the existing workforce or their unions. These conflicting Federal directives cannot be reconciled, leaving grantees in the untenable position of trying to decide which agency to believe and whose rules to follow.

A required carryover could have a significant adverse impact on contracted services in the paratransit area. In particular, the potential economic benefits of competitive contracting could be lost if labor costs are effectively "locked in" from one contractor to the next.

The Department of Labor had previously held that when a contract for a fixed length has been properly terminated in accordance with its terms, impacts that occurred solely as a result of the expiration of the bid contract were not to be considered "as a result of" a Federal grant, and thus would not give rise to 5333(b) protections for affected employees. One major exception to the general rule was where the applicable 5333(b) protections already in place explicitly required the carryover of employees and/or the collective bargaining agreement.

The transit labor unions have been more aggressively pursuing 5333(b) provisions requiring a carryover of the workforce and collective bargaining agreement, both in the context of negotiation over the terms to be included in 5333(b) agreements and in the form of 5333(b) claims filed under applicable existing 5333(b) protections.

Section 5333(b)'s roots can be traced back to late 19th century rail labor law. These protections basically provide that should a union member covered by a labor agreement lose his or her job through the actions of a federal grant, that union member is entitled to compensation of up to six years full salary. This onerous penalty, once widespread across the United States, now only applies to two industries: Amtrak and public transit.

The Senate reauthorization bill modified the labor protections in three ways. First, they reduced the severance pay for affected transit workers from six years to four years. Second, they clarified that a change in contractors does not produce 13(c) obligations. And third, they codified the current 13(c) warranty for the rural program and added the warranty for the Job Access and Reverse Commute program.

TLPA believes implementation of the Senate language would be a good start to attaining a more level playing field to the competitive bidding process at many transit agencies.

4. Adopt the President's New Freedom Program

President Bush has stated that his New Freedom Program is designed to close the mobility gap for disabled Americans who currently do not have adequate mobility options so that these persons will have "the opportunity to participate fully in society and engage in productive work." According to Secretary of Transportation Mineta, the New Freedom Program funds are intended to increase access to assistive

TLPA Testimony for the House Subcommittee on Energy Policy, Natural Resources and Regulatory Affairs
May 28, 2004
Page 16

technologies and educational opportunities, and to enhance the integration of disabled persons into the workforce and communities. The Department of Transportation is charged with responsibility for the New Freedom Program funding, underscoring the central role of transportation in achieving the goals of the program.

Today, most public transit systems are largely accessible to disabled persons as a result of public funding to meet the requirements of the Americans with Disabilities Act. However, the privately owned and funded taxicab and paratransit industry receives virtually *no* public funding to provide service to the disabled. At the same time, private operators provide an essential means of transportation for people in urban, suburban and rural areas. The industry is used on a curb-to-curb basis, to reach other transportation facilities such as bus and rail stations and airports, as well as workplaces, schools, doctors, community centers and other locations. Taxicabs are ubiquitous, operating in over 2,000 communities and providing demand-response service 24 hours per day, 365 days per year. For many people, the disabled included, taxicabs provide the essential link between home, the community at-large and other transportation systems. Taxicabs are more broadly available than municipal paratransit services, which are generally available only with advance reservation, for limited hours, and then only in city centers and in areas three-quarters of a mile from fixed route bus corridors or rail stations.

Significantly greater accessibility for a larger number of disabled persons easily could be achieved, consistent with the goals of the ADA, if New Freedom Program funds were made available to carry out a program designed to close the mobility gap with respect to critically important curb-to-curb transportation provided by the private taxicab and paratransit industry. The program, which would be administered by the Federal Transit Administration, would authorize funding to qualified organizations (community groups or directly to taxicab companies) for use in enhancing local transportation services for disabled persons by working with private taxi-van providers to fund the purchase, promotion and operation of taxi-vans that meet federal accessibility requirements for vans and that serve persons requiring accessible transportation to reach work, schools and other places in the community at-large.

The House of representatives included the New Freedom Program as a new standalone formula grant program in their TEA-LU reauthorization legislation. The Senate bill combines the 5310 Program and the New Freedom Program into one program where private operators are eligible to contract.

5. Streamline and Consolidate FTA's Special Needs Programs (JARC, New Freedom, and Section 5310) to Adopt the Same Planning and Eligibility Requirements

In the past seven years, the Federal Transit Administration (FTA) has introduced or proposed two innovative programs designed to meet the special needs of two of the most transportation-dependent groups: those with low incomes and the disabled. The Job Access and Reverse Commute (JARC) grant program is designed to transport welfare recipients and eligible low-income individuals to and from jobs and activities related to employment. President Bush's proposed New Freedom Program would provide for alternative transportation services to jobs and innovative solutions eliminating transportation barriers faced by persons with disabilities. Along with the FTA Section 5310 Elderly and Persons with Disabilities Program, JARC and the New Freedom program are FTA's special needs programs. Each one of these programs has a slightly different target audience, JARC (unemployed and welfare-to-work-individuals); New Freedom (disabled individuals whose needs cannot be with ADA accessible transportation options); and Section 5310 (assisting private non-profit groups and certain public bodies in meeting the transportation needs of seniors and persons with disabilities). However, there are such similarities and potential synergies among the programs that TLPA urges Congress to require that each program have uniform planning and eligibility requirements using the JARC planning and eligibility requirements as the guidelines. This request is also consistent with the recent emphasis on coordination of transportation resources at the Federal level.

The issue of providing affordable, accessible and safe transportation for human services clients has been extensively researched and promoted since the early 1970s. In October 1986, Secretary of the U.S. Department of Health and Human Services Otis Brown and Secretary of the U.S. Department of Transportation Elizabeth Dole signed an historic joint agreement on the coordination of transportation services funded by the two agencies. Every subsequent administration has renewed this commitment to coordination. In the past 17 years, the scope and reach of coordinated transportation services have advanced to such an extent that one can find exemplary models of coordinated activities in virtually every state. However, recent changes in Federal social service programs, principally the change from serving children's needs in the Aid to Families with Dependent Children program to serving entire families' needs in the Temporary Assistance to Needy Families (TANF) program; difficulties in funding medical services, primarily the financial dilemmas states are facing with the Medicaid program; and changes in the demographics of our country, chiefly the increasing proportion of our population age 65 and older, have fostered a renewed need for and commitment to coordination at the Federal level. The administration's reauthorization bill requires any locality applying for funding for NFI, Section 5310 or JARC to demonstrate

TLPA Testimony for the House Subcommittee on Energy Policy, Natural Resources and Regulatory Affairs
May 28, 2004
Page 18

that they have a local, coordinated process that includes all the stakeholders: public and private operators, local governments, private non-profit organizations and riders. Having a seat at the table should give private operators an enhanced role in helping plan for and provide coordinated services. TLPA supports having one streamlined program that has uniform planning and operating requirements for recipient and subrecipient grantees.

The importance to all parties involved in the planning process and especially to those who are not compensated to participate in planning, such as private operators and citizen groups, of having uniform planning and participation requirements for these special needs programs cannot be overstated. The Federal Transit Act requires that planners and grant recipients "shall encourage to the maximum extent feasible the participation of private enterprise." However, having to deal with different requirements for each and every FTA program is often mind numbing and counterproductive.

As noted above, the Senate voted to combine the Section 5310 Program and NFI into one program in which private operators are eligible to contract. The Senate bill also provides for the JARC planning process to be used by this new program, effectively accomplishing TLPA's goal of streamlined planning should this Senate provision become law.

Conclusion

As Congressman Ose has pointed out, FTA has had ample time and opportunity to undertake a ruling that ensures that public transit agencies will take adequate efforts to integrate private enterprise in their transit programs. Competitive contracting is a tool that is available to public transit agencies to assist them in managing their costs in these current economic times where virtually every state and locality is scrambling for dollars to overcome budget deficits. Competitive contracting not only results in lower costs for public services that are competitively contracted, it also induces improved cost performance from the public agency. Contractors are the friends of the public transit sector. They take over the least productive routes and usually deliver a comparable or better quality of service at a lower deficit rate. There is little evidence of any significant economies of scale in the transit industry, particularly for large transit agencies, meaning there is no real economic justification for protecting transit properties from competition. Research consistently shows that unit costs of delivering bus services rise when vehicle miles increase. Thus, private firms that assist in serving high-deficit peak loads should help reduce the scale of public operations to a more cost-efficient level.

TLPA Testimony for the House Subcommittee on Energy Policy, Natural Resources and Regulatory Affairs
May 28, 2004
Page 19

Despite the need and benefits, without a change in FTA attitudes, policies and legislation, the public will continue to be denied the substantial benefits that could be achieved from greater private operator participation through competitive contracting.

Thank you for this opportunity to submit testimony for the record.



Statement of the
Amalgamated Transit Union
Before the United States House of
Representatives Committee on Government
Reform Subcommittee on Energy Policy, Natural
Resources and Regulatory Affairs
On Maximizing Private Sector Participation in
Transportation

May 18, 2004

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The Amalgamated Transit Union (ATU) is the largest labor organization representing public transportation, paratransit, over-the-road, and school bus workers in the United States and Canada, with nearly 180,000 members in over 270 locals throughout 46 States and nine provinces. We are pleased to offer our views on the role of the private sector in the public transportation industry.

Throughout the past two decades, ATU has participated in transit privatization cost studies, policy forums, and legislative campaigns, including initiatives in Arizona, British Columbia, California, Colorado, Maryland, Massachusetts, New Jersey, Rhode Island, and Toronto, among others. In each case, our primary efforts have focused on promoting unbiased decision making in order to avoid artificially imposed cost models and anti-labor motivations. Moreover, we have sought to guard against job losses and ensure the delivery of safe and efficient transportation services consistent with local policies and agreements.

While our statement today focuses on private sector participation in transit, we would be remiss if we failed to note that the “Amador Case Study” cited in the May 11, 2004, subcommittee briefing memorandum involves issues separate and distinct from policy concerns involving the role of private operators in public transit. The Amador Stage Lines case – in which private charter bus services were replaced with traditional public transit services provided by the Sacramento Regional Transit District – was governed by federal regulations on charter bus service, currently codified at 49 CFR 604. Under current law, Federal Transit Administration (FTA) grantees must comply with the charter regulations, which, subject to certain exceptions, prohibit transit agencies from providing transportation to a group of persons who, pursuant to a common purpose, have acquired the exclusive use of a vehicle to travel together under an itinerary. In the Amador case, the FTA determined that the type of service that is now being provided by the Sacramento RTD does not fit into the definition of charter service, and therefore, no violation exists. As stated, that decision was unrelated to the announced topic of today’s hearing: “How Can We Maximize Private Sector Participation in Transportation.” In the public transit sector, those issues are governed by the “private sector participation” requirements codified at 49 USC 5306, and have no relation to the charter regulations.

ATU’s POSITION

For years, ATU and all transportation labor have endorsed the long-standing Congressional policy that decisions involving the choice between public and private transit operators should be left to local authorities who are better equipped to make local transportation decisions. The federal government is clearly best suited to making broad public policy decisions rather than micro-managing the local transit choices selected to meet the needs of rural, urban, and suburban communities. We firmly believe that the public versus private question should be decided on the basis of local needs, not ideology. **The federal government should remain neutral, and it should not intrude on local decision making.**

In the past, much has been made of the statutory references to involving the private sector to the “maximum extent feasible” when designing local and regional transit systems. Yet, Congressional

intent dating back to the first highway/transit legislation in 1964 indicates that the private enterprise participation sections of the surface transportation law, now codified under the Transportation Equity Act for the 21st Century (TEA 21), were designed to protect only then-existing private providers – rather than any future private sector operations.

ATU has never been opposed to the provision of transit services by private operators, so long as the methodology and criteria for service selection and final decisions are left to local decision makers, consistent with applicable laws, collective bargaining agreements, and other pertinent agreements. America’s transportation needs cannot be met by one mode alone, and they certainly cannot be met by only one sector of such mode. In fact, ATU represents thousands of transit workers in the United States throughout the public and private sectors.

For purposes of our discussion, it is important to define the term “privatization.” In the area of public transportation, the term has been used to refer to various projects, including those that provide for “competitive bidding,” “tendering,” or “subcontracting” of existing, new, or restructured transit service. The role of the private sector in these situations may involve entire operations or portions thereof. Similarly, the discussion of privatization can raise different issues depending on whether such plans involve fixed route bus service, ADA paratransit or other specialized service, or light and heavy rail service. The most controversial aspect of these options of course involves the contracting-out of sections of route segments or portions of existing systems, and denying those operations the opportunity to address new or emerging transit needs.

With respect to transit labor, two common elements are threaded through all the variations discussed above. First, we always strive to protect the collective bargaining rights and jobs of our members. Secondly, we seek to ensure that any potential cost savings are properly measured and weighed against potential adverse effects on safety and service.

It has been our experience that mandated privatization of public transit through competitive bidding serves to reduce the standard of living for workers and diminish the transportation service provided to communities. Moreover, as discussed below, transit privatization is based on questionable and at times false assumptions regarding competition, cost, and the mechanisms used to calculate these and other matters.

A BRIEF HISTORY

Between 1964 and 1984, UMTA (FTA) provided no separate guidance relating to the participation of private enterprise in public transportation. FTA first issued guidance on this issue in a 1984 policy statement, “*Private Enterprise Participation in the (Federal Transit) Program*,” which set forth the factors FTA would consider in determining whether a recipient’s planning process appropriately considered the participation of private enterprise. These factors included consultation with private providers in the local planning process, consideration of private enterprise in the development of the mass transit program, the existence of records documenting the participatory nature of the local planning process, and the rationale used in determining whether or not to contract

with private operators for transit services.

In 1986, FTA expanded its private enterprise guidance for recipients under the current 5307, 5309, 5310, and 5311 Programs in two separate circulars which outlined certain elements and procedures relating to private enterprise participation that grantees were to use in their planning process. These guidelines were relied upon by the FTA to intrude on the local decision making process over the objections of metropolitan planning organizations (MPOs), transit agencies, and other community-based groups.

During the 1980's, ATU, along with expert transit industry economists, including the nationally known KPMG Peat Marwick accounting firm, and the Economic Policy Institute severely criticized FTA's requirements which obligated transit grant recipients to utilize the so-called "fully-allocated cost" methodology when evaluating the cost differential between public agency costs and private sector bids for service competitively bid. The experts agreed that such decisions should be made by comparing the private company's bids against a public agency's "incremental" or "marginal" costs, without requiring public bids to include costs that would not disappear with the contracted service.

In carrying out the policies of the 1980's, FTA all too often interfered with the local decision making process affecting private sector participation. The agency used the transit grant program to override state/local laws and referenda, rulings of state regulatory bodies, and local collective bargaining agreements that covered important worker issues such as prevailing and living wage requirements, health care matters, contracting-out and hiring rights.

For example, in 1989, FTA required Sonoma County Transit in Santa Rosa, California, to reconsider the locally determined decision to retain the unionized Golden Gate Bridge highway and transportation district for certain fixed route transit services rather than contract with another non-union private operator which had in fact submitted a higher bid for the service. FTA served as an appeals bureau forcing the recipients to alter a locally determined decision reached in its best interest. Similarly, in 1990, Community Transit in Lynnwood, Washington, was compelled to enter into an agreement with FTA guaranteeing that buses purchased pursuant to a Section 5309 grant would only be used by a private operator under contract to Community Transit. The issue arose after Community Transit sought to bring the service in house and utilize the buses in question. FTA subsequently refused their request to bring the service in house, relying on the initial agreement which FTA unnecessarily mandated in the first place requiring the buses purchased under the contract to be used only by private operators in the area.

Moreover, in correspondence to members of the St. Louis, Missouri, area Congressional delegation, FTA indicated that future transit grant funding was jeopardized because of a locally established ordinance requiring prevailing wage standards for private operators bidding to perform existing public transit services. Rhode Island had a similar state law and could have been adversely affected by the policy as well. Earlier, FTA delayed funding to Phoenix, Arizona, because the federal agency disapproved a locally negotiated preference in hiring provision concerning the transfer of service from one private operator to another. These are only selected examples.

In an effort to restrain the agency and ensure the return to the federal policy of neutrality on these issues, Congress in the Intermodal Surface Transportation Equity Act (ISTEA, 1991) included the language currently codified at 49 USC 5305(e), which states:

Sec. 5305. Transportation management areas

(e) Certification. - (1) At least once every 3 years, the Secretary shall ensure and certify that each metropolitan planning organization in each transportation management area is carrying out its responsibilities under applicable laws of the United States. The Secretary may make the certification only if the organization is complying with section 134 of title 23 and other applicable requirements of laws of the United States and the organization and chief executive officer have approved a transportation improvement program for the area.

(3) The Secretary may not withhold certification based on the policies and criteria a metropolitan planning organization or mass transportation grant recipient establishes under section 5306(a) of this title for deciding the feasibility of private enterprise participation.

This provision was designed to ensure control by state and local governments, their MPOs, and transit grant recipients in developing and implementing competitive bid standards and conditions utilized for considering private sector participation in public transit services. The measure was a response to serious concerns that FTA was interfering with locally established decisions affecting such matters.

As part of a compromise, ISTEA (and later TEA 21) retained the “private enterprise participation” requirements currently codified at 49 USC 5306, which state that metropolitan plans or transportation improvement programs must encourage, to the maximum extent feasible, the participation of private enterprise. This compromise has worked well for all parties involved. It has allowed for the continuation of private sector involvement in public transit services. In fact, during the past twelve years, the percentage of contracted transit service in the U.S. (approximately 25 percent) has remained at pre-ISTEA levels. Yet, since 1991, the question of whether or not to utilize the private sector in the provision of such transit services has appropriately been a local decision. The federal government has remained **neutral** on the issue of which type of transportation provider is suitable for local communities.

The above-mentioned provision also led to FTA’s 1994 *Notice of Recision of Private Enterprise Participation Guidance*, which was praised by the majority of transit systems that prepared comments in response to the agency’s proposed Recision. The exaggerated results and misleading benefits generated by the fully allocated cost methodology were the principal reasons cited by FTA in rescinding the guidelines.

The House version of the TEA 21 reauthorization bill (HR 3550), passed by the full House on April 2 by a vote of 357-65, wisely retains current law on the issue of private sector participation in public transportation. ATU believes that it would be a giant step backwards to end the long-standing

federal policy of neutrality with regard to local decision making and transit grant recipients' choice of public or private transit providers, and the policies employed for their implementation.

FALSE PROMISES

As noted in a report by expert economist Elliott D. Sclar, Professor of Urban Planning at Columbia University,¹ privatization establishes the wrong priority for urban transportation systems. The primary goal of urban transportation policy should be to improve the speed, safety and convenience of metropolitan travel. The primary goal of privatization is to reduce the tax money that publicly operated systems receive to transport transit-dependent people, regardless of the effect on congestion, pollution, and the economic efficiency of the city. Thus, privatization is a significant break with past bipartisan federal policy that viewed urban public transportation expenditures as investments in the nation's productive capacity.

Moreover, privatization confuses the efficiency and effectiveness of transportation *systems* with lowering cost on individual routes. In fact, the measure of the success or failure of urban transportation lies in its ability to move travelers between *any* two points in a metropolitan area, not just between two points on a given route. One result is that privatization advocates typically omit from their competitive cost analysis the necessary cost of increased supervision and coordination which a privatized, route-focused approach requires.

The FTA's policies of the 1980s failed because they sought to impose privatization requirements on local government in an intrusive manner with the required use of the discredited "fully-allocated cost" methodology. This accounting system grossly exaggerates potential savings which have yet to be realized. Moreover, the underlying premise of transit privatization schemes – that private companies can reduce the cost of service delivery and provide a chance for locally owned transportation companies to find business – has been proven unfounded in an industry in which little competition exists.

The hope for savings from privatization rests upon an inaccurate conception of how public contracting operates in practice. It is important to avoid simplistic textbook theories of competitive markets which do not take into account the real-world market strategies of public contracting in which establishing monopolies, influencing public officials, and obtaining hidden subsidies are commonly used to enrich private investors at public expense.

¹*The Emperor's New Clothes: Transit Privatization and Public Policy*, Elliot D. Sclar, K.H. Schaeffer, and Robert Brandwein, for the Economic Policy Institute.

Privatization Failure in Yolo County, CA

Suffering from high driver turnover and service problems, Yolo County, California officials said last month they want to change the way they do business. Yolobus covers Yolo County, with service into downtown Sacramento and to Sacramento International Airport.

The executive director of the Yolo County Transportation District has asked First Transit, an Ohio-based company operating the Yolobus system, to agree to improve its bus operators' benefits in hopes of keeping drivers on the job longer.² First Transit pays its top drivers only \$14 an hour, while veteran Sacramento Regional Transit drivers earn \$21 an hour. **Incredibly, the district has lost 30 of its 56 drivers in the last year.** Studies have shown that high turnover rates have a direct impact on safety.

West Sacramento officials have noticed service delays and maintenance issues in the last half year, prompting the district to reassess its contract with First Transit and explore a merger with Sacramento Regional Transit.

The Denver Experience

Nowhere in America has transit privatization failed to deliver on lofty promises more than in Denver, Colorado, where in 1988 – in response to pressure from the FTA – the State Legislature passed a bill mandating that twenty percent of the bus routes operated by the Regional Transportation District (RTD) be put out for competitive bid. In 1987 and 1988 when the privatization effort was making its way through the Legislature, the 40 percent figure was continually bandied about in relation to cost savings to convince lawmakers to vote for passage of the privatization bill.

However, when the State Auditor reviewed the cost issue in 1995, the findings were startling. There was virtually no difference between public and private operating costs. The differences ranged from a high of four percent down to a low of seven-tenths of one percent, depending upon route packages. In fact, between 1989-1995, the costs of contracted service rose at a rate approximately double that of the rest of the system,³ costing the city nine million dollars more than it would have paid if the RTD had continued operating the service.

Since the mid 1990s, the situation in Denver has deteriorated even further. In 2000, lawmakers increased the required level of private sector participation to 35 percent. Yet, in 2002, for the third time in as many years, the RTD was forced to replace its major private contractor, as Oak Brook,

² *Yolo County looks to fix bus woes. High driver turnover spurs talk of a Sacramento RT merger*, by Steve Gibson and Tony Bizjak. *Sacramento Bee*, April 7, 2004, Page B1. (Attached)

³ *Paying More, Getting Less. The Denver Experience with Bus Privatization, 1990-1995*, by Elliott Sclar, Ph.D.

Illinois-based ATC/Vancom pleaded to be released from a five-year, \$80 million deal to avoid financial penalties after having trouble meeting the terms of the contract.⁴

ATC was hired in 2000 to run two-thirds of RTD's privatized routes. It replaced Knoxville, Tennessee's TCT Transit Service, which had been fired the previous fall after only three months on the job. TCT had left passengers stranded and failed to meet RTD's service requirements, disrupting bus service and forcing ATU drivers employed directly by RTD to pick up the slack by working overtime. In fact, TCT missed so many runs that RTD forced ATU members to cancel their days off. Many ATU members worked for six or seven weeks straight without a day off.

Since 1989, no Colorado companies have bid on any of RTD's routes, and finding companies that are both willing and able to carry the load has been an insurmountable challenge for RTD.

PRIVATE SECTOR OPPORTUNITIES EXIST; IMPEDIMENTS DO NOT

TEA 21 and FTA current practice already empower local communities to carry out Section 5306 of Title 49, which, as indicated above, states that metropolitan plans or transportation improvement programs must encourage, to the maximum extent feasible, the participation of private enterprise:

- Local officials have the authority to determine if, when and how routes are evaluated;
- Local officials have the authority to determine what factors they use in determining whether to use private or public transit providers. Federal policy permits locals to determine the extent to which costs are considered and whether they want to use the fully allocated cost methodology or another cost approach;
- Local officials, in determining overall local process, may determine if a dispute process is appropriate, and, if so, what that process will be;
- Local officials, at their option, may take into consideration local situations that may affect decisions on transit providers;
- FTA reviews the local process as part of Triennial Review and verifies that the local process is being observed;
- FTA certifies the local planning process, which must follow Section 5306.

⁴*Bus Stopped. The Wheels on the Bus Go Round and Round as RTD Struggles to find a Competent Contractor*, by Jonathan Shikes. Denver Westword, January 31, 2002.

CONCLUSION

Private sector involvement in transit remains a viable option in many instances. Without question, the participation of private enterprise in the nation's transit sector is essential to the health and success of the industry. And, we recognize today the emerging role played by taxi and small van operations in providing paratransit service, especially to meet the transit needs of our seniors, rural residents, and those on Medicare.

However, such decisions should be made on a case-by-case basis after a thorough analysis of the relative costs and benefits involved. The bottom line is that federally controlled privatization, initiated in Washington, D.C., and forced on local and state governments, is not in the best interests of either the nation's commuters or its taxpayers.

We are prepared to answer any questions or comments regarding these issues.

ATTACHMENT

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HEADLINE: Yolo County looks to fix bus woes. High driver turnover spurs talk of a Sacramento RT merger.

BYLINE: Steve Gibson and Tony Bizjak Bee Staff Writers

BODY: Suffering from high driver turnover and service problems, Yolo County officials say they want to change the way they do business, possibly even merging with Sacramento Regional Transit. Terry Bassett, executive director of the Yolo County Transportation District, said his first choice, at the moment, is the simplest:

He has asked the private company operating the Yolobus system to agree to improve its driver benefits in hopes of keeping drivers on the job longer. Failing that, he said the district may cancel the private company's contract and start running and maintaining its buses itself.

Bassett said he does not believe the district's current arrangement with First Transit, an Ohio-based bus operator, offers the right driver incentives.

"The goal is to minimize driver turnover," Bassett said. "Service is good, but we can do better. We have good drivers, we just need to motivate them to stay longer."

Bassett said the district lost 30 drivers in the last year. It currently employs 56.

Yolobus covers Yolo County, with service into downtown Sacramento and to Sacramento International Airport. The city of Davis has an internal bus service, Unitrans.

West Sacramento Mayor Christopher Cabaldon, a member of the transit district board, said officials have noticed some service and maintenance "slippage" in the last half year, prompting the district to reassess its contract with First Transit.

"The warning signs are there," Cabaldon said, such as "drivers missing stops, and having to go back. That leads to delays."

First Transit pays its top drivers \$14 an hour; veteran RT drivers earn \$21 an hour.

Officials with First Transit, an Ohio-based bus operator, did not return calls for comment Tuesday.

Vic Guerra, head of the bus driver's union, Amalgamated Transit Union Local 256, said he would like to see Yolo officials take operations in-house. "It means better benefits for our guys," Guerra said.

Woodland City Councilman Dave Flory, a member of the Yolo transit board, questioned the wisdom of an in-house operation. "If we do that, it's pretty darn hard to go back, because of labor issues," he said. "I don't want to create another huge bureaucracy."

Yolobus director Bassett is scheduled to meet April 16 with the city managers of West Sacramento, Woodland, Davis and Winters, as well as Yolo County Administrative Officer Vic Singh, to discuss the transit agency's options.

Bassett said he is advising his agency board and county officials against a merger right now with RT. He said he talked in February with RT officials and studied their cost structures, and determined Yolo could provide bus service on its own less expensively.

However, West Sacramento Mayor Cabaldon said he wants to explore a merger. If Yolobus and RT don't merge, Cabaldon said he still may ask the City Council to invite RT to add routes in West Sacramento, while still participating in the Yolobus system.

"It might make more sense for West Sacramento because of its geographic proximity with downtown Sacramento," Cabaldon said. "The way it is now, RT has one stop in West Sacramento and Yolobus has a handful of stops in Sacramento. But it's not integrated. It's more like a hostage exchange than it is an integrated transit system."

RT General Manager Beverly Scott said last week her agency would be interested in exploring a merger, or more service connections to Yolo and West Sacramento.

