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

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

SECOND SESSION

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

THURSDAY, SEPTEMBER 30, 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, Tiberi, Davis (ex officio), Tierney, and Kucinich.

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. Welcome to this morning's meeting of the Energy Policy, Natural Resources and Regulatory Affairs Subcommittee. Noting the presence of a quorum, I will call the meeting to order.

Today, we are meeting on the subject of "How Can We Maximize Private Sector Participation in Transportation?" I am joined by the gentleman from Ohio, Mr. Tiberi. We are going to go ahead and commence.

On May 18, 2004, this subcommittee held its initial hearing on maximizing private sector participation in transportation. Witnesses included the Department of Transportation, think tank experts, and three adversely affected small business operators of mass transit services. Today, we will focus on mass transit and highways, and we will further explore DOT's record in implementing the various statutory and regulatory private sector participation requirements.

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.

In 1964, Congress began to enact laws to encourage private sector participation in transportation. The 1966 law that established Department of Transportation identified six reasons for 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 governmentwide 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."

I became especially interested in this subject in March 2003, when I learned of a public takeover of an over 25-year competitively awarded contract for mass transit services in Sacramento, California. Since then, I have found a number of things. First, we have come upon unneeded expenditure of scarce Federal funds, substantial in nature; second, we have come upon noncompliance by a federally funded local transit grantee with the Federal law requiring private sector participation to the maximum extent feasible; and, third, we found inadequate enforcement by the Department of Transportation. Now, after the public takeover, in the city of Sacramento, peak hour bus service is every 15 minutes, versus every 5 minutes prior to the takeover, and the service costs 76 percent more, that being over $150,000 per bus today versus just over $86,000 per bus then.

In August 2003, I recommended two primary things: first, that the Department of Transportation initiate a rulemaking to ensure implementation of the statutory private sector participation requirements and, second, that the Department of Transportation take an appropriate enforcement action against the noncompliant Federal grantee. To date, Department of Transportation neither initiated a rulemaking, nor took an enforcement action. DOT argued that it is a grant-making, not a rulemaking agency, and it has a reduced enforcement rule. However, DOT does have a fiduciary responsibility to assure that Federal grant funds are expended in accordance with Federal law.

Since my investigation of this case, I have learned of additional cases involving federally funded grantee noncompliance with existing Federal statutory or regulatory protections. In some cases, the Department of Transportation has not enforced its own rules and, as a result, allowed local transit authorities to compete unfairly with existing private mass transit service providers. In another case, the New York City Council stated that a proposed takeover by a local transit agency of franchised private sector bus services "potentially make the City responsible for paying hundreds of millions of dollars in transfer costs arising from necessary purchases of infrastructure."

Our witnesses today include the Department of Transportation, current and former expert public officials, and three additional adversely affected small business operators of mass transit services. Small businesses remain 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 and does comply with the private sector participation requirements first laid out in 1964 in the Urban Mass Transit Act.

I want to welcome our witnesses today. They include Jennifer Dorn, the Administrator of the Federal Transit Administration; Dan Tangherlini, the Director of the District of Columbia Department of Transportation; Tom Mack, Chairman of the Tourmobile Sightseeing operation here in Washington, DC; Mr. David Smith, the director of marketing and sales at Oleta Coach Lines in Williamsburg, VA; Jerome Cooper, the chairman of Transit Alliance and president of Jamaica Buses, Inc., Jamaica, NY; and Mr. Steven Diaz, esq., former Chief Counsel for the FTA and the Department of Transportation.

In addition to these individuals, Ms. Shirley Ybarra, president of the Ybarra Group and Council Member for the National Council for Public-Private Partnerships, and former commissioner of the Virginia Department of Transportation, accepted our invitation to testify on September 29th but is unavailable for today's rescheduled hearing. Therefore, her testimony will be made part of today's hearing record. Last, we invited Iris Weinshall Schumer, commissioner of the New York City Department of Transportation, to testify, but she declined to do so.

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

Chairman Doug Ose
Opening Statement
How Can We Maximize Private Sector Participation in Transportation? – Part II
September 30, 2004

On May 18, 2004, this Subcommittee held its initial hearing on maximizing private sector participation in transportation. Witnesses included the Department of Transportation (DOT), think tank experts, and three adversely affected small business operators of mass transit services. Today, we will focus on mass transit and highways, and we will further explore DOT's record in implementing the various statutory and regulatory private sector participation requirements.

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.

In 1964, Congress began to enact laws to encourage private sector participation in transportation. The 1966 law that established DOT identified six reasons for 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.

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I became especially interested in this subject in March 2003 when I learned of a public takeover of an over 25-year competitively awarded contract for mass transit services in Sacramento, California. Since then, I found: (a) unneeded expenditure of substantial Federal funds, (b) noncompliance by a federally-funded local transit grantee with the Federal law requiring private sector participation to the maximum extent feasible, and (c) inadequate enforcement by DOT. Now, after the public takeover, peak hour bus service is every 15 minutes (vs. 5 minutes) and the service costs 76 percent more ($152,535/bus vs. $86,503/bus).

In August 2003, I recommended that: (a) DOT initiate a rulemaking to ensure implementation of the statutory private sector participation requirements, 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. DOT argued that it is a grant-making, not rulemaking agency, and it has a reduced enforcement role. However, DOT has fiduciary responsibility to assure that Federal grant funds are expended in accordance with Federal law.

Since my investigation of this case, I learned of additional cases involving federally-funded grantee noncompliance with existing Federal statutory or regulatory protections. In some cases, DOT has not enforced its own rules and, thus, allowed local transit authorities to compete unfairly with existing private mass transit service providers. In another case, the New York City Council stated that a proposed takeover by a local transit agency of franchised private sector bus services "potentially makes the City responsible for paying hundreds of millions of dollars in transfer costs arising from necessary purchases of infrastructure."

Our witnesses today include DOT, current and former expert public officials, and three more 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: Jennifer Dorn, Administrator, Federal Transit Administration (FTA), DOT; Dan Tangherlini, Director, DC Department of Transportation; Tom Mack, Chairman, Tourmobile Sightseeing, Washington, DC; David Smith, Director of Marketing and Sales, Oleta Coach Lines, Inc., Williamsburg, Virginia; Jerome Cooper, Chairman, Transit Alliance & President, Jamaica Buses, Inc., Jamaica, New York; and, Steven Diaz, Esq., former Chief Counsel, FTA, DOT.

In addition, Shirley Ybarra, President, Ybarra Group & Council Member, The National Council for Public-Private Partnerships, & former Commissioner, Virginia Department of Transportation accepted our invitation to testify on September 29th but was unavailable for today's rescheduled hearing; therefore, her testimony will be made part of today's hearing record. Lastly, Iris Weinshall Schumer, Commissioner, New York City Department of Transportation was invited to testify but declined to do so.

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September 23, 2004

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

FROM: Doug Ose

SUBJECT: Briefing Memorandum for September 30, 2004 Hearing, "How Can We Maximize Private Sector Participation in Transportation? – Part II"

On Thursday, September 30, 2004, at 10:00 a.m., in Room 2154 Rayburn House Office Building, the Subcommittee on Energy Policy, Natural Resources and Regulatory Affairs will hold a followup hearing on private sector participation in transportation, focusing on mass transit and highways. The hearing is entitled, "How Can We Maximize Private Sector Participation in Transportation? – Part II."

In addition, the hearing will further explore the Department of Transportation's (DOT's) record in encouraging 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.

Based on the May 18th hearing and my post-hearing followup, I remain concerned about public grantee compliance with the statutory and regulatory private sector participation requirements and DOT's oversight and enforcement.

Statutory and Regulatory Provisions

The 1966 law that established DOT identified six reasons for 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**"[1] (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)). The new Department included modal operating units for each type of transportation.

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

Separately, 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. 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).

Public-Private Partnerships

In March 2004, the then 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 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. My May 11th briefing memo provided more detail on the subject of public-private partnerships: http://reform.house.gov/EPNRRA/Hearings/EventSingle.aspx?EventID=1005.

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." Now, after the public takeover, peak hour service is every 15 minutes (vs. 5 minutes) and the service costs 76 percent more than under Amador ($152,535/bus vs. $86,503/bus).

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 specific compliance, DOT was unable – before, during and after the May 18th hearing, including in its answers to my three sets of post-hearing questions – to demonstrate specific compliance. In fact, on July 14th, the federally-funded public grantee admitted to me that it did not implement the July 1, 2001 post-audit DOT-negotiated Standard Operating Procedures for private sector participation until 2003, and submitted evidence that demonstrated that it failed to provide notice for the proposed public takeover in the daily publication of general

circulation that it uses and used since 1998 for every other proposed Program of Projects. To date, DOT has not taken an enforcement action in this case.

With respect to a rulemaking, DOT has not yet initiated the requested rulemaking, arguing that the Federal Transit Administration (FTA) is primarily a grant-making agency. However, DOT has fiduciary responsibility to assure that all Federal grant funds are expended in accordance with Federal law and Congressional intent. In fact, most grant-making agencies issue implementing programmatic rules for each of their grant programs in addition to their codification of the governmentwide grants management common rule, which provides uniform administrative requirements. Currently, FTA has 18 codified rules. A logical next step would be for FTA to either amend its rule, entitled "Major capital investment projects" (49 CFR §611), since it implements only part of 49 USC §5309, entitled "Capital investment grants and loans," or issue another freestanding rule.

May 18th Hearing

Witnesses for the May 18, 2004 hearing included: Emil Frankel, Assistant Secretary for Transportation Policy and Intermodalism, DOT; 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 Thomas, President, Community Bus Services, Youngstown, Ohio; Katsumi Tanaka, Chairman & CEO, E Noa Corporation, Honolulu, Hawaii; and, Dr. Max Sawicky, Economist, Economic Policy Institute.

Messers. Allen, Thomas and Tanaka presented three mass transit case studies. All three cases revealed noncompliance with the statutory private sector participation requirements. Mr. Allen's Amador case is discussed above. Mr. Thomas described lengthy appeals to deliver private transportation services for the elderly and disabled (his company's existing services) without direct competition by the public sector. His case involved FTA's headquarters overturning a FTA regional office decision. Mr. Tanaka described a proposed new service by a federally-funded public grantee that would be in direct competition with existing private transportation service providers.

September 30th Hearing

The invited witnesses for the September 30th hearing are: Jennifer Dorn, Administrator, FTA, DOT; Shirley Ybarra, President, Ybarra Group & Council Member, The National Council for Public-Private Partnerships, & former Commissioner, Virginia Department of Transportation (accepted for original September 29th date, unavailable for rescheduled September 30th date); Dan Tangherlini, Director, DC Department of Transportation; Iris Weinshall Schumer, Commissioner, New York City Department of Transportation (invited but declined); Tom Mack, Chairman, Tourmobile Sightseeing, Washington, DC; David Smith, Director of Marketing and Sales, Oleta Coach Lines, Inc., Williamsburg, Virginia; Jerome Cooper, Chairman, Transit Alliance & President, Jamaica Buses, Inc., Jamaica, New York; and, Steven Diaz, Esq., former Chief Counsel, FTA, DOT.

Ms. Ybarra will submit testimony on public-private partnerships, especially for high-occupancy toll (HOT) lanes on highways. Messrs. Mack, Smith, and Cooper will present three more mass transit case studies.

Mr. OSE. I want to recognize the gentleman from Ohio for the purpose of an opening statement.

Mr. TIBERI. Thank you, Mr. Chairman. It is my intent not to have an opening statement today. We have a number of panelists; I look forward to hearing from them and asking them questions once their testimony is done. Thank you, Mr. Chairman.

Mr. OSE. I thank the gentleman. As usual, he is brief and to the point.

Our practice here, as reflected in committee rules, we swear in all of our witnesses. Whether you are an administration, business, or small business witness, what have you, we subject you to the same regiment across the board. So, our first panel today is Ms. Jennifer Dorn, who is the Administrator for the Federal Transit Administration at U.S. Department of Transportation. The others that I mentioned will be on our second panel.

Ms. Dorn, if you would please rise and raise your right hand.

[Witness sworn.]

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

Our normal practice here is that, having received your written testimony, we invite you to share with us the highlights in summary form. We are going to recognize each of our witnesses on each of the panels for a period of 5 minutes to do that. Ms. Dorn being the only witness on today's panel, we might give you 5½ minutes, but we are going to be pretty sharp on the clock. So, thank you for joining us today. You are recognized for the purpose of a summary of your statement.

STATEMENT OF JENNIFER L. DORN, ADMINISTRATOR, FEDERAL TRANSIT ADMINISTRATION, U.S. DEPARTMENT OF TRANSPORTATION, ACCOMPANIED BY D.J. GRIBBIN, CHIEF COUNSEL, U.S. DEPARTMENT OF TRANSPORTATION, FEDERAL HIGHWAY ADMINISTRATION; AND WILLIAM SEARS, CHIEF COUNSEL, FEDERAL TRANSIT ADMINISTRATION

Ms. DORN. Thank you, Mr. Chairman. Thank you for the opportunity to discuss with you and members of the committee how we can work together to increase private sector participation in public transportation. I do appreciate the committee's interest in and vigorous pursuit of private sector participation in America's transportation network. This administration strongly supports increased involvement of the private sector in the transportation arena, and I am proud of this administration's actions to date and the proposals that we have submitted to Congress support that.

Over the last 3½ years, FTA has pursued our goal of increasing private sector participation through a number of strategies, including increasing private sector opportunities to deliver services, promoting private sector involvement, reducing administrative barriers to private sector service delivery, and contracting and advocating statutory changes that will help increase private sector involvement in transit.

In November 2002, I asked approximately 75 representatives of private sector operators, transit agencies, and union representatives to spend a day with me and our senior staff to develop an action plan, what we believe to be a win-win proposal to deliver more

public transportation to the American people through collaborations between the public and the private sectors. That group, over half of whom represented private sector operators, came to a consensus on a number of the most important things that could be done to support private sector involvement in transportation. Among other things, they agreed that, at the Federal level, we should focus on the following four items:

Since the primary objective of private sector involvement should be to maintain and grow ridership, performance awards should be developed for private and public operators to grow ridership. The administration's reauthorization proposal reflects that.

No. 2, there should be Federal leadership in education and proliferation of best practices, including procurement, cost models for fair and auditable cost comparisons, and contract administration. Thus, in the procurement arena FTA has undertaken a number of measures that this group had suggested to eliminate unnecessary rules and restrictions, while affording grantees maximum flexibility to make sound business judgments based on more than simply low bid.

There has been a renewed emphasis on ensuring sound grantee procurement practices. We have revised our procurement circular to the benefit of all of our stakeholders, we have issued best practices, and, with the strong support of both public and private stakeholders who recognize that we need to have more involvement of both sectors in order to have a fulsome transportation provision for this country.

Third, there was the view that there should be Federal neutrality in the choice of providers. FTA should not, in its policies and practices, favor either private sector providers or public sector providers; and, in order to ensure that transit operators operate in a transparent manner, which was the concern of private sector operators, and to help everyone understand the rules, we have developed, published, and distributed, a plain English brochure that explains the rules with regard to charter services. We are in the process of developing and will soon publish and distribute a similar plain English brochure that explains the rules with regard to school bus operations, and we are distributing those nationwide to private sector operators, public sector operators as well.

The fourth area of focus by this group that we convened suggested that potential competitive contracting should really focus on new services and services based on new technologies. We took that advice seriously as well, and we are working very hard across departments to ensure that new opportunities for transportation services are available to the private sector, especially in the growing arena of human service program transportation services and paratransit services. Conservative estimates put this market for paratransit services at over $5 billion annually, with over 70 percent of those services provided by the private sector.

Mr. Chairman, given the regulatory and legislative history surrounding the private sector involvement issue, the requirements for private sector participation are not easily tracked by our stakeholders; they are scattered, indeed, in a variety of laws, regulations, circulars, technical assistance, guides and other materials published for each FTA program. And, while I continue to believe that a re-

vamping of our regulations and circulars should be undertaken only after the surface transportation laws are reauthorized, I also believe that we can do a better job of explaining the current requirements to all stakeholders.

Therefore, I have asked FTA's general counsel to develop a user-friendly guide to private sector involvement requirements for use by planning agencies, transit agencies, and private sector transportation providers. I expect the document to again explain in plain English what the requirements are, how they are enforced, what sanctions may be applied under what circumstances, and what recourse is available to private parties who believe they have not been afforded the opportunities provided in law. We will make every effort to complete this document and circulate it for comment in the next 90 days.

Again, Mr. Chairman, I appreciate your continued interest in and concern about protecting private sector transportation operators from unfair competition. I assure you that I will handle any such matters identified by or brought to FTA for resolution fairly and in accordance with the applicable laws and regulations, as I have sought to do in the past. Thank you.

[The prepared statement of Ms. Dorn follows:]

Statement of
Jennifer L. Dorn
Administrator
Federal Transit Administration
United States Department of Transportation
Before the
Subcommittee on Energy Policy, Natural Resources and Regulatory Affairs
Of the
Committee on Government Reform
U.S. House of Representatives
Hearing on the Private Sector Participation in Transportation
September 30, 2004

Good morning, Mr. Chairman and members of the Subcommittee. Thank you for this opportunity to continue the Department of Transportation's conversation with the Subcommittee on private sector participation in transportation.

Mr. Chairman, I appreciate your interest in and vigorous pursuit of private sector participation in America's transportation network. This Administration strongly supports the continued involvement of the private sector in planning and delivering transportation services, expanding the Nation's transportation infrastructure, and producing innovations in transportation technology. A strong, vibrant transportation industry is critical to America's continued economic growth and prosperity.

Legislative History

The Federal Transit Administration (FTA) traces its private sector participation requirements to the Urban Mass Transportation Act of 1964 (Public Law 88-365), the agency's original authorizing legislation. This statute required that Federal transit program grantees consider and use the private sector to the maximum extent feasible. The legislative history indicates that this provision reflected Congress' concern about the potential public acquisition of privately owned transportation facilities, and was intended to ensure Federal neutrality on the question of whether public or private operators should operate public transportation services.

FTA first issued guidance on private sector participation in a 1984 policy statement, "Private Enterprise Participation in the Federal Transit Program" (49 FR 41310, October 22, 1984) which set forth the factors that FTA would consider in determining whether a grant recipient's planning and program development 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 further implemented its private enterprise guidance for FTA grant recipients in the form of circulars. The circulars outlined certain elements and procedures relating to private enterprise participation that grant recipients and Metropolitan Planning Organizations (MPOs) should use in their planning and program development processes. The circulars also provided that grant recipients and MPOs should develop a process for the resolution of disputes with private operators. In addition, the circulars explicitly stated that FTA would not condition grants on achieving a particular level of private enterprise involvement in the provision of mass transportation services.

In 1991, the Intermodal Surface Transportation Efficiency Act (ISTEA) explicitly prohibited FTA from withholding certification of the planning processes in large metropolitan areas (over 200,000 population) based solely on a finding that they did not ensure participation of the private sector in the planning process to the maximum extent feasible. (This prohibition was continued in the 1998 Transportation Equity Act for the 21st Century (TEA-21).) Moreover, the ISTEA Conference Committee Report indicated that localities must be afforded wide flexibility in establishing criteria to be used in determining the "feasibility" of private sector involvement in local programs. In light of these Congressional actions, in 1994 FTA rescinded its 1984 Policy Statement.

Proposed Changes in Law and Regulation

Mr. Chairman, I understand that you would like the Department of Transportation (DOT) to immediately undertake new rulemaking regarding private sector involvement in public transportation. While I appreciate and concur with your underlying goal of facilitating increased private sector participation, in our judgment additional rulemaking is not necessary in order for FTA to enforce current law. FTA has issued specific regulations with respect to charter bus operations and school bus operations, as well as joint regulations with the Federal Highway Administration (FHWA) with respect to planning. In addition, FTA enforces its requirements regarding unfair competition and private sector participation in transit agency program planning through the terms and conditions of the master agreement that governs every FTA grant. With the reauthorization of the surface transportation law, we believe that reconsideration of FTA's regulatory framework would be appropriate.

As you know, TEA-21 expired on September 30, 2003, but has been extended five times. Since this Subcommittee's hearing last May, the House and Senate have been in conference on the reauthorization legislation. Both President Bush and Secretary Mineta have repeatedly stressed the importance of the immediate passage of a responsible six-year bill.

The good news is that it is likely that the reauthorization legislation will enhance private sector involvement in public transportation, as well as FTA's leverage in encouraging and enforcing such involvement. The Administration's proposed reauthorization bill includes several important provisions with respect to private sector participation, and many of these provisions have been included in the Senate bill, House bill, or both.

First, the President proposes to clarify the requirements for including private operators engaged in public transportation in the development of statewide and metropolitan transportation plans and programs. Current law requires involvement of interested parties in the transportation planning process, and defines interested parties to include citizens, affected public agencies, representatives of transportation agency employees, freight shippers, providers of freight transportation services, private providers of transportation, representatives of users of public transit, and other interested parties. The President's proposal would explicitly require consideration of services provided by private operators engaged in public transportation in achieving the goals under four planning factors: supporting economic vitality, increasing access and mobility, modal connectivity and integration, and preserving and enhancing the existing system. We are extremely pleased that this provision was included in both the House and Senate bills, and expect that new regulations will be promulgated as a result of its passage.

Second, and perhaps more importantly with respect to transit, the President proposed to elevate the status of private operators to "sub-recipients" rather than "contractors" under the urbanized area and non-urbanized area programs, FTA's two primary formula grant programs. This change would put private operators on a par with public transit agencies in proposing projects and services to the statewide or metropolitan area planning organization or the transit authority. Currently, as contractors, private operators can only respond to requests for proposals from public transit agencies for specific services, and their contracts are subject to cancellation at the discretion of the contracting agency. Under the Administration's proposal, private operators would be permitted to seek and receive grants for the provision of public transportation services that they would define and deliver. Private operators might, for example, seek funding simply for three new buses, to be used to provide service along a route that they believe could be profitable based on fare collections. By allowing private operators to offer additional service strategies for inclusion in the public program of services, communities will have a creative new resource for the development and delivery of public transportation. This change in law – proposed for transit's urbanized area formula program, non-urbanized area formula program, discretionary capital grant program, and the elderly and disabled formula program – would truly give private providers of public transportation a "seat at the table." Again, we are extremely pleased that the proposal was included in both the House and Senate bills, and would expect to promulgate regulations related to this change.

Third, the President proposed to require that States and communities develop coordinated Community Transportation Plans to identify and rectify critical gaps in service to low-income, elderly, and people with disabilities. These plans would have to be developed with the full involvement of private sector operators, and prioritized at the community level.

There are also two significant proposals that will strengthen FTA's position with respect to enforcement of private sector participation. First, the Administration proposed to eliminate the provision in current law that prohibits FTA from considering the role of

the private sector in the planning process when certifying the planning processes of large metropolitan areas. There are no similar prohibitions against withholding certification if other stakeholder participation requirements are not met, including participation requirements for citizens, affected public agencies, representatives of transportation agencies employees, segments of the community affected by transportation plans and programs, and transportation authorities. This change is critical and will provide the Department with an important enforcement tool to ensure that private sector operators and others are appropriately involved in transportation planning. Absent this change in law, we have no enforcement mechanism available because FTA is expressly prohibited from considering private sector involvement when making certification decisions. This provision has been included in the Senate reauthorization bill, but is not in the House bill.

The second proposal would significantly strengthen FTA's ability to enforce the requirements that public transit operators not engage in unfair competition with privately provided charter bus and school bus service. I know that this is an issue in which you, Mr. Chairman, are particularly interested. As you are aware, under present law, if FTA finds a continuing pattern of violation, FTA may bar the grant recipient from further Federal transit assistance – a remedy that would dramatically and negatively affect so many people in a community who depend on public transportation. FTA does not have authority to impose civil penalties or award monetary damages. Instead, FTA works to bring the transit agency into compliance with the law. Under the Administration's reauthorization proposal, FTA would have the authority to withhold funds to the extent deemed necessary to bring a grantee into compliance, which would give FTA a significantly more useful enforcement tool. Again, Mr. Chairman, only the Senate bill includes the new enforcement mechanism proposed by the President; the House bill does not.

Over the last several years, FHWA and FTA have also undertaken a number of initiatives to explore ways to increase the number and efficacy of public-private partnerships. These initiatives include innovative contracting and financing tools, such as the use of Grant Anticipation Revenue Vehicle (GARVEE) bonds; the provision of Transportation Infrastructure Finance and Innovation Act (TIFIA) loans, guarantees and lines of credit; and the introduction of more flexible matching requirements, including the use of toll credits and donations. In order to expand funding for transportation projects through public-private ventures, the Administration's reauthorization proposal included provisions to:

- Expand access to the TIFIA program, by lowering the project size threshold to $50 million;
- Permit transit agencies to use a portion of their FTA funds as a debt service reserve in support of locally-issued bonds;
- Increase the Federal share to 80 percent for Joint Partnership Program projects, which are intended to encourage private sector deployment of innovative mass transportation services, technologies, and management and operational practices;

- Allow State and local governments to use up to an aggregate total of $15 billion in private activity, tax-exempt bonds to pay for projects eligible under the FHWA and FTA programs; and
- Establish a variable toll-pricing program under the Federal-aid highway program; ease the eligibility requirements for the Interstate Rehabilitation and Reconstruction Program; and allow States to permit single occupancy vehicles on high occupancy vehicle lanes, so long as time-of-day variable charges are assessed.

Fundamentally, the changes proposed by this Administration would provide increased opportunities for direct involvement of the private sector in identifying transportation needs and proposing solutions, and would encourage greater private sector investment in transportation projects. Communities will have the benefit of a broader selection of services, a more competitive environment that is likely to improve cost-effectiveness, and the opportunity to tap the creativity of the private sector for service innovations. In short, these changes will improve mobility and strengthen America's transportation network.

FTA Enforcement of Current Law

Within the parameters of current law, FTA has worked hard to ensure that the private sector does not face unfair competition from public transit agencies. With respect to the charter bus regulations, FTA grantees have a good record of compliance. Approximately 2,000 FTA grant recipients are subject to the charter service regulations. Yet, each year, FTA receives complaints or identifies violations through its Triennial Review process concerning only about 12 grantees -- less than one percent of its grant recipients. Only one complaint over the last 10 years has alleged that a transit agency was utilizing equipment purchased with Federal funds to provide services that competed unfairly with private companies. While we take every complaint and violation seriously, based on the number of complaints and oversight review findings, it does not appear that there is a widespread problem.

In general, as I indicated, FTA becomes aware of problems concerning potential charter and school bus regulation violations through one of two methods: through complaints or through FTA's regular oversight reviews.

If a complaint is filed, the appropriate FTA Regional Administrator is charged with investigating the complaint and making a determination in the case. Appeals of decisions by an FTA Regional Administrator must be filed within ten days of receipt of the decision, for consideration by the FTA Administrator. The Administrator may overturn a decision by the Regional Administrator if the appeal presents new matters of fact or points of law that were not available or known during the investigation of the complaint. If the Administrator declines to take action on the appeal, the appellant may seek judicial review in Federal court.

FTA's Triennial Reviews routinely include an examination of the full range of requirements for stakeholder participation in the development of transportation plans and services. Between 2000 and 2004, FTA conducted 811 Triennial Reviews and identified ten grantees (about 1 percent) that were deficient in their compliance with the requirements for private sector participation and outreach to private transportation operators. When a deficiency is found, FTA identifies the necessary corrective actions and notifies the grantee that such actions are required within a specified period of time (usually within 90 days). In every case between 2000 and 2004, the grantee involved has taken timely, appropriate action to bring its agency into compliance.

As you are aware, Mr. Chairman, in 2000, one of the grantees that FTA found to be not in compliance with private sector participation and outreach requirements was the Sacramento Regional Transit Authority (SACRT). As a result, the transit authority was required to develop and implement new standard operating procedures, which it issued on July 3, 2001, and revised in November 2001. Subsequently, on March 6, 2003, the California Bus Association (CBA) filed a complaint alleging that SACRT violated the laws intended to protect or foster private sector involvement. After extensive investigation and correspondence with Amador Stage Lines, SACRT, and others, FTA issued its findings on August 5, 2003 as follows:

- Charter Prohibition - FTA found that when SACRT expanded its fixed route public transportation service to include service formerly provided by Amador under a charter contract, SACRT was not providing charter service, as specifically prohibited under Federal law.
- Planning - SACRT did not violate the Department of Transportation planning requirements because the planning laws in question apply to MPOs and statewide planning organizations, not public providers of mass transportation.
- Grantees and Public Participation - In 2000, FTA's Triennial Review found a deficiency in SACRT's procurement practices. Specifically, SACRT provided insufficient notice in 1999 in publishing its intent to procure Compressed Natural Gas (CNG) buses. FTA worked with the grantee to remedy the deficiency, and on July 3, 2001, SACRT corrected this deficiency by adopting a new Standard Operating Procedure that required sufficient levels and means of public notification. FTA also noted that at the time of the 1999 CNG bus procurement, there was no evidence that SACRT intended to provide the specific expanded service to which Amador objected in 2003. Indeed, it was not until August 9, 2002, that the transit authority published the required notice of its intention to commence the new Downtown Circulator service, and on August 26, 2002, it held a public hearing on the matter. These actions were deemed by FTA to constitute compliance with the participation and outreach requirements of the law.
- Private Mass Transportation - FTA found that when SACRT expanded its fixed route *mass transportation* service to include service formerly provided by Amador, under a *charter* contract, SACRT was not acquiring or competing with private mass transportation, as specifically prohibited under Federal law. Under Federal law, charter service is expressly excluded from the definition of private mass transportation.

CBA appealed this decision, and, pursuant to regulation, FTA found no grounds for appeal. It is important to note that CBA did not seek judicial review in Federal court, an option that was available to them.

Clearly, this was a complex case. If any party to the case believes that there is new evidence of additional violations, then the appropriate forum for resolution of a complaint properly lies with FTA's Regional Office. If such evidence does exist, it would be inappropriate for FTA to comment upon it publicly, before FTA has properly considered and made a determination in the matter.

Additional Efforts to Encourage and Facilitate Private Sector Participation

Both FTA and FHWA take very seriously our responsibility to encourage and facilitate private sector participation in the development of transportation plans and programs, the delivery of transportation services, and the acquisition, construction and maintenance of transportation infrastructure. Under this Administration, both FTA and FHWA have worked with public and private transportation representatives to explore private sector issues, identify barriers to private sector participation, and find solutions. As a result, we have made a number of changes to procurement rules, and have worked to encourage greater private sector participation in transportation planning, service delivery and projects.

With respect to planning, FTA sponsored an evaluation of transit involvement in metropolitan transportation planning, entitled, "Transit at the Table: A Guide to Participation in Metropolitan Decision-making." A key finding of the study was that transit operators who partnered with the business community realized important benefits, including direct financial participations, support for revenue enhancement initiatives, and implementation of transit-oriented development projects that increased transit ridership and promoted economic growth. FTA has already distributed a pamphlet that summarizes the results of the study, and facilitated discussion sessions on the topic at four national conferences in 2004. Publication of the full report is expected next month.

In addition, FTA has sponsored the development and delivery of a number of training courses that devote considerable attention to the requirements for and benefits of private sector involvement in transportation planning. Between June 2003 and June 2004, over 370 employees of transit agencies, MPOs, State departments of transportation, and other Federal, State and local agencies took such courses. These included courses in financial planning, metropolitan transportation planning, statewide transportation planning, and public involvement that included specific curriculum elements about the role of the private sector. These courses will be offered a total of 14 times in locations around the country during fiscal year 2005.

I am particularly pleased to report that FTA is undertaking a new initiative to increase private sector interest in transit-oriented development. Just last week, I was in Los Angeles at the annual Rail~Volution Conference – which draws hundreds of public

and private transit operators, local officials, developers, investors, and contractors – to announce the availability of an important new tool in this effort. Under contract to FTA, the Center for Transit Oriented Development created a new database that will assist transit agencies, financial investors, and real estate developers in assessing the potential demand for housing near transit in the 42 metropolitan areas with rail transit systems. The database utilizes Geographic Information System (GIS) technology and data from the 2000 U.S. Census to create a snapshot of the population living within one-half mile of the 3,341 existing and 630 proposed rail stations. With this database, city planners, local real estate developers, and others can identify the potential of, and make plans for transit-oriented development. We followed the announcement with a panel discussion that featured experts in real estate development and finance, as well as representatives of local governments and transit agencies.

From Los Angeles, I went to Portland, Oregon, where I participated in what I hope will be the first of many locally convened forums around the Nation to promote transit-oriented development. Portland is a community where transit-oriented development has really flourished, and we hoped to use this first forum to better understand the secrets of their success. Over 30 local community leaders gathered to discuss their progress and the barriers that still deter private sector investment in development around transit. The developers, planners, lenders, housing officials, elected officials, and transit officials who joined us were optimistic about transit-oriented development, but provided a realistic assessment of the challenges involved. Acquiring financing and achieving local consensus are difficult; and the support of every segment of the community – businesses, local government, financial institutions, residents and riders – is crucial. It is my goal to lay the groundwork for a national consensus about the positive economic benefits of transit-oriented development.

Results

Mr. Chairman, FTA takes seriously any complaints and every adverse finding that emerges from its regular oversight of transit grantees. We believe that the Nation's public transit agencies have a generally good record of compliance. However, the relatively low number of complaints and adverse findings is by no means the only measure of the successful involvement of the private sector in public transportation.

When I came to FTA just over 3 years ago, one of the first transit agencies I visited was Foothill Transit, which operates in the San Gabriel Valley, east of Los Angeles. At Foothill Transit, both the management and operation of the community's public transportation system are contracted out to private companies. There are great examples of private sector participation in transit operations, maintenance, and construction throughout the country. With respect to operations and maintenance, consider the following examples:

- In Washington, Kitsap Transit contracted with private ferry providers to replace the State-run ferry transit system across Puget Sound between Kitsap

County and Seattle. And in King County, a private transportation company operates the water taxi that runs between downtown Seattle and West Seattle.

- In Massachusetts, the Massachusetts Bay Transportation Authority contracts with a private transportation company to operate the Massachusetts Bay Commuter Railroad. The present five-year contract is worth approximately $1 billion.

- In Connecticut and New Hampshire, Connecticut Transit and the Nashua Transit System use private management companies to both operate their systems and maintain their transit equipment.

- In New York City, seven private contractors operate complementary paratransit service, providing over 2.2 million trips each year with a fleet of over 840 vehicles.

- In Kansas, Johnson County contracts with a private operator to provide public transportation services within Johnson County and portions of Kansas City. Johnson County Transit owns the rolling stock, ancillary equipment, and the bus facility, while the private operator employs the bus operators and mechanics.

- In Missouri, St. Joseph contracts with a private operator to manage and provide transit service, including administration, operations and maintenance. The city owns the vehicles, and the private transportation operator provides its services for a monthly fee.

- And, in Las Vegas, Nevada, the Regional Transportation Commission of Southern Nevada contracts out the operation of its Citizen Area Transit System (CATS) bus service. And, of course, also in Las Vegas, Phase I of the Resort Corridor Monorail Project was funded locally and built under a design, build, operate and maintain (DBOM) contract with a private transportation company.

An innovative partnership of another sort was undertaken by Sound Transit and King County in Seattle, Washington, which partnered with General Motors to develop a 40-foot and 60-foot hybrid bus that would meet the air quality requirements for operating in Seattle's downtown tunnel and be able to handle the hilly terrain in the area. A successful model was developed, and the buses are now providing service throughout King County.

In 1997, the Department of Transportation issued policies on joint development and transit-oriented development that permit transit agencies to work with private developers and investors to develop property near transit that was acquired with Federal funds. As a result, in communities throughout the Nation transit agencies, local elected

officials, developers, and investors have recognized the potential and seized the opportunities that transit creates.

- In Atlanta, the Metropolitan Atlanta Regional Transit Authority has entered into ground leases around subway stations that include --
  - Development of two 500,000 square foot office buildings for Bell South, an additional 200,000 square foot office building, 285,000 square feet of retail space, and 120 residential condominiums on 51.3 acres at the Lindberg Station;
  - Development of four privately operated parking facilities near the North Springs, College Park and Indian Creek Stations; and
  - Construction of condominium units, 264 multi-family apartments, and a 142,000 square foot office building and retail space near the King Memorial Station.

- In Miami, Miami-Dade Transit has entered into ground leases and air rights leases that include --
  - Construction of a 19-story mixed-use transit center at the Coconut Grove Metrorail Station, with 23,000 square feet of retail space, a 611-space parking garage with dedicated transit parking, 220 rental apartment units, a 157,500 square foot office building with 500 parking spaces, a 30,000 square foot supermarket with 201 surface parking spaces, reconfigured bus lanes, and connecting pedestrian walkways;
  - Construction at the Santa Clara Metrorail Station of 208 apartment units, 200 residential parking spaces, and 88 transit parking spaces, reconfiguration of the transit "kiss and ride" lots, a pedestrian plaza, and a walkway linking the housing component to the station; and
  - Construction of five 5-story rental housing buildings, 200 residential parking spaces, and 200 transit parking spaces at the Northside Metrorail Station.

- In Oakland, California, the BART/Fruitvale Village transit-oriented development project, sponsored by the Spanish Speaking Unity Council, leveraged public funding to generate over $100 million in private investment to support a unique mixed-use development that includes retail space, housing, and office space.

Mr. Chairman, these examples are illustrative of the many instances of private sector involvement in transit throughout the Nation. I appreciate this opportunity to share these success stories and to discuss FTA's oversight program. The Department of Transportation looks forward to our continuing work with Congress to help ensure that America's communities reap the benefits of a robust private sector transportation industry.

Mr. OSE. Thank you, Ms. Dorn.

We are joined by my good friend from Massachusetts, Mr. Tierney, who I am going to recognize for the purpose of an opening statement.

Mr. TIERNEY. Thank you, Mr. Chairman. I will be brief. I know that today's hearing is going to focus on private sector participation in transportation, and I think private operators play an important role in providing that transportation throughout the country. That includes private transit operators who, just like their public counterparts, provide much of the needed transportation for commuters, students, and passengers.

There is, however, a decision as to whether and how often local systems should use private operators, and it is not a decision that should be made by the Federal Government, in my view. Transit systems are inherently local, and the decisions about using public or private operators I think should also be local. State and local officials should have the freedom to choose transit operators based on factors like safety, service needs, reliability, and quality of services.

Particularly in light of Congress's attention this week on the recommendations of the 9/11 Commission, an important issue we should be addressing is how we can improve the safety of mass transit. The 9/11 Commission's report points out the vulnerabilities of service transportation systems, and I am interested in hearing from the witnesses testifying today their thoughts on what needs to be done to improve transit safety.

I also, Mr. Chairman, ask unanimous consent that the hearing record be held open for 10 days so that the American Public Transportation Association can submit information to be included in the record.

Mr. OSE. Without objection.

Mr. TIERNEY. I thank you, Mr. Chair, and yield back.

Mr. OSE. I thank the gentleman.

I am pleased to recognize the gentleman from Ohio for the purpose of an opening statement.

Mr. KUCINICH. I want to thank the Chair for holding this hearing and just say that mass transit in our major cities is no small matter. Many people who are transit-dependent depend on the decision of this Congress to help make sure that those systems are intact. So, any decisions that are made by this committee and by the Congress with respect to providing for greater participation of the private sector in transportation needs to be scrutinized very carefully with respect to service, reliability, the cost. I appreciate the fact that the Chair is willing to go into these issues. Thank you.

Mr. OSE. I thank the gentleman for his opening statement.

Our normal practice is we go to rounds of 5 minute questions. One of the curious things about Congress is we all have multiple commitments, so, if you see Members get up and leave and come back and leave and come back, that is ordinary business around here. So, bear with us as we struggle through that.

I think given my friend's time constraints, I am prepared to allow you to go first, if you want. Mr. Tierney for 5 minutes.

Mr. TIERNEY. Thank you for that courtesy; I appreciate it.

Ms. Dorn, thank you. As you noticed from my opening statement and from questions that I asked Assistant Secretary Frankel last

May when he was here, I raised the point whether local transits are, I think, local, and so I think they should be the ones to decide what their needs are. I ask, don't you think that the ones that make the decisions on how to run their transit operations should also make the decision on whether to use public or private transit sector people?

Ms. DORN. Certainly the historic approach to transportation in this country has been the view that there is a Federal responsibility to assist in providing funds for necessary transportation. Decisions about what kind of transportation and where it should be located have been relegated to the local authorities and local decisionmaking process. The Federal statutes that outline requirements for grantees who receive Federal funds are very clear that this local decisionmaking must be respected.

By the same token, the laws are quite clear, even if in many places in the law they indicate that certain processes are important to follow. A specific one has to do with the public involvement process. And, while we do not prescribe explicitly what that local process must be, we are very precise about the kinds of public involvement that are required for the locals to make those decisions so that no one is left out. Fundamentally, it is a local decision, but there are caveats about how those local decisions are made in the light of day with public notice about routes, fares, schedules, and those sort of things so that the local community has an opportunity to have input on those decisions.

Mr. TIERNEY. So, we are clear and we agree that there is nothing in the law that prevents local communities from choosing private transit providers if they wish to, right?

Ms. DORN. Correct.

Mr. TIERNEY. Are there limited circumstances when public transit agencies should be permitted to provide community-based charter services directly to local governments and private nonprofit agencies that would not otherwise be served in a cost-effective manner by private operators? Now, that is the question. I am going to give you an example to help you out on that.

Ms. DORN. OK. Thank you. I appreciate that.

Mr. TIERNEY. I do this by way of the representative who represents Santa Monica Transit. Apparently, the Monterey-Salinas Transit was recently unable to transport volunteers from the Defense Language Institute at the Monterey Presidio to rehabilitate selected homes owned by elderly and disabled. The community group is called the Monterey-Salinas Rebuilding Together With Christmas in April. As a result, no service was provided for the group, since no private charter operator stepped up to the plate.

In an instance like that, the question really is would that be an appropriate limited circumstance where public transit agencies might be permitted to provide those community-based charter services?

Ms. DORN. That is a very good question about a complex set of local circumstances. Let me answer it in general terms and be very clear that I am not talking about the Santa Monica issue; it has not been brought to my attention.

If the grantee is providing charter bus service, what it is that the FTA does is we have responsibility for ensuring that, in fact, char-

ter service is provided. Mass transit is defined in the law as not being charter, so our view must be is this in fact charter in order to determine whether or not there is inappropriate or appropriate competition with an equitable type of service.

So the kind of questions we ask, as the grant manager, we say did the grantee receive approval from FTA for one of the exemptions provided under law, that no private operator, for example, is willing and able; did the grantee publish notice of intent to provide the service; or did a private charter operator request that the grantee provide charter equipment or service because it did not have accessible equipment.

We have very specific questions so that we can follow the intent of the law, which deliberately states that charter is not mass transit. It is a very complex arena, but we have laid out in statute and in regulation, in circulars, in guidance, and in our triennial process exactly what it is that is required so that the law is followed.

Mr. TIERNEY. I yield.

Mr. OSE. The difference between charter and mass transit, if I understand correctly, is whether it is an open door or closed door?

Ms. DORN. That is one of a number of conditions, yes, that is correct.

Mr. OSE. I want to come back to those other conditions.

Mr. TIERNEY. I yield back. Thank you.

Thank you, Ms. Dorn.

Ms. DORN. Thank you.

Mr. OSE. All right, I am going to take my 5 minutes.

Those other conditions as to whether or not it is a charter or mass transit, one is open door versus closed door.

Ms. DORN. Whether a fee for service has been charged; whether it is offered to—the open door is, I assume, opened to a closed——

Mr. OSE. Anybody walk-up?

Ms. DORN. Exactly. Specified times would be a part of a charter threshold; and that schedules and the amount that you pay can be altered by who has requested the service; and, whether the destination is determined by parties seeking the service. We have a whole list of what charter is and what mass transit is, and those are the threshold questions that we ask.

Mr. OSE. How many of those standards have to be met in order for it to be judged to be a transit service as opposed to a charter service?

Ms. DORN. It is my understanding that the issue of the control of the fares and the schedules very often is the critical balancing test. These decisions have to be made in the context of a case-by-case decision, so I can't say that every single test must be met in its entirety. There is some allowance for discretion, but these are the general requirements for meeting the definition of charter.

Mr. OSE. In the Defense Language Institute that my friend referenced, I presume that was a charter, or determined to be a charter service?

Ms. DORN. I couldn't comment on the specific case. I can say that these are the definitional requirements to meet the test. So, I wouldn't want to, at the spur of the moment, say it is or it is not.

Mr. OSE. So, if there is a bus service—and we are, at the moment, going to leave it undefined—if there is a bus service from

point A to point B that is regularly scheduled to leave point A at such and such a time and has scheduled stops along the way intermediate to getting to point B, that would be one of the standards FTA uses to determine whether this is a charter or a transit service? Do I understand that to be one of the thresholds?

Ms. DORN. If those schedules and stops had been determined not by the grantee, so to speak, or the provider of the service, but the acquirer of the service. So control of where it stops and when, under mass transit, is made by the grantee, by the service provider, rather than those who are procuring the service.

Mr. OSE. So, if the acquirer of the service determines where it stops, it is a charter?

Ms. DORN. That is one of the conditions, correct.

Mr. OSE. If the provider of the service determines the stops, one of the tests there would be that it is a transit service?

Ms. DORN. That is one of the conditions, yes. That is one of the ways that it allows us to determine whether, under the law, it is mass transit or charter.

Mr. OSE. OK. In other words, you have the acquirer of the service, you have the provider of the service, and then you have the people who use the service. If the people who use the service pay a fee to board the bus, is that one of the standards used to determine whether it is a transit service or a charter service?

Ms. DORN. A fee to board the bus?

Mr. OSE. Yes, like $1 to get on the bus.

Ms. DORN. Well, I understand that, yes, sir. If it is a part of the contract for service, then that is a charter.

Mr. OSE. So, if the acquirer of the service, who has determined the schedule and the route and all that, tells the provider of the service you may charge your users $1, then that would reinforce FTA's conclusion that it is a charter. But, if the acquirer makes no such requirement of the provider, either pro or con to whether or not they charge a fee for their service, that would be indicative of transit service?

Ms. DORN. Those conditions may or may not. It is all dependent on the specifics of the contract, the specifics of the case as interpreted by the very issues that we need to consider by law of what is charter and what is mass transit. So, Mr. Chairman, I just hesitate to posit by taking one particular condition and then to say in this instance that is charter. And, certainly we could very carefully, for the record, provide an answer, but it very likely would be the same answer; it may or may not, depending on other aspects that we have to consider.

Mr. OSE. What are the other aspects?

Ms. DORN. What we talked about, the fee for service, whether it is under the contract, it is to a specific group of people, whether the people who ride can alter the time or the people who procure. There are a number of issues defined in our regulation about what is charter service.

Mr. OSE. It would seem to me that, on each of these standards, as it relates to a predetermined route, you either have a predetermined route or you don't. It would seem to me that if someone who boards the bus is assessed a fee for that on a use basis, you either have that or you don't. You either have the ability to change the

arrival or departure times or you don't. You either have the ability to change the route or you don't. And, what I am trying to get is whether or not, in the aggregate having evaluated each of those parameters, is there some sort of scoring system that gets you to a determination whether something is a charter or a transit?

Ms. DORN. In some instances, Mr. Chairman, it is relatively subjective and, as I said, very often the tipping point, so to speak, has to do with who controls the fares and the schedules. Every provision of different types of service, charter or whatever kind of service, has different kinds of characteristics depending on where they are going, what the contract is.

So, we look to the specific contract. For example, one contract in a charter service may permit the driver to stop at a senior citizen center that wasn't previously scheduled because his charter contract bus is not yet full, so he or she can divert and go to a senior citizen center that wasn't contemplated on that day's charter trip. So, I just use that by way of an example that each of these cases requires very careful examination.

Mr. OSE. You are saying that some of these parameters may actually indicate one as opposed to other parameters may indicate exactly the opposite. In effect, one of the tests that you have highlighted, you have the ability to waiver from a fixed route, but that would indicate that it is either a transit or a charter, without a definitive determination. But, then you may have another thing where you pay a charge to get in, which indicates it is exactly the opposite. That is what you are suggesting, that you have to take them in the aggregate rather than individually, if I understand your testimony?

Ms. DORN. I would just say that each case is evaluated on its own merits in comparison to the standards that are defined. And, the nature and type of transportation in our country is so rich and so diverse that it must, and should, be made on a case-by-case basis with a very as strict as possible definition. So, I would not want to say that we have to take the aggregate versus weighing this or that.

Mr. OSE. I thank the gentlelady.

The gentleman from Ohio.

Mr. TIBERI. Thank you, Mr. Chairman.

Ms. Dorn, do you believe that a publicly funded entity should be in the business of providing service competition in the same market with an already private serving entity?

Ms. DORN. A couple of comments with respect to that good question, Congressman. First of all, this administration is strongly supportive of encouraging, enabling under the law private sector participation in transportation. That serves every community better when those options are available and they are exercised when locally preferred, and it allows transportation to be more robust and to continue our economy's growth. First point.

Second point, FTA is bound by the strict reading of the law in terms of under what conditions there can be appropriate competition or not. The FTA law specifically allows federally funded mass transit transportation to compete with the private sector under certain conditions, and there are a number of conditions that are outlined in the law that only if that service, for example, is essential

to a program of service, not the grantee's, a program of service for the community; if it provides for participation of private companies to the maximum extent feasible; if just compensation is paid; and, it is my understanding, labor protections are in place. So, the law very specifically tells us under what conditions it is appropriate for public to compete with private in the arena of mass transportation, and we have endeavored at the FTA to fulfill and respect very carefully that careful crafting in statute.

Mr. TIBERI. Let me get a little more specific. In our May 18th hearing earlier this year, ENOA Corp. in Hawaii presented one such case.

Ms. DORN. I am sorry, I am having trouble hearing.

Mr. TIBERI. ENOA Corp., at our May 18, 2004 hearing, presented one such case. In today's hearing Oleta Coach Lines in Williamsburg will be presenting another such case of the public sector competing with the private sector. Since January 20, 2001, can you tell me how many times the FTA has enforced the provision in its own rules to ensure that local government mass transits are not competing unfairly with existing private sector companies?

Ms. DORN. First, may I comment on the Williamsburg case? It is my understanding that is on appeal to my office, so it would be inappropriate to comment.

Mr. TIBERI. OK.

Ms. DORN. I just wanted to make the record clear on that.

With respect to how we enforce what we vigorously believe and what the law requires, we are a grant-making agency that has very strict contractual requirements with every grantee. With respect to private sector participation, we have planning requirements generally for both the grantees and the metropolitan planning organizations, and we insist that they take a strong look at what has been required in the law about private sector participation.

As you know, Congress has very seriously limited FTA's authority to enforce or to withhold certification in that arena; however, there are other arenas, the charter bus issue, the school bus violation, etc., where we take a very close look through triennial reviews, which we work with our grantee regularly, we do quarterly reviews, and we are very serious about their knowing the private sector participation requirements and fulfilling them.

For example, in the triennial review we have determined there were about 12 formal complaints with respect to charter or the triennial review. We have had, over the past several years, 10 findings in our triennial review that indicate there is a problem with how the transit agency completes that private sector requirement. We have very vigorously enforced to make sure that they remedy those problems, and I am pleased to say that in the 10 instances where we found a violation of private sector involvement, those have all been remedied by the grantee.

Mr. TIBERI. You can just give me a number answer, if you could, on this. Since January 2001, how many protests have you received from existing private sector mass transit providers about unfair competition? Just if you could give me a number.

Ms. DORN. I know of none at the formal headquarters level. However, I make it very clear that in our grant-making responsibility, our regional offices are working daily with our grantees, and many

times informally they will say to the grantee we don't see your public involvement process, you don't have a public notice, we are going to withhold funds, or let us wait until you put this mechanism in place. So many times that is informally resolved. Our strong interest, as the Administrator of mass transit programs, is to ensure that the community receives the services that are in so many cases desperately needed.

In the context of doing that, we work on a day-to-day basis to make sure that our grantees are compliant with the law and that we don't stop the delivery of service. What we want to do is to get compliance. Our records at the headquarters level show that these kinds of complaints are rare.

Mr. TIBERI. Mr. Chairman, can you indulge me just one final question to followup?

Mr. OSE. I would indulge you however you like.

Mr. TIBERI. Just a yes or no answer. Take your FTA hat off. Do you believe that a public sector entity should compete with a private sector entity already in existing market? Take your FTA hat off. Yes or no?

Ms. DORN. Sir, I won't take off my FTA hat, but I would say to you that personally and professionally I believe there is wisdom in the law as they have prescribed the mass transit issue. I think there are many factors to be considered, and I believe that this administration has proposed significant enhancements for private sector involvement, which I thoroughly support, and that would make the law even better.

Mr. TIBERI. Thank you.

Mr. OSE. I want to followup on a question you asked having to do with Williamsburg.

Ms. Dorn, on September 14th, a local James City Council Community Services official stated that "Williamsburg Area Transport has been pleased to operate this successful pilot project, but does not intend to operate the route in the future." Would that charge your response to Mr. Tiberi's inquiry regarding that matter and your freedom to comment on it?

Ms. DORN. I am sorry, I am having trouble hearing.

Mr. OSE. Williamsburg Area Transport does not intend to operate the route in the future, as of September 14, 2004.

Ms. DORN. I would still hesitate to comment on the facts of the matter, because I am not aware of all of the facts of the matter. So, I would suggest that I would be very happy to take a look at the matter if it is not a formal complaint that needs to go through a particular process, but I think it is risky to posit something when I don't have the entire facts.

Mr. OSE. I am pleased to recognize the chairman of the full committee who joins us today, Mr. Davis of Virginia.

Mr. DAVIS. Thank you, Mr. Ose. I appreciate your holding this hearing. I just have one question.

On the active and proposed public-private partnerships in Virginia, we have a completed project, the Pocahontas Parkway, and five active public-private partnerships now: Route 28, Route 288, the Colefield Expressway, Jamestown 2007, and Route 58. In addition, we have six rail or road projects that are in the proposal stage, including Dulles rail, which is very critical; the Hot Lanes

on the Beltway; Hot Lanes on I–95 and I–81, widening the Powhite Parkway western extension in the third; Hampton Roads Crossing.

What is your view on all such proposed projects; have you been involved; and can you comment on the Dulles rail project in particular?

Ms. DORN. Sure. Let me begin, Congressman Davis, with the first point, Washington-Dulles. The project which has now been approved to be into preliminary engineering, we are pleased that this is the first to use the procurement method under Virginia's Private-Public Partnership Act for Mass Transit. We believe that this has very important prospects for delivering on time, on budget this important transportation segment in this corridor. It is one of FTA's New Starts proposals, and we are certainly supportive of the increased private sector investment.

Our primary involvement, however, has been related more to the criteria for financial investment and whether it meets the test. However, we look forward to continuing to work with the grantee in this unique and hopefully growing public-private partnership approach.

With respect to the other five highway public-private partnerships, I would want to defer to my colleague, Federal Highway Administrator. We can either do that for the record or we have an individual here who could speak more specifically.

Mr. DAVIS. Let us hear from him.

Ms. DORN. OK, great. D.J. Gribbin is the Chief Counsel for the Federal Highway Administration.

Mr. DAVIS. Was he sworn?

Mr. OSE. Mr. Gribbin, please rise and raise your right hands.

[Witnesses sworn.]

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

The gentleman from Virginia.

Mr. GRIBBIN. Thank you, Mr. Chairman. In response to your question, the Federal Highway Administration has been working very closely with VDOT and the Warner administration on all of those projects. In fact, on the I–81 project in Virginia in particular, that is what we call a SEP–14, a Special Experimental Project 14, which we use on a case-by-case basis to help advance public-private partnerships. In this case, we have a regulation that does not allow a State to issue an RFP prior to a recorded decision on a project. We use SEP–14 to waive that requirement because of the unusual nature of the I–81 project. That was the first time in the Nation that we had done so.

Mr. OSE. I thank the gentleman.

Ms. Dorn, currently FTA has 18 codified rules, including one for planning assistance and standards, one for project management oversight services, one for credit assistance for surface transportation projects, but has none on private sector participation. And the source that I am referring to is right here—the Code of Federal Regulations. In 1994 Congress passed amendments to the 64 Mass Transit law requiring private sector participation to the maximum extent possible, and that is Sections 5306(a) and 5307(c) of Public Law 103–272.

In a June 28th of this year reply to one of my post-hearing questions, the Department of Transportation stated, "Section 5307(c) compels FTA to accept a grantee's annual certification of intent to comply. . . . FTA carries out the Section 5307(c) mandate through the agency's triennial review process."

DOT also noted that in 1994 the prior administration rescinded the Reagan administration's October 1984 nonbinding guidance on private sector participation.

In your written statement for today's hearing, you stated "in our judgment additional rulemaking is not necessary for FTA to enforce current law," and that is on page 2 of your statement.

Now, after discovering grantee confusion and noncompliance, in August 2003, I requested that you issue implementing rules for Sections 5306(a), dealing with private enterprise participation, and 5307(c), dealing with public participation requirements.

One logical option, it seems to me, is to amend FTA's major capital investment rule, Part 611, since it already implements part of 49 U.S. Code Section 5309, Capital Investment Grants and Loans.

Do you intend to amend an existing FTA rule or issue another freestanding FTA rule in order to clear up grantee confusion on this matter?

Ms. DORN. Mr. Chairman, FTA addresses private sector participation requirements in a variety of regulations and circulars, including the very important joint FTA-Federal Highway Administration planning regulations implementing the two sections which you mentioned, 5306 and 5307. With considerable changes affecting the private sector involvement now before Congress, we are very hopeful that those will pass, and I do not believe that it would be fruitful to amend the current regulations at this time.

However, as I indicated in my oral statement, I agree that because there are so many places at which private sector involvement requirements are in the law, the regulations, the circulars, that I do believe a clarification is needed even in the interim, while we await passage of the legislation; and I have directed my staff to develop a plain English guide, if you will, for comment, and we expect that to be ready for circulation within 90 days.

It is my view that currently we do not need to modify the rules to get clarification. We may need to better explain the rules that exist and make sure that they are in a more user-friendly fashion.

Mr. OSE. I am trying to find the assurance under which this subcommittee basically can say this issue has been resolved so I can go on to the next, because I have no shortage of similar issues in other agencies that are kind of like in a queue waiting to be looked at. I am not sure that I share your confidence that the highway authorization bill is going to be passed and that will take care of clarifications such as you suggest.

This isn't exactly a new issue. I have to express some dissatisfaction to you that, notwithstanding your comment that you are going to undertake guidance, guidance isn't binding. It just simply isn't binding; it has no legal force. I am just not convinced that, frankly, you are taking this very seriously.

Ms. DORN. In our agency, contractual commitments are definitely binding, and I can assure you that we have very vigorously enforced, through our triennial review process and the master agree-

ment that all grantees must sign and certify, if and/or when we find a violation of these private sector requirements, we get on it.

And, in fact, as I mentioned, of the 10 that we discovered over the past number of years, each one of them has been resolved. We don't give the agency the option to resolve it in the long-term; we say X number of days we expect the public involvement process, for example, to be remedied by adequate private notice, etc.

Mr. OSE. Well, I would like to explore that for a little bit, because I have more than a passing knowledge of one that I brought to your attention. Pursuant to a triennial review you did of SACRT back, I believe, in the year 2000, you entered into a Memorandum of Understanding regarding a Standard Operating Procedure for the days going forward.

Yet when I brought it to your attention that Sacramental Regional Transit has not complied with the requirements of that MOU in terms of how they conduct their affairs relative to one public-private competition, I have yet to see the first meaningful step whereby FTA would hold those folks accountable for not complying with an agreement that they signed long prior to the issue of this public-private competition arising.

This has to do with the issuance of a contract for service, but even more fundamentally how that contract was awarded in the first place, which your people examined under that triennial audit, identified the flaws, brought them to the attention of the local entity, had them sign an agreement saying that they would fix their systems; they haven't fixed their systems, I have brought it to your attention, and nothing has happened.

Ms. DORN. Mr. Chairman, we have documentation that requirement has been met, in terms of public involvement, and we asked, in the context of the case that you mentioned, for that documentation to be submitted. We examined it and we found it to be sufficient. To our knowledge, the grantee is in compliance. If you have additional evidence to that effect, FTA would eagerly take a look at that matter to ensure that it is remedied.

Mr. OSE. My point is that there was absolutely no consequence for the overt act commissioned by Sacramento RT for changing their advertising pattern from the historical norm in a single instance, the net result of which was to take a private service provider out of a position and replace them with a public service provider. You can call it potato soup if you want, but a rose by any other name has thorns.

This was a screw-up on the part of FTA. You can dance around the issue, you can talk about minimal compliance, but the net effect of the lack of oversight on behalf of FTA in terms of the Memorandum of Understanding that resulted from your triennial review is that the advertising that should have taken place in a particular manner did not and a private provider lost a service.

Now, you and I can sit here and debate it all you want, but the net effect is that the system got hijacked; I brought it to your attention. Near as I can tell, you haven't even sent a single letter to the municipal entity calling to their attention the fact that they changed their system, and I have to express to you some not so small dissatisfaction with that.

Ms. DORN. I understand and respect that. I respectfully disagree. We have done everything we have been able to do to both resolve the case fairly and appropriately under the terms of the law, and it is our understanding, clearly been documented, that this agency is in compliance with what we required of them in the triennial review.

Mr. OSE. Under the basis that it was a charter service, as opposed to a transit service?

Ms. DORN. That is our lawyer's view of the law.

Mr. OSE. The parameters of which are very subjective.

Ms. DORN. Pardon me?

Mr. OSE. The parameters of which, according to your earlier testimony, are highly subjective.

Ms. DORN. I don't believe I said highly subjective. There are elements of subjectivity, and that is why there is case law that would advise us and very specific lengthy list of factors, no single factor being the exclusive factor.

Mr. OSE. You can see why I was so interested in the parameters. I have no small frustration in getting FTA to define what those factors are in a determinant status so that people can actually rely on them in the future. That is why I asked for a rulemaking, as opposed to guidance, on these issues.

Ms. DORN. We certainly have not kept as secret the factors which define charter; anything but. I personally sent a letter to over 600 grantees in the last year to very strictly define what is charter, what is not, to what standards they must be held accountable in the law and our regulations. So, we are doing everything possible to make this user-friendly and so that everyone knows what is and is not a charter.

Mr. OSE. Gentleman from Virginia.

Now, the governmentwide grants management common rule provides various remedies for noncompliance by a grantee, and some of those remedies include temporarily withholding cash payments pending correction of the deficiency, disallowing all or part of the cost of the action not in compliance, wholly or partly suspending or terminating the current award for the grantee's program, withholding further awards for the program, taking other remedies that may be legally available. These are just some of the remedies for grantee noncompliance.

As it relates to the triennial review that indicated that the Standard Operating Procedure at SACRT did not meet FTA's requirements, were any of these remedies implemented?

Ms. DORN. I am not exactly sure where to start on this question because we have a fundamental disagreement about how the common grant rule applies to FTA programs.

Mr. OSE. Well, let us even go back further.

Ms. DORN. OK.

Mr. OSE. Did you or did you not find SACRT in compliance with your operating procedures pursuant to your triennial review in the year 2000?

Ms. DORN. With respect to the bus plans for bus procurement, correct, we did not find them in compliance. They later came into compliance through the documentation that was submitted to us.

Mr. OSE. I had a conversation with the Executive Director of Sacramento RT on July 14, 2004, in which she told me quite directly, in response to a direct question, no, we didn't bother to implement those things for 3 years. Now, at what point did you make the determination that SACRT was in compliance with the triennial review?

Ms. DORN. I am not sure of the dates, sir, but I do know that we have documentation, to the best of my knowledge, that those requirements were put in place in a timely fashion.

Mr. OSE. Actually, they told you they were put in place.

Ms. DORN. We saw notifications of public hearings and other such documentation. I cannot recall what it was, but I asked if we had the documentation in hand; they said yes; I looked at it. More importantly, my Chief Counsel thoroughly examined it, and we were satisfied.

Again, if there is additional evidence that relates to this case, then we would be more than happy to review it. We do not have that.

Mr. OSE. For the record, would you please check on the date so that I can compare the date at which you made that determination to the date indicated by the Director SACRT, the date indicated to me in July of this year as to when they actually implemented those provisions? I will give you a question, if you would like, in writing to which you can respond.

Ms. DORN. Whatever you prefer, sir. That would be fine.

Mr. OSE. Given the history of this particular grantee and my concern about FTA's oversight of its compliance, there remains a question dealing with this particular grantee amounting to about $1 million in previous years' unobligated money that was otherwise directed to SACRT. I am aware that as of September 1st of this year there were previously unobligated funds totaling $990,000 and change which were to expire on September 30th, today. Has FTA, since September 1st, approved the release of these funds to SACRT?

Ms. DORN. I would be happy to provide that for the record, sir. I am not aware. We have 2,000 grantees, and certainly in the last month there is always a rush by our grantees to obligate funds because they have completed adequately the process. I would be happy to check on that.

Mr. OSE. These are fiscal year 2002 funds.

Ms. DORN. OK.

Mr. OSE. Now, I notice the gentleman who came up and testified a moment ago has a Blackberry that is readily available. Perhaps during the course of our conversation he can contact your office and find out the status of these funds. Do you think that would be possible?

Ms. DORN. We will make every effort.

Mr. OSE. OK.

On our second panel today we have invited two witnesses, Iris Weinshall Schumer, who is the commissioner of the New York City Department of Transportation and the chairman of the Transit Alliance representing seven affected private sector transit operators to discuss the proposed takeover by a federally funded local transit agency, that being the Metropolitan Transit Authority [MTA], of

private sector bus services in Queens, Brooklyn, the Bronx, and Manhattan that currently operate under contracts with the city.

On June 11th of this year, the Council of the city of New York held a hearing on this particular idea, and its briefing paper for the hearing stated that the proposed takeover potentially makes the city responsible for paying hundreds of millions of dollars in transfer costs arising from necessary purchases of infrastructure, such as additional depots, garages, buses, and fueling stations.

The Transit Alliance's written testimony for today's hearing states that "the most recent budget submitted to the City Council calls for payment to MTA of $161 million, which is approximately $11 million more than present costs for delivery of the same service." It also states that "once the takeover is consummated the MTA plans to cut service." And, attached is a September 23rd of this year letter from an AFL–CIO union stating that "the MTA has not shown any evidence that it can adequately fulfill this major undertaking. . . . this. . . . would, without a doubt, be a 'lose-lose' situation to all."

Do you have any estimate of the difference in total public costs between the current franchisee arrangements and the proposed takeover that I have just cited?

Ms. DORN. No, sir, I do not.

Mr. OSE. Does FTA play a role in providing funds to the city of New York necessary to facilitate this takeover?

Ms. DORN. No. It is my understanding not. This issue, as I understand it, as you have described it, it is a local matter at this point. However, I am asking my Regional Administrator to ensure that the requirements of the law are known to the grantee so that private sector involvement requirements, public involvement requirements are met on this very important matter. I certainly agree that this kind of local decision we must do everything possible to make sure that we make aware to the grantee their requirements for full public involvement so that a decision can be made. We have received no complaints on that matter to date.

Mr. OSE. My investigation of the situation leads me to believe that, as it relates to Queens, Brooklyn, the Bronx, and Manhattan, you have mass transit service being provided by private operators, and that at least facially it appears to me as if the city of New York is moving to acquire those services so that such services can be provided by a public entity. If I understand that correctly, they cannot use Federal money to effect that change?

Ms. DORN. It is my understanding that decision by MTA has not been made; they are in the process of making local decisions on that. What our role is is to make sure, as MTA and the city pursue possible changes, that they comply strictly with the law respecting public involvement and private sector involvement.

Mr. OSE. Under the understanding that you have of this situation, is the city of New York able to rely on the FTA for grants, the purpose of which would be to effectuate the purchase of these private services?

Ms. DORN. I have no specific knowledge about that piece. I would not want to hazard a guess.

Mr. OSE. If the circumstances are as I have described, in that the services currently being provided in Queens, Brooklyn, the Bronx,

and Manhattan, are in fact privately provided, can the city of New York be confident that FTA will approve their grant for funds, the purpose of which will be to acquire these private services?

Ms. DORN. Our job is to make sure that the requirements for private participation are met. So, I don't want to prejudge what they might decide, in what context, etc. We have a very strict law and interpretation about what it is that we can and cannot do in terms of a local decision, and I would not want to hazard a guess as to what this grantee has in mind, what the city has in mind, but we do know that there are very specifically laid out protections in certain instances for the private sector, as I described for the Congressman earlier.

Mr. OSE. In a hypothetical situation involving four privately owned mass transit services in suburbs of a hypothetical large city, if the hypothetical large city sought to acquire those private services, would the hypothetical large city be able to rely with any degree of certainty on the FTA being willing to provide grants, the purpose of which would be to acquire such private mass transit services in such hypothetical suburbs of hypothetical large city?

Ms. DORN. Mr. Chairman, they could certainly rely on the fact that FTA would vigorously enforce the law with respect to Section 5323(a), which says FTA law specifically allows federally funded mass transportation to compete with the private sector under certain conditions. So, the test would be whether or not those conditions have been met. That is the law that we are required to administer, and you can believe and accept, I hope, that we will vigorously enforce that law, as is our job.

Mr. OSE. Could you highlight for me your understanding of the conditions under which a public entity could compete with a private provider under such circumstances?

Ms. DORN. If the service is essential to a program of services, if the service provides for participation of private operators to the maximum extent feasible, if just compensation is paid, and if labor protections are in place. Those are the generic conditions which are specifically outlined in our rule, in our law, that define the conditions under which the public sector can compete with the private sector in mass transit.

Mr. OSE. So, if the circumstances are such as to allow the public sector to compete, just compensation would have to be paid? Just compensation for what?

Ms. DORN. I don't want to move inappropriately beyond my depth; I am not a lawyer. This is a very complex matter of law. I would like to ask my Chief Counsel.

Mr. OSE. Would Mr. Sears like to be sworn in?

Ms. DORN. That would be fine. I would like him to be. Thank you.

[Witness sworn.]

Mr. OSE. Let the record show that Mr. Sears answered in the affirmative. Mr. Sears is the Chief Counsel for the FTA.

Sir.

Mr. SEARS. Thank you, Mr. Chairman. The provision of just compensation under 49 U.S.C. 5323(a) is a provision that has not been opined on much by FTA in recent decades, as there has been very little in the way of a provider of public transportation acquiring a

private provider of transportation. But, the general rule of law in this area of statutory construction is that there is a reasonableness standard applied to what just compensation is, and it is determined on a case-by-case basis.

Mr. OSE. If the public entity provides a service, and the ridership on the private provider goes down, is there an element of condemnation there?

Mr. SEARS. Condemnation as a matter of law, sir?

Mr. OSE. Yes.

Mr. SEARS. I don't believe so under 5323.

Mr. OSE. OK.

Mr. SEARS. But, I would have to look into that, sir.

Mr. OSE. Does the issue of just compensation relate to the facilities or to the value of the franchise that might be affected?

Mr. SEARS. Well, if I could reiterate that it has been, I believe, at least 20 years since this provision of law was exercised before at the time the Urban Mass Transportation Administration. I believe that just compensation speaks toward the loss to the private provider of public transportation and that the calculus is grounded in the loss to the private provider.

Mr. OSE. So, it would go beyond just the actual real estate or rail line, to the value of the franchise itself?

Mr. SEARS. Again, the jurisprudence surrounding this is somewhat dated, but my recollection is that is correct, yes.

Mr. OSE. I wonder how it is we could possibly share such information with the potential public provider in New York City. Any idea how that might happen?

Our second panel today, we have two witnesses. The first is the District of Columbia Director of Transportation and the other is the only person who for 30 years has operated the competitively awarded private sector franchise known as the Tourmobile, who will discuss the proposed two-phase Downtown Circulator system in Washington, DC.

Now, a May 8, 2000 National Park Service memorandum states: "The system proposed for implementation in the study may require financial subsidy to operate and will provide no monetary return to the National Park Service. The present concessioner-operated interpretive shuttle does not require subsidy and pays fees in which four National Capital Region parks and the National Park Service—split on an 80/20 franchise fee basis—approximatley $600,000 to $700,000 annually."

In December 2000, the Department of Transportation Office of the Secretary co-signed a Memorandum of Agreement for the proposed circular system, stipulating that DOT agrees to "Guide the MOA group through the reauthorization process of the transportation funding bill."

What specifically has Department of Transportation done to advance this project since January 21, 2001?

Ms. DORN. FTA has not participated in any monetary way with respect to this, so no Federal requirements are applicable, including the private sector. I will need to get back to you with respect to the Memorandum of Agreement; I am not familiar with the specifics of that, although I do know that the FTA's requirements would not be triggered because there is no funding involved from

our agency. So, I would be happy to provide for the record a more explicit discussion about the Memorandum of Agreement which you cite.

Mr. OSE. Mr. Sears, it is my understanding we have faxed you a copy of that Memorandum of Agreement. Is that true?

Mr. SEARS. I apologize, sir, I can't attest as to whether I received that fax or not.

Mr. OSE. We will followup on this in writing. What we are looking for is dates and documents for the hearing record.

Now, the District of Columbia Downtown Business Improvement District Web site on its proposed circulatory system states that current estimates are just under $12 million in capital costs and $6 million annually in operating costs. Do you know if these costs include any financial subsidy? Do they recognize the full buyout cost for the franchisee known as Landmark Services Tourmobile? If so, how much is estimated for the subsidy and how much for the buyout? And, if not, do you have separate estimates for the subsidy and the buyout, and what are they?

Ms. DORN. FTA has no involvement from the funding perspective, nor any other perspective that I am aware of, so I can't comment on any more than that.

Mr. OSE. FTA has not been approached, either preliminarily or otherwise, by the District of Columbia City Council and the like regarding potential grants that might be used to facilitate this takeover?

Ms. DORN. To my knowledge, not; however, our regional offices on a regular basis attempt to respond to inquiries from organizations, private and public, all the time. So, I wouldn't want to say that no one has approached FTA. I do know that no funding has been committed or contemplated from the headquarters perspective.

Mr. OSE. OK, we will be sending you a letter for further followup on this subject.

Ms. DORN. OK.

Mr. OSE. This, to me, is one classic example. Having almost been run down by the Tourmobile on numerous occasions, I want to make sure that it stays in existence so it can run down my successor.

Mr. Tiberi.

Mr. TIBERI. No further questions.

Mr. OSE. Mr. Davis.

Mr. DAVIS. Let me ask you, the impact of street closings on mobility downtown, are you familiar with that?

Ms. DORN. Sir, I could not speak to that; my colleague from the Federal Highway Administration would potentially be able to do that.

Mr. DAVIS. Be better off.

Ms. DORN. Would certainly be better, yes.

Mr. OSE. Bring him up here.

Mr. GRIBBIN. I have already been sworn.

Mr. OSE. You have been sworn.

Mr. DAVIS. Let us talk about these street closings going on downtown. Obviously it has had a huge effect on mobility. It is even having an effect on mobility around the Capitol, trying to get in in

the mornings. What is the Federal Government doing to address access and mobility downtown?

Mr. GRIBBIN. I apologize, Mr. Chairman, I am actually not prepared to answer that question this morning. We can get an answer back to you.

[The information referred to follows:]

Refer to: HCC-1

The Honorable Tom Davis
Chairman
Committee on Government Reform
U.S. House of Representatives
Washington, DC 20515

Dear Mr. Chairman:

Thank you for the opportunity to provide you and the Subcommittee on Energy Policy, Natural Resources, and Regulatory Affairs with some information during the hearing on how we can maximize private sector participation in transportation on September 30, 2004. During the hearing, you asked for information about what the Federal Highway Administration (FHWA) is doing to study congestion caused by road closures in the District of Columbia.

The Consolidated Appropriations Resolution, 2003 (Pub. L. 108-7), included $5,000,000 for transportation studies to alleviate congestion resulting from street closures and street restrictions in the vicinity of the White House. The FHWA plans to study the area extending from the Potomac River on the west, L or M street on the north, Capital Hill on the east, and the SE/SW Freeway on the south. Currently, the FHWA is working, in consultation with the National Capital Planning Commission, the District Department of Transportation, the United States Secret Service, and other Federal and local agencies, to select a consultant and to develop a study that will consider transportation alternatives in response to the street closures in the vicinity of the White House.

Another effort to address the congestion in the District of Columbia is the Downtown Congestion Task Force, which Mayor Anthony Williams established to develop innovative solutions to the transportation problems in the central business district. This task force is composed of representatives from Federal agencies, business interests, and non-profit groups. One of the issues that the task force will address is temporary lane closures. The U.S Department of Transportation John A.Volpe National Transportation Systems Center is facilitating this task force. The final task force meeting is scheduled for October 28, 2004.

The FHWA looks forward to working with you to continue to ensure the mobility of the roads in the District. If you have any additional questions, please contact me at (202) 366-0740. A similar letter has been sent to the Ranking Member of the House Committee on

Government Reform and the Chairman and Ranking Member of the House Subcommittee on Energy Policy, Natural Resources, and Regulatory Affairs.

Sincerely yours,

/s/
DJ Gribbin
Chief Counsel

Refer to: HCC-1

The Honorable Henry A. Waxman
Ranking Minority Member
Committee on Government Reform
U.S. House of Representatives
Washington, DC 20515

Dear Congressman Waxman:

Thank you for the opportunity to provide you and the Subcommittee on Energy Policy, Natural Resources, and Regulatory Affairs with some information during the hearing on how we can maximize private sector participation in transportation on September 30, 2004. During the hearing, Chairman Davis asked for information about what the Federal Highway Administration (FHWA) is doing to study congestion caused by road closures in the District of Columbia.

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Government Reform and the Chairman and Ranking Member of the House Subcommittee on Energy Policy, Natural Resources, and Regulatory Affairs.

Sincerely yours,

/s/
D.J. Gribbin
Chief Counsel

Refer to: HCC-1

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

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Committee on Government Reform and the Ranking Member of the House Subcommittee on Energy Policy, Natural Resources, and Regulatory Affairs.

Sincerely,

/s/
D.J. Gribbin
Chief Counsel

Reply to: HCC-1

The Honorable John F. Tierney
Ranking Member
Subcommittee on Energy Policy, Natural Resources,
and Regulatory Affairs
Committee on Government Reform
U.S. House of Representatives
Washington, DC 20515

Dear Congressman Tierney:

Thank you for the opportunity to provide you and the Subcommittee on Energy Policy, Natural Resources, and Regulatory Affairs with some information during the hearing on how we can maximize private sector participation in transportation on September 30, 2004. During the hearing, Chairman Davis asked for information about what the Federal Highway Administration (FHWA) is doing to study congestion caused by road closures in the District of Columbia.

The Consolidated Appropriations Resolution, 2003 (Pub. L. 108-7), included $5,000,000 for transportation studies to alleviate congestion resulting from street closures and street restrictions in the vicinity of the White House. The FHWA plans to study the area extending from the Potomac River on the west, L or M street on the north, Capital Hill on the east, and the SE/SW Freeway on the south. Currently, the FHWA is working, in consultation with the National Capital Planning Commission, the District Department of Transportation, the United States Secret Service, and other Federal and local agencies, to select a consultant and to develop a study that will consider transportation alternatives in response to the street closures in the vicinity of the White House.

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Committee on Government Reform and the Chairman of the House Subcommittee on Energy Policy, Natural Resources, and Regulatory Affairs.

Sincerely,

/s/
D.J. Gribbin
Chief Counsel

Mr. DAVIS. All right. I will wait until the next panel.

Mr. OSE. I am sorry, Mr. Chairman, I missed that. I was multitasking.

I want to thank Ms. Dorn, Mr. Sears, the gentleman from Federal Highway for joining us today. We have a number of questions; we will be sending you followup in writing. We would appreciate a timely response. We want to encourage you to expedite your rulemaking in any way, shape or form we can. And, I am just not done with Sacramento RT.

Ms. DORN. We got that impression, sir.

Mr. OSE. Thank you.

Ms. DORN. Thank you.

Mr. OSE. We will take a 5-minute recess.

[Recess.]

Mr. OSE. All right, we are back. This is the second panel for the Subcommittee on Energy Policy, Natural Resource and Regulatory Affairs hearing on the subject of "How Can We Maximize Private Sector Participation in Transportation?"

Our second panel is composed of five individuals. They are Dan Tangherlini, who is the director of the District of Columbia Department of Transportation here in Washington; Mr. Tom Mack, the chairman of Tourmobile Sightseeing here in Washington, DC; Mr. Jerome Cooper, chairman of the Transit Alliance and president of Jamaica Buses, Inc., in Jamaica, NY; Mr. David Smith, director of marketing and sales for Oleta Coach Lines, Inc. from Williamsburg, VA; and Mr. Steven Diaz, esq., former Chief Counsel for the Federal Transit Administration at the Department of Transportation.

Gentlemen, as you saw in our first panel, we swear in all our witnesses. That is the standard of course; it is not judgmental. If you would all rise and raise your right hands.

[Witnesses sworn.]

Mr. OSE. Let the record show that all five witnesses answered in the affirmative.

Now, as with our first panel, we have received your written testimony. In front of you I believe this monitor is working; that monitor is not. They are all working now. I stand corrected. They are both working. There are three little rectangles on that larger black box; there is green, yellow, and red. Green means you are in your 5 minute period; when it switches to yellow, it means you have a minute left; and, when it switches to red we put you on a long bus ride to pick your destination.

Your testimony has all been received; we have looked at it. We are very appreciative of your preparing it and submitting it. We are going to recognize each of you in turn to summarize your testimony in 5 minutes. Every got it?

Mr. Tangherlini, thank you for joining us today. You are recognized for 5 minutes.

STATEMENTS OF DAN TANGHERLINI, DIRECTOR, D.C. DEPARTMENT OF TRANSPORTATION, WASHINGTON, DC; TOM MACK, CHAIRMAN, TOURMOBILE SIGHTSEEING, WASHINGTON, DC; JEROME COOPER, CHAIRMAN, TRANSIT ALLIANCE AND PRESIDENT, JAMAICA BUSES, INC., JAMAICA, NY; DAVID N. SMITH, DIRECTOR OF MARKETING AND SALES, OLETA COACH LINES, INC., WILLIAMSBURG, VA; AND STEVEN DIAZ, ESQ., FORMER CHIEF COUNSEL, FEDERAL TRANSIT ADMINISTRATION, DEPARTMENT OF TRANSPORTATION, LAW OFFICE OF STEVEN A. DIAZ

Mr. TANGHERLINI. Thank you for having me, Mr. Chairman. Chairman Ose, members of the committee and staff, my name is Dan Tangherlini, and I am the director of the District of Columbia Department of Transportation. Thank you for inviting me here today to testify on the topic of private sector participation in transportation, especially regarding the proposed Downtown Circulator. I particularly look forward to the opportunity to clear up some misconceptions about the Circulator proposal.

First, I would like to give you some context about the DDOT and the amount of work that we do with the Federal Government and with the private sector. In fiscal year 2003, the last year in which we have closed the books, DDOT spent $42 million of local funds and $200 million in Federal funds on road, bridge, highway construction and maintenance. Of that sum, more than 90 percent was contracted out to the private sector. Since Mayor Anthony A. Williams took office in 1999, the amount of contracting to the private sector has increased from $110 million to $219 million, or more than 100 percent increase.

The Williams administration and my Department are committed to ensuring that the District's citizens get the most value out of each transportation dollar spent on their behalf, and we are very proud of our record.

The idea for a Downtown Circulator was developed by the National Capital Planning Commission as part of its legacy plan, a long-range vision plan for the Nation's capital completed in 1997. This Federal agency is tasked with ensuring the Nation's capital's workers, residents, and visitors can get around the city as quickly and easily as possible. They saw on the horizon a need for much expanded public transportation options in order to link popular destinations for an ever-growing population of downtown core.

Everything foreseen by the NCPC has been confirmed by local studies over the last decade. Downtown D.C. has added approximately 9.5 million square feet of office space since 1998. There are 3,000 new residents living in or near downtown, and another 3,000 new residents will be moving in next year. During this same period, we have added an enormous amount of cultural and entertainment space, and are attracting millions of more visitors than we were just 8 years ago.

In short, the District has added a city the size of downtown Denver in the last decade, while we have eliminated 70 percent of all short-term surface parking, reduced available roadways through security closures, and we have not added a single bus route to help people move about downtown. The city's transit service has tradi-

tionally focused on bringing people from surrounding communities and neighborhoods into and out of downtown.

Last month, the annual Texas Transportation Institute study of congestion placed Greater Washington with the third worst congestion in the country, after Los Angeles and San Francisco, and we only missed that by 1.4 minutes of delay per person, so we are catching up. Many of the people clogging suburban roadways are coming into the District and may be encouraged to take public transportation if we do a better job of providing surface links.

Finally, the National Park Service provided us with invaluable data earlier this year on the unmet demand for transportation by visitors to downtown D.C. The Park Service survey found that fully 71 percent of visitors, representing millions of people per year, would like to use an inexpensive, non-interpretive bus service if one were available.

In late 1998, the Downtown D.C. Business Improvement District, a group of downtown property owners, developers, and business leaders, took the NCPC idea and began to develop it. The idea for a Downtown Circulator was widely embraced by downtown business interests, a number of Federal agencies, including GSA and the NCPC, the Mayor and the D.C. Council.

The plans for the Circulator have evolved over the years. The planning group attempted to be as creative as possible to solve as many problems of congestion, access, and mobility as possible. As ideas were tested and discussed, we were able to develop a realistic plan of action that includes two phases of service: one that could be developed independently by DDOT with its existing partners and a second phase that could be developed in conjunction with the private sector and the National Park Service. In fact, I will add one reason we divided the project into two phases was to avoid in any way encroaching on the Park Service's existing single interpretive service concessionaire.

The Downtown Circulator is designed to be low-cost, very frequent, and faster than other public transportation due to less frequent stops. It is a form of bus rapid transit, if you will, and will provide no interpretive service.

Phase I of the Circulator, which is scheduled to begin in the spring of 2005, has a route to link Union Station with Georgetown via the new residential neighborhood growing along the Convention Center-Mass Avenue corridor, as well as tying the Convention Center to our emerging Anacostia development area. We also hope to extend it perhaps to the new baseball stadium.

It was always our desire to bid out Phase I, and until just last week this was not an available option. We have since learned that there may be a possibility to bid this phase to the private sector. If the National Park Service were to allow some opening of the existing concession, it would be our view that a variety of services should be offered through bidding with the private sector.

What may really be at issue is Phase II, a service that could be available to 92 percent of mall visitors who do not use current interpretive service, and the more than 70 percent of mall visitors who would like low-cost, non-interpretive transit service. Nothing can happen in Phase II without Federal involvement through the Park Service. If NPS chooses to change and/or compete the existing

more than 30 year old arrangement, we believe a private sector-operated non-interpretive service should be offered.

In conclusion, the District Government and its public-private partners have worked hard with the private sector to include them in every project we have done over the last several years. Despite the fact that there is absolutely no FTA funding being used to support Phase I of the Circulator, we are committed to work with the private sector operators to the extent we are able.

I very much appreciate the opportunity to appear before you today and am available for any questions you have.

[The prepared statement of Mr. Tangherlini follows:]

Testimony of the
District of Columbia Government
ANTHONY A. WILLIAMS, MAYOR

Private Sector Participation in Transportation

Dan Tangherlini
Director, District Department Of Transportation

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

Congressman Doug Ose, Chairman

Thursday, September 30, 2004
10 AM
2154 Rayburn House Office Building
Washington, DC

Testimony for Dan Tangherlini, Director District of Columbia Department of Transportation Before the US House of Representatives Committee on Government Reform, Subcommittee on Energy Policy, Natural Resources and Regulatory Affairs September 30, 2004

Chairman Ose and Members of the Committee, my name is Dan Tangherlini. I am the Director of the District of Columbia Department of Transportation. Thank you for inviting me here today to testify on the topic of private sector participation in transportation, especially regarding Phases 1 and 2 of the Downtown Circulator.

First, I would like to give you some context of DDOT and the amount of work that we do with the federal government and with the private sector. In FY 2003, the last year on which we have closed the books, DDOT spent $42 million of local funds and $200.4 million of federal funds on road, bridge and highway construction and maintenance. Of that sum, 90% was contracted out to the private sector. Since Mayor Anthony Williams took office in 1999, the amount of contracting to the private sector has increased from $110.4 million to $219.9 million, or a 100% increase. In addition, the DC Public School System spends $48 million per year on special education student transportation—virtually all of it contracted out to the private sector. With respect to general public transportation, the District subsidizes Metrorail and Metrobus service through the Washington Metropolitan Area Transit Authority (WMATA) that was established by Congress under an Interstate Compact decades ago, and which has made our regional

transit service one of the most effective in the nation. Fully 40% of daily commute trips to and from downtown are provided by WMATA at affordable prices to the consumer.

The Williams administration and my department are committed to ensuring that the District's citizens get the most value out of each transportation dollar spent on their behalf and we are very proud of our record.

With respect to the Downtown Circulator, I would like to provide you with some history for context and then update the committee on where we are today, how we plan to proceed, and how the District Department of Transportation and our partners have been trying to assure the private sector that we will be working with them in the coming years.

The idea for a Downtown Circulator was developed by the National Capital Planning Commission as part of its Legacy Plan long-range vision plan for the Nation's Capital completed in 1997. This federal agency is tasked with ensuring that the nation's capital's workers, residents and visitors can get around the city as quickly and easily as possible. They saw on the horizon a need for much expanded public transportation options in order to link popular destinations for an ever-growing population in the downtown core.

Everything forseen by the NCPC has been confirmed by local studies over the last decade. Downtown DC has added approximately 9.5 million square feet of office space since 1998. There are 3000 new residents living in and near the downtown. Another 3000 new residents will be moving in in 2005. During this same period we have added an

enormous amount of cultural and entertainment space and are attracting millions more visitors than we were just 8 years ago. In short, the District has added a city the size of downtown Denver (30M sq. feet of space) in the last decade, while we have eliminated 70% of all short term surface parking, reduced available roadways through security closures, and we have not added a single bus route to help people move about downtown. The city's transit service has focused on bringing people from surrounding communities and neighborhoods into and out of the downtown. Last month the annual Texas Transportation Institute study of congestion placed Greater Washington with the third worst congestion in the country, after Los Angeles and San Francisco (by only 1.4 minutes of delay per person per day). Many of the people clogging suburban roadways are coming into the District, and may be encouraged to take public transportation if we do a better job of providing surface links. Finally, the National Park Service provided us with invaluable data earlier this year on the unmet demand for transportation by visitors to downtown DC. The Park Service survey found that fully 71%, representing millions of people per year, would like to use an inexpensive non-interpretive bus service if one were available.

In late 1998 the Downtown DC Business Improvement District – a group of downtown property owners, developers, and business leaders took the NCPC idea and began to develop it. They hired Parsons Brinkerhoff, a leading private sector transportation consulting firm, to develop a feasibility study. They also contacted a number of local and federal agencies and private sector groups to gauge their interest in such a service. I should note that the Downtown BID staff included a former deputy transportation

secretary from the state of Connecticut and a professional transportation planner. DDOT's predecessor agency, the Department of Public Works, became involved in the project at that time. The idea for a Downtown Circulator was widely embraced by downtown business interests, a number of federal agencies including GSA and the NCPC, the Mayor and the DC Council.

The plans for the Circulator have evolved over the years. The planning group attempted to be as creative as possible to solve as many problems of congestion, access and mobility as possible. As ideas were tested and discussed we were able to develop a realistic plan of action that includes two phases of service. One that can be developed independently by DDOT with its existing partners, and a second phase that could be developed in conjunction with the private sector and the National Park Service.

The Downtown Circulator is designed to be low cost (introductory fares will be $.50 per ride), very frequent (every 5 to 7 minutes), and faster than other public transportation due to less frequent stops and innovations such as off-vehicle fare purchase, and boarding through multiple vehicle doors. It will not provide interpretive service. While the routes, fares and timing are designed to encourage use by visitors as well as workers and residents, it is not designed to compete with any interpretive service. It is simply high quality general-purpose public transportation—comparable to other transit service provided by WMATA.

Phase I of the Circulator which is scheduled to begin in the spring of 2005 has a route to link Union Station with Georgetown via the new residential neighborhood growing up along Massachusetts Avenue, the Convention Center and the K Street commercial corridor. A second route connects the convention center with the Waterfront via downtown and the National Mall. Neither route is well served by frequent, inexpensive, short-haul bus service at present. Combined they are expected to generate over four million annual trips for residents, workers and visitors. Our analysis indicates that this service is unlikely to divert riders from existing transportation services.

Phase II routes, which seem to be the ones that have generated the most concern from private sector operators, would link the downtown business district with Union Station, the Capitol, the Mall, the Westend government and commercial office center, the White House and the monuments area.

Private sector representatives first approached the Circulator planners about two years ago. Lobbyists from the American Bus Association, and operators such as Old Town Trolley, Yellow Transportation and Martz contacted us for information about the Circulator. We have always been happy to share with them the best information we had at the time because, until about a year ago, we had hoped to compete this service through a competitive bid process. We have notified private transportation providers of our intent to implement the Circulator at annual meetings of the Private Transportation Providers Task Force sponsored by the Metropolitan Washington Council of Governments, most recently at the May 4, 2004 meeting of that group—without any expression of interest in

private sector participation from its members. We have also met with representatives of the ABA and the United Motorcoach Association, most recently on July 26, 2004, to express our willingness to consider private sector participation in operation of the Circulator. I am submitting for the record two letters to these representatives of private sector groups that reiterate this point and once again promise that if Phase II service were to be offered it should be competitively bid out.

As I mentioned, it was always my desire to bid out Phase I as well, however, until just last week, this was not an available option. For several years the Circulator partners have been working to raise the necessary capital and operating funds for the new service. We spent a couple of years trying to raise the funds both with the Administration and here on Capital Hill but were unsuccessful. Finally, about two years ago, we reached an agreement that in exchange for the District purchasing the buses, operations would be funded with contributions from the business community, the DC government and the federal government. We decided to use funds from a 1960's lawsuit (Democratic Central Committee of the District of Columbia et. al. v. Wash. Metro and Transit Commission et. al.), commonly called the DC Transit Riders' Fund case, to purchase the buses. We believed that a major restriction on the use of these funds was that the buses had to be owned and operated by WMATA. We were of the opinion that we would have to contract with WMATA to operate any bus service provided with vehicles purchased from the DC Riders' Fund.

Just last week I had a conversation with WMATA's General Manager and we agreed to explore how we might arrange for the operation of these buses to permit managed competition. Three options appear to be possible: WMATA could operate and maintain the service as conventional local bus service subsidized by the District (this is our current proposal); WMATA could sub-contract the operation and maintenance of the service to a private provider; or WMATA could lease the vehicles to DC so that operation and maintenance of the service could be contracted to a private provider under a DC government contract. I am completely agreeable to the possibility of private sector participation in the future operation of the Circulator as long as we can begin service on the street by this March. We have committed to be up and running this spring and we have no desire to let this goal slip.

There is one other major issue we are addressing with respect to Phase II of the circulator. We have been in discussions with the National Park Service for several years about the transportation options that they offer to residents and visitors who want to visit the national Mall and monuments areas. There has been no public transportation in these areas for decades. In fact, there has been only one transportation provider sanctioned by the Park Service as a franchise operator since the early days of the Nixon Administration. Other operators who try to compete for tourist business on the Mall are not allowed to collect fares or advertise their services anywhere on the Mall or Monuments areas. With an average daily adult fare of $20 per person, interpretive transportation services are not affordable by many, not used by the millions of people who live and work in the Washington region, and rarely used for more than a single day by visitors. This leaves

the vast majority of visitors to our national treasures with no affordable or convenient transportation options between destinations.

I have also attached a letter from the Downtown DC BID to the National Park Service in response to the Park Service's planning for the future of transportation on the Mall. This letter encourages the National Park Service to open these areas up to real competition, and to welcome a public transportation alternative. I believe that this type of competition is the best way to provide high quality service and to meet the needs of all those who need, or wish, to visit downtown destinations.

In conclusion, the District government and its public and private partners have worked hard with the private sector to include them in every project we have done over the last several years. Despite the fact that there is no FTA funding being used to support Phase I of the Circulator we are committed to work with private sector operators to the extent we are able.

I very much appreciate the opportunity to appear before you today and welcome any questions that you may have.

GOVERNMENT OF THE DISTRICT OF COLUMBIA
DEPARTMENT OF TRANSPORTATION

Office of the Director

July 23, 2004

Mr. A. Craig Smith
General Manager
Martz Gold Line/Gray Line
5500 Tuxedo Road
Tuxedo, MD 20781

Dear Mr. Smith:

This is in response to your letters of June 9 and June 25, 2004, to Mr. Richard A. White, General Manager and Chief Executive Officer of the Washington Metropolitan Area Transit Authority (WMATA), regarding the Downtown DC Circulator. The District Department of Transportation (DDOT) has been working in partnership with the Downtown DC Business Improvement District, the National Capital Planning Commission, and WMATA to improve public transit for District residents, workers and visitors for daily trips around downtown, and to reduce traffic congestion from private automobiles that currently drive downtown because convenient transit service is not available for these trips.

The Circulator is an appropriate public transit service to achieve the objective of increased transit ridership in congested downtown DC. The Circulator will provide passenger transportation around downtown and will be an adjunct to existing commuter service into and out of the city. Existing Metrorail and Metrobus services are designed primarily to accommodate commuters. Improved downtown transit circulation will promote greater transit ridership as a result of this added transit connection. Higher transit ridership will contribute to increased mobility, reduced automobile use, reduced traffic congestion and air pollution, and increased economic activity from those who come to the city's business districts.

For example, there is currently no single regularly scheduled transit route between Union Station, the Convention Center and Georgetown—three of the most frequently visited destinations in downtown DC. The Circulator will permit residents, workers and visitors to access these locations by a single convenient transit route across town, with easy transfer connections to and from Metro stations on each of the five Metrorail routes and

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numerous Metrobus routes in the downtown. This, in turn, will encourage more people to use transit for their trip into the city, rather than drive autos, because they can also rely on transit for trips around the core.

In addition, as attendance at Convention Center events increases, it will be necessary to increase transit capacity to the Center and increase transit connections from the Center to commercial areas of the city. This will increase economic activity in our business districts, and is a traditional function served by public transportation.

Correspondingly, the Circulator partners group intends to implement two routes of Circulator service within the next year: between Union Station and Georgetown, and between the Convention Center and the Southwest Waterfront. The group has selected WMATA to operate these Phase I routes because WMATA operates all public transit services in the District, and because this option would shorten the time needed to implement service.

Similarly, DDOT and the Circulator partners group propose to use the DC Riders Trust Fund to purchase vehicles for the first two Circulator routes because these funds are available in the near term to expedite the implementation of service, and because this proposed use is consistent with the provisions of the Riders Trust. The Riders Trust Fund is intended for use by WMATA to purchase buses for transit operation in the District of Columbia where the previous DC Transit Company provided service.

Regarding your concern that the Circulator may displace or compete unfairly with private bus operators, let me assure you that it is not the intent of the Circulator to replace, eliminate or preclude the operation of private buses in the city. Charter and tour buses will be able to continue their services as they do now. In fact, there is every reason to expect that the Circulator will expand the potential market for private bus operations, including increased charter service for added visitors to the city who will have an improved transit option downtown, and for private bus patrons who will want to return to favored destinations after exploration on the Circulator.

As for your concern that implementation of the Circulator may create a redundant service to those potentially proposed by the on-going National Park Service Visitors Transportation Study, it is our understanding that the NPS study acknowledges the first two Circulator routes (Phase I) as part of the "no-build" or base case of existing transportation services in the study area. Furthermore, the NPS study specifically includes as one alternative two additional Circulator routes that are identical to those proposed as Phase II of the Circulator Implementation Plan. The partners group will not implement Phase II of the Circulator before the NPS study and its recommendations are complete. After gaining cost and operating experience in Phase I, it is the partners group's current intention to invite competitive bidding on Phase II services from private contractors such as yourselves and other American Bus Association/United Motorcoach Association member companies.

In response to your request to facilitate a District-wide discussion on parking and traffic issues, let me provide you with the following updated information. The Downtown DC Congestion Task Force has been working since May 2004 to develop numerous recommendations to relieve congestion in the downtown. One of the proposed recommendations of the Task Force is to implement the Downtown Circulator. Other recommendations include increased short-term tour bus parking near attractions, designated pick-up and drop-off zones for motorcoaches, and the development of long-term tour bus parking with driver lounge facilities. The Task Force will issue its final recommendations in October 2004.

As part of the DC Tour Bus Management Initiative, The Volpe Institute of the US Department of Transportation will make a proposal to DDOT this summer to prepare an implementation plan based on recommendations from their earlier work on best practices for both tour bus and freight management. New curbside parking for tour buses has been added around the perimeter of the Old Convention Center site. The Union Station parking garage expansion effort is underway: When completed, additional tour bus parking will be available there. Efforts are also underway to provide tour bus parking at RFK Stadium.

The Government of the District of Columbia appreciates the services provided by private bus companies, such as yours, which facilitate tourism in the nation's capital. We regret that there appears to have been a misunderstanding about the purpose of the Downtown Circulator. It is primarily an extension of the District's existing transit services. We look forward to a continued partnership with you to improve the environment for private bus operations here. In the short term, we hope that you will join with us in opposing an effort by the U.S. Capitol Police to ban tour buses from streets surrounding the U.S. Capitol.

Sincerely,

Dan Tangherlini
Director

Cc: Anthony A. Williams, Mayor
Carol Schwartz, DC Council
Richard A. White, WMATA
Richard Bradley D-BID
Patti Gallagher, NCPC

GOVERNMENT OF THE DISTRICT OF COLUMBIA
DEPARTMENT OF TRANSPORTATION

Office of the Director

July 23, 2004

Mr. A. Craig Smith
General Manager
Martz Gold Line/Gray Line
5500 Tuxedo Road
Tuxedo, MD 20781

Dear Mr. Smith:

This is in response to your letters of June 9 and June 25, 2004, to Mr. Richard A. White, General Manager and Chief Executive Officer of the Washington Metropolitan Area Transit Authority (WMATA), regarding the Downtown DC Circulator. The District Department of Transportation (DDOT) has been working in partnership with the Downtown DC Business Improvement District, the National Capital Planning Commission, and WMATA to improve public transit for District residents, workers and visitors for daily trips around downtown, and to reduce traffic congestion from private automobiles that currently drive downtown because convenient transit service is not available for these trips.

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For example, there is currently no single regularly scheduled transit route between Union Station, the Convention Center and Georgetown—three of the most frequently visited destinations in downtown DC. The Circulator will permit residents, workers and visitors to access these locations by a single convenient transit route across town, with easy transfer connections to and from Metro stations on each of the five Metrorail routes and

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numerous Metrobus routes in the downtown. This, in turn, will encourage more people to use transit for their trip into the city, rather than drive autos, because they can also rely on transit for trips around the core.

In addition, as attendance at Convention Center events increases, it will be necessary to increase transit capacity to the Center and increase transit connections from the Center to commercial areas of the city. This will increase economic activity in our business districts, and is a traditional function served by public transportation.

Correspondingly, the Circulator partners group intends to implement two routes of Circulator service within the next year: between Union Station and Georgetown, and between the Convention Center and the Southwest Waterfront. The group has selected WMATA to operate these Phase I routes because WMATA operates all public transit services in the District, and because this option would shorten the time needed to implement service.

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Regarding your concern that the Circulator may displace or compete unfairly with private bus operators, let me assure you that it is not the intent of the Circulator to replace, eliminate or preclude the operation of private buses in the city. Charter and tour buses will be able to continue their services as they do now. In fact, there is every reason to expect that the Circulator will expand the potential market for private bus operations, including increased charter service for added visitors to the city who will have an improved transit option downtown, and for private bus patrons who will want to return to favored destinations after exploration on the Circulator.

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In response to your request to facilitate a District-wide discussion on parking and traffic issues, let me provide you with the following updated information. The Downtown DC Congestion Task Force has been working since May 2004 to develop numerous recommendations to relieve congestion in the downtown. One of the proposed recommendations of the Task Force is to implement the Downtown Circulator. Other recommendations include increased short-term tour bus parking near attractions, designated pick-up and drop-off zones for motorcoaches, and the development of long-term tour bus parking with driver lounge facilities. The Task Force will issue its final recommendations in October 2004.

As part of the DC Tour Bus Management Initiative, The Volpe Institute of the US Department of Transportation will make a proposal to DDOT this summer to prepare an implementation plan based on recommendations from their earlier work on best practices for both tour bus and freight management. New curbside parking for tour buses has been added around the perimeter of the Old Convention Center site. The Union Station parking garage expansion effort is underway: When completed, additional tour bus parking will be available there. Efforts are also underway to provide tour bus parking at RFK Stadium.

The Government of the District of Columbia appreciates the services provided by private bus companies, such as yours, which facilitate tourism in the nation's capital. We regret that there appears to have been a misunderstanding about the purpose of the Downtown Circulator. It is primarily an extension of the District's existing transit services. We look forward to a continued partnership with you to improve the environment for private bus operations here. In the short term, we hope that you will join with us in opposing an effort by the U.S. Capitol Police to ban tour buses from streets surrounding the U.S. Capitol.

Sincerely,

Dan Tangherlini
Director

Cc: Anthony A. Williams, Mayor
Carol Schwartz, DC Council
Richard A. White, WMATA
Richard Bradley D-BID
Patti Gallagher, NCPC

GOVERNMENT OF THE DISTRICT OF COLUMBIA
DEPARTMENT OF TRANSPORTATION

Office of the Director

June 28, 2004

Mr. Victor S. Parra
President and Chief Executive Officer
United Motorcoach Association
113 South West Street, 4th Floor
Alexandria, VA 22314-2824

Dear Mr. Parra,

Mayor Anthony A. Williams has asked me to respond to your letter of May 26, 2004, regarding the Downtown DC Circulator and parking for tour buses. The District Department of Transportation has been working in partnership with the Downtown DC Business Improvement District, the National Capital Planning Commission, and the Washington Metropolitan Area Transit Authority (WMATA) to improve public transit for District residents, workers and visitors for daily trips around downtown, and to reduce traffic congestion from private automobiles that currently drive downtown because convenient transit service is not available for these trips.

Let me assure you that it is not the intent of the Circulator to replace, eliminate or preclude the operation of tour buses in the city. Tour buses will be able to continue their service of supervised group transportation to the major destinations and landmarks of our city as they do now. There is also every reason to expect that the Circulator will serve some people who have already spent part of their day with a charter or tour bus group, and want to return to some of their favorite destinations for further exploration when tour bus operations are not available.

The Circulator is an appropriate public transit service to achieve the objective of increased transit ridership in congested downtown DC. The Circulator will provide passenger transportation around downtown, not just commuter service into and out of the city. Existing Metrorail and Metrobus services are designed primarily to accommodate commuters. Improved downtown transit circulation will promote greater transit ridership as a result of this added transit connection. Higher transit ridership will contribute to reduced automobile use, reduced traffic congestion and air pollution, and increased economic activity from visitors to the city's business districts.

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For example, there is currently no single regularly scheduled transit route between Union Station, the Convention Center and Georgetown—three of the most frequently visited destinations in downtown DC. The Circulator will permit residents, workers and visitors to access these locations by a single convenient transit route across town, with easy transfer connections to and from Metro stations on each of the five Metrorail routes and numerous Metrobus routes in the downtown. This, in turn, will encourage more people to use transit for their trip into the city, rather than drive autos, because they can also rely on transit for trips around the core.

In addition, as attendance at Convention Center events increases, it will be necessary to increase transit capacity to the Center and increase transit connections from the Center to commercial areas of the city. This will increase economic activity in our business districts, and is a traditional function served by public transportation.

Correspondingly, the Circulator partners group intends to implement two routes of Circulator service within the next year: between Union Station and Georgetown, and between the Convention Center and the Southwest Waterfront. The group has selected WMATA to operate these Phase I routes because WMATA operates all public transit services in the District, and because this option would shorten the time needed to implement service. WMATA has also demonstrated that it has an excellent safety record in operating Metrorail and Metrobus service, so this should alleviate your concern for the safety of Circulator passengers. It is possible that in subsequent phases of Circulator implementation, after gaining cost and operating experience, the partners group will reconsider the possibility of competitively bidding these routes to private contractors such as your member companies.

Regarding your concerns about the availability of parking locations, and the status of the DC tour bus management initiative, let me provide you with the following updated information. The Volpe institute will make a proposal to DDOT this summer to prepare an implementation plan based on the recommendations in their earlier reports about best practices for both tour bus and freight management. DDOT has requested increased enforcement to ticket and remove unauthorized vehicles that now occupy curbside spaces designated for tour bus use. If you or your members spot a violation, they should report it to 202-727-1000. New curbside parking for tour buses has been added around the perimeter of the Old Convention Center site. The Union Station parking garage expansion effort is underway. When completed, additional tour bus parking will be available there. Efforts are also underway to provide tour bus parking at RFK.

The Government of the District of Columbia appreciates the services provided by private bus companies which facilitate tourism in the nation's capital. We regret that there has been a misunderstanding about the purpose for creating the Downtown Circulator. It is primarily an extension of the District's existing transit services. We look forward to a continued partnership with you to improve the environment for tour bus operations here. In the short term, we hope that you will join with us in opposing an effort by the U.S. Capitol Police to ban tour buses from streets surrounding the U.S. Capitol.

Sincerely,

Dan Tangherlini
Director

Cc: Anthony A. Williams, Mayor
Patti Gallagher, NCPC
Richard White, WMATA
Richard Bradley D-BID

DOWNTOWN DC
Business Improvement District

March 1, 2004

Ms. Susan Hinton
Transportation Planner
National Park Service – National Capital Parks Central
900 Ohio Dr, SW
Washington, DC 20024-2000

Dear Ms. Hinton:

The Downtown DC Business Improvement District (DBID) applauds the National Park Service for conducting the Washington DC Visitor Transportation Survey 2003. The Downtown BID understands that the Park Service is using this survey as part of its process to determine what type of transportation and interpretation services it should offer visitors to the National Mall and Monuments areas after its current interpretive tour concession agreement expires. The DBID's comments and recommendations are intended to help the Park Service make the best decision based on both the results of its own survey and on transportation planning work that has been completed by other federal and local transportation planning organizations over the last several years.

Unlike most other National Park Areas, visitors to the Washington DC's National Parks, especially those who visit the National Capital Parks Central area, flow freely into and out of the areas designated as national parks throughout the course of a day without ever being aware whether they are inside or outside of the park boundaries. Therefore, visitors to the National Parks in Washington are really visitors to the District of Columbia and the Washington region who are shared by all institutions and attractions that welcome and serve them. Visitors to the National Capital Parks are also the residents and workers in the District of Columbia for whom these parklands represent the largest available green-space in their everyday lives.

The DBID, like the National Park Service, and many other visitor oriented organizations in Washington, is dedicated to creating a first class environment and experience for our common visitors. The DBID strongly recommends, therefore, that the criteria that the National Park Service uses to determine what services will be offered to Washington's visitors (on roadways that it controls) will place the highest value on providing the greatest number of visitor with high quality transportation and interpretation choices.

The DBID believes that it is important to create an easy, seamless, and high quality experience for Washington's visitors, regardless of which destinations they visit, how they choose to move between destinations, or when their visits occur.

The National Park Service's Washington D[illegible] Transportation Survey 2003 leads us to conclude that visitors desire several different [illegible] ation options, rather than a one size fit all service.

Since 1968, Tourmobile has been the exclusive interpretive transportation concessionaire of the National Park Service on the Mall and in the Monuments area. The survey indicated that fewer than 10% of visitors to the National Mall and Monuments areas avail themselves of this service.[1] An additional eight percent of visitors use other private companies for interpretive tour transportation. Fully 82% of visitors surveyed use no interpretive or non-interpretive transportation service to travel between the major destinations in the Mall/Monuments areas. The percentage of visitors surveyed who use the services available is almost identical to the percentage of visitors who say that the existing interpretive transportation options are cost prohibitive.

Most instructive is the survey finding that an identical percentage of visitors desire non-interpretive transportation between attractions as desire in depth interpretive transportation. However, when asked about their demand based on a range of prices for service, between 61% and 79% of respondents desired non-interpretive transportation between destinations using fixed daily price of $3-$7, while only 29% - 39% desired in-depth commentary interpretive tours when priced between $15 - $25 per day. There was relatively little price sensitivity for those who desired introductory orientation transportation with a maximum of 59% desiring such service when priced at $6 per day.

The most relevant findings to address the Downtown DC BID's desire to ensure high satisfaction in transportation among visitors to Washington are that:

1. Visitors desire both interpretive and non-interpretive transportation services
2. Visitors have a stronger preference for interpretive service when priced below what is currently offered from Washington's interpretive tour services.
3. Visitors desire inexpensive, non-interpretive transportation routes between destinations, and a fare structure, that are not currently available from Metrobus, or any other transportation provider.

The data suggest that 20% more visitors would use non-interpretive-, rather than interpretive-transportation, when given the choice between them at prices that could realistically be offered by the market.

There are a number of other relevant findings in the survey data. These include:

1. a very high majority (79%) are willing to pay $3 per day for all-day non-interpretive transportation.
2. a majority of visitors are willing to pay as much as $10/day for all-day non-interpretive transportation,
3. a high desire to use all-day passes for transportation between destinations;
4. the majority of people who drive to the Mall area find both driving and parking difficult.
5. a willingness among those who drive to the Mall to park at remote locations and be bussed to the Mall area;
6. the vast majority of those who use interpretive tour services are satisfied with them. This percentage is so high that it is fair to conclude that there is high satisfaction irrespective of the provider, or the level of regulation.

These findings from the National Park Service's Study lead us to make recommendations on the types and levels of services in two major categories: types of service and routes.

[1] Only 18% of visitors use interpretive tours and 54% of these people use Tourmobile, to which the Park Service has issued an exclusive concession agreement.

Category 1: Types of services that should be offered and the nature of these services:

The survey indicates preferences for a variety of types of transportation that includes no interpretation as well as different levels of interpretation. DBID recommends that the Park Service seriously consider enabling several different types of transportation services for Washington's visitors. At a minimum, the Park Service should seek to provide low cost public transportation without interpretation that links destinations on the Mall, the National Monuments, public transit stations, and off-the-Mall destinations in the downtown. To this end, the DBID recommends that the Park Service work with the Downtown Circulator working group to implement phase II Circulator service in the Mall/ Monuments areas.

Secondly, the DBID recommends that the Park Service consider expanding the number of interpretive tour services allowed to compete for visitors on the Mall. Licensing three or four different interpretive tour services could offer advantages to visitors, the Park Service, and concessionaires. For example, competition would enable companies to be more responsive to market demand and would encourage niche services. Companies would compete for the reputation of providing the best historical information, the most context and the most engaging presenters. Competitors would have market driven incentives to regularly modernize their fleets. Visitors would benefit from price competition. And, finally, by creating a limited competitive environment, the Park Service should be able to reduce its own need (and that of its concessionaire) to negotiate for changes in services, to oversee and audit accounts, and to provide facilities on National Park land.

Category 2: Routes, Street Configuration and Usage

1) With respect to routes for non-interpretive service, The DBID recommends that the Park Service adopt the routes laid out as Phase II of the Downtown Circulator operating plan. A route map of the plan is attached to this letter. These routes were developed by four major Washington planning organizations including the National Capital Planning Commission, The Washington Metropolitan Area Transit Authority; the District Department of Transportation and the Downtown DC BID. These four groups have worked in collaboration over the last 5 years to develop a plan to provide frequent and inexpensive public transportation services to Washington's visitors, including those to the Mall and Monuments. This plan, and its routes, was developed in response to the federal governments guiding planning document for the monumental core, the NCPC Extending the Legacy plan. It looked at visitor travel and tourism patterns throughout Washington and was designed to maximize service to the largest number of potential users.

   It is the understanding of the DBID that the Park Service is free to collaborate with the public agencies that have developed this plan now, so that it can be implemented after the expiration of the existing concession agreement. There is no consensus on who would be hired to operate the two Phase 2 routes that run on Park Service property, therefore, this service could be operated either by WMATA under a fee for service contract or bid out to a private operator.

2) With respect to private companies that offer interpretive transportation services, the DBID recommends that the Park Service consider allowing private companies to choose their own routes based on the type of tour each provides. The Park Service may want to consider implementing a coordination, rather than a control, function for such transportation service. Each private operator could be required to file a plan with the superintendent and to negotiate

timetables with the Park manager. Stops for all transportation services could be determined by the Park Service and shared by all transportation operators.

In conclusion the Downtown DC BID is pleased to offer comments on the future of visitor transportation on Mall and in the Monuments areas of Washington. Based on its own work, and a thorough review of the Park Services Visitor Transportation Survey, the BID strongly suggests that the Park Service ensure that visitors to Washington have easy access to both interpretive and non-interpretive transportation service. The BID encourages the Park Service to make an affirmative decision to collaborate with the Downtown Circulator Planning Group and to adopt and implement its phase 2, non-interpretive transit routes as soon as is feasible. Further, the BID recommends that the Park Service expand the provision of privately provided interpretive transportation in coming years.

Thank you for considering these comments and please do not hesitate to call upon our staff they can clarify any of the points made in this letter.

Sincerely yours,

Kingdon Gould III
Chairman

Attachment – Downtown Circulator Route Map

cc. Vicki Keys, NPS
Terry Carlstrom, NPS
Dan Tanghlerlini, Ddot
Patty Gallagher, NCPC
Edward Thomas, WMATA

Mr. OSE. Thank you, Mr. Tangherlini.

Our next witness is Mr. Tom Mack, who is the chairman of the Tourmobile Sightseeing enterprise that is so ubiquitous here in Washington.

Sir, welcome. Thank you for joining us. You are recognized for 5 minutes.

Mr. MACK. Thank you, Mr. Chairman and members of the committee, for extending us an invitation to appear before you. I regret that the Tourmobile is so hazardous to you; we will talk to them about that.

In 1967, the National Park Service issued a public prospectus seeking concessions to operate a mass transportation system on the Federal mall. The Federal mall is a fragile place; the ecology is fragile and there are too many cars. The atmosphere is causing damage to the plant life and others there. The Park Service decided that it needed a mass transportation somewhat consistent with the 1901 McMillen plan, which called for a pedestrian mall and a mass transportation system. That ideal has been sought for a long time. We don't know if that will ever be achieved, but it is certainly important.

We participated in the competitive bid circumstance, and, at that time, our organization, Universal Interpretive Shuttle Corp. I, bid and we were issued a contract whereupon we were sued by numerous who lost, and we spent a number of years in court. In 1968, the Supreme Court issued a decision favorable to the Secretary of the Interior, the Director of the National Park Service assuring that the Secretary of the Interior had absolute control over the contract which was issued, and in March 1969 the service began.

We extended our service to Arlington National Cemetery in 1970 at the request of the Department of the Army, and we have been there 32 years. I acquired Tourmobile in 1981 and have owned it since that time, and we continue to receive high marks from the National Park Service in terms of evaluations, and they continue to do so even under difficult circumstances.

The first time I became aware of some appearance on the national mall related to transportation services was something called a Museum Bus. The Museum Bus, the intention of that organization, as I understand it, was to take people off the Federal mall and take them on their buses to places of culture, museums, art places throughout the city, and perhaps other locations. That operation lasted for a significant amount of time, I thought, for an experiment. The experiment proved an absolute failure and it was discontinued.

I have never spoken with anyone from BID, an organization I first became aware of when—Downtown Improvement District BID—I received a telephone call from a Washington Post writer, who asked me if I was aware of the Circulator program; I told him no. Will you send me the information? He said he couldn't, but read The Washington Post tomorrow. I did, whereupon I learned that BID, in concert with others, but principally BID, because they were the spokesperson for this and the potential operator, I believe, had expressed an opinion which was stated in the Post that they intended to begin an operation on the national mall similar to mine;

asked me my opinion about that. I told them it would destroy my business.

I still haven't spoken with anyone from BID, and I thought it was quite arrogant on their part to make such a statement without even conferring with me or letting me know what they intended to do, and asking me if I had any ideas about it or wanted to participate in it. I don't, but perhaps that opportunity will prevail.

The information that I received on BID and that proposed Circulator operation is fraught with Federal funding. They have stated on numerous occasions that the foundation of their operation will be dependent upon tourists. Unequivocally, that has been stated numerous times. I believe that is a serious mistake and we oppose it.

[The prepared statement of Mr. Mack follows:]

Testimony of Tommy Mack, Chairman, Tourmobile Sightseeing
Before the House Subcommittee
On Energy Policy, Natural Resources and Regulatory Affairs
September 30, 2004

Chairman Ose and Members of the Subcommittee. Thank you for this opportunity to present the views of my company, Tourmobile, in connection with your hearing on private sector participation in mass transportation.

Tourmobile is a privately owned company, which, for more than 30 years has operated as a concessionaire of the National Park Service to provide interpretive transportation services to visitors to our Nation's Capital along the National Mall and other Federal properties in the area. Based on my years of experience and knowledge of this City and its visitors, I am here to voice my concerns with what appears to be a misguided plan to spend Federal tax dollars on an ill-conceived transportation proposal to fund a government operated local transportation service to compete with existing private companies.

This is a proposal generally known as the DC Downtown Circulator Project. It envisions Washington Metropolitan Area Transit Authority ("WMATA"), the region's quasi-governmental transit authority, using Federal funding to operate a series of bus routes throughout the City, including the National Mall. From what little is known of the proposal, it appears the initial plan is to operate two distinct routes throughout the downtown and Mall areas with a fleet of 29 full size buses. WMATA has apparently budgeted at least $16

million dollars for the first phase of the project, although some estimates suggest the actual cost may be four times that amount, for which additional Federal funding would no doubt be requested.

From what I know of the proposal, it will likely squander scarce resources, it will likely worsen the already intolerable traffic congestion problems of the downtown area, and it will certainly stand as a slap in the face to the private transportation community.

I will explain my reasons for opposing this plan, but first may I offer some background about Tourmobile.

Tourmobile Sightseeing

Tourmobile Sightseeing has been for more than 30 years the exclusive provider of interpretative transportation services on the National Mall and Arlington National Cemetery under a concession agreement with the National Park Service ("NPS"), which includes a Memorandum of Understanding with the Department of the Army. I have owned Tourmobile since 1981. Tourmobile is certainly well known to the Members on the Subcommittee. Our distinctive trams are an everyday sight along the Mall and other Park Service land, filled with tourists, attentively listening to our guides while riding along and viewing our national monuments, memorials, and government buildings and who board and alight as they choose numerous stops along our route.

The National Mall is a special place, and Tourmobile takes seriously its own role as a steward of the area which the U.S. Supreme Court has described as

"an expansive, open sanctuary in the midst of a metropolis; a spot suitable for Americans to visit to examine the historical artifacts of their country and to reflect on monuments to the people and events of its history." In today's world, it is a spot suitable not only for Americans, but also for those visitors from throughout the world who wish to view these many monuments to democracy.

With perhaps a touch of immodesty, by reason of our dedication to our mission, I believe Tourmobile is known as the sightseeing and interpretive transportation of choice for those who come to visit the Mall and surrounding areas, and the many attractions which line it.

Tourmobile's status on the Mall is one established and protected by law. Tourmobile has a unique concession agreement with the National Park Service to provide interpretive transportation services. Under that agreement, Tourmobile has invested heavily in equipment and facilities, including not only our fleet of trams, but also additional vehicles better suited to the transportation of persons with disabilities who require wheelchairs. Perhaps most of all, Tourmobile is an important private employer in the Washington tourism industry, employing as many as 250 employees during the height of the tourist season.

By way of background, years ago, the Secretary of the Interior, acting through the National Park Service, decided that the National Mall was best presented through the services of a single concessionaire, providing interpretive services carefully monitored and approved by NPS. The exclusive power of the Secretary of the Interior over the Mall area, including transportation services sold

and offered on Federal lands has been affirmed by the U.S. Supreme Court in its decision titled *Universal Interpretive Shuttle Corp. v. Washington Metropolitan Area Transit Commission*, 393 U.S. 186 (1968).

Since that time, the Park Service has been fully involved in overseeing Tourmobile's operations, while at the same time maintaining our exclusive role on the Mall, consistent with the Supreme Court's view of its authority to do so.

The Downtown Circulator Project

Tourmobile vigorously opposes the Downtown Circulator Project as it has been described, to the extent the Project will be operated by WMATA, a public entity, and financed – at least in part – through Federal funding, presumably through the Federal Transit Administration.

No matter who was to operate it, the proposed service as we now know it is simply ill-conceived. As I understand it, the Circulator is designed to operate full size buses on a very short headway at free or greatly reduced fare through the core of the Central Business District. One proposed route mentioned appears to be along K Street NorthWest; another is from the Convention Center area across the Mall to Southwest. Anyone who has spent time standing along any of the routes mentioned can readily see that midday traffic in Washington is a major impediment to transportation throughout the City. As but one example, to stand along K Street and imagine even more full size buses – stopping to board and alight passengers at every corner - would cause one to realize the result of such service would be more congestion and more traffic delays. Indeed, one of the

selling points for the original Metrorail concept was to have Metrorail carry passengers away from the city core so they could board buses at less congested, satellite locations, thereby freeing downtown streets from so many buses. Setting up a new downtown city bus system only defeats that purpose.

Whatever one might say about congestion in a perfect world, as the Members of the Subcommittee well know, those of us in Washington live in a City dominated by security concerns. One need only look outside this building to see how traffic is impacted by new security concerns. Street closures and barricades and rerouting are almost everyday occurrences, and according to the press, these changes are often implemented without notice. Contemplating a new downtown bus service like the Circulator in today's security-conscious environment is simply foolish.

Even if the proposal were not so poorly conceived, I believe it is not wise public policy to burden an already overburdened (financially and managerially) WMATA with another entirely new system for which it must obtain vehicles and hire employees and then operate. I understand WMATA has a difficult task and I am not here to engage in WMATA bashing, but at the same time, as a longtime Washingtonian, I think it is fair to say WMATA isn't doing a very good job in meeting its current responsibilities. I am confident that members of the Subcommittee, who live in Washington and see the local media, can understand my concern.

This is the same WMATA, which repeatedly states to the press that it has insufficient funding to operate its current services. This is the same WMATA, which has many well-publicized maintenance and service problems with the Metrorail system. I would point out the recent policy change of requiring so-called "Smart Cards" for all Metro parking and then discovering that there weren't enough of the cards available for purchase as a good example of a system which is already so overburdened that management just doesn't have the time to carefully consider the ramifications of all its new activities. How can we burden WMATA with all the burdens of an entirely new service and system?

It appears from the proposal that the Downtown Circulator may be organized as an entirely distinct transportation service, separate and apart from WMATA's current Metrobus operation. If so, beyond the operating costs of the new service, this plan will result in needless expenditures to create an entirely new and surely very expensive administration to oversee this new service. I respectfully suggest it would be an obvious waste of Federal funds to create a new management layer just to oversee the operation of a new bus service by WMATA.

My observations about the likely ineffectiveness of the proposed Circulator raise another important issue. As a member of the local transportation community, I am aware that there are a number of other Tourmobile competitors, which provide local sightseeing and interpretive services. Two such companies are Old Town Trolley and Gray Line Trolley, both of which operate using somewhat distinctive trolley-bus vehicles. Both of these companies operate near the National

Mall, and each of them offers City tours, which include significant points of interest away from the Mall. The Washington National Cathedral in Northwest is one ready example.

These companies are good examples of the how the private sector operates. If and when their management identifies an attraction or area which they believe tourists would like to visit and which they also believe is not served or is underserved by existing services, they offer a new tour or new tour stop to include it. As to some degree a competitor of these companies, I know that over the years, each of these companies has modified its services to include different offerings to the public. If their assessment provoking change is correct, presumably they realize a profit from their foresight; if their assessment is incorrect, they suffer the loss and discontinue the service, while at the same time, looking for other unserved or underserved opportunities. To me, that's the way the private sector uses opportunities for reward to expand services, with resulting better choices for the public at no cost to the government.

This is in sharp contrast to a quasi-government proposal of a few years ago, which operated under the name "Museum Bus." This was in some ways a predecessor to the new Circulator concept. Museum Bus was created and operated using someone's funds to provide a special shuttle bus service to take visitors from the Mall area to various museums around the city. For a variety of reasons, which were apparent to any observer knowledgeable about transportation and tourism, the service was clearly doomed to be a commercial failure, and indeed it was. To

many people, there was never a question that the service could not be sustained without funds over and above fare box revenues. Yet, with additional funding, it operated for quite some time before the idea was ultimately abandoned.

This is the heart of the matter. When it comes to non-mass transit transportation services in the Downtown area, it has been shown time and time again that private sector companies are best able to identify and promptly take advantage of opportunities to serve markets these companies view as underserved, while at the same time providing high levels of responsive service. Most of all, these private companies do so putting their own resources at risk, not taxpayer funded monies. Private companies are not prone to operate services, which are so clearly infeasible as is the proposed Downtown Circulator, because without a reasonable likelihood of success, they don't want to risk their own money. If such a service is offered and operated using someone else's money, there is no incentive to not operate a foolish project; indeed, if there are Federal funds to be had, it is often financially advantageous to operate such a service, since the operator will be paid no matter how low the ridership.

I am aware of various Federal Transit Administration policies prohibiting Federally funded transit authorities from competing with private charter companies; I am aware of policies requiring publicly funded entities to reach out and include private entities when a new service is to be contemplated. To my best knowledge, none of those policies was ever considered when the Downtown Circulator project was undertaken. That this expensive, wasteful, infeasible

project has come so far along already is testimony enough to the importance of adhering to these policies meant to protect the public interest by making private companies an integral part of the planning process and operators of those services which are not directly related to the core transit business of the mass transportation of passengers.

Thank you for this opportunity to share my views. I shall be pleased to answer such questions the Subcommittee may have and provide whatever additional information the Subcommittee may request.

Mr. OSE. I thank the gentleman for his time and his testimony.

Our next witness, Mr. Jerome Cooper, who is the chairman of the Transit Alliance and president of Jamaica Buses, Inc., in Jamaica, NY.

Sir, welcome. Pleased to have you join us. You are recognized for 5 minutes.

Mr. COOPER. Thank you, Mr. Chairman. My name is Jerry Cooper. I am the chairman and chief executive officer of Green Bus Lines, Triboro Coach, Jamaica Buses, and Command Bus Companies, who represent the Transit Alliance. We are private operators of bus mass transportation services in Queens, Brooklyn, and Manhattan in New York. Collectively, these companies employ 2,000 people, providing daily transportation to about 400,000 riders.

I have worked for these companies for 45 years, and, for the past 7 years, I have been the CEO and chairman of the Board. Although these titles and the company names may sound like institutional corporations, they are not. The four companies and their predecessors are, to my knowledge, the oldest operating mass transportation organizations in the United States. We invented mass transportation in the New York area. These businesses were built by hard-working people and entrepreneurs, not government agencies.

Shortly after World War I, a group of veterans found employment in our transit system. Eventually, these veterans became the bus drivers and mechanics who created the modern corporate entities which today are the principal assets for about 315 shareholders who are the decedents of these veterans. For over 100 years private effort and capital have continuously made efficient and convenient transportation an everyday expectation for our riders.

Sadly, the city of New York, a recipient of enormous amounts of Federal funding for transit, is trying to put these companies out of business and preparing unnecessarily to lose hundreds of millions of public dollars in the process.

Since the Federal Government began public transit assistance, private transit companies have been swallowed up by local government, but not Green Bus, Triboro, Jamaica, or Command. We are living proof that private enterprise works in transit.

Unfortunately, New York City, the bastion of capitalism, has embarked on a program to push these private companies out of transit. Public officials inaccurately railed that these companies do not maintain buses adequately or care about the safety or comfort of the transit-riding public. Yet, the city refuses to spend more than $150 million in federally appropriated funds to retire old, obsolete, and exhausted equipment.

Of the 709 buses in the combined fleets, on average 80 are out of service on a daily basis because of the need for repair or are Told that is not financially practical to repair them. Of the 709 buses, 98 are not wheelchair equipped and are inaccessible to persons with disabilities. The average age of 268 buses of the combined fleet is 18 years or older. Many parts cannot be obtained and must be cannibalized from other equipment. These facts should be compared to the Federal standard of a 12-year useful life for transit buses.

We operate under the cardinal rule that not a bus leaves the depot unless we deem it to be safe and reliable. The shortage of

equipment results in overcrowding and short tempers. The public deserves better.

The city is sitting on $150 million which has been appropriated and is available to replace the city's outdated fleet, but the city will not apply for these funds and replace the buses. They won't apply for the funds because, if they do, they must buy buses to replace the fleet we operate for them, which they don't want to do so they can use the artificial safety convenience and comfort crisis they have created to prove what a bad job the private sector does in maintaining and operating the buses. They will not apply for the funds because the city has previously arranged to transfer the work to the Metropolitan Transit Authority.

Although the city administration proclaimed that the city would save $150 million in operating costs once the takeover occurred, the most recent budget submitted to the City Council calls for payment to the MTA of $161 million, which is approximately $11 million more than present costs for delivery of the same service. The city's estimate of the cost of the takeover does not include the value of our realty or our intangible property rights, which has been publicly placed at hundreds of millions of dollars. It is also no secret that, faced with large deficit, the MTA plans to cut service. To me, this takeover is wasteful, ill advised, and badly planned.

In the limited time allowed, I can only give the outline of a very counterproductive situation. I have submitted several supplemental documents for your consideration, and I thank the subcommittee for the opportunity of testifying here today.

[The prepared statement of Mr. Cooper follows:]

TESTIMONY

JEROME COOPER, CHAIRMAN AND CEO

JAMAICA BUSES, INC.; COMMAND BUS CORPORATION; TRIBORO COACH, INC., AND GREEN BUS LINES, INC.

OF NEW YORK CITY

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.

SEPTEMBER 30, 2004

Mr. Chairman and Members of the Subcommittee:

My name is Jerome Cooper, though I prefer to be known as "Jerry." I am the Chairman and CEO of Jamaica Buses, Inc., Command Bus Corporation, Triboro Coach, Inc., and Green Bus Lines, Inc., private operators of bus mass transportation services in Queens, Brooklyn, and Manhattan under contract with the City of New York which also issues operating authority to us. Collectively, these companies employ approximately 2,000 drivers, dispatchers, mechanics, supervisors, secretaries, clerks, claims personnel, bookeepers and others whose efforts provide daily transportation to some 400,000 riders going to work, school, shopping, medical appointments, social excursions and generally moving about on the business of life. Mr. Chairman, I wish to thank the Subcommittee for affording me this opportunity to present information on the use of private sector resources in mass transportation infrastructure.

I have been around these companies my entire life and I have worked for them for about 45 years in various capacities. For the past seven years I have been CEO and Chairman of the Board. Although these titles and the company names may sound like institutional corporations, they are not. They are more like family retainers. Go to any retirement community in this country and you will find someone who, with bittersweet memory recalls riding the Green line to the beaches in Far Rockaway, or a Triboro Coach to school in Astoria or taking a date to the Valencia Theatre in Central Queens on a Jamaica Bus. The four companies and their predecessors are to my knowledge the oldest operating mass transportation organizations in the United States, the oldest of them having started operations about the time of the Civil War. Progressing from horses and wagons to modern day transit coaches, these businesses were built by hard-working people and entrepreneurs, not government agencies.

Shortly after World War I, when returning veterans were looking for work, a group of them found employment in our transit system. Eventually, these vets turned bus drivers and mechanics created the modern corporate entities in which they took the stock which today is the principle asset of many of these descendants. These companies are the property of working people who created transit from the sweat of their brows for a growing New York, not by tax subsidies or government authority. For over one hundred years private effort and capital have continuously made efficient and convenient transportation an everyday expectation in Queens, Brooklyn and Manhattan.

But, I am here today to share with you the sad facts of how the City of New York, a recipient of enormous amounts of Federal funding for transit, is trying to put these companies out of business, and preparing unnecessarily to lose hundreds of millions of public dollars in the process.

With the advent of Federal transit assistance in the 1960's local governments across America assumed the burden of providing mass transit in a period when economic conditions drove many of the originally private transit companies out of business. Over time, these subsidies became an important source of municipal revenue and finance. As public agencies grew with Federal assistance, there came to be a view that the operation of mass transit was a government function, not truly an area of private equity investment.

Eventually, private companies providing transit came to be seen as an obstacle or irritant to municipal agencies. So, more and more private transit companies were swallowed up by local government. But not Green Bus, Triboro Coach, Jamaica Buses or Command Bus, which have continuously served the public with distinction since the very birth of mass transit in this country. We are living proof that the guiding principle of the original Urban Mass

Transportation Act and the landmark Intermodal Surface Transportation Efficiency Act of 1991, and every Federal transit reauthorization since then, that public investment in transit infrastructure must be leveraged to the maximum extent feasible by private investment, is a viable and necessary way to meet the overwhelming and growing demand for mass transportation in the United States.

Yet, not everyone sees it that way. New York City, the bastion of capitalism, is embarked on a program to push private investment out of transit. Over the past several years the City of New York has allowed more than one hundred fifty million dollars in available Federal funds to sit in an account unspent in an effort to create the false impression that our companies and our employees are not doing a good job for the public. While public officials rail that private bus operating companies do not maintain buses adequately or care about the safety or comfort of the transit-riding public, the City refuses to spend federally appropriated funds for the purpose for which Congress intended: to retire old, obsolete and exhausted equipment which we maintain and operate under our contracts with the City.

It is to be noted that of the 709 buses in the combined fleets, on average 80 are out of service on a daily basis because of the need for repair or are so old that it is not financially practical to repair them. There are 234 buses in the Green Line fleet. They have a peak pull-out requirement of 185 buses, which should allow for sufficient spares in case of a breakdown. But because of the age of the current fleet and the need for major repairs on so many of the buses, Green Line has no spares available. Of the 709 buses 98 are not wheelchair-equipped and are inaccessible to persons with disabilities. Indeed, the average age of the Green Bus and Jamaica fleets is 15 years; about 60% of the Green Bus fleet is 18 years or older; a third of the Triboro fleet is 18 years old or older. 268 buses of the combined fleets are 18 years or older. 112 buses

are 19 years old or older and many parts cannot be obtained and must be cannibalized from other equipment. These statistics should be considered in light of the Federal standard of a 12 year useful life for transit buses.

We operate under the cardinal rule that notwithstanding the difficulty of putting service on the road not a bus leaves the depot unless we deem it to be safe and reliable. Notwithstanding the age and worn out condition of these buses the shop employees, through Herculean effort get most of the buses most of the time through the depot door in order to make service. The shortage of equipment results in overcrowding and short tempers but our riders, for the most part, with the help of an harassed driver work force understand the problems. But they are entitled to better service, newer and more comfortable buses but the private sector is powerless without the funding to provide such service.

A moment ago I told you that the City is sitting on one hundred fifty million dollars which has been appropriated and is available to replace the City's outdated fleet which we operate for the City under the local contract. But the City will not apply for these funds and replace the buses, even though they should do so under Federal standards, industry standards and traditional local practice.

They will not apply for the funds, because if they do they must buy buses to replace the fleet we operate for them, which they don't want to do so they can use the artificial safety, convenience and comfort crisis they have created to "prove" what a "bad" job the private sector does in maintaining and operating the buses.

They will not apply for the funds because the City wants to transfer the work from the private sector to the Metropolitan Transportation Authority (or "MTA" as it is commonly called),

with which it has already entered into an agreement for operating the serviced founded by our companies a century and more ago.

It is true that I want to protect the business and its employees, and even the shareholders (who, you recall, are the descendants of those World War I vets who became bus drivers to operate transit and support their families). There is nothing wrong with those motives, especially if you consider that it was they and their progeny who built up hundreds of millions of dollars of private equity in the properties which are used as transit garages, depots and offices. Our private properties provide equity leverage for vital mass transportation infrastructure, but the City does not presently pay fair market value for the use of them.

The City's arrangement with the MTA for this takeover is a bad investment in other ways. Originally the City administration proclaimed that the City would save $150 million dollars in operating costs once the takeover occurred. In truth the most recent budget submitted to the City Council calls for payment to the MTA of $161 million dollars, which is approximately $11 million dollars more than present costs for delivery of the same service. Further, the City's estimate of the cost of the takeover does not include the rental of our realty or the value of our intangible property rights, which the Chairman of the City Council has publicly placed at hundreds of millions of dollars.

Both the City and the MTA claim huge deficits for the coming year. It is also no secret that faced with these deficits, once the takeover is consummated the MTA plans to cut service, especially on the express routes presently delivered by other private providers as well as by Green, Triboro, Jamaica and Command. To me this government incursion into the private sector is wasteful of taxpayer money, ill advised and badly planned. By any measure, given a level playing field, the private operators in the New York metropolitan area believe they can deliver

transit services as well as the MTA. Yet, because the City administration opposes cooperation with the private sector we are being squeezed out of business. Such attitude and policies are in stark and diametric opposition to the intent of Congress to leverage public transit infrastructure investment with private equity, as expressed in the Federal Transit Act.

In the limited time allowed to me I can only give you the outline of a very counterproductive situation which is fueled by a misguided use of vital Federal infrastructure assistance. I have also submitted for the record several supplemental documents for your consideration. We all understand the importance of mass transportation, but we must work with great care to steward the limited resources available to make sure that the American people get the best value for every appropriated dollar.

Again, Mr. Chairman, I thank the Subcommittee for the opportunity of testifying here today. I look forward to answering any questions you or the other Members may have.

SUPPLEMENTAL MATERIALS

TO THE TESTIMONY OF

JEROME COOPER

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.

SEPTEMBER 30, 2004

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JEROME COOPER

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Amalgamated Transit Union - A.F.L., C.I.O.
Local 1181 - 1061

101-49 WOODHAVEN BOULEVARD, OZONE PARK, N. Y. 11416 845-5600

September 23rd, 2004

SubCommittee on Energy Policy,
Natural Resources and Regulatory Affairs
United States House of Representatives
Washington, DC 20016

Dear Sirs/Madams:

My name is Salvatore Battaglia, President/Business Agent of Local 1181-1061 of the Amalgamated Transit Union, AFL-CIO. I am writing to express my deepest concerns over the transfer of the Surface Commuter Lines of the City of New York to the Metropolitan Transit Authority. Since the Mayor's plan was originally made public, the Metropolitan Transit Authority has not shown any evidence that it can adequately fulfill this major undertaking.

For many years, our Local has represented the employees of Command Bus Lines (one of the present franchisee operators of the aforesaid transit lines). During those years, we have negotiated numerous collective bargaining agreements with Command Bus Lines and have established and maintained a solid working relationship with its highly qualified professional staff. The employees of Command have provided and continue to provide, outstanding service to the some 400,000 commuters throughout the City of New York. My concern is very specific, that the benefits our members so rightly deserve ie: pensions and health care coverage, would be gravely compromised should this takeover prevail.

The City's blatant refusal to utilize the available funding has contributed to the decline of service within our communities. Thus, the attempt to transfer the operation to a *mega-agency* (one which is already burdened with millions of dollars in debt) would be a momentous disservice not only to the riding public of New York City but to our members and franchise operators as well. To have this *mega-agency* take over Command Bus Lines at this juncture would (without a doubt) be a "lose-lose" situation to all.

It is respectfully suggested that the service now being provided to the riding public by the companies who have the expertise and knowledge to perform such service, be extended in order to ensure the riding public of this City, the continued first rate service it so justly deserves.

Very truly yours,

SALVATORE BATTAGLIA
A.T.U. Local 1181-1061
President / Business Agent

SB:la

Amalgamated Transit Union

Local 1179

A.F.L. C.I.O.

JOHN LONGO
PRESIDENT-BUSINESS AGENT

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718-658-3836 - FAX: 718-658-5977

THOMAS DeMARINIS
FINANCIAL SECRETARY-TREASURER

CHRISTOPHER ESPOSITO
VICE-PRESIDENT

September 21, 2004

Mr. Jerry Cooper
CEO, Transit Alliance
165-25 147th Ave.
Jamaica, New York 11435

Dear Jerry,

I am writing you this letter as a testimonial to the good working relationship ATU Local 1179 has experienced with Green Bus Lines.

From its inception in 1938, Local 1179 has been intertwined with Green Bus Lines as part of the fabric, that today makes up New York City's inter-modal mass transit system. Green Bus Lines has meant many different things to different people. To the men, women and children that use Green Lines' bus service it has meant efficient and affordable transportation to work, school and play. To the union rank and file, comprised from many different ethnic and racial backgrounds, Green Bus Lines has meant an opportunity to experience the American dream, a good job, with good wages, benefits and working conditions. This is due in no small part to the excellent working relationship both union and management continue to enjoy to this day.

New Yorkers' possess two great qualities, a sense of humor and a sense of proportion, but we're also a practical people. We sense when things have gone too far, when the time has come to return to the basic fundamentals that has made this City great. We have faced seemingly insurmountable problems in the past and we have overcome them through cooperation and we will overcome them again. We will only fail if we allow ourselves to be boxed in by the limitations and errors of others.

During these past few "hard" years as both Local 1179 and Green Bus Lines continue to suffer because of the mishandling and mistakes made by the City of New York surrounding

Affiliated with American Federation of Labor, Congress of Industrial Organization, New York State Federation of Labor, Central Trades and Labor Council of Greater New York and Vicinity, New York State Legislative Conference Board.

the attempted MTA takeover of the private bus companies, I want you to know that you still have my support and the support of my members. I am positive, if given a choice, an overwhelming majority of our members would wish to continue working for Green Bus Lines.

Sincerely,

John Longo
President, B/A
ATU Local 1179

Mitchell B. Schwartz
Assistant Director
Infrastructure Division

Roberto Ragone
Special Projects
Coordinator
Infrastructure Division

**The Council of
the City of New York**

**BRIEFING PAPER OF THE INFRASTRUCTURE DIVISION
Marcel Van Ooyen, Deputy Chief-of-Staff**

September 8, 2004

**Committee on Transportation
John C. Liu, Chair**

Oversight: Status of the transfer of New York City's private franchise bus lines to the Metropolitan Transportation Authority

INTRODUCTION

On September 8, 2004, the Committee on Transportation, chaired by Council

Member John Liu, will hold a follow-up oversight hearing on the transfer of New York City's subsidized private bus lines to the Metropolitan Transportation Authority (MTA). This hearing comes in the wake of the delay in the transfer of the private bus line services from the New York City Department of Transportation (DOT) to the MTA. Details of exactly how the transfer is to be effectuated remain scarce. This public hearing has been convened for the purpose of updating the committee of the status of the plans, intricacies and nuances of the announced transfer of April 19, 2004. While the Committee held a hearing on June 11, 2004 to better understand the process to be undertaken, the MTA and the DOT declined to testify.

BACKGROUND

I. New York City's subsidized private bus lines

New York City's subsidized private bus lines are operated under the auspices of the DOT and are comprised of roughly 1,200 buses dispatched to service 82 local and express bus routes in Queens, Brooklyn, the Bronx and Manhattan. This system accounts for roughly twenty percent of New York City's total local and express bus service. This bus system, although overseen by DOT, is provided by seven private bus companies, which operate pursuant to franchise agreements or interim operating authorities granted by the City. These bus companies are Command Bus Company, Inc., Green Bus Lines, Inc., Jamaica Buses, Inc., Queens Surface Corporation, Liberty Lines Express, Inc, New York Bus Service and Triboro Coach Corporation.

The City of New York began subsidizing capital purchases for the private bus companies in 1974. In 1986, DOT created a Surface Transit office to monitor the quality of franchised bus service and to manage the City, State and Federal subsidies administered with relation to these private companies. In 2002, the subsidies totaled $188,861,321 while fare revenue was $96,985,056.[1] For fiscal year 2003, the City of

New York's subsidy alone was $162.8 million. Over the last several years, government subsidies to these private bus lines have remained at fairly static levels. At the same time, the fleet of buses and the infrastructure, most of which is owned by the City, has continued to age and deteriorate without sufficient funds for proper repair or replacement. It has become increasingly difficult for these seven bus companies to continue to operate their respective bus lines in a manner that provides a basic level of efficient and clean service to New York City riders.

II. The Metropolitan Transportation Authority's bus system

The MTA, chartered by New York State in 1965, is responsible for operating, maintaining and improving public transportation in the Metropolitan Commuter Transportation District. The Metropolitan Commuter Transportation District, as created and established by section 1262 of the New York State Public Authorities Law, consists of the five counties that comprise New York City, as well as Dutchess, Nassau, Orange, Putnam, Rockland, Suffolk and Westchester Counties.

The MTA is the parent entity of several subsidiaries that aid the MTA in carrying out its mission. Two of these subsidiaries pertain to MTA bus operations – MTA New York City Transit (NYCT) and MTA Long Island Bus (also known as the Metropolitan Suburban Bus Authority). NYCT was created in June 1953 to assume responsibility for bus routes[2] formerly run by New York City's Board of Transportation. NYCT actually preexisted the MTA, created in 1965, to oversee the activities of NYCT. Currently, NYCT operates more than 200 local and 30 express bus routes within the five boroughs that comprise New York City. These routes include those operated by the Manhattan and Bronx Surface Transit Operating Authority (MaBSTOA)[3], a subsidiary of NYCT.

ANALYSIS

The two-layered bus system that has served New York City for decades had been scheduled to come to an end on June 30, 2004. That was the date upon which the relevant franchise agreements and interim operating authorities under which the seven private subsidized bus lines were to expire pursuant to law[4]. The MTA had agreed to assume responsibility for service beginning on July 1, 2004.

As stated earlier, the Committee held a hearing on June 11, 2004 to better understand the process to be undertaken, but the MTA and the DOT declined to testify. The Committee did take testimony from the following individuals, who raised issues and concerns about the transfer: Queens Borough President Helen Marshall; representatives from the Offices of the Bronx and Brooklyn Borough Presidents; Richard Conry, Superintendent of Transportation of Jamaica Buses, Inc.; Joseph Welch, International Vice President of the Amalgamated Transit Union; the respective President/Business Agents of Local Division 1056, of Local Division 1181-1061, and of Local Division 1179 of the Amalgamated Transit Union; Ed Watt, Secretary-Treasurer of TWU Local 100; Donna Pirillo, a non-union employee speaker for herself and other non-union workers of the private bus lines; and Teresa Meade, expressing her concerns as a disabled commuter. On June 30, 2004 the City Council passed Int. No. 391, which extended the operating authority of the private bus companies to December 4, 2004.

The transfer announcement of April 19, 2004 provided few details for what is a very complex, multi-layered transaction. While the buses are owned by the City of New York, most of the bus depots are not. The seven bus lines employ both unionized and non-unionized employees. Job protection for both classifications of employees, as well as pension and other benefits are still not resolved to the Council's knowledge. While the MTA has agreed to assume all union employees and honor existing collective bargaining agreements and obligations, new agreements are being negotiated, the discussions and terms of which the Council is not privy to. Perhaps, the most overarching concern, however, is that service that has heretofore been supplied by the

seven private lines not be curtailed by the MTA in any way. It is critical that this transfer result in improved service in terms of number of routes, frequency of service and quality of service.

The following represents the limited amount of information that the Council and the public are currently aware of relating to the transfer that was to take effect on July 1, 2004:

I. The MTA will be responsible for all aspects of service delivery, while the City of New York will pay the MTA the difference between the actual cost of operation and all revenues, including subsidies, fares and advertising (this means that the City will continue to subsidize the operation of these bus services to the tune of a minimum of $150 million per year);

II. The City will lease all its bus-related assets to the MTA, including approximately 440 new buses currently on order by the City, as well as two bus depots owned by the City;

III. The MTA will amend its 2000-2004 Capital Plan to set aside a $322.5 million reserve to be used for costs associated with fleet replacement, facilities and other necessary capital improvements related to the MTA's assumption of service;

IV. The City will provide any additional assets necessary for the successful assumption of service by the MTA (what this encompasses is completely unclear and potentially makes the City responsible for paying hundreds of millions of dollars in transfer costs arising from necessary purchases of infrastructure, such as additional depots, garages, buses and fueling stations);

V. The MTA will assume all union employees and will honor existing collective bargaining agreements and obligations until new agreements are negotiated (non-union employees, of which there are many impacted, are completely omitted from the transfer agreement);

VI. The MTA will not assume any preexisting liabilities, such as worker's compensation, tort claims, environmental remediation and pension obligations (these items, therefore, would continue to be the responsibility of the seven private bus line operators).

While the items listed above provide basic information regarding the terms of the upcoming transfer, there have been no details provided to the Council or the public. These bus lines serve over 400,000 persons each day and provide jobs for hundreds of employees. Service and jobs are of paramount importance to the Council and the lack of details and accountability regarding the terms of this transfer is deplorable.

One of the primary functions of the City Council is to provide a public forum for issues that concern and impact the public to be aired. The Council has jurisdiction over the City DOT and possesses oversight powers over the NYCT, the subsidiary of the MTA that provides mass transit services within New York City. The fact that both of these entities declined to attend and participate at the hearing held on June 11, a position they have unconscionably taken in the past on this issue as well, is reprehensible. The Council and the public have a right to this information.

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[1] *See:* http://www.ci.nyc.ny.us/html/dot/html/masstran/buses/bushist.html

[2] As well as for the subway system.

[3] MaBSTOA was created by the New York State Legislature on March 19, 1962 as a non-civil-service subsidiary of NYCT to take over bus service for the bankrupt Fifth Avenue Coach routes.

[4] As provided for in subdivision b of section 378 of the New York City Charter.

THE COUNCIL OF THE CITY OF NEW YORK
OFFICE OF COMMUNICATIONS

CITY HALL
NEW YORK, NY 10007
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For Immediate Release

September 8, 2004

Contact: Leticia Theodore - 212.788.7157

COUNCIL QUESTIONS WHETHER BENEFITS OUTWEIGH COSTS OF PENDING MTA BUS TAKEOVER

City Hall, NY – The Transportation Committee, chaired by Council Member John Liu, held a hearing today on the proposed Metropolitan Transportation Authority (MTA) takeover of the city-subsidized private bus lines. These lines serve some 400,000 commuters daily. Mark Page, Bloomberg Administration Budget Director, testified on behalf of the City on the status of the takeover. Also testifying were union leaders and private bus company owners.

"It is clear the City won't be saving any of the annual subsidies it pays to the private bus lines. Moreover, the City will be saddled with up to a billion dollars in upfront costs," said Chairperson Liu.

Page's testimony confirmed major concerns expressed earlier by Chairperson Liu and other elected officials. That is, Mayor Bloomberg's promise that the deal would save the City $150 million annually would not be realized and that upfront costs will be substantial. Page admitted it is unclear what the annual cost to the City will be once the takeover is complete.

What is clear is that the City will not have the same degree of input regarding the provision of service to the public, potentially leaving the door open to service reductions. In addition, the MTA is currently moving ahead with hearings to implement its second fare hike in less than two years.

"If the City does save money in the future we ask that it not be at the expense of bus services which are vitally needed," said Chairperson Liu during the hearing. "We deserve our fair share and the Administration should not allow the MTA to railroad the City into shifting scarce transit resources out of the City."

Currently, the Bloomberg Administration, the MTA, and private bus operators are in the midst of ongoing negotiations. The MTA is seeking to set up a new corporate entity to oversee the service provided by private operators.

Mr. Page appeared less than certain of a complete MTA takeover of service by the December 4th deadline. According to his testimony, the main issues hindering talks are employee benefit liabilities, the cost of acquiring bus related real assets, and the value of corporate goodwill and other intangible assets.

Chairperson Liu will hold follow up hearings on this matter on October 6th and November 4th to ensure that progress is being made.

###

Mr. OSE. Thank you, Mr. Cooper.

Our next witness is Mr. Davis Smith, who is the director of marketing and sales of Oleta Coach Lines in Williamsburg, VA. He is joined today in the audience by his father, Howard Smith.

Sir, thank you for joining us. You are recognized for 5 minutes.

Mr. SMITH. May God bless you, Mr. Chairman, and thank you. My name, again, is David Smith, and I am the director of marketing and sales for Oleta Coach Lines. My parents, Howard Smith, who is present here, and Tawana Smith founded Oleta Coach Lines in 1986 and our family has been serving the communities of Williamsburg, James City County, and York County ever since.

As you have probably had a chance to read, my father and I discussed in 2000 with the community the need of connecting Virginia's historical triangle via a motorcoach service. In 2001 our planning began, and by 2002 Oleta began regular motorcoach tours to Jamestown and Yorktown from central pickup locations in Williamsburg. We then saw the need for a mass transit service to Jamestown and Yorktown for tourists, employees, or anyone who needed just transportation to any of the four Jamestown or Yorktown sites. We started a trial service in January 2003, which led up to us having a familiarization tour with local and State level officials, including the local transit agency, in March 2003.

Oleta was applauded by all who attended, so, with help from the local press, our transit service officially began. Much to our surprise, in March 2004, it was publicized that Williamsburg Area Transport, a department of James City County, was planning to partner with Colonial Williamsburg Foundation and the National Park Service to start a pilot transportation program free or charge for tourists interested in visiting either Jamestown or Yorktown.

Operating expenses for WAT, Williamsburg Area Transport, came through an enhancement grant from the U.S. Department of the Interior totaling over $44,000. WAT's federally funded buses would operate this service from Memorial Day to Labor Day weekends, which is Williamsburg's peak tourism season.

Immediately from the start of this service our ridership drastically decreased. On June 7th, we filed an official complaint with FTA's regional office in Pennsylvania. After close to 2 months from filing our complaint, and just a few weeks before the service was over, FTA ruled that this service provided by WAT was in fact mass transit. FTA failed to acknowledge DOT and FTA statutes and regulations in that, No. 1, WAT was using DOT and FTA-funded vehicles; No. 2, the local private bus operators were not consulted with in this project; No. 3, the participation of the private enterprise was zero.

WAT, in one instance, stated in an e-mail, which we had received through the Freedom of Information Act, that Oleta, a private charter company, apparently has recently voiced concerns that they were not involved by NPS, National Park Service. This statement was made on March 2nd, close to 2 months before this service began.

FTA completely ignored two major facts: that, No. 1, Oleta was already offering this service successfully; No. 2, per all the documents and advertisement about WAT service, riders needed an ad-

mission ticket in order to ride WAT's bus, which would make this a closed door service and not open to the general public.

The first full week after this pilot program was over, I am happy to report that our ridership levels have increased dramatically. Upon preparing for this hearing, on September 28th, we learned that yet another transit organization by the name of Hampton Roads Transit had copied a passenger commuter service that Oleta had been offering since 2001. This service that Oleta was given by the Department of Motor Vehicles a Certificate of Public Convenience and Necessity connected the cities of Williamsburg, Newport News, and Hampton to relieve traffic congestions. Upon research we learned that, on September 7th, HRT began the same service through a grant received from the State totaling over $848,000. This would cover their operating expense and was also the purchase of three new coaches.

Doing further research on the situations that have been coming up with the transit organizations and the private sector, I came across a document on the Jamestown 2007 Web site. Transportation information had been collected from both transit agencies and charter bus operators for the purpose of a bus census in and around Williamsburg. Out of the 18 private providers found in surrounding cities, as well as in Williamsburg, Oleta was not listed.

We have come to the conclusion that WAT and HRT, with support of the FTA, is trying to put in particular my family's small company out of business. We pray that this subcommittee will see to it that something be done to make sure that the private sector receives maximum participation in all projects and programs related to transportation.

Thank you for your time.

[The prepared statement of Mr. Smith follows:]

Testimony Before

Subcommittee on Energy Policy, Natural Resources, and

Regulatory Affairs

Hearing On

How Can We Maximize Private Sector

Participation in Transportation? Part II

By

OLETA COACH LINES, INC.

Oleta Coach Lines, Inc., is a minority family owned and operated private bus operator. My father, Howard W. Smith, Sr., founded the company, in 1986 for the purpose of rendering a service to those who deserve to be treated with a taste of love.

In late 2000, my father and I discussed with the community the need to connect Virginia's Historic Triangle via a fixed route motorcoach service. Our research told us that there was an urgent need for this service. In 2001, we began work on this project by developing different routes to provide tourists with a convenient means to visit the three sites that make up Virginia's Historic Triangle – Colonial Williamsburg, Jamestown and Yorktown. By 2002 we began service to Jamestown & Yorktown from various hotels and resorts. We then saw the need for a mass transit/transportation service in addition to the tours that we offered to Jamestown & Yorktown. In January 2003 we began, with the help of a local Resort, trial runs of this new service. After our trial service had proven to be a success, we approached the press, state officials and members of the Virginia Tourism, Jamestown-Yorktown Foundation, National Park Service (NPS), Williamsburg Area Transport (WAT), a US Department of Transportation/Federal Transit Administration (FTA) grantee, and York County Tourism among many others and invited them on a Familiarization (FAM) Tour.

On March 4, 2003, representatives from each of these organizations participated in the FAM Tour. Our Master Plan was to have anyone who wanted to go to Jamestown or Yorktown, to drive to or ride a WAT bus to the Williamsburg Transportation Center (WTC), which was used as a transportation hub for Amtrak, WAT and Oleta. Passengers would then board the coach to Jamestown's Island & Settlement. The coach would then return to the WTC for those who did not want to continue on to Yorktown. After departing the WTC midday, passengers would arrive to Yorktown for the afternoon. At the end of the business day, the coach would return to the WTC where passengers would, once again, get into their cars or board a WAT bus.

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Based on the extraordinarily positive comments we received by all who participated in the FAM Tour, Oleta began regularly scheduled bus runs to accommodate anywhere from one person to a full coach of people who were interested in going to Jamestown or Yorktown. Please note that *Oleta required no public taxpayer subsidy to operate this fixed-route open door service.*

We operated this service successfully until Memorial Weekend of this year. In March, 2004, we learned that WAT, a Department of James City County, was planning to use tax dollars to partner with the Colonial Williamsburg Foundation and the National Park Service (NPS), to begin a pilot transportation program *free of charge* for tourists interested in visiting Jamestown or Yorktown. The service would be provided during peak tourist season only from Memorial Day to Labor Day weekends. The operating expenses for WAT would be paid for by an enhancement grant from the U.S. Department of Interior totaling over $44,000 for the first few months. WAT's federally funded buses, costing over $200,000, would be purchased with federal DOT/FTA funds to operate this service, meaning that a local transportation service, once provided successfully by private enterprise, was now to be subsidized by the Federal government. In effect, private enterprise would be barred from competition since it could not compete with a *free service*.

On June 7, 2004 Oleta filed an official complaint with the Regional Office of the FTA. It wasn't until *almost two months later,* August 2, 2004 -- *more than halfway through the pilot period* -- that FTA ruled in favor of WAT. The FTA Regional Administrator, concluding that WAT was indeed operating mass transit service, failed to acknowledge that WAT, a DOT/FTA grantee, was violating several DOT/FTA Statutes and Regulations that: (1) prohibit competition by a grantee using DOT/FTA funded vehicles (49 CFR §18.32); (2) require proper grantee notification and consultation with affected local private bus operators (49 USC §5307); (3) require meaningful participation of private enterprise operators to the maximum extent feasible (49 USC §5306); and, (4) in the case of existing private operator service that WAT wanted to displace, a DOT Secretary finding of maximum private sector participation is required (49 USC §5323).

Further, the FTA ignored the fact that this service -- virtually identical to the service Oleta provided -- was offered by WAT on only a seasonal basis. Thus, the goal of WAT could not have been to provide needed mass transportation, but instead to compete unfairly, using DOT/FTA paid-for equipment, and lure passengers away from Oleta's service. Moreover, contrary to claims by WAT representative, *the service WAT provided was not open to the public, but, in fact, riders needed to posses an admission ticket to one of the four attractions in order to ride the WAT bus.* This fact was stated in all materials and information promoting WAT's free service.

We could only conclude that WAT's sole intent was to use federal tax dollars to put a *small, minority-owned transportation provider out of business*!

Based on FTA's decision that this was mass transit service, it was obvious that several FTA non-compete Statutes and Regulations were violated as I have stated above. For example, please note that US DOT/FTA Statutes and Regulations require transportation service to be provided by private enterprise to the greatest extent feasible and in DOT's codification of its Grants Management Common Rule (GMCR), applying to all of the Department's assistance programs, forbids grantees or subgrantees from using equipment acquired with grant funds to provide service for a fee to compete unfairly with private companies providing equivalent services (49 CFR §18.32 Equipment).

From the record presented here, WAT clearly violated Federal Statutes, Regulations, and Grants Management Common Rule provisions. While the FTA failed in its responsibility to enforce such violations, James City County, the parent of WAT, voluntarily chose to withdraw the service in the future so as not to unfairly compete with private enterprise and further damage Oleta's business. Please see the attached September 14, 2004 letter from Anthony Conyers with James City County, which acknowledges the need for private enterprise participation in the future. In effect, this letter validates Oleta's claim that FTA abdicated its statutory

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responsibilities to ensure that its grantees are not unfairly competing with and excluding local private transportation providers in the planning and provision of transportation services.

In closing, we must say that, as an American tax-paying family, we are very upset that our own tax dollars were used to compete against our family business. It not only damaged our company and our livelihood, but also the families of those we employ. We can only find consolation in that now that WAT has ceased this service, our ridership connecting Virginia's Historic Triangle has improved dramatically. The demand for more bus service is growing now that public funded buses are no longer operating a free service over the same routes.

COMMUNITY SERVICES

HUMAN SERVICES CENTER, 5249-A OLDE TOWNE ROAD, WILLIAMSBURG, VIRGINIA 23188
(757) 259-3116

E-MAIL: ocs@james-city.va.us
FAX: (757) 259-3188

COLONIAL COMMUNITY CORRECTIONS
HOUSING AND COMMUNITY DEVELOPMENT
PARKS AND RECREATION
PUBLIC TRANSIT
SOCIAL SERVICES
VIRGINIA COOPERATIVE EXTENSION SERVICE

September 14, 2004

Ms. Dorothy Geyer
Colonial NHP
P.O. Box 210
Yorktown, VA 23690

Dear Ms. Geyer:

As we approach the completion of the first year of the Jamestown Area Shuttle, I think it is a good time to begin planning for the future of this service. Williamsburg Area Transport (WAT) has been pleased to operate this successful pilot project, but does not intend to operate the route in the future.

As you know, a private provider has alleged that WAT's provision of this service is illegal. WAT clearly received assurances at both the State and Federal level before implementation that WAT could legally provide this service and our legal authority to provide the service was upheld by the Federal Transit Administration after a formal complaint had been filed. However, we have determined that there has been a major administrative burden associated with the service. Much of that burden was due to the unsuccessful challenge.

I would recommend that the National Park Service make plans to contract with a private provider if you wish to continue the service in the future. WAT would be happy to assist you in this process and will do whatever we can to facilitate a successful partnership between the National Park Service and a private provider. If you find that there are no willing and able providers after pursuing a procurement process, then WAT would be willing to entertain the potential for operating the service in the future.

I hope you understand our position. If you have any questions or want to discuss th matter further, please contact me.

Sincerely,

Anthony Conyers
Manager of Community Services

cc: Nancy Greene, FTA
Howard Smith, Oleta
Sandy Wanner, County Administrator
Mark Duncan, Colonial Williamsburg
Danny McDaniel, Colonial Williamsburg

Commonwealth of Virginia

DEPARTMENT OF MOTOR VEHICLES
REGULAR ROUTE COMMON CARRIER - PASSENGER
CERTIFICATE OF PUBLIC CONVENIENCE AND NECESSITY

OLETA COACH LINES INC
101 DOGWOOD DR
WILLIAMSBURG VA 23185

This is to certify that the above named carrier is hereby issued a certificate to operate as a regular route common carrier - passenger service in the Commonwealth of Virginia provided such operation is in compliance with Chapter 20, Title 46.2 of the Code of Virginia, and the requirements and restrictions listed on the back of this certificate. Under this certificate, the carrier's service routes are limited to those listed on the attached appendix.

This certificate is effective January 3, 2003.

Number: 2678

DEPARTMENT OF MOTOR VEHICLES

BY: A M Quillen
Asbury M. Quillen
Commissioner

APPENDIX

OLETA COACH LINES INC
CERTIFICATE: 2678
EFFECTIVE DATE: January 3, 2003
SERVICE ROUTES

DEPARTING WILLIAMSBURG, VIRGINIA, AT 468 BOUNDARY STREET, TO ROUTE 60 EAST, TO ROUTE 31 SOUTH, TO JAMESTOWN/JAMESTOWN ISLAND, THEN ONTO THE COLONIAL PARKWAY PAST THE INFORMATION CENTER OF COLONIAL WILLIAMSBURG ONTO ROUTE 132 SOUTH TO LAFAYETTE STREET, TURNING RIGHT ONTO NORTH BOUNDARY STREET INTO THE WILLIAMSBURG TRANSPORTATION CENTER, 468 BOUNDARY STREET, WILLIAMSBURG, VIRGINIA. BACK TO LAFAYETTE STREET TURNING LEFT ONTO ROUTE 132 NORTH, TO THE COLONIAL PARKWAY, TURNING LEFT CROSSING ROUTE 238 AND INTO THE VICTORY CENTER OF YORKTOWN, AND INTO YORKTOWN, VIRGINIA, AND THE NATIONAL PARK SERVICE VISITOR CENTER. RETURNING TO WILLIAMSBURG, VIRGINIA, FROM THE NATIONAL PARK SERVICE VISITOR CENTER ONTO THE COLONIAL PARKWAY WEST PAST THE INFORMATION CENTER OF COLONIAL WILLIAMSBURG ONTO ROUTE 132 SOUTH, TURNING RIGHT

ONTO LAFAYETTE STREET, NORTH TO BOUNDARY STREET
AND INTO THE WILLIAMSBURG TRANSPORTATION CENTER,
468 NORTH BOUNDARY STREET, WILLIAMSBURG, VIRGINIA.

COMMONWEALTH OF VIRGINIA

Department of Motor Vehicles

CERTIFICATE
OF

PUBLIC CONVENIENCE AND NECESSITY
NUMBER P-2670

OLETA COACH LINES, INC.
WILLIAMSBURG, VIRGINIA

is hereby authorized to furnish *Passenger* service, by means of motor propelled vehicles pursuant to the provisions of Section 46.2-2004 of the Code of Virginia, to operate via regular routes within the following geographic area:

SEE "APPENDIX A" ATTACHED HERETO AND MADE A
PART OF THIS CERTIFICATE

in accordance with Time Schedules and Tariffs of rates or fares and charges on file with the Department and subject to conditions and limitations noted below:

CONDITIONS: NONE

All motor vehicles operated under and by virtue and authority of this Certificate must be operated in accordance with Chapter 20, Title 46.2, Code of Virginia, and applicable rules and regulations of the Department of Motor Vehicles.

LIMITATIONS: SEE APPENDIX "A" ATTACHED

Dated at Richmond, Virginia on August 9, 2001.

DEPARTMENT OF MOTOR VEHICLES

BY: _____
Asbury W. Quillian
Acting Commissioner

MC-012

Appendix A
Certificate Number P-2670
OLETA COACH LINES, INC.
Case Number MC-0100036SC
August 9, 2001

ROUTE DESCRIPTION

From the Williamsburg Transportation Center on North Boundary Street, to Lafayette Street, and then head East to Rt. 60E, taking Rt. 199E – I-64E – 258 (Mercury Boulevard) to the Coliseum Mall (Wards parking lot). This is the turn-around point of route back to Williamsburg. From Wards parking lot to Mercury Boulevard, making a right onto Mercury Boulevard, to I-64W – Rt. 143E – The Patrick Henry Mall (North end next to the Comfort Inn Hotel). From the parking lot to Rt. 143W – I-64W – Rt. 199W – Rt. 60W – Lafayette Street to the Williamsburg Transportation Center.

Mr. OSE. I thank the gentleman for his attendance and testimony.

Our final witness in the second panel is Mr Steven Diaz, esq. He is former Chief Counsel for the Federal Transit Administration at the Department of Transportation, now in private practice.

Sir, thank you for joining us. You are recognized for 5 minutes.

Mr. DIAZ. Thank you, Mr. Chairman. I am honored to be here. My name is Steven Diaz. I am an attorney based here in Washington. I have spent the past 30 years practicing mass transportation law, half the time in public practice, half the time in private practice. My testimony today represents my own personal opinion of long standing and is addressed to the issue of private sector participation in mass transportation. I will address specifically the rescission by the Clinton administration of the private enterprise policy of the FTA, which was adopted in the Reagan administration. I have also submitted supplemental documents in support of my testimony.

As the single largest source of mass transportation investment, the Federal Government plays a central role in encouraging and facilitating policies used around the country to implement mass transportation programs. From the beginning of the mass transit program, Congress has demanded that federally appropriated funds be used to increase the mass transportation available to our citizens, not merely to replace private ownership with public ownership and not to duplicate or undermine existing transportation offered by private investment.

Diverging transit investment is a matter of getting and keeping America moving, a practical matter, not a matter of ideology or partisan purpose. Both great Republicans and great Democrats have forged a policy of leveraging public with private equity in transit.

As the supplemental materials I have supplied demonstrate, the pursuit of the maximum use of private operators in mass transportation long has been supported by such leaders as Senators George Mitchell, Bob Dole, Mark Hatfield, Bob Graham of Florida, and the late Daniel Patrick Moynihan of New York. Indeed, David Osborne, coauthor of Reinventing Government, who was one of the principal manager advisors to the Clinton administration, specifically praised the FTA Office of Private Sector Initiatives and the agency's former private sector guidance as a model for the effective management of government-assisted transit programs. Mr. Osborne implored the Federal Transit Administration not to rescind its private sector guidance.

This practical approach is shared by America's elected State and local leaders as well. Public sector leaders, such as Mayor Kurt Schmoke of Baltimore, Mayor Frank Jordan of San Francisco, Governor Lawton Chiles of Florida, and Governor William Donald Schaeffer of Maryland, among others, specifically endorsed the policy prior to its rescission. The strong positive effect that private sector-oriented transit programming has traditionally had in minority communities is underscored by the statistics cited by former Congressman Alan Wheat in the letter he wrote to try to persuade the FTA not to abandon its private sector guidance. In the same vein, the Eastern Paralyzed Veterans Association noted its concern

for the negative impact upon the disability community of a Federal withdrawal from a strong private sector participation policy.

The Office of Advocacy of the Small Business Administration also admonished the Department of Transportation not to abandon the private enterprise guidance. In a scholarly review of the sources for the guidance and a reasoned analysis of its impact, the Office of Advocacy spoke with candor and urgency in support of the policy.

Each of these writers had a different emphasis in supporting a strong Federal policy for the utilization of private sector operators, but the very wide array of commentators and their various separate reasons are themselves indications of the scope and the importance of the contribution that private operators of mass transportation services have made. There is every reason to encourage such participation and, indeed, to strengthen this important and vital element of our national transportation infrastructure, which has always been a mandatory, if not always enforced, feature of the Federal transit program.

You have heard from a number of witnesses who have given a good overview of why reform is needed. Although it is sometimes said that the Federal Transit Administration is not a regulatory agency—I believe that was reiterated this morning when the Administrator said we are a grantmaking agency—it defies common sense to say that billions of dollars of federally appropriated funds are simply given out with no concomitant Federal fiduciary obligation. Money is appropriated by Congress for specific purposes, and upon specific conditions; hence the 18 existing FTA rules already published in the Code of Federal Regulations.

If Congress is serious about encouraging Federal transit infrastructure investment leveraged with private equity, it must require an implementing regulation to that effect. This is especially true in light of the enforcement experience we have had without such a regulation, as demonstrated particularly by the case studies which have been presented to the subcommittee. After all, in management in the public sector, just as in management in the private sector, it is always a question of getting the most bang for the buck.

Mr. Chairman, I thank the subcommittee for its interest in my views, and I am pleased to respond to any questions you may have.

[The prepared statement of Mr. Diaz follows:]

TESTIMONY

OF STEVEN A. DIAZ

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.

SEPTEMBER 30, 2004

Mr. Chairman and Members of the Subcommittee:

I am Steven Diaz, an attorney in private practice in Washington, D.C. I served as Chief Counsel of the Federal Transit Administration from 1989-1993 and as a member of the U.S. Architectural and Transportation Barriers Compliance Board from 1985-1989. I also served as Deputy City Attorney of the City and County of San Francisco, California from 1974-1985 and as the founding Chairman of the Transit and Intermodal Transportation Law Committee of the Transportation Research Board. I have spent half of my thirty years of practice in public service and half in private practice. I have spent all of the past thirty years practicing in the area of mass transportation law. I am honored by the Subcommittee's request for my testimony this morning.

My testimony today represents my own personal opinion of long-standing and is addressed to the issue of private sector participation in the mass transportation programs of the Federal government. Particularly, I will address the rescission by the Clinton Administration of the Private Enterprise Policy of the Federal Transit Administration which was adopted in the Reagan Administration. I have separately submitted to the Subcommittee a number of supplemental documents in support of my testimony.

It is beyond controversy to note that the need for mass transportation infrastructure in the United States continues to grow exponentially and far in excess of any reasonable expectation of public appropriations to support it. That is the reason that in 1991 a deeply bi-partisan majority passed landmark Intermodal Surface Transportation Efficiency Act encouraging the leveraging of infrastructure appropriations with private investment.

As the single largest source of mass transportation investment, the Federal government plays a central role in encouraging, leading and facilitating expenditures and policies used around the country to implement mass transportation programs. From the beginning of the Federal mass transit program, Congress has demanded that federally appropriated funds be used to increase the mass transportation available to our citizens, not merely to replace private ownership with public ownership, and not to duplicate or undermine existing transportation facilities and activities offered by private investment.

The principle of leveraging public investment with private capital underlies the Charter Regulation and the School Bus Regulation of the Federal Transit Administration. It is the same principle which brought into being the phrase "to the maximum extent feasible" with regard to the use of private operators of mass transportation services in the Federal Transit Act.

Leveraging infrastructure investment is a matter of getting and keeping America moving, a practical matter, not a matter of ideology or partisan purpose. Both great Republicans and great Democrats have forged the policy of leveraging public with private efforts in the field of mass transportation. As the supplemental materials I have supplied to the Subcommittee demonstrate, the pursuit of the maximum use of private operators and other private resources in mass transportation long has been supported by such leaders as Senators George Mitchell, Bob Dole, Mark Hatfield, Bob Graham of Florida and the late Daniel Patrick Moynihan of New York.

Indeed, David Osborne, coauthor of the book *Reinventing Government*, who was one of the principal advisors to the Administration of President Bill Clinton, specifically praised the FTA Office of Private Sector Initiatives and the agency's private sector

guidance as a model for the effective management of government-assisted transit programs. Mr. Osborne implored the Federal Transit Administration not to rescind its private sector guidance.

This practical approach is shared by America's elected state and local leaders as well. Public sector leaders such as Mayor Kurt Schmoke of Baltimore and Mayor Frank Jordan of San Francisco, Governor Lawton Chiles of Florida, and Governor William Donald Schaffer of Maryland, among others, specifically endorsed the policy prior to its rescission.

The strong positive effect that private sector-oriented transit programming has traditionally had in minority communities is underscored by the statistics cited by former Congressman Alan Wheat in the letter he wrote to try to persuade the FTA not to abandon its private sector guidance.

Similarly, the Eastern Paralyzed Veterans Association noted its concern for the negative impact upon the disability community of a Federal withdrawal from a strong private sector participation policy.

The Office of Advocacy of the Small Business Administration, one of the Congress' unique watchdog agencies, also admonished the Department of Transportation not to abandon the private enterprise guidance. In a scholarly review of the sources for the guidance and a reasoned analysis of its impact, the Office of Advocacy spoke with candor and urgency in support of the policy regulations.

Each of these writers had a different emphasis in supporting a strong Federal policy for the utilization of private sector operators, but the wide array of commentators and their separate reasons are themselves indications of the scope and significance of the

contribution that private operators of mass transportation services have made. There is every reason to encourage such participation, and indeed to strengthen this important and vital element of our national transportation infrastructure which has always been a mandatory (if not always enforced) feature of the Federal transit program.

You have heard from a number of witnesses who have given a good overview of why reform is needed. A Federal mandate for the utilization of private sector transit operators, not in competition with public agencies, but as a natural community resource to assure more and more varied sources of mass transportation services will help meet the nations' urgent transit requirements.

Although it is sometimes said that the Federal Transit Administration is "not a regulatory agency" it defies common sense to say that billions of dollars of federally appropriated funds are simply given out with no concomitant Federal fiduciary obligation. Money is appropriated by Congress for specific purposes -- and upon specified conditions -- hence the 18 existing FTA regulations already in the Code of Federal Regulations. If Congress is serious about encouraging Federal transit infrastructure investment with private equity, it must require an implementing regulation to that effect. This is especially true in light of the enforcement experience we have without such a regulation, as demonstrated by the case studies which have been presented to the Subcommittee.

There can be no reasonable objection to measuring the efficiency and economy of alternative service models if our common objective is more and better transit. Competition, the engine of our economy, is necessarily the best way to challenge and encourage the development and implementation of the most efficient and economic mass

transportation possible. After all, in management in the public sector, as in the private sector, it is always a question of getting the most "bang for the buck." The Private Enterprise Policy was an invaluable fiscal tool which served the government and the people very well.

Mr. Chairman, I thank the Subcommittee for its interest in my views and would be pleased to respond to any questions you may have for me.

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TESTIMONY OF

STEVEN A. DIAZ

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HISTORICAL REVIEW OF THE FTA PRIVATE ENTERPRISE PARTICIPATION POLICY

BACKGROUND

In 1964, the Congress first established the Federal Transit Act, known before 1991 as the Urban Mass Transportation Act (Act). This Act was designed to provide support for mass transportation infrastructure in the United States. Since the adoption of the Act over thirty years ago, through liberal, conservative, and moderate administrations alike, the Federal mass transit program has always required that private operators be utilized to the "maximum extent feasible" as a condition of Federal assistance. The Act specifically forbids interference with private non-subsidized mass transportation services by federally assisted transit operators. These private operator participation requirements are a key element of the effort of the Intermodal Surface Transportation Efficiency Act of 1991 (ISTEA) and subsequent reauthorizations to "leverage" private investment in this important component of national infrastructure.

In 1984, the Federal Transit Administration (FTA) promulgated a private enterprise participation policy. This policy required that federally assisted transit programs periodically review their service routes to determine whether private operators could provide the service more efficiently and effectively than the public operator; that federally assisted operators determine the feasibility of utilizing private operators before they undertake new or significantly restructured services; and, that federally assisted operators compare their "fully allocated costs" (including overhead and public subsidies) when competing against private, unsubsidized operators. This policy also required that transit grant recipients publish the procedures they will use to evaluate new or restructured service and provide for a local appeal of the public/private service determination. The final determination to use either public or private service was left to the transit grant recipient under the policy. David Osborne and Ted Baebler cite this policy as an example of how the federal government should operate at page 85 f this book, Reinventing Government.

THE PROBLEM

On November 26, 1993, the FTA announced its intention to rescind the private enterprise participation policy, notwithstanding the fact that the Act itself mandates that a special finding be made for each individual grant application that the prospective recipient of federal transit assistance funding utilizes private sector providers "to the maximum extent feasible." This finding is a condition of transit grant eligibility. The FTA replaced the grant-by-grant private enterprise participation finding with a three year compliance review. The Act provides that grant funding may not be withheld as a result of local planning procedures or the periodic review by the FTA of program compliance. Therefore, the Congress already has disallowed the FTA's review of private enterprise participation compliance by grantees as part of a three year programmatic audit as a compliance tool. In any event, three year periodic reviews do not satisfy the need for grant-by-grant compliance findings, nor do they provide adequate recourse for affected private providers inasmuch as the administrative "remedy" is be unduly delayed and forces the FTA to cut off grant funding (because violation of grant conditions already have occurred) instead of being able to oversee the process in an orderly and prospective manner. Further, affected private companies are forced to file lawsuits or acquiesce in violations of their

statutory rights, although such suits have been successfully defended on the grounds that the Act provides "no private right of action."

DISCUSSION

Former Senator Majority Leader George Mitchell and former Senator Minority Leader Bob Dole both opposed to the FTA's change of policy. Likewise, David Osborne, who wrote that the FTA's private enterprise participation program is a model for the federal government, also opposes the policy change.

Others who actively opposed the change in policy include Representative Alan Wheat (who is concerned about the negative impact of the change on minority enterprises and the Black community); the Eastern Paralyzed Veterans Association (who share Senator Dole's concerns for the impact of the change on the implementation of the Americans with Disabilities Act (ADA)); and such state and local officials as Mayors Kurt Schmoke of Baltimore and Frank Jordan of San Francisco as well as Governors Lawton Chiles of Florida and William Donald Schaeffer of Maryland, among others.

There are over 550,000 working men and women (drivers, mechanics, and office personnel) engaged in the private mass transportation industry in the United States (consisting of over 9,000 taxicab, van, and bus companies) who have an enormous stake in the outcome of this matter. Collectively, the private sector provides transportation for over 2 billion passengers annually – this is one of every five transit trips taken in the U.S. While the FTA would have you believe that there will be no change in the utilization of the private sector in federally assisted transit operations if the federal government makes the proposed change in policy, this is simply not the case. A good example of the need for federal oversight of the manner in which federal transit assistance is utilized can be seen in the attached article from the San Francisco Chronicle of March 14, 1994, and the attached article from the New York Daily News of September 9, 2004.

The various arguments advanced for the change of policy, including the claims that the former process was burdensome and invasive of local prerogatives, are demonstrably erroneous. As a survey of all FTA enforcement proceedings on the private enterprise participation policy shows (there are only a dozen such actions, and none involve defunding a project or altering a local preference for public or private service), it is the clear intention of the federal government to demand efficiency and competition which produced a largely self-policing public/private collaboration for more and better transit services within costs that are mindful of efficient alternatives.

The policy did not undermine local service choices merely because it requires grant recipients to have the facts about service costs before they decide how to spend federal assistance funding. The policy protected taxpayers and consumers by relying upon competitive service procurement.

SUMMARY OF ISSUES

The main issues in this matter are: 1) the private enterprise participation policy is good for jobs and small businesses; 2) the private enterprise participation policy is necessary to assure

competition in federally funded transit activities; 3) the policy is necessary to leverage public transit investments with private investment in transit; and, 4) the policy is an outcome neutral vehicle to assure proper stewardship of federal funds. These points may be filled out by the following outline:

1. The Private Enterprise Participation Policy Is Good For Jobs And Small Businesses.

   Over 550,000 men and women are employed in the private transit industry as drivers, mechanics, and office personnel. Collectively, they work in over 9,000 generally small Businesses across the country. These workers are often unionized and depend upon an open and competitive market for transit services in order to make their livelihoods. See, attached letter from the Small Business Administration. Many of these people are minorities. See, attached letter from Alan wheat.

2. The Private Enterprise Participation Policy Is Necessary to Assure Competition In Federally Funded Transit Activities.

   Every organization requires competition to stimulate efficiency and innovation. Federally funded activities are especially subject to lack of innovation due to the fact that grant money arrives in a steady, unchallenged flow which doesn't come from any local source which is likely to complain to transit officials about inefficiency. Thus, this painless "entitlement" comes with no incentive to search for efficiencies or alternatives. By requiring transit authorities to know the true costs involved in providing service ("fully allocated costs"), the realities of a transit service are revealed to local decisionmakers. By requiring an analysis of the feasibility of utilizing private providers for new or significantly restructured service, the federal policy assures that whether the service option selected is public or private, the efficiencies and economies which are forced by competition will provide the maximum benefit for the expenditure. Experience has demonstrated that without the Federal policy many transit grantees will not consider the private alternatives, and therefore are deprived of the benefits of competition. See the letter from David Osborne.

3. The Policy Is Necessary To Leverage Public Transit Investment With Private Investment.

   An essential element of the Intermodal Surface Transportation Efficient Act of 1991 (ISTEA) and subsequent reauthorizations is the leveraging of private investment into the national transit infrastructure. This is reiterated in the most clear terms by Senate Majority Leader George Mitchell, in the attached letter to the DOT. Without the FTA private enterprise participation policy, and the competition it requires, there is little incentive or opportunity to draw private resources into transit services. This is particularly important when it comes to the implementation of the Americans With Disabilities Act (ADA). See the letter from the EPVA.

4. The Policy Is Necessary To Assure Proper Stewardship Of Federal Funds.

   The Federal transit program is not a block-grant program like the HUD program. The Federal transit program is an infrastructure investment of the Federal government. The statue

which authorizes this program requires that the private sector be considered, and leveraged into, the projects it funds. The statute mandates utilization of the private sector "to the maximum extent feasible" as a condition of grant funding. Further, the statute specifically enjoins the FTA to encourage the utilization of the private sector "to the maximum extent feasible." See the letters of Mayors Schmoke and Jordan, Governor Chiles, and the 1993 resolution of the Fairfax County, VA. Board of Supervisors.

PROCEDURAL REVIEW OF
THE RESCISSION OF THE FTA PRIVATE ENTERPRISE PARTICIPATION POLICY

I. INTRODUCTION AND REQUEST FOR RULEMAKING.

On November 26, 1993, the Federal Transit Administration (FTA) published a Notice of Proposed Recision of Private Enterprise Participation Guidance (Notice) in the Federal Register. This Notice announced the intention of the FTA to abolish the underlying administrative procedures by which the private enterprise participation requirements of the Federal Transit Act (Act) are enforced.

Although apparently following Federal rulemaking procedures, the Notice declared that the FTA did not consider or treat the matter as a "rulemaking" under the Administrative Procedures Act (APA).

II. THE PRIVATE ENTERPRISE REQUIREMENTS OF THE FTA.

A. Background.

For the past 30 years, the Act has specified certain protections and activities for private enterprise, both in the planning and the operational provisions of the Act. The statutory requirement is that public entities seeking federal transit assistance must utilize the private sector "to the maximum extent feasible." This is the source of the private enterprise participation guidelines of the FTA.

B. The Statutory Framework..

1. The Private Enterprise Requirements.

There are at least six provisions of the Act relating to private enterprise participation in the federally assisted transit program. Three of these sections [3(e), 8(o), and 9(e)(1)] contain the basic mandate that grantees must utilize private enterprise "to the maximum extent feasible." Three of these sections [8(g)(4), 8(h), and 9(f)] require the proactive involvement of the private sector in federally assisted transit planning. Section 8(I)(5) of the Act prohibits enforcement of the private enterprise requirements on a periodic review basis, thereby endorsing the long established administrative practice of applying the private enterprise requirements on a project by project basis. The Secretary of Transportation is required to make an affirmative finding of compliance with the private enterprise participation requirements as an express condition of each grant made in the transit assistance program. The FTA utilizes the "maximum extent feasible" standard in enforcement of the Americans With Disabilities Act (ADA) as mandatory language.

2. The Procurement Requirements.

Section 3(a)(2)(c) of the Act prohibits procurements that are "exclusionary and discriminatory." Under the FTA procurement requirements as set forth in Circular 422.01(B), any factor utilized to deprive the private sector of the statutory right to participate to the maximum extent feasible

but which is not justified by another provision of law, violates the exclusionary and discriminatory prohibition. Therefore, open and competitive procurement mandates require that private enterprise be considered in the offering of new or expanded transit services.

C. The Regulatory Requirements.

1. The Private Enterprise Participation Provisions.

FTA policy afforded maximum local flexibility in decision making and expressly reserved to local transit assistance recipients the final determination of the utilization of public or private service providers. However, the policy explicitly required that local authorities knew what the actual costs of providing publicly financed service might have been before making that decision. Local authorities were free to consider any factor that they considered relevant to such decisions, provided they disclosed what those criteria might have been.

2. Enforcement.

There have been only 12 enforcement proceedings under the private enterprise participation policy. Eight of these matters were dismissed because they only challenged the local public/private decision: the FTA policy prohibits interference with such local decisions. Two matters dealt with the failure of the same grantee to adopt a written policy to let affected private operators know the process by which the grantee would make the public/private decision and affording a hearing opportunity to review and decide local objections. Only two decisions have dealt with "violations": one involved an administrative admonition not to violate the policy again, without disturbing the local decision, and one told a grantee that it could make any decision appropriate, but if the decision violated the statutory requirement of private sector involvement that the FTA would not fund that particular project. The record shows minimal Federal interference.

D. Analysis Of The Notice.

Although the Notice purported to respond to complaints and comments about the "burdens" of the private enterprise participation policy, in response to a Freedom of Information Act (FOIA) request, no record of a single such complaint or comment was produced. In fact, there have been no such matters for over two years prior to the publication of the Notice.

1. The Requirement of Route Review Was Not Unduly Burdensome.

Again, in response to a FOIA request for documentation to support the claim that periodic route review to ascertain if competition would produce a more efficient service is burdensome, there was no documentation produced.

2. Fully Allocated Cost Analysis.

Objections to utilizing fully allocated costs, or the acknowledgments of public subsidy in analyzing the cost of providing service are a disingenuous exercise in avoiding the statutory prohibition of using Federal assistance directly to compete against privately financed

businesses. These objections are further misstated in that any "unavoidable" costs may be discounted, after disclosure when evaluating public versus private transit options, at the discretion of the local grantee.

Objections to the fully allocated cost methodology are fundamentally objections to full disclosure of management stewardship of public resources, and a device for unfair competition against private unsubsidized operators.

3. Local Institutional Barriers.

It is argued by the FTA that local grantees should be able to avoid Federal statutory conditions by passing local ordinances or entering into third party agreements to avoid the Federal funding conditions. This proposition has been rejected by Federal funding programs consistently since it was first raised as a device to deprive equal opportunity based upon local prejudices.

4. The Appeal Process Did Not Interfere With Local Decisionmaking.

As noted above, local decisionmakers have the right to make the final determination regarding public and private service options. Federal requirements only mandated that these decisions be made on an informed basis. The review of enforcement actions, above, graphically demonstrates that there is virtually no burden associated with the Federal appeal process that is necessary to assure compliance with congressional mandates.

III. PROCEDURAL OBJECTIONS.

A. The Notice Was Not Legally Adequate.

The Act requires that all substantial regulatory actions by the FTA be taken by rulemaking. The Notice itself admits that the contemplated action will have considerable effects, affecting settled expectations. Because the Notice claimed that rulemaking procedures do not apply, this action violates the standards of the law, especially as set forth in Motor Vehicle Mfrs. Ass'n. v. State Farm Mut., 463 U.S. 29 (1983).

B. The Notice Does Not Reflect The Record Before The Agency.

As demonstrated by the response to the FOIA request, the underlying circumstances which the FTA claims gave rise to the Notice cannot be supported in the records of the agency. In fact, a careful study of FTA files demonstrates that the available documentation absolutely contradicts each of the four claims set forth in the Notice.

IV. CONCLUSION.

Neither the facts or the law supported action by the FTA to abolish the private enterprise participation guidance.

DAVID OSBORNE
25 Belcher Street
Essex, MA 01929
508-768-3244

August 20, 1993

The Honorable Federico Peña
Secretary of Transportation
U.S. Department of Transportation
400 Seventh Street, S.W.
Washington, D.C. 20590

Dear Secretary Peña,

It has recently come to my attention that there is some interest in the Department of Transportation in reviewing the functions of the Office of Private Sector Initiatives (OPSI) in the Federal Transit Administration (FTA).

As you may be aware, in Reinventing Government (p. 85), I specifically cited the efforts of the OPSI's public/private program to achieve competition and efficiency in the delivery of government services. 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 defined transit objectives. Yet it mandates no particular conclusion: local authorities are left with the final power to choose the local service deliverers that best serve them. This policy seems quite modest to me in light of the very strong pro-private sector provisions of the Federal Transit Act, most recently reiterated in the Intermodal Surface Transportation Efficiency Act of 1991.

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.

I realize that the Administrator-designate of the FTA has not yet been confirmed, and that you will therefore probably not undertake any substantive modification of the program policy until he is free to guide the process. Nonetheless, I do want to give an early indication of my active interest in this matter.

I wish you the best of luck in your efforts to reinvent the Transportation Department. I spoke at the kick-off meeting of your Reinvention Team, and I would be happy to help in any other way. Please don't hesitate to call on me.

Sincerely,

David Osborne

David Osborne

cc: Vice President Al Gore
Deputy Secretary Mortimer Downey
Deputy Administrator Grace Crunican

GEORGE J. MITCHELL
MAINE

United States Senate
Office of the Majority Leader
Washington, DC 20510-7010

September 23, 1993

The Honorable Federico Pena
Secretary
Department of Transportation
400 Seventh Street, SW
Washington, DC 20590

Dear Mr. Secretary:

I understand that a working group has been convened within the Department of Transportation for the purpose of reviewing the Private Enterprise Policy and the role of the Office of Private Sector Initiatives within the Federal Transit Administration (FTA). Having spent hundreds of hours as a conferee on the 1991 Intermodal Surface Transportation Efficiency Act (ISTEA), I am concerned about this review and the possibility that FTA may take a step backward from both ISTEA and public-private partnerships that have been encouraged to meet local needs.

I believe there continues to be a broad consensus in the Congress in support of the concept of public-private cooperation in providing mass transportation services, particularly among Members who represent rural areas. The Private Enterprise Policy works. Local authorities consider locally available alternatives, public and private, to ensure that local service delivery is tailored to meet local needs in the most cost-effective and practical manner possible. I am very concerned about any efforts that may remove local flexibility in determining how best to meet local needs. In many cases in Maine, the private sector plays a critical role in assisting communities to meet their transit needs. The competition between public and private transit providers helps constrain costs, which is particularly important given the large gap between available funding and demand for transit assistance.

With regard to ISTEA, the Act sought to expand public-private partnerships, not contract them. Prior to ISTEA, the private sector was not eligible to compete for Section 16 (elderly and disabled funds) and Section 18 (rural funds). Under ISTEA, that is no longer the case. Metropolitan Planning Organizations (MPOs) may choose the most appropriate and cost-effective means of transit delivery, public or private. I do not believe that the consensus among Members with regard to an MPO's ability to choose private transit assistance where appropriate has changed.

The Honorable Federico Pena
September 23, 1993
Page 2

I share your concern that policies ought to be reviewed to ensure that they are working as intended. I have met with service providers in Maine and I believe that the Private Enterprise Policy is working well. I would very much appreciate being kept informed of the efforts of the Department of Transportation generally and the FTA specifically with regard to any changes under consideration to the Private Enterprise Policy and the Office of Private Sector Initiatives.

In the meantime, I am very interested in learning more about the intentions of the FTA working group with regard to public-private partnerships.

I look forward to your response.

With best regards

Sincerely,

George Mitchell

George Mitchell

BOB DOLE
KANSAS
141 SENATE HART BUILDING
(202) 224-6521

COMMITTEES:
AGRICULTURE, NUTRITION, AND FORESTRY
FINANCE
RULES

United States Senate

WASHINGTON, DC 20510-1601

September 30, 1993

Honorable Federico F. Peña
Secretary
Department of Transportation
400 Seventh Street, S.W.
Washington, D.C. 20590

Dear Mr. Secretary:

I write to express my concern about changes to the private enterprise policy of the Federal Transit Administration (FTA) which are being considered in the Department of Transportation at the present time.

My interest in the private enterprise aspects of Federal transportation policy is significant and continuing. I am firmly committed to cooperative efforts between public and private entities to maximize access to mass transportation, to the well-being of small business enterprise in the United States, and to the attainment of the goals of the Americans With Disabilities Act (ADA). The private transportation industry is an important component of these interests.

As you know, there is a longstanding and bi-partisan tradition of commitment to private enterprise-sponsored transit service in the United States. The policy of promoting competition in government services often has been reiterated by Vice President Albert Gore, Jr. For example, on May 24, 1993, the Vice President, writing in an Op-Ed column in the New York Times said: "We are working to change the very culture of our Government. We want a Government that measures performance and puts its customers first. We want to inject competition within Government and make Government more market-oriented." Examples of the social and economic benefits achieved under the private enterprise policy and OPSI activity include: opportunities for minorities, cost savings, and attainment of ADA initiatives.

I ask that you please provide me with an outline of your plans for extending the benefits of the private sector policy of the Federal Transit Administration and the programmatic activities of POSI. In this regard, I am particularly interested in the enforcement of the cost comparison provision of the Private Enterprise Policy. I look forward to your early reply.

Sincerely,

BOB DOLE
United States Senate

BD/gs

N WHEAT
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MEMBER
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RULES
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833-4646

October 25, 1993

The Honorable Gordon J. Linton
Administrator
Federal Transit Administration
400 Seventh St, S.W., Room 9328
Washington, DC 20590

Dear Administrator Linton:

I write to you to express my urgent concern about changes I am told are being proposed to the Private Enterprise Policy (PEP) and the Office of Private Sector Initiatives (OPSI). I have personal knowledge of the taxicab and para-transit industry and its role in the economic life of the African-American community, and I am alarmed about these possible changes.

In my view, the PEP and the OPSI have long served the nation's transit needs in many ways, by helping to ensure access and mobility to users of publicly funded transit systems. The PEP has helped meet the needs of the Americans With Disability Act and adapt to the increasing demand for suburban mobility. Further, it is the competition, flexibility of policy and the leveraging of private resources to supplement public funds which have helped to keep federal transit policy in tune with the 90's.

According to figures published by the Federel Transit Administration in June of 1988, approximately 33 percent of all urban drivers were African-Americans in the taxicab and paratransit industry in 1986. At the date of the study, African-Americans constituted 12.2 percent of the population of the United States as a whole. These figures demonstrate the importance of this industry to the African-American community. Further, it is an historical fact that minority ownership of local taxicab and paratransit businesses has been a longstanding and significant beachead for economic empowerment among African-Americans in particular.

I urge your immediate reconsideration of the implications of any change in the Private Enterprise Policy or the Office of Private Sector Initiatives.

Thank you for your consideration.

Sincerely

Alan Wheat
Member of Congress

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Eastern Paralyzed Veterans Association
75-20 Astoria Blvd
Jackson Heights NY 11370-1178
Executive Office
(718) 803 EPVA

November 19, 1993

Hon. Gordon J. Linton
Federal Transit Administration
US Department of Transportation
400 7th Street, S.W.
Suite 9328
Washington, DC 20580

Dear Administrator Linton:

The Eastern Paralyzed Veterans Association (EPVA) is a membership organization comprised of veterans who have incurred spinal cord injuries. All of our members are mobility impaired.

For years we have been active in seeking transportation alternatives for people with disabilities, including rendering mass transit systems accessible and the creation of meaningful paratransit programs.

Rumors are circulating that the Federal Transit Administration (FTA) is planning on curtailing the Private Enterprise Policy of the Office of Private Sector Initiatives. It is this organization's fear that limiting private sector involvement in the provision of paratransit will have an adverse effect on severely disabled persons who currently rely on private contractors for paratransit services.

Since many public systems will be unable to provide adequate paratransit services without the participation of private contractors in the foreseeable future, your office should encourage, not discourage, the involvement of private operators in public paratransit programs.

For the past 17 years, I have been involved in the struggle to make mass transit accessible and to provide paratransit for those who cannot use even accessible systems because of the severity of their disabilities. I have never heard advocates for people with disabilities promoting publicly operated paratransit over privately operated paratransit. Our objective was merely to ensure the adequacy of paratransit service by imposing paratransit responsibility on operators of public systems. It was not our intent to displace private contractors.

On behalf of EPVA, I respectfully request that any action you take regarding private sector initiatives not displace current riders on privately operated, public paratransit systems.

Thank you for your consideration.

Yours truly,

JAMES J. WEISMAN
Program Counsel

CITY OF BALTIMORE

KURT L. SCHMOKE, Mayor

OFFICE OF THE MAYOR
250 City Hall
Baltimore, Maryland 21202

August 31, 1993

The Honorable Gordon Linton
Administrator
Federal Transit Administration
400 Seventh Street, S.W., Room 9328
Washington, D.C. 20590

Dear Mr. Linton:

Please allow me to congratulate you upon becoming Administrator of the Federal Transit Administration (FTA). It is very welcome to have a person of your background, having served in state elected office as well as having specific experience with the transit operations of a major metropolitan area, in charge of the FTA. Based on your own experience you know how important it is to have a knowledgeable Administrator. I look forward to working with you during the next four years.

Among the issues currently on your plate are the matter of the Private Enterprise Policy and the Office of Private Sector Initiatives. As the mayor of a city to which mass transportation is vitally important, I would like to offer my views on these subjects in the hope that they may be useful to you.

You know only too well that municipal resources are strained beyond the ability of local governments to provide basic services. We also labor under the burden of complying with unfunded mandates of the Federal government, such as the paratransit and accessibility requirements of the Americans with many of these mandates, as the manager of my city's resources, I must find a way to comply with such requirements while providing for all the other services upon which the citizens of Baltimore depend. This I can do only with the assistance of the private sector and the investment, employment, and experiences that the private sector provides.

In transit, the private sector is an essential factor. When providing for paratransit services in particular, and other kinds of specialty transportation, only the taxicab and paratransit companies are equipped, trained, experienced, and capitalized to assist public operators to achieve the ADA mandates in a timely and efficient manner. I need not remind you that this industry is also a major source of employment and opportunity in minority communities.

Without the Office of Private Sector Initiatives, many opportunities for connecting the public and private sectors would be lost. Not that there is any hostility between these groups, but there is always more cooperation when we take the time consciously to think about working together. The Office of Private Sector Initiatives and the Private Enterprise Policy are the only effective programs in the FTA to maintain and develop a healthy synergy between public and private mass transportation providers. I encourage you to expand the efforts of the FTA in creating new opportunities for public and private cooperation as we proceed through an era of limited resources and high expectations.

Again, my heartiest congratulations as you embark upon your tour as chief transit executive in the United States. Please do not hesitate to call upon me for assistance or support, and thank you for taking the time to consider my views.

Sincerely,

Kurt Schmoke

Mayor

KLS:ams

Office of the Mayor
SAN FRANCISCO

FRANK M. JORDAN

September 28, 1993

The Honorable Gordon Linton
Administrator
Federal Transit Administration
400 Seventh Street, S.W., Room 9328
Washington, D.C. 20580

Dear Administrator Linton:

Please accept my heartiest congratulations on your confirmation to America's highest mass transit post. Agencies which operate mass transit services around the country (including the City and County of San Francisco) are very pleased that a person of your ability and experience has been selected to head the Federal Transit Administration (FTA).

I know that among the matters of concern to you must be finding ways in which mass transit can benefit from the President's initiative to "reinvent government"; I can certainly tell you that it is a matter of considerable concern for those of us trying to provide important municipal services in this era of constrained public financial resources. But, the good news is that your agency is at the vanguard with respect to developing policies which make the most of every precious dollar and maximize the quantity and quality of transportation services in this country.

The Office of Private Sector Initiatives and the Private Enterprise Policy of the FTA have served the changing needs of the transit community well. Whether it's meeting the urgent demands of the Americans With Disability Act or keeping pace with the increasing demand for suburban mobility, it is the element of competition, the flexibility of policy and the leveraging of private resources to supplement public expenditures which have helped to keep the financial challenges of the 90's in proportion for mass transit

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RECYCLED PAPER

agencies. There are few programs in the FTA which better serve the goals of the Intermodal Surface Transportation Efficiency Act of 1991 than the Private Enterprise Policy and the activities of the Office of Private Sector Initiatives. I urge you to maintain these important activities.

I look forward to the opportunity of meeting you personally and working with you to make transit in America the economic resource it should be. Very best wishes as you undertake your new responsibilities.

Sincerely,

Frank M. Jordan

FMJ/jll/bs

LAWTON CHILES
GOVERNOR

STATE OF FLORIDA
Office of the Governor
THE CAPITOL
TALLAHASSEE, FLORIDA 32399-0001

January 25, 1994

Docket Clerk
Federal Transit Administration
U. S. Department of Transportation
Room 9316 (No. 93-B)
400 Seventh Street, SW
Washington, DC 20590

Dear Docket Clerk:

I write this letter to oppose the Notice of Proposed Recision of Private Enterprise Participation Guidance based on my observations of the advantages of competition for government services and my own "Reinventing Government" initiative here in the State of Florida.

The essence of injecting competition into the provision of government services is constantly measuring performance against market alternatives. It is this competition that makes both public and private organizations alert to efficiencies and service improvements. That is the reason I sponsored a "Reinventing Government" initiative here in Florida, and that is why President Clinton and Vice President Gore have done the same in Washington.

I know of David Osborne's personal interest in and support for the Federal Transit Administration's Office of Private Sector Initiatives and your Private Enterprise Policy, and I want to add my own endorsement to these effective programs. After all, one of the main points of the Intermodal Surface Transportation Efficiency Act of 1991 (ISTEA) is that leveraging private investment into transit activities is absolutely essential to managing public transportation in the modern environment.

In Florida, we have many fine private transportation companies. Without the enthusiastic participation of these companies in our public transportation system, Florida could not handle the enormous growth in our State or the special needs of our elderly and disability communities. Our many jitney operators, reflecting the significant Caribbean contribution to the vitality of our economy, also demonstrate that new ways to solve old problems can only be found when the system encourages diversity and competition.

I urge that you not change the private enterprise procedures of the Federal Transit Administration.

Sincerely,

LAWTON CHILES

LC/pm

cc: Vice President Albert Gore, Jr.
Secretary Frederico Pena
FTA Administrator Gordon J. Linton
Florida's Congressional Delegation

STATE OF MARYLAND
OFFICE OF THE GOVERNOR

IN REPLY REFER TO

WILLIAM DONALD SCHAEFER
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TDD (410) 333-3098

February 10, 1994

Docket Clerk
Federal Transit Administration
U.S. Department of Transportation
Room 9316 (Docket 93-B)
400 Seventh Street, S.W.
Washington DC 20590

Dear Docket Clerk:

I write to oppose the notice of Proposed Rucision of Private Enterprise Participation Guidance as published in the Federal Register on November 26, 1993.

I am an ardent advocate of competition as the necessary spur to develop and maintain efficiency and program effectiveness in government service. In Maryland, I have undertaken a "reinventing government" project, just as the President has done in Washington, to achieve the maximum benefit from the expenditure of public funds. The current Private Enterprise Participation Guidance of the Federal Transit Administration (FTA) requires the kind of careful consideration of alternatives that every government manager should undertake as part of the prudent management of the resources they control. This is the essence of the "reinventing government" program.

I urge the FTA to maintain, and even to broaden and strengthen its existing private enterprise participation requirements in the interest of improving the quality and quantity of federally assisted transit services available to the citizens of Maryland and the nation.

Sincerely,

/S/

Governor

U.S. SMALL BUSINESS ADMINISTRATION
WASHINGTON, D.C. 20416

OFFICE OF CHIEF COUNSEL FOR ADVOCACY

FEB 25 1994

Mr. Gordon J. Linton
Administrator
Federal Transit Administration
Department of Transportation
Room 9316
400 7th Street, S.W.
Washington, DC 20590

Docket Number 93-B

Dear Mr. Linton:

The Office of Advocacy of the U.S. Small Business Administration (SBA) was established by Congress under Pub. L. No. 94-305. (15 U.S.C. Sections 634a-g) to represent the interests of small business before federal agencies and Congress. Advocacy is submitting these comments to the Federal Transit Administration (FTA) on its proposal titled Private Enterprise Participation. 58 Fed. Reg. 62,407 (1993)(proposed November 26, 1993). The proposal would rescind its current guidance on private enterprise participation in the development of plans and programs funded under the Urban Mass Transportation Act (the "Act") (49 U.S.C. 1601-1625). The Office of Advocacy is opposed to FTA's proposed recision of its guidance on private enterprise participation.

The Private Enterprise Guidance was implemented by FTA in 1984. The Guidance set out the principal factors that FTA would consider in assessing compliance with sections 1602(e) and 1607(c) of the Act.[1] Those factors include: 1) Providing

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[1] 49 Fed. Reg. 41,310, 41,310. Section 1602(e) requires that "no financial assistance shall be provided under this Act . . . unless . . . (1) The Secretary finds that such assistance is essential to the local program of projects required by Section 8 (section 1607) of this Act; and (2) the Secretary finds that such program, to the maximum extent feasible, provides for the participation of private mass transportation companies". Section 1607(c) requires that "the plans and programs required by this section shall encourage to the maximum extent feasible the participation of private enterprise."

reasonable notice and early consultation with private carriers;[2] 2) participation and consideration of private enterprise at different stages of the planning process;[3] 3) a comparison of the "total costs" of public transportation;[4] and 4) an appeals process to assess the individual complaints of private carriers with specific mass transit programs.[5] FTA thought that the Guidance was necessary because private carriers were complaining that public decision makers were "not fully or fairly considering the capacity of private enterprise to provide mass transportation services."[6] The GAO had also urged FTA to determine what constituted "meaningful compliance" with sections 1602(e) & 1607(c).[7]

The FTA is now proposing to rescind the Private Enterprise Guidance. FTA believes that the Guidance conflicts with the 1991 Intermodal Surface Transportation Efficiency Act (ISTEA). FTA believes that the discretion Congress intended under ISTEA for local planners creates "a new emphasis on public participation in local decision making on transit choices."[8] FTA believes that this new emphasis has rendered the Guidance too restrictive for local planning agencies and transit operators.[9] FTA also believes that the Guidance is unnecessary because of procedures under section 1607a(f)[10] of the Act and FTA's recently issued

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[2] 49 Fed. Reg. at 41,311-41,312.

[3] Id. at 41,312.

[4] Id. "Total costs" refers to the inclution of all subsidies that public and nonprofit carriers recieve. This is to insure that the cost of subsidies are reflected in cost comparisons between service proposals of private and public carriers.

[5] Id.

[6] Id. at 41,310.

[7] Id.

[8] 58 Fed. Reg. at 62,407.

[9] Id.

[10] Section 1607a(f): "Responsibilities of recipients relating to preparation of program of projects; availability to public. Each recipient shall--
(1) make available to the public information concerning the amount of funds available under this subsection and the program of projects that the recipient proposes to undertake with such funds;
(2) develop a proposed program of projects concerning

metropolitan planning regulations under 23 C.F.R. pt. 450 and 49 C.F.R. pt. 613.[11]

The Office of Advocacy believes the Guidance should be retained. Private carriers consist primarily of small businesses.[12] Rescinding the Guidance would impose hardship on small private carriers in the following ways: 1) Subsidies to public and nonprofit carriers would no longer have to be reflected in cost comparisons of service proposals for private and public carriers; 2) local planners would no longer have to actively review programs periodically to determine if the service could be more efficiently provided by the private sector; 3) local planners could avoid using private carriers with the excuse that it would interfere with public agency labor agreements or local preferences favoring public carriers; and 4) local planners would be left with the sole discretion to decide whether they had provided private carriers the maximum participation feasible in mass transit programs. Advocacy believes that FTA should avoid imposing these hardships on small businesses for several reasons.

First, encouraging the use of private carriers in urban mass transit is good economic policy. Private carriers tend to be

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activities to be funded in consultation with interested parties, including private transportation providers;
(3) publish a proposed program of projects in such a manner to afford affected citizens, private transportation providers, and as appropriate, local elected officials an opportunity to examine its content and to submit comments on the proposed program of projects and on the performance of the recipient;
(4) afford an opportunity for a public hearing to obtain the views of citizens on the proposed program of projects; and
(5) assure that the proposed program of projects provides for the coordination of transit services assisted under this section with transportation services assisted from other Federal sources.

In preparing the final program of projects to be submitted to the Secretary, the recipient shall consider any such comments and views, particularly those of private transportation providers, and shall, if deemed appropriate by the recipient, modify the proposed program of projects. The final program of projects shall be made available to the public."

[11] 58 Fed. Reg. at 62,409.

[12] For example, at least half of the 700 members of the United Bus Owners of America have annual revenues of less than $1 million. SBA defines small carriers as businesses with annual revenues under $3.5 million. 13 C.F.R. 121.601 Standard Industrial Classification (SIC) Codes 4111-4142.

more efficient than public carriers. Private carriers have strong incentives, such as making a profit, for maximizing efficiency. Forcing public carriers to compete with private carriers also encourages public carriers to be more efficient.

Second, rescinding the Guidance is inconsistent with the goals of Executive Order 12893, Principles for Federal Infrastructure Investment.[13] Under section 2(c) of the Order, agencies are to "seek private sector participation in infrastructure investment and management."[14] Agencies are also to "work with state and local entities to minimize legal and regulatory barriers to private sector participation in the provision of infrastructure facilities and services."[15] By rescinding the Guidance, FTA is eliminating a significant opportunity to seek private enterprise involvement with our nation's infrastructure.

Third, the Guidance is consistent with ISTEA. Congress was aware of the Guidance when drafting ISTEA.[16] Congress could have repealed the Guidance if they believed it was overly restrictive to local planners. However, Congress choose to retain the Guidance. Section 1607(i)(5) is further evidence that the Guidance is consistent with ISTEA. This section was added to the Act by ISTEA to prohibit the Secretary from withholding certification of a local planning process "for determining the feasibility of private enterprise participation in accordance with [section 1607(o)." Section 1607(i)(5) would be unnecessary if Congress intended for FTA to relinquish its active role of overseeing local planners to insure they provide maximum feasible participation of private enterprise. Moreover, the Conference Committee Report on section 1607(i)(5) pointed out that a locality's "wide flexibility in establishing criteria to be used in determining the 'feasibility' of private involvement in local programs" under section 1607 did not "diminish the responsibility of the Secretary to encourage grantees of federally funded projects to provide for the maximum feasible participation of private enterprise in accordance with [section 1607(o)]."[17]

Fourth, rescinding the Guidance would be inconsistent with the Urban Mass Transit Act. As just discussed, the language and history of section 1607(i)(5) demonstrate that Congress intended

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[13] 59 Fed. Reg. 4233 (January 31, 1994).

[14] Id. at 4234.

[15] Id.

[16] 58 Fed. Reg. at 62,409.

[17] H.R. Conf. Rept. No. 404, 102d Cong., 1st Sess. 414 (1991).

for FTA to maintain an active role of encouraging the maximum feasible participation of private enterprise. Moreover, the Guidance's appeal mechanism for reviewing individual complaints is important for the enforcement of section 1602(e). This section prohibits the Secretary from granting financial assistance to mass transit programs that do not provide participation of private enterprise to the maximum extent feasible. To insure compliance with section 1602(e) the Secretary must perform a case by case assessment of each mass transit program seeking financial assistance. Eliminating the Guidance would eliminate the agency's case by case assessment mechanism for discovering specific programs in noncompliance with the section 1602(e). FTA's proposed use of the periodic review process under section 1607 to enforce section 1602(e) will be ineffective. Periodic review of a locality's planning process is not the case by case review of specific programs needed under section 1602(e). Moreover, section 1607(i)(5) prohibits the enforcement of the Act's private enterprise provisions through section 1607 mechanisms.

In addition, the procedures under section 1607a(f) apply only to grants provided under section 1607a. They do not apply to sections that authorize other kinds of grant programs, such as grants under section 1602. In contrast, sections 1602(a) and 1607(o) encompass all grant programs under the Act. Sections 1602(a) and 1607(o) should also be interpreted to mean more than compliance with section 1607a(f), unless Congress intended these sections to be redundant. However, Congress has never expressed the belief that compliance with section 1607a(f) would satisfy sections 1602(a) or 1607(o).

If you would like to discuss this matter or if this Office can be of any further assistance, please feel free to contact me or Gregory Koontz, Assistant Chief Counsel for Environmental Policy at (202) 205-6532.

Thank you for your cooperation.

Sincerely,

Doris S. Freedman
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COMMONWEALTH OF VIRGINIA
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RESOLUTION

WHEREAS the Federal Transit Act of 1964 requires public transit authorities to utilize the private sector to the maximum extent feasible; and

WHEREAS the competitive bidding of transit services has been widely used in Fairfax County and the Metropolitan region; and

WHEREAS competitively bid transit service allows the County to save scarce taxpayer resources, maintain adequate service levels and hold down fare costs; and

WHEREAS the stated policy blueprint of the Clinton Administration is the principles specified in the book Reinventing Government and the only federal agency cited in that book for infusing competition into the federal government was the Federal Transit Administration (FTA); and

WHEREAS the FTA has announced its intentions to eliminate private sector participation in public transit by eliminating FTA Circular 7005.1, abolishing the Office of Private Sector Initiatives and by doing away with the Private Sector Policy: Therefore be it

RESOLVED, That the Fairfax County Board of Supervisors does hereby express to the FTA our strong objections to the proposed elimination of the FTA Private Sector Policy of 1984, the elimination of the Current Private Sector Guidance contained in FTA Circular 7005.1, and the elimination of the Office of Private Sector Initiatives; and be it

RESOLVED further, That the Fairfax County Board of Supervisors requests that the Washington Metropolitan Area Transit Authority (WMATA) Board not eliminate or change in any way its private sector policy.

1ST STORY of Level 1 printed in FULL format.

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The San Francisco Chronicle

MARCH 14, 1994, MONDAY, FINAL EDITION

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HEADLINE: Lower-Cost Transit Plans May Get Stalled

BYLINE: JONATHAN MARSHALL, Chronicle Economics Editor

BODY:

Back in 1988, faced with a growing deficit, BART came up with a clever way to save $ 15 million over five years without cutting service.

Its trick was unleashing competition on its express bus service, which connects outlying towns in the East Bay to its rail line. BART simply forced AC Transit, which ran the service, to bid against private operators. AC lost out to Laidlaw Transit Inc., and happy with the results, BART just signed another three- year contract with the private, unionized, Modesto-based company.

Across the nation, private contractors handle about 10 percent of all bus transit and 70 percent of all paratransit services. But their share may shrink if the Clinton administration adopts a controversial proposal to withdraw federal pressure on public transit agencies to work with private enterprise.

The potential loss of millions of dol lars in contracts with the private sector for bus and dial-a-ride-type services has provoked a battle between private operators, public agencies and transit unions over the best use of taxpayers' money.

DISSENT TRIGGERED

It also has triggered dissent within the administration between those who believe ''reinventing government'' means tapping the private sector for more efficient solutions and those who think it means making less demands of local governments.

At issue is a November proposal by the Federal Transit Administration, a branch of the Department of Transportation, to rescind its 1986 private enterprise participation program.

The new policy, which could be implemented within weeks, would mean local agencies would no longer have to: review routes periodically to see if they could be better served by private operators; apply a common method for comparing their costs to private bids; or face federal appeals of disputes with the private sector.

Academic studies and independent audits have shown that competitive contracting typically cuts costs between 20 percent and 40 percent and sustains those savings over many years. A 1992 Price Waterhouse audit of Los Angeles City and County contract bus routes found better quality, better safety and 60 percent savings, according to Wendell Cox, a national transit consultant.

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BUREAUCRATIC INERTIA

Private operators save money by paying drivers closer to prevailing market ·ages, controlling absenteeism and avoiding costly work rules that let drivers collect pay for time they are not actually on the road.

Yet many public agencies resist contracting, often out of bureaucratic ..nertia or to avoid union battles. Proponents of contracting say local agencies need prodding from the federal government to consider contracting as an option.

The proposal to rescind the private enterprise policy has triggered a storm of controversy. ''We have received over 390 comments,'' said Grace Crunican, deputy FTA administrator. ''People have expressed some fairly strong opinions.''

Opponents of the proposed change include San Francisco Mayor Frank Jordan, who urged the agency's head not to tinker with the existing private enterprise policy, saying it was ''a matter of considerable concern for those of us trying o provide important municipal services in this era of constrained public financial resources.'' (Muni, however, has rebuffed offers from the private ector to save millions of dollars by contracting some of its operations.)

OPPOSING VIEWS

Opponents also say that the proposal violates the spirit of President clinton's Executive Order 12893, issued January 31, which calls on federal agencies to ''minimize legal and regulatory barriers to private sector articipation in the provision of infrastructure facilities and services.''

Stacked on the other side are the Amalgamated Transit Union, which vigorously opposes competitive contracting as a threat to its bargaining power, and the merican Public Transit Association.

As the federal transit agency noted last fall in proposing to scrap its rivate enterprise rules, ''Many transit authorities and local officials have omplained that these requirements have significantly increased their paperwork, have been labor intensive, and most importantly, have reduced local flexibility nd decision-making.''

Said Crunican, ''We had come into office saying we needed to reinvent overnment and reduce paperwork . . . We are trying to get out of mandated xercises and trust local management to know best how to do their job.''

Jerome Kuykendall, chief of planning at Golden Gate Transit, said the xisting rules are mostly reasonable, simply mandating close attention to costs nd private-sector alternatives, which any well-run agency would do anyway.

APPEALS PROCESS

But the provision for involving Washington in resolving disputes between private operators and public transit agencies did cause trouble for Golden Gate nd other agencies, he said.

The California Bus Association, which represents private bus companies, has ied that appeals process almost continuously since 1990 to complain about olden Gate's bidding and accounting practices, which the association claims

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are designed to make the public agency's costs appear artificially low compared to the private sector.

The result, Kuykendall said, was ''we were having to defend what we had done to a whole series of people.'' In the end, Golden Gate sustained its case. But ''every little complaint created a whole huge amount of work. It was like blackmail.''

SCRAPPING THE RULES

Jim Seal, chief lobbyist for the California Bus Association, said that without a private enterprise policy, agencies like Golden Gate could cook their books at will. The result will be less contracting, more public monopolies and a withering of private sector competition, Seal said.

Even some public transit heads question scrapping the private enterprise rules. David Knight, manager of Sonoma County Transit, said he manages to put buses on the road for half the hourly cost of Golden Gate Transit because he contracts with a more efficient unionized private operator. But he doesn't detect any support from the current administration for saving the taxpayers money.

QUESTIONING COMPETITIVENESS

''To me, the FTA is saying we don't care whether you spend our money wisely or not, that's up to you,'' Knight said. ''Forget about competitiveness, we'll give you the money (anyway).''

But Crunican, who said she and other staffers are working as fast as they can to prepare a final order, insisted the fuss is misdirected.

''We very much think it's a good idea to utilize the private sector'' in controlling costs, she said. ''Once this is passed, private sector operators will see our commitment to the involvement of all parties in the provision of transit services.''

CHART

COST SAVINGS FROM PRIVATIZATION

Transit agencies that contract out service often enjoy big savings.

Public agency	Cost savings	Type of Service
Chicago Transit Authority	50%	Service for the disabled-
Johnson County, Kan.	39	21 fixed-route buses
Fairfax County, Va.	39	33 fixed-route buses
Yolo County, Ca.	37	14 fixed-route buses
City of Los Angeles	32	19 fixed-route buses
BART	26	45 fixed-route buses
Snohomish County, Wash.	22	58 fixed-route buses

Source: Roger Teal, 'Issues Raised by Competitive Contracting of Bus Transit in the USA,' PTI Journal, March/April, 1990 EC

GRAPHIC: PHOTO, BART patrons at the Del Norte station in El Cerrito boarded an express bus chartered from Laidlaw Transit Inc., a private company. By

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unleashing competition, BART has saved $ 15 million over five years , BY JERRY TELFER, THE CHRONICLE

LANGUAGE: ENGLISH

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Thursday, September 9, 2004

SUBURBAN

COUNCIL LEERY ON STATUS OF BUS TAKEOVER

FRANK LOMBARDI DAILY NEWS CITY HALL BUREAU

THE CITY'S budget director testified yesterday that considerable progress is being made in negotiating the takeover of seven private bus lines by the MTA. But the status report by Budget Director Mark Page left many critical questions unanswered and generated much skepticism among members of the City Council's Transportation Committee.

Page said he is "optimistic" that several of the seven city- subsidized bus lines will be turned over to the Metropolitan Transportation Authority before the Dec. 4 deadline that was set in June after the takeover process stalled in Albany.

"Whether we will manage to tie together all of it by the Dec. 4 date, I guess I'm fairly optimistic," Page said.

The seven lines serve 400,000 daily riders in Queens, Brooklyn and the Bronx. As proposed, the MTA intends to set up a separate company to manage and operate the seven lines.

Page, who said he is "intimately" involved in working out the takeover, divulged no details of his ongoing negotiations with the private lines. He also declined to provide a ballpark cost to the city for pension liabilities, buying privately-owned garages and other facilities and compensating owners for their "intangible" assets.

In questioning Page, Councilman John Liu (D-Queens), who headed the hearing, contended the upfront takeover costs to the city will be "in the hundreds of millions, perhaps $1 billion."

"I don't think it's anything like $1 billion," Page countered.

After the hearing, Liu issued a statement questioning the economic viability of going ahead with the takeover, which was initiated in April through a joint agreement by Mayor Bloomberg and Gov. Pataki.

But during the hearing, Page argued that an MTA takeover would result in management and operational savings and that planned purchases of new buses by the city and the MTA would improve service.

MTA officials declined to testify, saying their board will not be briefed on negotiations until later this month.

More skepticism about the takeover talks came from Jerome Cooper, board chairman of four bus lines: Green, Jamaica, Triboro and Command.

"I do not have the rosy picture that the city administration does with respect to the takeover by Dec. 4," he testified.

Liu said additional status-report hearings will be held Oct. 6 and Nov. 4.

flombardi@edit.nydailynews.com

---- INDEX REFERENCES ----

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Mr. OSE. I thank the gentleman for his testimony and his presence.

All right, as we indicated in the previous panel, what we do is we just have questions for you. To the extent that we can get through all our questions, there will be fewer follow-on questions. I do want to advise the witnesses that I have a note here that between 11:30 a.m. and noon we are going to have three votes, so we are going to go as quickly and as expeditiously as we can. That is not to say that, if you have a point you want to make, we are going to roll right over you. I want you to make your points. I want you to answer our questions. If you have a point that occurs to you, make it. All right?

Now, Mr. Diaz, in particular, I want to start with a question to you. Your point about the dollars, I was tempted to offer Ms. Dorn that she could send the money out and I would come over and I would supervise whether or not the money is used to the purpose that it is supposed to go. I knew what the answer would be, but I was going to offer it anyway. What is your view of FTA's enforcement role to date of the statutory requirements for private sector participation in mass transit?

Mr. DIAZ. Mr. Chairman, clear signals are sent from Washington that don't have to be embodied in rules to make people act. With the recission of the private enterprise participation policy, a signal was sent out that was received loud and clear. You have heard many tales, some in your own district, of what happens when enforcement is sought on regulations since the rescission of the policy, and I think we can safely say that it is a matter of a lack of perceived intent, and the perception is what is a matter of policy, and policy is what the board of directors of the United States, or the Congress, is supposed to set.

Mr. OSE. Long story short, you are saying that FTA is kind of giving a wink and a nudge to the enforcement provision; they are just not doing it.

Mr. DIAZ. It is a reasonable conclusion from the histories that have been presented, yes, sir, it is.

Mr. OSE. Do you think the issuance of a rule consistent with the other 18 rules, the purpose of which were to bring certainty or clarity to what constitutes private sector participation in mass transit, do you think that is a good idea or could stand further review?

Mr. DIAZ. I have been an administrative lawyer and a public lawyer for many years, sir, and the only thing I can say to you is that clarity is the essence of the matter, and I think that the committee would well consider the degree of clarity that it received in the first panel with the rules and the intentions of the committee.

The fact of the matter is that the charter regulation, for example, is not unclear; the standards are very plain. If you can't look at a service with common sense and know that it is open to the public or closed to the public, if you can't know who is paying for it, if you can't know whether it is published in the timetables and the schedules or not, then I would suggest that some training is in order.

Mr. OSE. Thank you.

The bells you just heard were calling me to a vote. I have 15 minutes and, with great respect, it is likely to take 40 minutes for

the two follow-on votes beyond that, so we are going to try and finish this up. This is not to be disrespectful, it is just the press of time. To the extent that we can't finish up, we will be sending questions in writing to you, and we would appreciate timely responses accordingly.

Mr. Tangherlini, on July 23rd of this year, you sent a letter to Martz Gold Line about the proposed Circulator in D.C. stating, "The Circulator is an appropriate public transit service" and then further "After gaining cost and operating experience in Phase I, it is the partner group's current intention to invite competitive bidding on Phase II services from private contractors." Now, you have changed that a little bit in your testimony today regarding Phase I in particular. My question is, in the context of the Business Improvement District's Circulator proposal, will that require Federal funding to implement?

Mr. TANGHERLINI. A couple of things. The point about changing it, we have changed it because we were interested in working with the private sector providers in the city to see what other options we could explore. Our interest is in providing high-quality service at the lowest possible cost, and we think that perhaps the private sector could be part of that. We were under the impression that the buses funded from money that had been won through a lawsuit, something called the D.C. Rider's Trust, could only be operated by WMATA. We have learned since that may not be the case, and we are fully interested in exploring a proposal that might allow for private sector operation.

Would it require some subsidy? Yes, it would, but we propose a level of subsidy, we think, which is unique in public transportation finance that would include private, local, and Federal subsidy through the District of Columbia Appropriations Bill, not through the Federal Transit Administration. No Federal Transit Administration money would be used to pay for the buses; no Federal Transit Administration money would be used to operate the buses.

Mr. OSE. So, you get around the prohibition on, if you will, the squeeze-out effect by using direct appropriations as opposed to FTA grants?

Mr. TANGHERLINI. Again, we don't think there is any squeeze-out effect. I would like someone to show me what private sector operator is operating on K Street providing frequent service on K Street. This is transit service from across the town, from the Convention Center to the waterfront.

We also believe that this is just the beginning of fair recompense for the Federal Government's closure of such streets as Pennsylvania Avenue and E Street, separating the east and west portions of the city, and continued closures up here on Independence and Constitution, or at least checkpoints that have made mobility in the city very hard due to the security closures.

Mr. OSE. One of the concerns I have has to do with the Tourmobile services, and, Mr. Mack, I want to followup on this with you. Mr. Tangherlini indicates that there is no evidence there will be an adverse impact to your enterprise. You have 30-odd years of experience here. What is your sense of that?

Mr. MACK. It is untrue.

Mr. OSE. OK.

Mr. MACK. As I told the reporter of The Washington Post which quoted D.C. BID and others indicated that they wished to implement the service on the national mall, and they were intending to do it my first understanding was in 2001 and later Circulator reports, as Mr. Tangherlini indicate they change from time to time, the next proposed takeover in effect was in 2003. I guess they will change that to another time since it hasn't happened so far.

But, there is no question about it. If a federally funded entity imposes itself on the Federal mall, where our operation is, our operation will not be able to survive. I think that quoting the letter that you referred to, I believe in one of the paragraphs it indicates that the Circulator expects to impose its second phase after the Park Service issues its report, and that solicitation of private operators may be appropriate then.

Mr. Tangherlini probably understands that he, BID, nor anyone else other than Secretary of the Interior, has an authority to put any kind of transportation on the national mall. It appears from this letter that you referred to to Martz that they are assuming that this is a done deal. They are proceeding and in numerous studies that this organization has commissioned, every one that I have seen or heard of indicates that there is a tremendous amount of money needed to fund it and that it can't operate otherwise.

If we are talking about 90 buses ultimately when the service is completed, with facilities to maintain those buses, 55 passenger full-size buses operating on clogged streets that are already dangerously overloaded, I believe, this proposal makes no sense, and it will endanger the operations of my company and other companies also. And, as a matter of fact, I think one of the studies commissioned by this organization indicates that it will have a predatory effect upon the existing transit system in order to fill the seats that they plan to purchase.

Mr. OSE. Before we leave this issue, I just want you to understand on both sides of this, without being judgmental, I am watching this and I will continue to watch this, and I will watch it until it is done or I am done, one or the other, whichever comes first.

Mr. Cooper and Mr. Smith, if I may, you are both private operators. I know of no testimony to the effect that your service isn't adequate or that it is not meeting the needs of your customers. Can you estimate the adverse economic effect to your company if the DOT refuses to enforce on public entities the non-compete clause portion of its grants? In other words, if they take the Federal money then compete against you, what position does that leave you in with your respective enterprises?

Mr. COOPER. If by what you mean is an MTA takeover of the lines, I assume that is what you are referring to?

Mr. OSE. In whole or in part?

Mr. COOPER. Well, if they take over the lines or partly take over the lines and there is no increased funding to us or there aren't any new buses purchased, we can't put those fleets on the road. In other words, we have certain peak pullouts that have to be met.

When you have equipment that is 18 and 20 years old, where the bulkheads and the engines and the transmissions need to be overhauled immediately, and you have to put those against the wall, it does two things: first of all, we have a certain pullout we must

meet and certain other requirements we have to meet. If we can't meet those, then, in a way, our incentive payments, which we get from the city, is deducted. In addition, the cost to maintain 20-year-old buses that have hundreds of thousands of miles on them, which are falling apart literally, it is impossible to maintain.

Mr. OSE. And, that would be the case of using MTA's existing rolling stock? That is the situation they face, not that you face.

Mr. COOPER. I didn't hear the question.

Mr. OSE. Your point about the cost to maintain very heavily used equipment, that is the situation MTA faces, not the situation you face?

Mr. COOPER. That is exactly right.

Mr. OSE. OK.

Mr. COOPER. The general manager of Green Bus Lines is here today, and she has said to me over and over again we can't get these buses through the door. And, we won't put out a bus that is not safe and reliable. Now, that is as opposed to an MTA that has unlimited funds. While they don't operate on our lines, you can see the difference in the quality of the equipment.

It is just difficult to make headways, it is difficult to make pull-outs, it is difficult to do any of the things that are required. And, we did, for more than 100 years, an apparently satisfactory to the city, but now for some reason we are an anathema to them and I don't know how to answer those questions anymore with them.

Mr. OSE. So, your point is that the city's competition with you using Federal funds to keep these assets rolling would put assets on the street that are less safe, less well maintained, your ridership would go down, etc.?

Mr. COOPER. Well, you have just about paraphrased what we would say. You can't compete that way if you don't have the equipment to put on the road, you just can't. I submitted a couple of letters from the unions involved here, and these poor people, they have to get those buses out on the road. It is tough to put a 20-year-old bus which needs almost a total repair back on the city streets, but they do it, and we maintain service and we do the best we can. But we can't keep this up. It just can't go on.

I told the City Council that, if the MTA were to take this over at some future date, they can't forget us in the interim period; we need equipment.

Mr. OSE. Mr. Smith, in your enterprise same kind of question: what is the economic impact of the FTA's blind eye, if you will, toward the private participation requirements in the law?

Mr. SMITH. I am trying to make sure I understand your question. As far as monetary?

Mr. OSE. Yes. What would be the impact on your enterprise?

Mr. SMITH. Well, I looked at, once again, with information that I had received from the Freedom of Information Act that I had requested, they had 102 days worth of service for if we do everything completely down to the tee with what they were doing as far as 102 days, hours, they incorporated radio costs and everything like that, they received a grant for $44,600. Our price being a privately owned and operated company, one which has to pay for insurance, no insurance breaks, no fuel cost breaks, our price came to $47,000. So, you can see the closeness of it.

If we do a per ridership, ours is on a minimum price, just for kids, is five. On the 3 months that they did it, I think it came out to approximately 2,000 some riders from beginning to end of this pilot. So, at a minimum of $5 per kid, that is about what it would be.

Did that answer your question?

Mr. OSE. Yes.

I apologize. I have to go vote. I am not going to be back in time for us to have a timely continuation of this discussion. I want to express my appreciation to each of you for coming here and being candid with us, because it can't be easy to be candid in public on issues involving this amount of money and this important level of detail. That is the first thing. The second thing is we have questions. I have questions that I have not yet been able to get to ask. We will be sending them respectively to each of you as the case suggests, and we would appreciate a timely response to the committee.

I am a strong advocate for business. I happen to think there is not a single product I know of that can't be more effectively and less costly delivered by private enterprise compared to the government delivery. I want to encourage you to stand your ground. While I may not be here next year, I do know people who will be here next year who share my passion for keeping government out of successful private businesses.

Again, I want to thank you all for joining us today, and we will send you these questions.

And we are adjourned.

[Whereupon, at 12:14 p.m., the subcommittee was adjourned.]

[Additional information submitted for the hearing record follows:]

Private Sector Participation in Transportation

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

September 30, 2004

Shirley J. Ybarra

President
The Ybarra Group

Mr. Chairman and Members of the Subcommittee:

My name is Shirley J. Ybarra. I am President of The Ybarra Group, Ltd., a transportation consulting firm specializing in innovative financing and public private partnerships. I am the former Secretary of Transportation for the Commonwealth of Virginia (1998-2002) for Governor Jim Gilmore and former Deputy Secretary of Transportation (1994-1998) for Governor George Allen. I have been in the private sector as president of a division of a British company and Executive Vice President of two other consulting firms. I also served as Special Assistant to Secretary of Transportation, Elizabeth Dole. My responsibilities included the legislative initiative and implementation of the transfer of National and Dulles Airports to a Regional Authority.

My testimony will provide information on the history of public private partnerships in the US, information on the Virginia initiative and specific information on the Virginia projects including the HOT lane proposal for the Beltway currently under consideration by Virginia.

Brief History of PPP's in US Transportation

There has been much written about the very early days of transportation from the Colonial era through the middle of the twentieth century and the extensive involvement of the private sector during that time. Beginning with the years after World War II however, the road and transit responsibilities in the US became more and more concentrated in the hands of government. Passenger rail, transit systems and virtually all highway construction and maintenance moved into the hands of the state and local governments.

But public funds (federal, state and local) were not keeping pace with the demand to maintain and improve the nation's extensive network of roads, bridges and transit systems. In 1991, the Intermodal Surface Transportation Efficiency Act (ISTEA), Congress opened the door for private sector to again participate in transportation by increasing the flexibility to blend Federal aid with private financing and authorized more flexible operating arrangements. Section 1012 of ISTEA expanded the opportunities for Federal-aid participation in toll roads and permitted private ownership of facilities constructed with Federal-aid financing (Interstates were not permitted to utilize this provision.) Even with this flexibility, the potential was never realized,

Presidents G.W Bush and William Clinton issued executive orders (Executive Orders 12803 and 12893, respectively) to encourage private sector involvement in infrastructure investment. However, little private sector involvement was forthcoming. The states had

statutes on their books that were aligned with the traditional funding and procurement mechanisms. These statutes would have to be addressed on a state by state basis. In addition, there were long standing practices embedded in the federal and state bureaucracies as well as in the contracting community.

The State Legislative Action

Most of the early ventures and attempts at public private partnerships in the 1990's were either single project legislation or a limited number of "demonstration" projects.

For example, the Dulles Greenway legislation was enacted in 1988 for a single private road using a regulatory model. By that I mean, the private entity was to be established as a public utility and regulation of the tolls and rate of return were to be regulated as a utility by the State Corporation Commission (the Virginia equivalent of a public utilities commission).

In 1989, California AB680 authorized up to four projects in a franchise model, i.e., the construction phase was held by a franchise and then turned over to the state. The state then had the ability to lease each facility to the developers for up to 35 years.

In Washington State, five projects were authorized and proposals were submitted for many more than that. However, when the legislature changed parties, the bill was changed dramatically and sent all proposals back to the drawing boards. This undermined the private sector confidence in the Washington State model. (One project survived but not as originally envisioned).

Arizona enacted legislation in 1991 combining some of the Virginia utility model and some of California franchise model, It allowed for privately financed transportation facilities. Three projects were selected however never went to final financing. A final toll road project met with major local political opposition and in the end, it did not move forward.

Minnesota enacted legislation in 1993, however the project moving forward was vetoed by a locality.

All of this as a quick summary to demonstrate that the USA did not have a good track record in the public private partnership arena. And in Virginia, the 1994 the General Assembly enacted legislation that looked like the 1988 legislation (public utility model) for any number of projects. Governor George Allen asked that the legislation be rewritten so that it could be enacted in 1995, using a "market based" approach. The responsibility for the rewrite came directly to the Secretary of Transportation's office.

The Virginia Public Private Transportation Act of 1995

The Virginia PPTA took a more open approach to the idea of public private partnerships in transportation. For example, it ensured that project sponsors were not hampered by regulating them as utilities, as in the 1988 Greenway statute. The tolls and user fee rates are determined on a project-by-project basis and embodied in the comprehensive agreement for a given project. (there is no "regulation" by the an public utilities body, such as the SCC in the case of the Dulles Greenway)

The PPTA streamlined the application and approval process by allowing any number of projects. Further, the act did not limit the projects to highways but allowed for all modes of transportation. And finally, it included opportunities not only for capital projects but for operations and maintenance as well.

Using a "market based approach" it allowed for unsolicited proposals, thus permitting the private sector to select projects and propose a solution. Of course the public agency could also solicit proposals. The public sector maintained flexibility in setting the scope and terms of the project. The public sector maintained the responsibility for right of way acquisition. At the same time, public support was needed to advance any project and was not solely the responsibility of the public sector agency but required distribution of and support for the (unsolicited or solicited) private sector proposal. To maintain competition for the unsolicited proposal, the scheme was posted for a period of time asking others to offer competitive proposals.

The PPTA in Virginia provided an opportunity for the industry to initiate the planning, construction and maintenance process. This process encourages industry to share their knowledge with VODT on building, operating and maintaining highways. At the same time VDOT can learn new techniques. Most importantly, it provides the opportunity for the taxpayer to get the best product for their investment.

The Virginia Project Experience:

Performance Based Maintenance (Asset Management)

The first unsolicited proposal was to take over the maintenance of the Interstate Highway System in Virginia. Virginia Department of Transportation (VDOT) signed a comprehensive agreement with a private company, VMS, for fence-to-fence maintenance responsibility for 1,250 lane miles on Interstates 95, 77, 81, and 381. This five-and-one-half year, fixed-price contract with VDOT was the first interstate highway asset management project in the nation.

The facilities ranged from the urban expressway in Richmond to rural interstate South of Richmond and in mountainous terrain of Southwest Virginia. . The work included all required restorative work such as roadway resurfacing and bridge deck replacement. The level of work accomplished is that required to meet a pre-determined roadway performance criteria. An independent assessment of the cost efficiency of the pilot project estimated that VDOT saved about $16-23 million dollars over a five-year period. The cost savings have been attributed to the contractor's ability to procure labor, equipment, and material for lower costs. The contact was extended for another five years continuing levels of savings commensurate with the first five years.

The advantages for VDOT have been not only the cost savings but a guaranteed fixed price. There have been no change orders and no claims which would normally increase prices under traditional methods. Throughout the contract period the contracted sections of the road way have shown significant and steady improvement. The risk is virtually all on the contractor. When weather conditions are like they were last winter and VDOT exceeded it snow removal budget, VDOT experienced a fixed cost on 1250 lane miles.

I-895- Pocahontas Parkway

The first capital project under the PPTA was an unsolicited proposal for Route 895 in the Richmond area. The 8.8-mile, 4-lane, limited-access, divided highway includes interchanges with Interstates 95 and 295, a 200-meter clear-span, cast-in-place bridge over the James River, smaller bridges, and toll facilities. The toll system uses the "Smart Tag" AVI technology being established throughout the Northeast. The Virginia Department of Transportation (VDOT) owns, maintains, and operates the Pocahontas Parkway.

Fluor led the joint venture responsible for the financing, design, and construction of the Pocahontas Parkway (Route 895) connecting southern Chesterfield and eastern Henrico counties in Richmond, Virginia. The parkway's signature high-level river crossing, the Vietnam Veterans Memorial Bridge, allows ocean-going ships access to the Port of Richmond's Deepwater Terminal.

During the three-year development period, Fluor raised private capital funding and employed an innovative use of tax-exempt bond financing (one of the first 63-20 corporations in the US) to bring the budgeted $324 million project to reality while fostering local support and obtaining agency clearances.

Project activities included utility relocations, wetland mitigation, right-of-way property acquisition, and permitting, in addition to design and construction. Construction began in 1998. The eastbound lanes opened May 2002, and the westbound lanes four months later. The project was completed using the PPTA fifteen years ahead of the schedule it would taken to accumulate traditional state funding sources.

And finally, The Pocahontas Parkway was completed $10 million under budget. (Virginia provided $27 million of the total project budget with the remaining funds from the private sector.

Route 288 (Design Build Warranty)

The Virginia State Route 288 project also used innovative financing strategies and a performance-based approach to construct 10.5 miles of new highway, expand 7 miles of existing highway, build six new interchanges, modify two interchanges, and construct 23 bridges along the roadway. APAC-Virginia, Inc., which is partnering with CH2M Hill and Koch Performance Roads, was awarded the Virginia 288 project with a cost of $236 million. A design-build-warranty approach was chosen in order to finish the road quickly and with minimal delays.

The first section of the project was finished in December 2003, and the second phase opened in spring 2004. The final section will open shortly. This project was complete some 3 years ahead of what it would have been if a traditional state funding and procurement approach was used.

This contract also included a long-term warranty (20 years for pavement, 5 years for other aspects). Route 288 had been in the making for about 40 years and has been turned into a reality only due to the unique public-private partnership and is expected to save the state $47 million.

Other PPTA active projects in Virginia

Route 28

The Virginia Department of Transportation signed an agreement with Clark Construction Group, Inc. and Shirley Contracting Company LLC to begin design and construction of improvements along the Route 28 corridor in Fairfax and Loudoun Counties. The agreement is for the replacement of 6 interchanges and ultimately 10 interchanges along the corridor. Construction is underway and the first six interchange are expected to be completed by 2006.]

Dulles Rail

The Virginia Department of Rail and Public Transportation signed an agreement in June, 2004 with Dulles Transit Partners, LLC, a partnership of Bechtel Infrastructure and Washington Group International, to engineer, design and build the 23-mile Metrorail extension. The initial work by Dulles Transit Partners, LLC will be for Preliminary Engineering for the entire project for $45.4 million -- 8% lower than an independent engineering firm's estimate.

Preliminary Engineering will require approximately 15 months to complete and will provide more detailed cost information and an estimated schedule for project construction. Additionally, PE will address previously identified environmental issues, and resolve any major design or engineering issues that could be encountered during construction.

Interstate 81 Improvements

Negotiations currently are under way between the Virginia Department of Transportation and STAR Solutions on a proposal submitted by STAR Solutions for improving the 325 mile I-81 corridor in Virginia. Currently in the environmental process, this project is estimated to cost over $6 billion dollars. As originally envisioned, the project was to be toll lanes for trucks that would finance part of the project.

Beltway Hot lanes

Fluor Daniel proposed to develop, design, build and finance four HOT lanes (2 in each direction) on the Capital Beltway. Using electronic toll collection the lanes will be financed by tolls combined with minimal (13%) public funds to add a nearly $700 million project. Currently the Environmental studies are being completed. This project would be the first major improvement to the Beltway since it was widened in 1977. Negotiations between VDOT and Fluor began in late August, 2004.

I have attached an article from the April 2004 issue of "Road and Bridges" magazine providing additional information about the proposal.

Jamestown 2007

In anticipation of the 400th anniversary of Jamestown a proposal was submitted to VDOT to accomplish a number of smaller projects in and around Williamsburg and Jamestown, Virginia. A comprehensive agreement was signed in October 2002.. The total cost of the projects is $32 million.

Summary

Virginia has had a positive experience with it Public Private Partnership Act of 1995. Has every proposal moved forward—No. But many have and many have brought much needed improvements to Virginia sooner than what traditional methods would have allowed. The benefits are obvious:

Private Investment—expands the resources;

Innovative Financial Structuring creates non-traditional funding sources, rather than simply relying on state and federal gas tax revenues;

Schedules for projects are often accelerated (most of the projects have been completed or are expected to be completed sooner that in tradition methods and time is money);

Guaranteed cost, often at a cost savings from traditional methods;

Innovative Project Delivery –brings new ideas and concepts to the table; and,

Significant reduction of risk to the public agency as the risk is shifted to the project manager

And finally, as noted in the Virginia experience, public private partnerships are not just about toll roads. It must be said it is not for every project but PPP's can be an important tool for addressing infrastructure needs.

Loosening the belt

Terms & Conditions of Use

A closer look at how I-495 officials sold the HOT lane concept

For close to three decades, the roadway has not kept up with prescribed standards to alleviate safety and operational concerns. The proposed HOT lanes will in most cases bring the roadway up to present highway standards.

- Gary Groat, Contributing Author

Northern Virginia has the most traveled roadway in the Commonwealth of Virginia—14 miles of the Capital Beltway (I-495). As its primary use has shifted from serving through traffic bypassing Washington, D.C., to a major local commuter road, the Beltway is traveled by up to 240,000 vehicles daily. This amount of travel demand on the Beltway routinely exceeds capacity resulting in long traffic tie-ups and unsafe driving conditions. Fluor Daniel is proposing adding high-occupancy toll (HOT) lanes, which are financed primarily by tolls, on the Beltway to alleviate the severe traffic congestion and meet projected transportation volume of 320,000 vehicles per day by 2020.

The last major improvement to the Beltway, which was constructed in 1964, occurred in 1977 when it was widened to eight lanes. For close to three decades, the roadway has not kept up with prescribed standards to alleviate safety and operational concerns. The proposed HOT lanes will in most cases bring the roadway up to present highway standards.

The HOT look

Fluor Daniel submitted its conceptual proposal to develop, finance and design-build the Capital Beltway HOT lanes to the Virginia Department of Transportation (VDOT) under the Public-Private Transportation Act (PPTA) of 1995. The year was 2002 and VDOT had recently completed a draft Environmental Impact Statement (EIS) and the pursuant public comment period on proposed improvement alternatives. Along with more than 900 citizens, Fluor Daniel attended the three VDOT public hearings and heard numerous comments supporting or opposing the three widening alternatives. These citizen comments gave Fluor Daniel the ideas that ultimately became the HOT lane concept.

The proposed four HOT lanes, two in each direction, will be added in the center of I-495 extending 12 miles from west of the Springfield interchange to south of the Georgetown Pike (Rte. 193). Separating these lanes from the adjacent general-purpose lanes will be a 4-ft yellow-striped buffer and orange plastic pylons. Eight general-purpose roadways, four in each direction, will complete the continuous 4-2-2-4 lane configuration. The HOT lanes could operate at 65 mph with the general-purpose lanes continuing to operate at the current 55 mph. To ensure reliable and free-flowing traffic conditions, the HOT lanes would be actively managed by VDOT.

Two of the seven entry/exit HOT lane points will have direct ramp-to-ramp access at I-66 and the Dulles Airport Access and Toll Road. Intermediate entry/exit points near Rte. 123, U.S. Rte. 50 and Braddock Road will provide access from all other intermediate Beltway interchanges. The general-purpose lanes will connect to all interchanges to and from the right.

As proposed, the concept stays substantially within the existing right-of-way with minimal displacement of only six residential structures. Some narrow strips of land adjacent to the Beltway along the existing right-of-way will be required to allow for the additional lanes, retaining walls, sound walls and utility easements. In comparison, earlier EIS alternatives considered by VDOT indicated more than 300 homes and businesses would be taken and some 103 to 168 acres of land acquired. Placing the HOT lanes within the existing Beltway reinforces rather than damages residential and business development patterns in a corridor key to Fairfax County's economic vitality.

Air quality joins displacement as a prominent quality-of-life issue surrounding any road capacity increase. A qualitative analysis of the potential regional air quality impacts of HOT lanes on the Capital Beltway prepared by the Metropolitan Washington Council of Governments (COG) for Fluor Daniel indicates such lanes perform much better than conventional widening solutions. The preliminary COG study found that adding HOT lanes to the Beltway will result in a slight increase in volatile organic compounds (VOC) and a moderate increase in oxides of nitrogen (NOx) emissions. COG also concluded that its estimates "are conservative, i.e., likely to overestimate emissions" because the study did not account for emission reductions associated with a decrease in cut-through traffic on adjacent streets and the projected reduction in traffic on the general-purpose lanes of the Beltway.

Electronic toll collection (ETC) facilities will be located at each HOT lane access point. A Smart Tag/E-ZPass will be required to use the HOT lanes. Patrons must establish and maintain a valid Smart Tag/E-ZPass account. The ETC system will capture the data necessary to process the transaction and store it for processing. Tolls are assessed electronically, recorded in transaction records and posted to customer prepaid toll accounts maintained in the Smart Tag/E-ZPass Customer Service Center. For a vehicle using the HOT lanes without a valid Smart Tag/E-ZPass, the ETC system will digitally photograph the offending vehicle and retain its rear image for violation processing.

Toll revenues from non-HOV vehicles are the primary funding source for the $694 million capacity increase. Depending on time of day, HOT lane fees for one- and two-passenger vehicles will vary from $1 in off-peak hours to $4.80 at peak demand. Tolls collected will repay the toll revenue bonds and Transportation Infrastructure Finance and Innovation Act (TIFIA) loan financing for 87% of construction costs. Virginia and Fairfax County will have no general or

moral obligation for these bonds and loan. The public share of the cost is estimated to be 13%.

< a>

Fluor Daniel's HOT lane concept represents a major new multimodal facility for the Washington, D.C., region. It will offer beneficial enhancements affecting the existing HOV facilities, express bus rapid transit (BRT), the slug system and Metrorail station access.

Introducing HOT lanes on the Capital Beltway will create 12 miles of new HOV facilities and provide the missing link to connect existing HOV facilities on I-95/395, I-66 and the Dulles Toll Road. In addition, the HOT lanes provide a BRT guideway at no cost to area transit agencies on which these vehicles could operate at higher and more reliable speeds as compared with the existing, congested general-purpose lanes. The informal car-pooling of the current slug system would be supported and ride-sharing opportunities expanded in the Dulles corridor, linking western Fairfax County with the I-395 corridor by way of the Capital Beltway.

The HOT lanes have the potential to improve connectivity between future express bus service and existing and future Metrorail stations linking many neighborhoods to the regional Metrorail system. Both the Capital Beltway EIS and Capital Beltway Rail Transit Feasibility Study envisioned a connection between the Dunn Loring Metrorail Stations and bus transit service on the Capital Beltway. Such a connection would link many neighborhoods to the regional Metrorail system and be much improved over the present situation.

After reviewing Fluor Daniel's unsolicited conceptual proposal, VDOT in accordance with the PPTA process advertised for competing proposals for 120 days and received no responses. Next, the Commonwealth Transportation Board (CTB) advanced Fluor Daniel's concept to the detailed proposal phase. Following receipt of the detailed proposal in October 2003, the PPTA advisory panel will hold one or more meetings to solicit public comment. Independent of the PPTA process, VDOT is conducting the required National Environmental Policy Act (NEPA)/EIS analysis and will hold public workshops in spring 2004. Written comments will be solicited by VDOT for both the PPTA proposal and the final EIS.

Under NEPA, will evaluate the various comments on Beltway build alternatives against a no-build alternative and issue a NEPA-build or no-build decision this spring as well. VDOT's decision will be documented in the final EIS and record of decision (ROD), both scheduled for completion December 2004. If all environmental and contractual negotiations and clearances are completed by 2004, construction can begin in early 2005, with the HOT lanes fully operational on the Beltway in 2009.

Support group

The proposed Beltway HOT lanes have a wide base of support that cuts across both the public and private sectors. State and county public officials are on record supporting HOT lanes, major print and television media have commented favorably, businesses are proponents of them and the general public is finding the HOT lane plan appealing. HOT lanes on the Beltway are included in Fairfax Board of Supervisors Chairman Gerry Connelly's 4-Year Transportation Plan that the full board endorsed Feb. 9, 2004.

Fluor Daniel funded an independent public opinion survey of 600 citizens that indicates 62% support for adding HOT lanes to improve the Beltway capacity. In the September 2003 survey, support for HOT lanes increased even more if improved travel time is consistently reliable, trucks are restricted, BRT option is included and variable toll is used while a free option also is maintained.

Evaluation of the HOT lane concept continues as part of the ongoing Capital Beltway EIS and PPTA processes. As the public becomes more informed about the specifics of Fluor Daniel's concept, indications are that most—not some—like HOT lanes for the Capital Beltway in northern Virginia.

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INDEPENDENT

October 8, 2004

BY FACSIMILE
The Honorable Jennifer L. Dorn
Administrator
Federal Transit Administration
Department of Transportation
400-7th Street, S.W.
Washington, DC 20590

Dear Ms. Dorn:

This letter follows up on the September 30, 2004 hearing of the Subcommittee on Energy Policy, Natural Resources and Regulatory Affairs, entitled "How Can We Maximize Private Sector Participation in Transportation? – Part II." 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 October 29, 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/FTA's Implementing Rules. Currently, the Federal Transit Administration (FTA) has 18 codified rules, such as for Planning assistance and standards (Part 613), Project management oversight services (Part 633), and Credit assistance for surface transportation projects (Part 640), but none on Private sector participation. 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 a June 28, 2004 reply to one of my post May 18th hearing questions, the Department of Transportation (DOT) stated, "Section 5307(c) compels FTA to accept a grantee's annual certification of intent to comply ... FTA carries out the Section 5307(c) mandate through the agency's triennial review process." DOT also noted that, in 1994, the prior Administration rescinded the Reagan Administration's October 1984 nonbinding guidance on private sector participation. In your written statement for the Subcommittee's September 30, 2004 hearing, you stated, "in our judgment additional rulemaking is not necessary for FTA to enforce current law" (p. 2). During the hearing, you stated that you plan for FTA to develop nonbinding "Plain English" guidance on private sector participation.

After discovering grantee confusion and noncompliance, in August 2003, I asked you to issue implementing rules for Sections 5306(a), Private Enterprise Participation, and 5307(c), Public Participation Requirements. One logical option is to amend FTA's Major capital investment (Part 611) rule since it already implements part of 49 USC Section 5309, "Capital investment grants and loans."

a. Because of existing grantee confusion, instead of issuing nonbinding and unenforceable guidance, will you instead amend an existing FTA rule or issue another freestanding FTA rule?

b. If not, how can you assure this Subcommittee that FTA has sufficient safeguards in place to meet its fiduciary responsibility to ensure that Federal funds are spent in accordance with Federal laws and rules? And, how can you ensure grantee compliance without specific and enforceable DOT direction?

c. If you decide to pursue nonregulatory guidance as a first or only step, will you publish a proposed version in the Federal Register for public comment? And, what will be the timetable for issuance of proposed and then final versions?

d. If you decide to pursue a rulemaking, what is the timetable for issuance of a proposed rule, followed by a final rule?

Q2. 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)). In your written testimony for the Subcommittee's September 30, 2004 hearing, you stated, "Under the Administration's reauthorization proposal, FTA would have the authority to withhold funds to the extent deemed necessary to bring a grantee into compliance" (p. 4). However, under its codification of the grants management common rule, DOT already has authority to withhold funds for a noncompliant grantee.

In a post-hearing question, I asked, "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?" In reply, DOT identified 10 problem grantees from Fiscal Years 2000 through 2003 (including the Sacramento Regional Transit or SACRT) but stated, "Only in extreme cases in which there is a lack of good faith efforts by a grantee does FTA resort to formal enforcement actions. In all of the instances identified above, the grantees took actions voluntarily to bring themselves into compliance."

In my opening statement for the September 30, 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 general 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 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 a local transit grantee (SACRT) to purchase new buses without prior compliance with the private sector participation notice requirements.
- 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 California Bus Association (representing private sector provider Amador Stage Lines) filed a primarily non-charter service emergency protest about private sector participation violations.
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- Nonetheless, on March 25th, the grantee moved ahead without any consequence from DOT, i.e., despite DOT's written direction to the grantee not to move forward.
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- On August 6th, I asked you to provide evidence of specific compliance and requested you to initiate a FTA rulemaking.
- In December, FTA Chief Counsel justified your 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").
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    a. Because of the deficiency finding, what specific followup actions did DOT take to ensure ongoing and full compliance with the July 2001 SOP? How come DOT did not discover that the grantee failed to implement the SOP from July 2001 to 2003? And, what specific date did FTA determine for full compliance by SACRT?

b. What specific evidence underpinned your August 5, 2003 judgment of "minimum" compliance?

c. Do you consider grantee compliance with Sections 5306(a) and 5307(c) to be operational decisions outside the purview of DOT's enforcement?

d. Why didn't FTA ask SACRT why it did not publish notice in The Daily Recorder **only** for the instant case? Will FTA now do so?

Q3. DOT Enforcement of Restrictions on Use of Equipment. The government-wide grants management common rule, coordinated by the Office of Management and Budget, 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. Do you believe that a publicly funded entity should be engaged in providing service that is already being provided by the private sector?

b. In the Subcommittee's May 18, 2004 hearing, E Noa Corporation in Hawaii presented one such case. In the Subcommittee's September 30th hearing, Oleta Coach Lines in Williamsburg, VA presented another such case. Since January 20, 2001, how many times has FTA enforced this provision in its own rules 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?

c. If not, why not?

d. Since January 20, 2001, how many protests has FTA received from existing private sector mass transit providers about such unfair competition? Please provide, for the hearing record, information about each such complaint and FTA's resolution.

Q4. Private Sector Complaints Filed with DOT/FTA.

a. How many non-charter complaints, appeals, protests, etc. has FTA received since January 20, 2001 and how were they resolved? Please provide a summary of each for the hearing record.

b. How many charter bus complaints, appeals, protests, etc. has FTA received since January 20, 2001 and how were they resolved? Please provide a summary of each for the hearing record.

c. Did any of the charter bus complaints mention a federally-funded public grantee using FTA-funded equipment or facilities to provide a charter service in an area already served by a private charter service operator? If so, did FTA

actively investigate each such complaint? Did FTA take any enforcement action(s)? Did FTA require one or more grantees to pay compensation to an existing private sector operator? Please provide a summary of each case for the hearing record.

d. How many private sector complaints were characterized by FTA as "charter" even though they primarily involved private sector participation requirements?

Q5. Youngstown, OH Case. At the Subcommittee's May 18, 2004 hearing, the President of Community Bus Services in Youngstown, Ohio testified, "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). In its June 28th post-hearing answer, DOT explained, "Due to an extended leave of absence for the Regional Counsel ... the Office of Chief Counsel in headquarters provided legal counsel." Is this an isolated case where the FTA's Chief Counsel in DC had to intervene in a private sector participation case? If not, in how many other cases has headquarters intervened?

Q6. Amador/Sacramento Case. On March 13, 2003 and August 6th, I sent letters to you about the Amador Stage Lines case. At the Subcommittee's May 18, 2004 hearing, the President of Amador Stage Lines in Sacramento, California laid out a sorry case of FTA's nonenforcement of the statutory private sector participation requirements. After FTA directed the local grantee to "hold any action on the subject contract or service in abeyance pending the outcome of our review" (on March 18, 2003), Amador stated, "FTA never admonished" the local grantee for approving the public takeover without waiting for the completion of DOT's review (p. 5). And, Amador stated that DOT "never demonstrated by independent investigation or by evidence how [the local grantee] had met each statutory obligation" (p. 6). I found the same in my further investigation. Also, on July 14, 2004, the General Manager/Chief Executive Officer of SACRT admitted to me that SACRT did not implement the 2001 co-signed FTA-directed revised SOP until 2003.

a. Will DOT now initiate an enforcement action against SACRT for its noncompliance with the statutorily-required private sector participation requirements?

b. What do you recommend to recover the excess Federal dollars expended?

c. In a post-hearing question, I asked DOT Assistant Secretary Frankel, "what do you recommend that Amador now pursue to remedy the harm it suffered?" A few days before the Subcommittee's September 30, 2004 hearing, he advised, "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."

Since Amador filed its emergency private sector participation (i.e., non-charter) appeal to you in March 2003 and the public takeover occurred in April 2003, what could FTA do now after-the-fact, i.e., what would be the purpose of a further filing by Amador to you? And, if another filing makes no sense, what do you advise Amador now pursue to remedy the financial harm it has suffered?

d. Is Amador an isolated case or are there other examples of public takeovers with Federal funds of cost-effective private sector mass transit services? What about the Kemps service in Rochester, NY?

e. Considering the several compliance problems under investigation by FTA (e.g., the fleet/service management plan and private sector participation), why did FTA approve on August 30, 2004 the last-minute expenditure by SACRT of all of the previously unobligated Fiscal Year 2002 (3-year) funds (in P. L. 107-87 of 12/18/01), totaling $990,029, which were to expire on September 30, 2004?

Q7. Honolulu Case. At the Subcommittee's May 18, 2004 hearing, the Chairman and CEO of E Noa Corporation in Honolulu, Hawaii presented his urgent problem. I asked DOT in a post-hearing question: "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?"

In a June 28th post-hearing answer, DOT replied, "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. ... 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.'"

Nonetheless, on September 17th and September 20th, FTA notified the State of Hawaii and the City and County of Honolulu, respectively, that FTA rescinded its October 23, 2003 Record of Decision on the BRT project and found the project to be ineligible for FTA funding, partially because it had moved ahead without necessary FTA prior approvals.

Do you think that it is fair to existing private sector operators, including the E Noa Corporation, that a Federal grantee, the City and County of Honolulu FTA, now prohibits private sector operators from continuing to pick-up and deliver

passengers at Hanauma Bay, the principal sightseeing locale in Honolulu, even though the local FTA has a "monopoly" to do so?

Q8. Williamsburg Oleta Case. At the Subcommittee's September 30, 2004 hearing, a private sector transit operator (Oleta Coach Lines in Williamsburg, VA) discussed the initiation of a new service by a federally-funded local government mass transit provider (Williamsburg Area Transport or WAT). On June 7th, Oleta appealed to FTA, saying that the WAT service was unfairly competing with Oleta's pre-existing service in violation of DOT's regulatory protections (codified by DOT at 49 CFR §18.32(c)(3)). On August 2nd, FTA ruled in favor of WAT.

Nonetheless, on September 14th, the local James City County Community Services stated, "Williamsburg Area Transport (WAT) has been pleased to operate this successful pilot project, but does not intend to operate the route in the future. As you know, a private provider has alleged that WAT's provision of this service is illegal. WAT clearly received assurances at both the State and Federal level before implementation that WAT could legally provide this service and our legal authority to provide the service was upheld by the Federal Transit Administration after a formal complaint had been filed" (emphasis added).

Is the James City County letter correct that the FTA Regional Office upheld the unfair competition violation? If so, why? Please provide your detailed analysis and all DOT-signed documents in this case for the hearing record.

Q9. New York City Case. The Subcommittee invited two witnesses – Iris Weinshall Schumer, Commissioner of the New York City Department of Transportation, and the Chairman of the Transit Alliance, representing the 7 affected private sector transit operators – for its September 30, 2004 hearing to discuss a proposed takeover by a federally-funded local transit agency (the Metropolitan Transit Authority or MTA) of private sector bus services in Queens, Brooklyn, the Bronx and Manhattan under operating contracts with the City. On June 11th, the Council of the City of New York held a hearing on this proposal. Its briefing paper for the hearing stated that the proposed takeover "potentially make the City responsible for paying hundreds of millions of dollars in transfer costs arising from necessary purchases of infrastructure, such as additional depots, garages, buses and fueling stations."

The Transit Alliance's written testimony stated, "the most recent budget submitted to the City Council calls for payment to the MTA of $161 million dollars, which is approximately $11 million more than present costs for delivery of the same service" (p. 5). It also states, "once the takeover is consummated the MTA plans to cut service" (p. 5). And, attached was a September 23rd letter from an AFL-CIO union, stating, "the Metropolitan Transit Authority has not shown any evidence that it can adequately fulfill this major undertaking ... would (without a doubt) be a 'lose-lose' situation to all."

a. What is DOT's estimate for the difference in total **public** costs (Federal, State, and local) between the current franchisee arrangements and the proposed buyout?
b. Do you think this is a good deal for the taxpayer?

Q10. Washington, DC Tourmobile Case. The Subcommittee invited two witnesses – the DC Director of Transportation and the sole 30+ years competitively awarded private sector franchisee – for its September 30, 2004 hearing to discuss the proposed 2-phase "Downtown" Circulator system in Washington, DC. A May 8, 2000 Department of the Interior/National Park Service memorandum stated, "The system proposed for implementation in the Study may require financial subsidy to operate and will provide no monetary return to the National Park Service. The present concessioner operated interpretive shuttle does not require subsidy and pays fees in which four National Capital Region parks and the National Park Service (80/20 franchise fee split) share approximately $600,000 to $700,000 annually."

a. The DOT Office of the Secretary's co-signed December 2000 Memorandum of Agreement (MOA) for the proposed Circular system stipulates that DOT agrees to "Guide the MOA group through the reauthorization process of the transportation funding bill." What specifically has DOT done to advance this project since January 21, 2001? Did DOT have any contact with either the executive branch or the legislative branch of the DC government about this project? Please provide detailed dates and all documents for the hearing record.

b. The DC Downtown Business Improvement District (BID)'s website on its proposed Circulator system states that current estimates are $11.9 million in capital costs and $6 million annually in operating costs. Do these costs include: (a) any financial subsidy, and (b) full required buy-out costs for the franchisee Landmark Services Tourmobile, Inc. (including fair value possessory interest in government improvements, concessioner improvements, tourmobiles and supertrams, merchandise and supplies, and equipment)? If so, how much is estimated for the subsidy and how much for the buy-out? If not, what are your separate estimates for the subsidy and the buy-out?

c. What is DOT's estimate for the difference in total **public** costs (Federal and local) between the current franchisee arrangement and the proposed Circulator system? Do you think this is a good deal for the American taxpayer?

Q11. DOT's View of VA's Active and Proposed Public-Private Partnership Projects. Virginia has one completed (Pocahontas Parkway) and five active (Route 28, Route 288, Coalfields Expressway, Jamestown 2007, and Route 58) public-private partnership projects. In addition, six such rail or road projects are in the proposal stage. They include: Dulles Rail, HOT lanes on the Capital Beltway (I-

495), HOT lanes on I-95, I-81 widening, Powhite Parkway Western Extension, and Third Hampton Roads Crossing.

a. What is DOT's view of all six proposed projects? Has DOT assisted Virginia in any or all of these efforts? If so, how?

b. Have you been actively involved in the Dulles Rail project? And, are there any other Public-Private Partnership rail projects either active or proposed elsewhere in the United States? If so, please elaborate.

Q12. Administration Initiatives. Since January 21, 2001, what has the Administration done to encourage and increase private sector participation in the provision of transit services within existing law? What does the Administration plan to do in a possible second term within existing law?

TOM DAVIS, VIRGINIA,
CHAIRMAN

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BERNARD SANDERS, VERMONT,
INDEPENDENT

October 8, 2004

BY FACSIMILE
The Honorable Jennifer L. Dorn
Administrator
Federal Transit Administration
Department of Transportation
400-7th Street, S.W.
Washington, DC 20590

Dear Ms. Dorn:

This letter follows up on the September 30, 2004 hearing of the Subcommittee on Energy Policy, Natural Resources and Regulatory Affairs, entitled "How Can We Maximize Private Sector Participation in Transportation? – Part II." Please respond to the enclosed followup questions from Congressman Paul Kanjorski 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 October 29, 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

CONGRESSMAN PAUL E. KANJORSKI

COMMITTEE ON GOVERNMENT REFORM
SUBCOMMITTEE ON ENERGY POLICY, NATURAL RESOURCES AND REGULATORY AFFAIRS

HEARING ON PRIVATE SECTOR PARTICIPATION IN TRANSPORTION

QUESTIONS FOR WITNESSES JENNIFER DORN, FEDERAL TRANSIT ADMINSTRATION AND DAN TANGHERLINI, DC DEPARTMENT OF TRANSPORTATION REGARDING THE D.C. CIRCULATOR

SEPTEMBER 30, 2004

---

1. Does the private sector currently provide the services that the proposed D.C. Circulator would provide?

2. Why do we need to provide public funding for a service that the private sector is adequately providing?

3. For how long will this initiative require federal subsidies?

4. Does Washington Metro's decision to purchase buses for this project from a Belgian-based company violate any Buy American provisions?

5. Has the private sector been adequately consulted?

U.S. Department
of Transportation
**Federal Transit
Administration**

Administrator

400 Seventh St., S.W.
Washington, D.C. 20590

November 8, 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 October 8, 2004 questions following the September 3, 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,

Jenna Dorn

Enclosure

Questions for the Record
From Congressman Doug Ose
Following the September 30, 2004 Hearing
"How Can we Maximize Private Sector Participation in Transportation?"
Before the Subcommittee on Energy Policy,
Natural Resources, and Regulatory Affairs
Committee on Government Reform
U.S. House of Representatives

Q1. DOT/FTA's Implementing Rules. Currently, the Federal Transit Administration (FTA) has 18 codified rules, such as Planning assistance and standards (Part 613), Project management oversight services (Part 633), and Credit assistance for surface transportation projects (Part 640), but none on Private sector participation. 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 a June 28, 2004 reply to one of my post May 18th hearing questions, the Department of Transportation (DOT) stated, "Section 5307(c) compels FTA to accept a grantee's (sic) annual certification of intent to comply . . . . FTA carries out the Section 5307(c) mandate through the agency's triennial review process." DOT also noted that, in 1994, the prior Administration rescinded the Reagan Administration's October 1984 nonbinding guidance on private sector participation. In your written statement for the Subcommittee's September 30, 2004 hearing, you stated, "in our judgment additional rulemaking is not necessary for FTA to enforce current law" (p.2). During the hearing, you state that you plan for FTA to develop nonbinding "Plain English" guidance on private sector participation.

After discovering grantee confusion and noncompliance, in August 2003, I asked you to issue implementing rules for Section 5306(a), Private Enterprise Participation, and 5307(c), Public Participation Requirements. One logical option is to amend FTA's Major capital investment (Part 611) rule since it already implements part of 49 USC Section 5309, "Capital investment grants and loans."

a. Because of existing grantee confusion, instead of issuing nonbinding and unenforceable guidance, will you instead amend an existing FTA rule or issue another freestanding FTA rule?

Response: As noted at the hearing, FTA plans to issue a document that explains to planning agencies, transit agencies, and private sector providers in plain English what the requirements are, how they are enforced, what sanctions may be applied under the circumstances, and what recourse is available to private parties who believe they have not been afforded the opportunities provided in law. FTA will, of course, make any necessary modifications to current regulations once the multiyear surface transportation reauthorization bill has been enacted.

b. If not, how can you assure this Subcommittee that FTA has sufficient safeguards in place to meet its fiduciary responsibility to ensure that Federal funds are spent

in accordance with Federal laws and rules? And, how can you ensure grantee compliance without specific and enforceable DOT direction?

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 under the joint FTA/Federal Highway Administration (FHWA) planning regulations (23 C.F.R. Part 450) and related planning reviews. FTA's authority to set terms and conditions in grant agreements, coupled with its Triennial Review program, as provided for by Congress, are the primary mechanisms utilized to assure grantee compliance with all applicable Federal laws and rules or to direct necessary corrective action.

c. If you decide to pursue non-regulatory guidance as a first or only step, will you publish a proposed version in the Federal Register for public comment? And what will be the timetable for issuance of proposed and final versions?

Response: If appropriate, FTA will publish it in the Federal Register. FTA will make every effort to complete this document and circulate it for comment before the end of the calendar year.

d. If you decide to pursue a rulemaking, what is the timetable for issuance of a proposed rule, followed by a final rule?

Response: If FTA pursues a rulemaking, we will follow normal rulemaking timetables, as prescribed in the Administrative Procedures Act.

Q2. 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 Section 18.43(a)).

In a post-hearing question, I asked "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?" In reply, DOT identified 10 problem grantees from Fiscal Years 2000 through 2003 (including the Sacramento Regional Transit or SACRT) but stated, "Only in extreme cases in which there is a lack of good faith efforts by a grantee does FTA resort to formal enforcement actions. In all of the instances identified above, the grantee took actions voluntarily to bring themselves into compliance."

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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 general public and the private sector provider (Amador Stage Lines) were adversely affected.

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a. Because of the deficiency finding, what specific follow-up actions did DOT take to ensure ongoing and full compliance with the July 2001 SOP? How come DOT did not discover that the grantee failed to implement the SOP from July 2001 to 2003? And, what specific date did FTA determine for full compliance by SACRT?

Response: Although SACRT did not immediately implement its new SOP, it did provide appropriate public notice of its intent to expand its fixed route mass transportation service in early 2003. FTA has addressed this issue with the grantee during FTA's regular quarterly review meetings, and has received assurances from the grantee's new 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. 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.

b. What specific evidence underpinned your 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.

c. Do you consider grantee compliance with Sections 5306(a) and 5307(c) to be operational decisions outside the purview of DOT's enforcement?

Response: No. 49 U.S.C. Section 5306(a) requires planning agencies to consider the private sector to the maximum extent feasible; it does not apply to public providers of public transportation. Section 5306(a) is enforced through the 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 public transportation provider grantee's annual certification of compliance 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.

d. Why didn't FTA ask SACRT why it did not publish in The Daily Recorder **only** for the instant case? Will FTA now do so?

Response: *The Daily Recorder* is one of many methods used by SRT to publish information for the public and satisfy public notice requirements. FTA does not require that notices be published in any particular publication.

Q3. 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. Do you believe that a publicly funded entity should be engaged in providing service that is already being provided by the private sector?

Response: Generally, no. 49 USC 5323(a) provides that an FTA grantee may compete with a private provider of mass transportation only if it satisfies multiple and specific requirements set forth in Federal law.

b. In the Subcommittee's May 18, 2004 hearing, E NOA Corporation in Hawaii presented one such case. In the Subcommittee's September 30th hearing, Oleta Coach Lines in Williamsburg, VA presented another such case. Since January 20, 2001, how many times has FTA enforced this provision in its own rules 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: A review of FTA records indicates that, since January 2001 no complaints have been received alleging that an FTA grantee that is a public provider of mass transportation has impermissibly competed with a private provider of mass transportation.

c. If not, why not?

Response: As noted above, FTA has received no such complaints.

d. Since January 20, 2001, how many protests has FTA received from existing private sector mass transit providers about such unfair competition? Please

provide, for the hearing record, information about each such complaint and FTA's resolution.

Response: As noted above, FTA has received no such complaints.

Q4. Private Sector Complaints Filed with DOT/FTA.

a. How many non-charter complaints, appeals, protests, etc. has FTA received since January 20, 2001 and how were they resolved? Please provide a summary of each for the hearing record.

Response: A review of FTA records indicates that since January 2001, FTA has received no non-charter complaints, etc, appropriately alleging that public providers of mass transportation are competing unfairly with private providers of mass transportation.

b. How may charter bus complaints, appeals, protests, etc. has FTA received since January 20, 2001 and how were they resolved? Please provide a summary of each for the hearing record.

Response: Since January 2001 FTA has received 87 charter bus complaints, exception requests, and appeals. A summary of each can be found as Attachment A.

c. Did any of the charter bus complaints mention a federally-funded public grantee using FTA-funded equipment or facilities to provide a charter service in an area already served by a private charter service operator? If so, did FTA actively investigate each such complaint? Did FTA take any enforcement action(s)? Did FTA require one or more grantees to pay compensation to an existing private sector operator? Please provide a summary of each case for the hearing record.

Response: Two charter complaints (California Bus Association v. Sacramento Regional Transit, 2003-01; and Oleta Coach Lines, Inc. v. Williamsburg Area Transport, 2004-11) mentioned a Federally-funded grantee providing alleged charter service in an area already served by a private charter service operator. FTA actively investigated both complaints. FTA did not take enforcement action because it determined in both cases that the service being provided was mass transportation rather than prohibited charter service. Summaries of both cases are contained in Attachment A.

d. How many private sector complaints were characterized by FTA as "charter" even though they primarily involved private sector participation requirements?

Response: None.

Q5. Youngstown, OH Case. At the Subcommittees May 18, 2004 hearing, the President of Community Bus Services in Youngstown, Ohio testified, "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)*. In its June 28th post-hearing answer, DOT explained, "Due to an extended leave of absence for the Regional Counsel ... the Office of Chief Counsel in headquarters provided legal counsel." Is this an isolated case where the FTA's Chief Counsel in DC had to intervene in a private sector participation case? If not, in how many other cases has headquarters intervened?

Response: Yes, this was an isolated case. Moreover, FTA's Chief Counsel did not overrule the regional office in the Youngstown case. The delay occurred because Niles was a new grantee and did not yet have bid protest procedures in place. FTA informed the City of Niles that it should implement bid protest procedures and then consider the bid protest by Western Reserve. Once Niles issued their bid protest decision, the protester had the right to appeal that decision to FTA, which Western Reserve did. The final decision, in favor of the City of Niles and Community Bus Services, came from the FTA Regional Office.

Q6. Amador/Sacramento Case. On March 1, 2003 and August 6th, I sent letters to you about the Amador Stage Lines case. At the Subcommittee's May 18, 2004 hearing, the President of Amador Stage Lines in Sacramento, California laid out a sorry case of FTA's enforcement of the statutory private sector participation requirements. After FTA directed the local grantee to "hold any action on the subject contract or service in abeyance pending the outcome of our review" (on March 18, 2003), Amador stated, "FTA never admonished" the local grantee for approving the public takeover without waiting for the completion of DOT's review (p.5). And, Amador stated the DOT "never demonstrated by independent investigation or by evidence how [the local grantee] had met each statutory obligation" (p.6). I found the same in my further investigation. Also, on July 14, 2004, the General Manager/ Chief Executive Officer of SACRT admitted to me that SACRT did not implement the 2001 co-signed FTA-directed revised SOP until 2003.

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 (see Attachment B), FTA monitors compliance with statutory and regulatory private enterprise requirements as part of its Triennial Review process. FTA also reviewed Sacramento Regional Transit's public participation process as part of our investigation of the complaint by the California Bus Association. FTA has determined that Sacramento Regional Transit fulfilled its public notice and participation requirements in this case. 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, but this figure has not been

substantiated. Even if there is a difference in operating cost between Amador's previous charter service and the current mass transportation service, no Federal dollars could be involved because Sacramento is an urbanized area with a population over 200,000 and is, thus, ineligible to receive Federal operating assistance.

c. In a post-hearing question, I asked DOT Assistant Secretary Frankel, "what do you recommend that Amador now pursue to remedy the harm it suffered?" A few days before the Subcommittee's September 30, 2004 hearing, he advised, "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." Since Amador filed its emergency private sector participation (i.e., non-charter) appeal to you in March 2003 and the public takeover occurred in April 2003, what could FTA do now after-the-fact, i.e., what would be the purpose of a further filing by Amador to you? And, if another filing makes no sense, what do you advise Amador now pursue to remedy the financial harm it has suffered?

Response: It would be a conflict of interest for FTA to advise a complainant how to pursue a remedy against the Federal government. If Amador wants to further pursue this matter, it should obtain private counsel with respect to its options.

d. Is Amador an isolated case or are there other examples of public takeovers with Federal funds of cost-effective private sector mass transit services? What about the Kemps service in Rochester, NY?

Response: It is important to clarify that Amador was not providing mass transportation service; it was providing charter service. FTA has no record of any other examples of this type.

On February 10, 2004, Kemps alleged that Rochester-Genesee Regional Transportation Authority bid on a contract to provide service for the Rochester Institute of Technology and the University of Rochester. Kemps alleged this service was a violation of a previous FTA order. On July 14, 2004, FTA issued its decision concluding that the service in question did not violate FTA's regulations regarding charter service.

On September 8, 2004, Blue Bird Coach Lines doing business as Coach USA and Kemps Bus Service filed a civil action pursuant to the Administrative Procedure Act in the United States District Court for the Southern District of New York alleging that FTA's decision was "arbitrary and capricious." Since the matter is in litigation, FTA is not free to comment.

e. Considering the several compliance problems under investigation by FTA (e.g., the fleet/service management plan and private sector participation), why did FTA approve on August 30, 2004 the last minute expenditure by SACRT of all the

previously unobligated Fiscal Year 2002 (3-year) funds (in P.L. 107-87 of 12/18/01), totaling $990,029, which were to expire on September 30, 2004?

Response: Considering the public transportation improvements that would have to be deferred if the funds in question were allowed to expire on September 30, 2004, FTA approved the application having determined that SACRT was making acceptable progress in resolving outstanding management issues. SACRT's Fleet Management Plan has been updated to address several issues and questions that were raised by FTA and its project management oversight consultant.

RT intends to purchase 13 CNG buses for service expansion. SACRT has identified five new routes (Routes 11, 50E, 65, 66, and 143) and a significant service improvement for one route (Route 81) that require 17 buses in peak service. SACRT prepared an analysis (pursuant to FTA Circular 9300.1C) to justify the purchase of expansion buses. Since the funds available to obligate in Grant CA-90-Y289 were sufficient to cover only 13 of the 17 required expansion vehicles, SACRT proposed to purchase the other four buses with FY 2002 Bus Discretionary funds earmarked for Regional Transit ($990,300), plus local funds.

Q7. Honolulu Case. At the Subcommittee's May 18, 2004 hearing, the Chairman and CEO of E Noa Corporation in Honolulu, Hawaii presented his urgent problem. I asked DOT in a post-hearing question: "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?"

In a June 28th post-hearing answer, DOT replied, "the mass transportation service provided by the City and County of Honolulu 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. ... 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.'"

Nonetheless, on September 17th and September 20th, FTA notified the State of Hawaii and the City and County of Honolulu, respectively, that FTA rescinded its 10/23/03 Record of Decision on the BRT project and found the project to be ineligible for FTA funding, partially because it had moved ahead without necessary FTA prior approvals.

Do you think that it is fair to existing private sector operators, including the E Noa Corporation, that a Federal grantee, the City and County of Honolulu FTA (sic), now prohibits private sector operators from continuing to pick-up and deliver passengers at Hanauma Bay, the principal sightseeing locale in Honolulu, even though the local FTA (sic) has a "monopoly" to do so?

Response: FTA understands that E Noa Corporation, a tour operator, expressed its opposition to a BRT project proposed by the City and County of Honolulu. Since FTA has not funded this project, no FTA requirements are applicable, including private sector protections. Moreover, no information or evidence regarding Honolulu's decision to restrict the pick-up and delivery of passengers at Hanauma Bay has been presented to FTA.

Q8. Williamsburg Oleta Case. At the Subcommittee's September 30, 2004 hearing, a private sector transit operator (Oleta Coach Lines in Williamsburg, VA) discussed the initiation of a new service by a federally-funded local government mass transit provider (Williamsburg Area Transport or WAT). On June 7th, Oleta appealed to FTA, saying that the WAT service was unfairly competing with Oleta's pre-existing service in violation of DOT's regulatory protections (codified by DOT at 49 CFR §18.32(c)(3)). On August 2nd, FTA ruled in favor of WAT.

Nonetheless, on September 14, 2004, the local James City County Community Services stated, "Williamsburg Area Transport (WAT) has been pleased to operate this successful pilot project, but does not intend to operate the route in the future. As you know, a private provider has alleged that WAT's provision of this service is illegal. WAT clearly received assurances at both the State and Federal level before implementation that WAT could legally provide this service and our legal authority to provide the service was upheld by the Federal Transit Administration after a formal complaint had been filed" *(emphasis added)*.

Is the James City County letter correct that FTA upheld the unfair competition violation? If so, why? Please provide your detailed analysis and all DOT-signed documents in this case for the hearing record.

Response: Since an appeal is pending, FTA is not free to comment regarding the proceeding.

Q9. New York City Case. The Subcommittee invited two witnesses – Iris Weinshall Schumer, Commissioner of the New York City Department of Transportation, and the Chairman of the Transit Alliance, representing the 7 affected private sector transit operators – for its September 30, 2004 hearing to discuss a proposed takeover by a federally-funded local transit agency (the Metropolitan Transit Authority or MTA) of private sector bus services in Queens, Brooklyn, the Bronx and Manhattan under operating contracts with the City. On June 11, 2004, the Council of the City of New York held a hearing on this proposal. Its briefing paper for the hearing stated that the proposed takeover "potentially make the City responsible for paying hundreds of millions of dollars in transfer costs arising from necessary purchases of infrastructure, such as additional depots, garages, buses and fueling stations."

The Transit Alliance's written testimony stated, "the most recent budget submitted to the City Council calls for payment to the MTA of $161 million dollars, which is

approximately $11 million more than present costs of delivery of the same service" (p. 5). It also states, "once the takeover is consummated the MTA plans to cut service" (p. 5). And, attached was a September 23rd letter from an AFL-CIO union, stating, "the Metropolitan Transit Authority has not shown any evidence that it can adequately fulfill this major undertaking ... would (without a doubt) be a 'lose-lose' situation to all."

a. What is DOT's estimate for the difference in total **public** costs (Federal, State, and local) between the current franchisee arrangements and the proposed takeover?
b. Do you think this is a good deal for the taxpayer?

Response: FTA understands that the situation in New York is very much in flux, but at its core, this matter involves local planning and decision-making. Since FTA has not formally received any information or material for review or action, and because it is a local matter, it would be inappropriate for FTA to comment.

Q10. Washington, DC Tourmobile Case. The Subcommittee invited two witnesses – the DC Director of Transportation and the sole 30+ years competitively awarded private sector franchisee – for its September 30th 2004 hearing to discuss the proposed 2-phase "Downtown" Circulator system in Washington, DC. A May 8, 2000 Department of the Interior/National Park Service memorandum stated, "The system proposed for implementation in the Study may require financial subsidy to operate and will provide no monetary return to the National Park Service. The present concessionaire operated interpretive shuttle does not require subsidy and pays fees in which four National Capital Region parks and the National Park Service (80/20 franchise fee split) share approximately $600,000 to $700,000 annually."

a. The DOT/Office of the Secretary's co-signed December 2000 Memorandum of Agreement (MOA) for the proposed Circular system stipulates that DOT agrees to "Guide the MOA group through the reauthorization process of the transportation funding bill." What specifically has DOT done to advance this project since January 21, 2001? Please provide detailed dates and all documents for the hearing record.

b. The DC Downtown Business Improvement District (BID)'s website on its proposed Circulator system states that current estimates are $11.9 million in capital costs and $6 million annually in operating costs. Do these costs include: (a) any financial subsidy, and (b) full required buy-out costs for the franchisee Landmark Services Tourmobile, Inc. (including fair value possessory interest in government improvements, concessionaire improvements, tourmobiles and supertrams, merchandise and supplies, and equipment)? If so, how much is estimated for the subsidy and how much for the buy-out? If not, what are your separate estimates for the subsidy and the buy-out?

c. What is DOT's estimate for the difference in total **public** costs (Federal and local) between the current franchisee arrangement and the proposed Circulator system? Do you think this is a good deal for the American taxpayer?

Response: Since FTA has not funded this project, no FTA requirements are applicable, including private sector protections. Moreover, since FTA has not formally received any information or material for review or action, it would be inappropriate for FTA to comment on the merits of these local issues.

Q11. DOT's View of VA's Active & Proposed Public-Private Partnership Projects. Virginia has one completed (Pocahontas Parkway) and 5 active (Route 28, Route 288, Coalfields Expressway, Jamestown 2007, and Route 58) public-private partnership projects. In addition, six such rail or road projects are in the proposal stage. They include: Dulles Rail, HOT lanes on the Capital Beltway (I-495), HOT lanes on I-95, I-81 widening, Powhite Parkway Western Extension, and Third Hampton Roads Crossing.

a. What is DOT's view of all 6 proposed projects? Has DOT assisted Virginia in any or all of these efforts? If so, how?

Response: The U.S. DOT has encouraged the use of public-private partnerships for many years. The Federal Highway Administration (FHWA), for example, has undertaken administrative changes and experimental programs to encourage private sector participation in the finance and operation of surface transportation facilities. On October 6, 2004, FHWA Administrator Mary Peters initiated Special Experimental Project No. 15 (SEP-15). While FHWA has long encouraged increased private sector participation in Federal-aid projects, SEP-15 allows FHWA to actively explore much needed changes in the way we approach the oversight and delivery of highway projects to further the Administration's goals of reducing congestion and preserving our transportation infrastructure. The State of Virginia has expressed an interest in pursuing the I-81 project under SEP-15.

FHWA has worked with Virginia on a number of other active and proposed projects that involve public-private partnerships. The following is a description of whether, and if so, how FHWA has assisted with the Virginia projects mentioned in your question.

- **Pocahontas Parkway** – FHWA served as the lead agency in the NEPA process and issued a Record of Decision, approving the project's location and approved access points at I-95 and I-295. The project received Federal-aid funding from Virginia's State Infrastructure Bank.

- **State Route 28** – Improvements to this high volume roadway are being financed with State highway funds and revenue bonds backed by proceeds from a special Route 28 Tax District. FHWA has not been actively involved in this project.

- **State Route 288** – FHWA approved the NEPA document for the portion from I-64 to U.S. 250 (Broad Street), and approved the interchange with I-64. Additionally, Federal-aid funds were used in the construction of these projects.

- **Coalfields Expressway** - FHWA served as the lead agency in the NEPA process and issued a Record of Decision, approving the project's location. Federal-aid funding was provided for the NEPA work and for ongoing preliminary engineering for Section A. FHWA has also approved this project under SEP-14. FHWA recently approved an environmental re-evaluation for Section A of this route.

- **Route 58 Corridor Development Program** - The purpose of this State-funded program is to enhance the transportation network and foster economic development in southwestern Virginia. FHWA has not been actively involved in the projects associated with this program.

- **Jamestown 2007 Project** – This project includes work on Route 199 and Route 31 in James City County and the City of Williamsburg. FHWA has not been actively involved in this project.

- **Dulles Rail Project** - FHWA is working with FTA in the review of the environmental document.

- **Capitol Beltway HOT Lanes** – FHWA is working with VDOT in the preparation of the FEIS. FHWA also is working with VDOT in the review of proposals under Virginia's Public Private Transportation Act (PPTA) and has assigned a project manager for this effort.

- **HOT lanes on I-95** – FHWA is working with VDOT in the preliminary review of the PPTA proposals.

- **I-81 Widening** – Virginia used Federal-aid funding for preliminary engineering for the NEPA work. FHWA has signed a Process Streamlining Agreement with VDOT regarding the NEPA activities, and has assigned a project manager for this effort. FHWA also is working with VDOT towards approving I-81 as a SEP-15 project and as an Interstate System Reconstruction and Rehabilitation Pilot Program under TEA-21, Section 1216(b).

- **Powhite Parkway Western Extension** – VDOT has returned the proposals for this project to the private sector sponsors. FHWA has not been involved with this project.

- **Third Hampton Roads Crossing** - FHWA served as the lead agency in the NEPA process and issued a Record of Decision, approving the project's location. Federal-aid funds were used in the preparation of the NEPA document and its

associated preliminary engineering. FHWA is involved with the review of the PPTA proposal.

b. Have you been actively involved in the Dulles Rail project? And, are there any other Public-Private Partnership rail projects either active or proposed elsewhere in the United States? If so, please elaborate.

Response: The Dulles Corridor Rail Project is one of FTA's New Starts projects, so we have been actively involved. FTA is very supportive of increased involvement of the private sector in transit projects. We believe private sector involvement will enhance the viability of projects, so that they better meet a community's needs.

In addition to the Dulles Project, the Portland Airport light rail project, which has been operating for several years, was also a public-private partnership project. The first phase of the Las Vegas Monorail project, which received no FTA funds, was developed with private sector investment.

Q12. Administration Initiatives. Since January 21, 2001, what has the Administration done to encourage and increase private sector participation in the provision of transit services within the existing law? What does the Administration plan to do in a possible second term within existing law?

Response: This Administration believes strongly that increasing mobility in America depends upon all of us working together – public providers, private non-profit providers, and private for-profit providers.

As noted in testimony, the Administration's proposed reauthorization bill includes several important provisions with respect to private sector participation, and many of these provisions have been included in the Senate bill, House bill, or both.

First, the President proposes to clarify the requirements for including private operators engaged in public transportation in the development of statewide and metropolitan transportation plans and programs. Current law requires involvement of interested parties in the transportation planning process, and defines interested parties to include citizens, affected public agencies, representatives of transportation agency employees, freight shippers, providers of freight transportation services, private providers of transportation, representatives of users of public transit, and other interested parties. The President's proposal would explicitly require consideration of services provided by private operators engaged in public transportation in achieving the goals under four planning factors: supporting economic vitality, increasing access and mobility, modal connectivity and integration, and preserving and enhancing the existing system. We are extremely pleased that this provision was included in both the House and Senate bills, and expect that new regulations will be promulgated as a result of its passage.

Second, and perhaps more importantly with respect to transit, the President proposed to elevate the status of private operators to "sub-recipients" rather than "contractors" under

the urbanized area and non-urbanized area programs, FTA's two primary formula grant programs. This change would put private operators on a par with public transit agencies in proposing projects and services to the statewide or metropolitan area planning organization or the transit authority. Currently, as contractors, private operators can only respond to requests for proposals from public transit agencies for specific services, and their contracts are subject to cancellation at the discretion of the contracting agency. Under the Administration's proposal, private operators would be permitted to seek and receive grants for the provision of public transportation services that they would define and deliver. Private operators might, for example, seek funding simply for three new buses, to be used to provide service along a route that they believe could be profitable based on fare collections. By allowing private operators to offer additional service strategies for inclusion in the public program of services, communities will have a creative new resource for the development and delivery of public transportation. This change in law – proposed for transit's urbanized area formula program, non-urbanized area formula program, discretionary capital grant program, and the elderly and disabled formula program – would truly give private providers of public transportation a "seat at the table." Again, we are extremely pleased that the proposal was included in both the House and Senate bills, and would expect to promulgate regulations related to this change.

Third, the President proposed to require that States and communities develop coordinated Community Transportation Plans to identify and rectify critical gaps in service to low-income and elderly persons, and people with disabilities. These plans would have to be developed with the full involvement of private sector operators, and prioritized at the community level.

There are also two significant proposals that will strengthen FTA's position with respect to enforcement of private sector participation. First, the Administration proposed to eliminate the provision in current law that prohibits FTA from considering the role of the private sector in the planning process when certifying the planning processes of large metropolitan areas. There are no similar prohibitions against withholding certification if other stakeholder participation requirements are not met, including participation requirements for citizens, affected public agencies, representatives of transportation agencies' employees, segments of the community affected by transportation plans and programs, and transportation authorities. This change is critical and will provide the Department with an important enforcement tool to ensure that private sector operators and others are appropriately involved in transportation planning. Absent this change in law, we have no enforcement mechanism available because FTA is expressly prohibited from considering private sector involvement when making certification decisions. This provision has been included in the Senate reauthorization bill, but is not in the House bill.

The second proposal would significantly strengthen FTA's ability to enforce the requirements that public transit operators not engage in unfair competition with privately provided charter bus and school bus service. Under present law, if FTA finds a continuing pattern of violation, FTA may bar the grant recipient from further Federal transit assistance – a remedy that would dramatically and negatively affect so many

people in a community who depend on public transportation. FTA does not have authority to impose civil penalties or award monetary damages. Instead, FTA works to bring the transit agency into compliance with the law. Under the Administration's reauthorization proposal, FTA would have the authority to withhold funds to the extent deemed necessary to bring a grantee into compliance, which would give FTA a significantly more useful enforcement tool. Only the Senate bill includes the new enforcement mechanism proposed by the President; the House bill does not.

Over the last several years, FHWA and FTA have also undertaken a number of initiatives to explore ways to increase the number and efficacy of public-private partnerships. These initiatives include innovative contracting and financing tools, such as the use of Grant Anticipation Revenue Vehicle (GARVEE) bonds; the provision of Transportation Infrastructure Finance and Innovation Act (TIFIA) loans, guarantees and lines of credit; and the introduction of more flexible matching requirements, including the use of toll credits and donations. In order to expand funding for transportation projects through public-private ventures, the Administration's reauthorization proposal included provisions to:

- Expand access to the TIFIA program, by lowering the project size threshold to $50 million;
- Permit transit agencies to use a portion of their FTA funds as a debt service reserve in support of locally-issued bonds;
- Increase the Federal share to 80 percent for Joint Partnership Program projects, which are intended to encourage private sector deployment of innovative mass transportation services, technologies, and management and operational practices;
- Allow State and local governments to use up to an aggregate total of $15 billion in private activity, tax-exempt bonds to pay for projects eligible under the FHWA and FTA programs; and
- Establish a variable toll-pricing program under the Federal-aid highway program; ease the eligibility requirements for the Interstate Rehabilitation and Reconstruction Program; and allow States to permit single occupancy vehicles on high occupancy vehicle lanes, so long as time-of-day variable charges are assessed.

Fundamentally, the changes proposed by this Administration would provide increased opportunities for direct involvement of the private sector in identifying transportation needs and proposing solutions, and would encourage greater private sector investment in transportation projects. Communities will have the benefit of a broader selection of services, a more competitive environment that is likely to improve cost-effectiveness, and the opportunity to tap the creativity of the private sector for service innovations. In short, these changes will improve mobility and strengthen America's transportation network.

Additionally, over the last four years, FTA has provided 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/FHWA statewide and metropolitan planning regulations. FTA has also provided

assistance for 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 Private-for-Hire Vehicle Industry in Public Transit."
5. TCRP Project B-21, "Effective Approaches to Meeting Rural Intercity Bus Transportation Needs."

Finally, on November 20 2002, FTA held a forum with approximately 30 representatives of the private sector, labor unions, and public transit providers to explore barriers to and opportunities for the public and private sector work to together to provide more public transportation.

US Department
of Transportation
**Federal Transit
Administration**

Administrator

400 Seventh St., S.W.
Washington, D.C. 20590

OCT 2 2003

The Honorable Doug Ose
Chairman, Subcommittee on Energy Policy,
Natural Resources and Regulatory Affairs
House of Representatives
Washington, DC 20515-6143

Dear Congressman Ose:

Thank you for your letter dated August 6, 2003, regarding recent developments in the provision of transportation services in Sacramento. Having recently issued my decision on review of a related appeal from a Federal Transit Administration (FTA) regional office decision with respect to an alleged violation of FTA's charter service laws, I am now able to respond to your requests

First, you ask how Sacramento Regional Transit District (RT) complied with the laws regarding public participation in transit programs, including private transportation providers. Specifically, you cite 49 U.S.C. 5307 and 5306(a). With respect to section 5307, this Urbanized Area Formula Grants program requires grantees, as a condition of receiving a Federal grant, to "develop, in consultation with interested parties, including private transportation providers, a proposed program of projects for activities to be financed" (section 5307(c)(2)) and 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 . . . ." Section 5307(c)(3). Further, this program requires that grantees "consider comments and views received, especially those of private transportation providers, in preparing the final program of projects . . . ." Section 5307(c)(6).

FTA determines compliance with these and other requirements primarily through the Triennial Review process. FTA's July 2000 Triennial Review noted that RT did not develop its Program of Projects using the required consultation process with interested parties (such as private transportation providers and transit users). In response, RT developed a Standard Operating Procedure (SOP) in July 2001 to prepare an annual capital budget each fiscal year that includes the Program of Projects to be funded using section 5307 and section 5309 funds. The SOP requires that a Program of Projects be developed in consultation with interested parties, including private transportation providers. 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. Thus, the chronology provided below provides examples of the notices and public hearings by which RT fulfilled its obligations discussed above.

Please note that section 5306(a), which you reference, does not apply to transit agencies; instead, section 5306(a) requires that plans developed by Metropolitan Planning Organizations—in this case, the Sacramento Area Council of Governments—consider, to the maximum extent feasible, the participation of private enterprise. This provision, therefore, does not apply to plans and programs developed by a transit agency.

Second, you request a chronology of events and activities relevant to the issues your raise. The chronology follows:

1997	FY1997 FTA Triennial Review of RT (full compliance)
March 9, 1998	FTA letter to RT (full compliance with Triennial review)
June 19, 1999	RT published notice of expansion of its CNG (Compressed Natural Gas) bus fleet
June 1999	RT held a public hearing for its Program of Projects, including expansion of the CNG bus fleet
March 31, 2000	RT annual budget hearing
July 2000	FY2000 FTA Triennial Review of RT (deficiency in planning with private sector)
August 2, 2000	FTA letter to RT enclosing FY2000 Triennial Review (deficiency in planning with private sector)
June 3, 2001	RT sent information to FTA on compliance with private sector requirements referenced in Triennial Review
July 3, 2001	RT issued Standard Operating Procedures
June 27, 2002	Amador Stage Lines contract with California Department of Health Services (July 1, 2002 through June 30, 2005)
July 31, 2002	Contractual agreement between Amador and DGS (Department of General Services) for service from July 1, 2002 to January 4, 2003
August 9, 2002	RT published notice of new Downtown Circulator Service
August 26, 2002	RT public hearing regarding new Downtown Circulator Service
September 11, 2002	RT letter to DGS regarding Charter Service Analysis

September 2002	Amador notified CBA (California Bus Association) that DGS would extend shuttle service contract to April 7, 2003, then terminate contract
September 30, 2002	RT approved Downtown Shuttle Service
January 2003	RT notice of public hearing
January 27, 2003	RT public hearing, CBA testified
January 27, 2003	CBA letter to RT (protest and receipt of email, staff reports and analysis)
January 28, 2003	DGS letter to Amador (contract cancellation effective April 4, 2003)
February 28, 2003	DGS notified California State Employees Association of new RT service
March 6, 2003	CBA emergency protest letter to Jennifer Dorn
March 10, 2003	Sacramento Regional Transit District hearing
March 12, 2003	CBA letter to Administrator Jennifer Dorn (enclosures to March 6 letter: petitions, emails, video)
March 13, 2003	Congressman Ose letter to Administrator Dorn requests review of CBA's emergency protest
March 18, 2003	FTA Region IX letter to RT (summarizes complaint, including private sector, CNG buses, and charter; requests RT to hold action on contract in abeyance pending outcome of FTA investigation)
March 20, 2003	RT's response to FTA Region IX (RT urges FTA to withdraw its request to RT to stay its pending action)
March 20, 2003	DGS letter to RT to approve contract with RT
March 21, 2003	FTA Chief Counsel Will Sears letter to CBA (acceptance of charter complaint and referral to FTA Region IX)
March 24, 2003	CBA response to FTA Region IX (rebuttal to RT)
March 25, 2003	RT's response to FTA regarding CBA's protest

March 26, 2003	Administrator Dorn response to Congressman Ose
March 28, 2003	DGS contract with RT for Central City Transit Pass Program
March 31, 2003	CBA letter to FTA Region IX
April 7, 2003	CBA's rebuttal
June 3, 2003	RT letter to FTA re: private enterprise participation
August 1, 2003	Administrator Dorn letter to Congressman Ose
August 5, 2003	FTA Region IX decision on Charter Complaint 2003-01, and 49 U.S.C. Sections 5303, 5304, 5306, 5307, and 5323
August 6, 2003	CBA letter to FTA (procedural matters)
August 6, 2003	Congressman Ose letter to FTA
August 8, 2003	CBA letter to FTA (requests additional information)
August 12, 2003	CBA facsimile to FTA (procedural matters)
August 15, 2003	CBA appeal of FTA Region IX's decision to Administrator Dorn
September 16, 2003	Administrator Dorn's Decision to deny CBA's appeal

Third, you ask that FTA undertake a rulemaking to ensure that its grantees make adequate efforts to integrate private enterprise in their transit programs. As you may know, on May 14, 2003, the Administration submitted its reauthorization proposal, the Safe, Accountable, Flexible and Efficient Transportation Equity Act of 2003 (SAFETEA) to the 108th Congress. Since Congress is considering the future structure and funding of our programs, including the many provisions of SAFETEA that would expand private sector participation, I do not believe it would be appropriate to undertake a major rulemaking at this time. Nevertheless, I look forward to working with you on this important legislation.

Finally, please accept some additional information with respect to FTA's interest in ensuring a full realization of the many resources the private sector can bring to the provision of public transportation. During more than two years at FTA, I have worked to strengthen inclusion of the private sector in our transit programs. Toward that goal, on December 27, 2001, I issued a "Dear Colleague" letter to the transit community and mailed hundreds of copies of a new "Charter Service Information" brochure to hundreds of private and public transportation providers. That brochure highlights important aspects of FTA's charter service regulation (49

CFR Part 604) and provides information on how to grow the private role in transportation (copy enclosed).

The interconnected nature of America's transportation network requires that all passenger transportation providers work together to maintain the vitality and effectiveness of every component of our system. For instance, local transit agencies, especially in rural areas, are providing connecting feeder and distributor services to intercity operators. Local transit operators have become ticket agents for both local and intercity service. Intercity over-the-road bus operators have become contractors to public governmental agencies, particularly providing long distance commuter services, and have made their resources available for special events in times of unusually high demand. The health of every component—public and private—affects the health and effectiveness of our entire passenger transportation system.

Thank you for interest in this issue. I look forward to working with you again on matters related to the provision of transit service in our nation's communities.

Sincerely,

Jennifer L. Dorn

Enclosures

cc: The Honorable Tom Davis
The Honorable John Tierney

Attachment A

CHARTER SERVICE SURVEY REPORT
October 2001

- Summary: **Over the course of the last year FTA took administrative action in twenty (20) instances of charter bus activity by FTA grantees.**
- **Triennial reviews resulted in findings at seven (7) transit authorities (SRTA; City Link; Fargo, ND; City of Fort Collins, CO; City of Sioux Falls, SD; Colorado DOT; and Wyoming DOT).**
- **Six (6) transit authorities requested special event exceptions (Lowell RTA; Red Rose Transit Authority; WMATA; IndyGo; KCATA; and LACMTA).**
- **Four (4) transit authorities had issues regarding trolley vehicles (SRTA; City Link; Charlevoix County Transit, MI; and Milwaukee County Transit System).**
- **Four (4) complaints were brought against transit authorities (Charlevoix County Transit, MI; Albuquerque, NM; Ottumwa Transit Authority, IA; and PACE, Arlington Heights, IL).**
- **Two (2) transit authorities had difficulties with the notice to willing and able private operators (Miami Valley RTA, OH; and Colorado DOT).**
- **One (1) rural transit authority was granted a hardship exception (Jefferson Transit Authority, WA).**

1. Southeastern Regional Transit Authority, New Bedford, MA

Triennial review revealed that locally funded trolleys are used in charter service and kept in SRTA's Federally funded garage. FTA Region I advised SRTA to park the trolleys in a public/city lot to eliminate the problem.

2. Lowell Regional Transit Authority, Lowell, MA

United States Senator Bob Smith requested LRTA to provide a 25-passenger, or larger, Compressed Natural Gas powered bus to transport staff and press to various events in Western New Hampshire on August 20-21, 2001. A special event exception was granted.

3. Red Rose Transit Authority, Lancaster, PA

Three RRTA trolleys were requested to assist President Bush in his visit to a hydroelectric generating plant in Safe Harbour, PA. The service was provided since the RRTA had entered into an agreement with the two willing and able private charter operators who responded to RRTA's latest public notice.

4. Washington Metropolitan Area Transit Authority, Washington, D.C.

WMATA requested a special events charter exception to operate service for attendees of the International Transportation Symposium scheduled for October 9-12, 2000, in Washington, D.C. FTA granted a special events exception to provide charter service because of safety and security concerns.

5. Greater Peoria Mass Transit District (City Link), Peoria, IL

As a result of a triennial review, FTA learned that City Link was operating charter service with trolleys and charging different rates to private individuals and other providers. In February 2001, FTA advised City Link that if it wished to provide charter service it must renegotiate its agreement with willing and able private charter operators.

6. Indianapolis Public Transportation Corporation (IndyGo), Indianapolis, IN
IndyGo requested a special events exception to provide charter service for the World Police & Fire Games in Indianapolis in June 2001. FTA denied the request because there was no evidence that private charter operators were not capable of providing the service.

7. Charlevoix County Transit, Boyne City, MI
Mackinaw Trolley Company submitted a written complaint to FTA concerning charter service operated by Charlevoix County Public Transportation using a trolley. The matter was resolved upon Charlevoix's agreement to discontinue the service.

8. Miami Valley Regional Transit Authority, Dayton, OH
FTA determined that Miami Valley RTA would have to reissue its public notice to determine if there are any willing and able private charter providers. Miami Valley's previous notice had improperly specified certain vehicle types, including trolleys and senior mobility vehicles.

9. Milwaukee County Transit System, Milwaukee, WI
Milwaukee requested a waiver of the charter regulation for its trolley replica buses. FTA denied the request.

10. City of Albuquerque Transit Department, Albuquerque, NM
An Albuquerque resident complained that the City of Albuquerque was planning to substantially reduce its fixed route service because of service the City was planning to provide for the annual Balloon Fiesta held in Albuquerque on the weekend of October 7, 2000. No City of Albuquerque buses were actually used for the Balloon Fiesta because the transit workers went on strike.

11. Kansas City Area Transportation Authority (KCATA), Kansas City, MO
KCATA requested a special exception request to provide transportation for the American Dental Association Convention on October 12-15, 2001. FTA directed KCATA to determine if there were any willing and able private charter operators. No willing and able private charter operator responded and KCATA will be pursuing its request for a special events exception.

12. Ottumwa Transit Authority (OTA), Ottumwa, IA
Southern Iowa Transit, Inc. filed a complaint alleging that OTA and Ten-Fifteen Regional Transit performed illegal charter service on a number of occasions from

April 1998 to April 2000. FTA directed OTA and Ten-Fifteen Regional Transit to cease and desist operating charter service. The matter has been resolved.

13. City of Fargo, ND
Triennial review found that grantee was operating charter service outside the allowed exceptions. FTA directed grantee to cease and desist. Charter rates must be revised to reflect fully allocated costs.

14. City of Fort Collins, CO
Triennial review found that grantee was operating charter service outside the allowed exceptions. FTA directed grantee to cease and desist.

15. City of Sioux Falls, SD
Triennial review found that grantee was operating charter service outside the allowed exceptions. FTA directed grantee to cease and desist.

16. Colorado Department of Transportation, Denver, CO
Triennial review found that grantee failed to obtain agreement of private willing and able operators to provide charter service. FTA directed grantee to revise its charter agreement.

17. Wyoming Department of Transportation, WY
Triennial review found inadequate monitoring of charter services. Grantee advised to revise its monitoring procedures.

18. Los Angeles County Metropolitan Transportation Authority, Los Angeles, CA
LACMTA requested a special event exception for the Democratic National Convention to be held in Los Angeles from August 14-17, 2000. FTA authorized the exception.

19. Jefferson Transit Authority (JTA), Port Townsend, WA
JTA requested a "hardship" exception to the charter regulation. FTA granted the exception for one year from December 29, 2000.

20. American Bus Association v. PACE, Arlington Heights, IL
In October 2001, FTA learned that PACE provided charter service with 35 buses in response to a request from the White House. The buses were used to transport approximately 4,000 airline employees to O'Hare airport for a White House event including the Secretary of Transportation. PACE did not request an exception from FTA. The American Bus Association orally complained to FTA Administrator Dorn about the service. FTA sent a letter to PACE advising the service was charter service and that PACE was required to follow the procedural requirements for seeking a special exception.

2002 FTA Charter Service Docket

2002-01 Classic Caddy Limousine vs. Lansing Capital Area Transit Authority **TRO-5**

On August 16, 2002, Classic Caddy Limousine filed a complaint alleging that CATA (1) improperly found Classic Caddy not "willing and able;" and (2) improperly used four trolley vehicles for prohibited service.
This case was consolidated with Docket Numbers 2002-04, and 2002-10.
On October 11, 2002, FTA found that CATA provided illegal charter service with its trolleys, both direct and indirect service through improperly leasing the vehicles. On November 6, 2002, amended its determination based on new information that the trolleys were funded with FHWA funds and ordered it to immediately cease and desist using the trolleys for charter service.
CATA appealed the decision. The Administrator denied the appeal on May 14, 2003.

2002-02 Kemp's Bus Service vs. Rochester-Genesee Regional Transportation Authority and its subsidiary, Livingston Area Transit Service **TRO-2**

On March 18, 2002, Kemps filed a complaint alleging that the RGRTA provided prohibited charter service for (1) Rochester Firefighters; (2) a school field trip; (3) for senior citizens to Wegman's grocery stores; (4) for the Wegmans' International Ladies Professional Golf Association tournament; and (5) to the Rochester Institute of Technology. Further, on May 6, 2002, Kemps complained that service RGRTA provided to the Town of Chile was prohibited charter service.
On September 18, 2002, FTA found that RGRTA was providing prohibited charter service in all instances and ordered it to cease and desist any such further service. RGRTA appealed the decision. On January 2, 2003, the Administrator denied RGRTA's appeal and issued and advisory opinion regarding the questioned services.
On June 16, 2003, the Administrator issued a letter to RGRTA concluding that with respect to the service at issue, RGRTA was in compliance with FTA's charter service regulation.

2002-03 The Point Companies vs. Lowcountry Regional Transportation Authority **TRO-4**

On January 16, 2002, The Point Companies alleged that the LRTA provided prohibited charter service for (1) the Designer Show House; (2) the Mr. Russell Beer; (3) to a group from Savannah International Airport to Hilton Head Island; and (4) the U.S. Marine Corps.
The South Carolina DOT investigated the complaint because LRTA is a sub-recipient. LRTA admitted providing charter service to the Marine Corps on

January 15, 2002, however, LRTA claimed that it provided the service pursuant to an exception, 49CCR 604.9(5)(b). On July 9, 2002, SCDOT determined that the service did not qualify for the claimed exemption. LRTA stated that it would comply with the requirements of 49 CFR 604.9 in the future.

2002-04 The Tecumseh Trolley & Limousine Service vs. Lansing Capital Transit Authority **TRO-5**

On April 1, 2002, Tecumseh Trolley filed a complaint alleging that CATA provided prohibited charter service and improperly leased its trolley vehicles. This case was consolidated with Docket Numbers 2002-01, and 2002-10.
On October 11, 2002, FTA found that CATA provided illegal charter service with its trolleys, both direct and indirect service through improperly leasing the vehicles. On November 6, 2002, amended its determination based on new information that the trolleys were funded with FHWA funds and ordered it to immediately cease and desist using the trolleys for charter service.
CATA appealed the decision. The Administrator denied the appeal on May 14, 2003.

2002-05 Windstar Lines v. Western Iowa Transit **TRO-7**

On March 11, 2002, Windstar Lines filed a complaint alleging that Western Iowa Transit provides prohibited charter service to a casino 82 miles away on the last Thursday of every month. The parties resolved their dispute through informal conciliation and on June 3, 2002, FTA closed its file.

2002-06 Sharaton Bus Service, Inc. v. Endless Mountain Transportation Authority **TRO-3**

On April 24, 2002, Sharaton filed a complaint about EMT's shared ride program for the elderly. EMT Mountain explained that the service in question was state funded and performed with state funded vehicles. Sharaton did not articulate any further complaint. The matter was closed on February 13, 2003.

2002-07 Desert Resorts Transportation v. SunLine Transit **TRO-9**

On April 22, 2002, Desert Resorts filed a complaint alleging that SunLine provided prohibited charter service for the Palm Springs International Film Festival in January 2002. On January 3, 2003, FTA found that SunLine had engaged in prohibited charter service and ordered it to immediately discontinue the service.
SunLine and Desert Resorts both appealed the decision. The Administrator denied the appeals on July 7, 2003.

2002-08 Cardinal Buses, Inc. v. Interurban Transit Partnership TRO-5

On June 20, 2002, Cardinal filed a complaint alleging that ITP was planning to provide bus service for a radio station's birthday on June 22, 2002. On August 20, 2002, FTA found that the service violated FTA's charter regulation and ordered it to cease and desist.

2002-09 Laidlaw Education Services v. Rochester-Genesee Regional Transportation Authority TRO-2

On May 22, 2002, Laidlaw filed a complaint alleging that RGRTA provided prohibited charter service to Syracuse, NY for Buffalo Bills and basketball games, Finger Lakes Concerts, private campus shuttles, special event services and senior citizen super market trips. On December 20, 2002, RGRTA filed a response.

2002-10 Indian Trails, Inc. v. Lansing Capital Area Transportation Authority TRO-5

On July 12, 2002, Indian Trails filed a complaint alleging that CATA provided prohibited charter service and improperly leased its charter vehicles.
This case was consolidated with Docket Numbers 2002-01, and 2002-04.
On October 11, 2002, FTA found that CATA provided illegal charter service with its trolleys, both direct and indirect service through improperly leasing the vehicles. On November 6, 2002, amended its determination based on new information that the trolleys were funded with FHWA funds and ordered it to immediately cease and desist using the trolleys for charter service.
CATA appealed the decision. The Administrator denied the appeal on May 14, 2003.

2002-11 Desert Resorts Transportation v. Sun Line Transit Agency TRO-9

On April 22, 2002, Desert Resorts filed a compliant alleging that Sunline provided prohibited charter service on 106 occasions primarily for school field trips.
On April 28, 2003, FTA found that SunLine had engaged in prohibited charter service and ordered it to immediately discontinue the service.
SunLine appealed the substance of the decision and Desert Resorts appealed regarding the remedy. The Administrator denied both appeals on August 5, 2003.

2002-12 Faith Bus Service v. Baldwin Rural Area Transportation TRO-4

On September 1, 2002, Faith Bus filed a complaint alleging that BRAT provided prohibited charter service to the YMCA in Baldwin County, the Head Start Program, and Bayside Academy. The Alabama Department of Transportation

received a response from BRAT stating that the service in questions was mass transportation, not prohibited charter service. Faith Bus Service did not rebut. On March 18m 2003, Alabama DOT closed its file.

2002-13 Desert Resorts Transportation v. Morongo Basin Transit Agency TRO-9

On September 26, 2002, Desert Resorts filed a complaint alleging that Morongo Basin Transit Authority performed prohibited charter sightseeing service for the Chamber of Commerce, including a tour of Joshua Tree National Park. Counsel for Desert Resorts called on February 7, 2003, and requested FTA to hold off rendering a decision because as with Desert Resorts' complaints against SunLine Transit (2002-07 and 2002-09) the only issue is remedy.

2002-14 Lewis Brothers Stages v. Park City Transit System TRO-8

On December 19, 2002, Lewis Brothers Stages filed a complaint alleging that Park City Transit System provided prohibited charter service between the Salt Lake City International Airport and Park City and to the Sundance Film Festival.

On March 28, 2003, FTA found that the service was expanded regular bus routes that stop at regular bus stops and not prohibited charter service.

2002-15 Lakeland Area Mass Transit District TRO-4

On September 4, 2002, the Office of Inspector General notified FTA of a hotline complaint alleging that Lakeland Area Mass Transit District is performing prohibited charter service. An FTA Triennial Review issued on March 19, 2002, contained findings regarding charter service. A follow-up Triennial Review was scheduled for the fall of 2002. A new Triennial Review issued in July 2003 contained a deficiency concerning the Charter Bus Service regulation. On July 29, 2003, FTA stated that as a result of corrective actions taken following the site visit, one charter bus issue closed.

2002-16 Metropolitan Transit Development Board & North County Transit District TRO-9

On September 18, 2002, the MTDB requested a special event exception to operate charter service on January 26, 2003, for Super Bowl XXXVII in San Diego, CA. On January 3, 2003, FTA granted MTDB's request.

2002-17 Ozark Regional Transit TRO-6

On October 4, 2002, Ozark Regional Transit requested FTA's approval of an exception to provide charter service for three non-profit social service agencies. On January 27, 2003, FTA responded that the services ORT provides to Ozark

Guidance Center, EOA Children's House, and Benton County Sunshine School are eligible for an exception to the charter regulation in accordance with 49 CFR 604.9(b)(5)(ii).

2002-18 Capital District Transportation Authority, Albany, NY **TRO-2**

On June 3, 2002, Representative Michael McNulty wrote DOT and requested support for CDTA's request for a waiver of the charter service regulation so that the City of Albany could use federally funded trolley vehicles to promote tourism. On August 6, 2002, Secretary Mineta advised Representative McNulty that there was no legal basis on which a waiver could be granted.

2002-19 Greater New Haven Transit Authority **TRO-1**

On July 2, 2002, Representative DeLauro asked whether FTA would allow the NHTA to provide prospective business owners to the New Haven area with promotional tours on one of its new federally funded natural gas trolleys. On October 15, 2002, FTA Administrator Jenna Dorn denied the request.

2002-20 PACE, Arlington, IL **TRO-5**

On May 8, 2002, PACE requested a special events exception to the charter regulation for a visit by the President of the United States to Chicago, IL on May 13, 2002. PACE was requested to provide 20 buses to transport employees of United Parcel Service from their suburban location to their hub downtown for the President's visit. On May 10, 2002, FTA granted the request.

2003 FTA Charter Service Docket

2003-01 California Bus Association v. Sacramento Regional Transit **TRO-9**

On March 6, 2003, CBA filed a complaint alleging that Sacramento Regional Transit planned to take over a private shuttle bus service, formerly provided by Amador Stage Lines, to transport state government workers from outlying parking lots to their government offices in Sacramento.
On August 5, 2003, FTA's Region IX office issued a decision that RT's new service was not impermissible charter service since it is "mass transportation" within the meaning of the Federal transit laws.
On August 15, 2003, CBA appealed the decision. On September 16, 2003, Administrator Dorn denied the appeal.

2003-02 Hillsborough Area Regional Transit (HARTline) **TRO-4**

On or March 26, 2003, HARTline provided public transportation to support President Bush's "Briefing to the Troops" on March 26, 2003, at MacDill Air Force Base, Florida. HARTline provided the service after coordinating with three private operators. The private operators provided eleven vehicles and HARTline provided nine vehicles in order to complete the request for twenty vehicles.
On April 22, 2004, FTA wrote HARTline to admonish it for providing charter service without seeking guidance or an exception from FTA.

2003-03 Lakeland Area Mass Transit District **TRO-4**

On March 4, 2003, informant alleged that Lakeland Area Mass Transit District is still performing prohibited charter service despite FY 2002 Triennial Review report that it was cleared of charges. On April 14, 2003, FTA referred to the Office of Inspector General for Investigation. LAMTD Annual Financial Report, dated February 17, 2004, indicated continuing violation of charter regulation. FTA is investigating complaint.

2003-04 Motorcoach Marketing International, Inc. & Fame Tours, Inc. v. Houston Metro **TRO-6**

On January 31, 2003, FTA received a phone call from Motor Coach Marketing Int'l. alleging that Houston Metro was planning to provide prohibited charter service in connection with the annual Houston Livestock Show and Rodeo scheduled for the month of February 2003. On February 4, 2003, Fame Tours, Inc. filed a similar complaint with FTA. On February 7, 2003, the United Motorcoach Association filed a similar complaint with FTA.
On October 28, 2003, FTA determined that the service constituted mass transportation rather than prohibited charter service and included private charter operators in the provision of the service.

2003-05 Frankfort, Kentucky **TRO-4**

On January 6, 2003, Frankfort requested a special exception for the Governor's Kentucky Derby Breakfast activities on May 3, 2003. On February 13, 2003, FTA Region IV granted the special exception request since there were no private operators willing and able to provide the service.

2003-06 City of Ojai, California **TRO-9**

On May 5, 2002, City of Ojai, California, a small rural community, requested FTA's authorization to provide charter service in its community since there are no willing and able private charter operators in the Ojai valley. Although FTA authorization is not required to proceed to provide charter service when there has been a determination that there are no willing and able private operators, the City of Ojai failed to send copies of the notice to the United Bus Owners of America and the American Bus Association as required by 49 CFR 604.11(b)(3).
FTA advised the City of Ojai that it was required to mail copies of the notice to the United Bus Owners of America and the American Bus Association.

2003-07 Regional Transportation District **TRO-8**

On January 23, 2003, RTD requested a special exception to provide charter service to the International Association of Lions Clubs 2003 International Convention. On February 19, 2003, granted an exception based on RTD's compliance with 4 CFR 604.11.

2003-08 September Winds and Great Lakes Limousine Service v. Toledo Area Regional Transit Authority **TRO-5**

On July 15, 2003, September Winds alleged that TARTA openly advertises for bus and trolley charters, and has provided prohibited charter service for the following: Crosby Garden Festival of the Arts, Parade of Homes, Senior Open, school runs, employment services, Christmas shuttle service, and wedding trolley.
On August 14, 2003, FTA conveyed to TARTA its Triennial Review in July of 2003; TARTA was found to be out of compliance with FTA's charter regulation and was told to cease and desist from providing charter service.
On October 7, 2003, TARTA's website indicated that it was still providing charter service FTA ordered it to immediately cease and desist from providing charter service.
On November 18, 2003, FTA was notified of an incident involving TARTA that took place on November 13, 2003. On November 13, 2003, the Ohio Department of Public Safety (ODPS) discovered underage drinking of alcohol on TARTA buses that were running between the University of Toledo and Headliner's bar. The ODPS incident was assigned docket number 2003-24 and was consolidated with this complaint for decision purposes.

On November 18, 2003, Great Lakes Limousine Association filed a complaint against TARTA for charter violations. Great Lakes' complaint was consolidated with this complaint.
On February 3, 2004, in response to these complaints, FTA issued a decision that TARTA had been providing impermissible charter service and ordered it to cease and desist any such further service.
On March 18, 2004, FTA received a new complaint against TARTA that it is illegally referring its charter business to a broker called Green Horse Charters, which then subcontracts with TARTA for trolley vehicles.
On April 5, 2004, FTA advised that it would not allow TARTA to make any more draw downs from existing grants until it is fully in compliance with the charter regulations.

2003-09 Lodi Transit **TRO-9**

On March 12, 2003, FTA learned via the internet that Lodi Transit, CA allegedly provided prohibited charter service for weddings, garden clubs, church groups, and school classes. Subsequently, FTA learned that the Lodi City Council changed its rules to require advertisement to the private sector before using any buses for charter.

2003-10 American Bus Association v. Washington Metropolitan Area Transit Authority **TRO-3**

On April 16, 2003, ABA alleged that WMATA was intending to provide charter service to the Joint Services Open House located at Andrews Air Force Base on May 17-18, 2003. FTA informed the Air Force that this would constitute prohibited charter service. As a result the Air Force held an open public competition for the service.

2003-11 Southeastern Missouri Transportation Service, Inc. **TRO-7**

On February 10, 2003, SMTS requested an exception to the charter service regulation pursuant to 49 CFR 604.9(b)(5) in order to provide service to the Missouri Department of Corrections, Board of Probation and Parole. On February 11, 2003, FTA advised that the proposed charter service met the requirements of the exception.

2003-12 Gladwin Limousine Service v. Isabella County Transportation Commission, Michigan Department of Transportation **TRO-5**

On March 6, 2003, Gladwin Limousine filed a complaint via email alleging that ICTC was booking wedding charters with their two trolleys. FTA referred the matter to the State of Michigan Department of Transportation for investigation. On May 27, 2003, the State of Michigan DOT advised that the ISTC mistakenly believed that it could still operate under the guidelines established for the charter

demonstration project in the mid-1990's. ICTC was informed that it must follow the current charter regulation. ICTC now refers all charter requests to private operators.

2003-13 City of Rochester, Minnesota **TRO-5**

On February 2, 2003, complainant, a bus passenger, alleged that the City of Rochester, which contracts for its public transportation service with Rochester City Lines, an independent private operator, is invoicing the City for charter service performed for profit with buses that are maintained for use in the public transit programs. FTA advised complainant that Rochester City Lines was currently in compliance with FTA regulations.

2003-14 Vandalia Bus lines, Inc. v. South Central Illinois Mass Transit District of Centralia IL **TRO-5**

On July 18, 2003, Vandalia Bus Lines, Inc. alleged that SCIMTD submitted a bid to provide charter service for Kaskaskia College in Centralia, IL. On August 12, 2003, SCIMTD advised that it was rescinding its proposal for transportation service for Kaskaskia College. On October 23, 2003, FTA closed its file.

2003-15 Advanced Coach v. South East Area Transit, Zanesville, OH **TRO-5**

On July 18, 2003, Advanced Coach alleged that SEAT entered into an inclusive agreement for charter service with Lakefront Trailways even though Advance Coach was a willing and able private charter operator. On May 14, 2004, Ohio Department of Transportation issued its decision and advised SEAT that it was not permitted to operate services, which do not meet exceptions under the regulation unless an agreement to do so is reached with the willing and able charter companies.

2003-16 No Problem Limo v. Iosco Transit Corporation, Ohio **TRO-5**

On July 24, 2003, No Problem Limo complained via email that Iosco was using buses for senior citizens and private weddings. Case was referred to Michigan DOT for investigation. On January 26, 2004, MDOT advised IOSCO of the complaint regarding prohibited charter service and required it to determine whether there were any willing and able private charter operators and to stop providing wedding and other charters immediately. On March 3, 2004, MDOT again advised Iosco that it was operating prohibited charter service and not to enter into any new charter services. On June 11, 2004, MDOT advised that it notified Iosco that the services in question were prohibited charter service and Iosco did not provide services.

2003-17 No Problem Limo v. Roscommon County Mini Bus System, Ohio **TRO-5**

On July 24, 2003, No Problem Limo complained that Roscommon is using buses for senior citizens and private weddings. Case was referred to Michigan DOT for investigation. FTA referred the case to MDOT for investigation. On November 16, 2003, Rosco Mini Bus advised FTA that it had ceased providing charter service for weddings with the trolley. On January 28, 2004, MDOT requested Rosco to confirm in writing by February 13, 2004, that it had ceased all prohibited charter service including weddings. On June 11, 2004, MDOT advised FTA that Roscommon provided a letter stating that they have ceased all prohibited charter service, including weddings, with FTA funded equipment. .

2003-18 Detroit Department of Transportation **TRO-5**

On September 10, 2003, DDOT requested a waiver of the charter regulation for security reasons for the U.S.-Arab Economic Forum on September 28-30, 2003. On September 25, 2003, FTA denied DDOTs request.

2003-19 Ozark Regional Transit Authority **TRO-6**

On September 16, 2003, Senator Blanche Lincoln wrote in support of ORTA's request for a waiver to continue contracted transportation services to human service agencies. FTA provided Senator Lincoln with copies of its guidance issued in Charter Service Docket # 2002-17, in which FTA advised that That the services ORT provides to Ozark Guidance Center, EOA Children's House, and Benton County Sunshine School were eligible for an exception to the charter regulation in accordance with 49 CFR 604.9(b)(5)(ii).

2003-20 Majestic Limousine Service v. Des Moines Metropolitan Transit Authority **TRO-7**

On October l6, 2003, Majestic filed a complaint alleging that Des Moines MTA was performing illegal charter service. The parties agreed to an informal conciliation process to resolve the complaint. On November 4, 2003, FTA issued its finding that Des Moines violated the charter regulation and ordered it to cease and desist from engaging in the provision of prohibited charter service.

2003-21 Houston Metropolitan Transit Authority **TRO-6**

On August 25, 2003, Houston METRO requested a special exception for the Super Bowl and associated activities from January 24 through February 1, 2004. On January 14, 2004, FTA determined that the demand for charter service would exceed the capability of private charter operators and granted an exception to Houston METRO to provide incidental charter service to the extent that private charter firms were not capable of meeting the transportation demand.

2003-22 Washington Metropolitan Area Transportation Authority **TRO-3**

On October 2, 2003, the Department of the Air Force requested approval for charter service with WMATA for Joint Services Open House on Andrews Air Force Base for May 15-16, 2004. On April 12, 2004, FTA denied WMATA's request. A private provider, Logistics USA, using WMATA as a subcontractor, provided the service.

2003-23 Five Oaks Charters, Inc. v. Des Moines Metro Transit Authority TRO-7

On October 8, 2003, Five Oaks Charters, Inc. alleged that Des Moines MTA was providing prohibited charter service even though Five Oaks is a willing and able private operator.

2003-24 Toledo Area Regional Transit Authority TRO-5

On November 18, 2003, FTA was notified of an incident involving TARTA that took place on November 13, 2003. On November 13, 2003, the Ohio Department of Public Safety (ODPS) discovered underage drinking of alcohol on TARTA buses that were running between the University of Toledo and Headliners' bar. This incident was consolidated with docket number 2003-08. On February 3, 2004, in response to these complaints, FTA issued a decision that TARTA had been providing impermissible charter service and ordered it to cease and desist any such further service.
On March 18, 2004, FTA received a new complaint against TARTA that it is illegally referring its charter business to a broker called Green Horse Charters, which then subcontracts with TARTA for trolley vehicles.
On April 5, 2004, FTA advised that it would not allow TARTA to make any more draw downs from existing grants until it is fully in compliance with the charter regulations.

2003-25 Riteway Bus Service, Inc., Richfield, Ohio TRO-5

On June 11, 2003, Riteway Bus Service wrote to Senator Herb Kohl to reinforce the position taken by the American Bus Association regarding the issue of the illegal provision of charter services by publicly funded transit organizations. On July 9, 2003, Senator Kohl forwarded his constituent's letter to FTA. FTA responded on August 19, 2003.

2003-26 Massachusetts Bay Transportation Authority TRO-1

On November 5, 2003, MBTA requested a special event exception for the July 2004 Democratic National Convention (DNC) to be held in Boston as a National Special Security Event. On November 24, 2003, The New England Bus Transportation Association (NEBTA) protested. On December 10, 2003, FTA urged the MBTA to work with the private operators to identify opportunities for them to provide transportation services for the event. On December 23, 2003,

MBTA advised the DNC that it anticipated using the 125 air-conditioned buses it committed to the DNC for provide substitute transit services for its daily commuters and urged the DNC to meet with NEBTA to define the private carriers role. On May 17, 2004, MBTA requested guidance whether it could provide 32 accessible buses to Peter Pan, a private operator, because all resources in the private sector were exhausted. FTA advised MBTA that it was not required to supply vehicles to a private provider for charter service. FTA further advised that if MBTA did provide the service it must be "incidental." MBTA entered into an agreement with Peter Pan Bus Lines to supply accessible vehicles during the Convention.

2003-27 Las Vegas RTC **TRO-7**

Review of RTC's Bus Management Plan indicated violation of charter service regulations by provision of VIP service to visiting delegations and dignitaries.

2004 FTA Charter Service Docket

2004-01 Kemps Bus Service, Inc. v. Rochester-Genesee Regional Transportation Authority **TRO-2**

On February 10, 2004, Kemps alleged that RGRTA bid on a contract to provide university service for the Rochester Institute of Technology and the University of Rochester. Kemps alleged this service is a violation of FTA's previous order. This case was consolidated with 2004-03. On July 14, 2004, FTA issued its decision concluding that the service in question did not violate FTA's regulations regarding charter service.
On September 8, 2004, Blue Bird Coach Lines d/b/a Coach USA and Kemps Bus Service filed a complaint pursuant to the Administrative Procedures Act in the United States District Court for the Southern District of New York alleging that FTA's decision was "arbitrary and capricious."

2004-02 Tecumseh Trolley & September Winds Motor Coach, Inc. v. Toledo Area Regional Transit Authority **TR0-5**

On March 18, 2004, Tecumseh and September Winds alleged that TARTA is providing illegal charter service through a broker, Green Horse Charters. They allege that TARTA is in violation of FTA's previous order. On August 25, 2004, FTA issued its decision that with regard to these complaints TARTA is not in violation of the charter service regulation. The majority of complainant's allegations were addressed through TARTA's remediation plan. FTA did however, direct TARTA to immediately cease and desist providing its "Trolley Direct Trip for Six."

2004-03 Coach USA, Inc. v. Rochester Genesee Regional Transportation Authority. **TRO-2**

On April 1, 2004, Coach alleged that RGRTA is providing prohibited charter service to the RIT campus. On July 14, 2004, FTA issued its decision concluding that the service in question did not violate FTA's regulations regarding charter service.
On September 8, 2004, Blue Bird Coach Lines d/b/a Coach USA and Kemps Bus Service filed a complaint pursuant to the Administrative Procedures Act in the United States District Court for the Southern District of New York alleging that FTA's decision was "arbitrary and capricious."

2004-04 Transportation Management Services **TR0-3**

On April 15, 2004, Transportation Management Services requested a special exception on behalf of the Washington Metropolitan Area Transit Authority, Montgomery County Transit Services/Ride On, Maryland Transit Administration, Alexandria Transit Company (DASH) and Fairfax County Department of

Transportation (Fairfax Connector) to provide service for the World War II Memorial dedication on May 29, 2004. On May 19, 2004, FTA approved TMS' request since private charter operators were not capable of providing the service.

2004-05 St. Louis Metro **TR0-7**

On March 3, 2004, St. Louis Metro requested an exception pursuant to 49 CFR 604.9(b)(4) to provide wheelchair accessible service for the National Veterans' Wheelchair Games to be held in St. Louis from June 14-20, 2004. On April 16, 2004, the Department of Veterans Affairs certified that it was an organization exempt from taxation under subsection 501(c)(3) of the Internal Revenue Code and that there would be a significant number of handicapped persons as passengers. St. Louis Metro provided the charter service in accordance with a recognized exception to the prohibition against charter service.

2004-06 Cowlitz Coach v. Sunset Empire Transit District, Astoria, OR **TRO-10**

On May 5, 2004, Cowlitz Coach complained that Sunset Empire Transit District (SETD) performed prohibited charter service during the recent Crab Festival, in Clatskanie, Oregon, for cruise ship excursion service, and for train excursion service. On September 8, 2004, the Oregon Department of Transportation issued a charter service decision that none of the service in question was prohibited charter service. On September 17, 2004, Cowlitz appealed ODOT's decision to the Administrator.

2004-07 Sheraton Bus Services v. Endless Mountains Transportation Authority **TRO-3**

On May 3, 2004, Sheraton Bus Services complained that Endless Mountains is providing charter service to tourist and shopping attractions, theater performances, concerts, fairs and festivals, as well as long distance trips to Lancaster County, Pennsylvania and New York state. Sheraton complained that Endless Mountains has not published a public notice of its intent to perform charter services, but that Sheraton has notified Endless Mountains on several occasions that it is willing and able to perform charter services. Sheraton complained that Endless Mountains charges below market fares for its charter service since it is federally subsidized. Sheraton requested that Endless Mountains be ordered to cease and desist form providing charter service; be barred from receiving further federal financial assistance, repay financial assistance received from April 2000 to the present and award damages in the amount of $109,795 with interest and costs.

2004-08 American Bus Association v. LaCrosse, Wisconsin Municipal Transit Utility **TRO-5**

On May 24, 2004, the American Bus Association (ABA) complained that LaCrosse, Wisconsin MTU plans to provide prohibited charter service for shuttle bus access to the Deke Slayton Airfest scheduled for June 12-13, 2004. On July 20, 2004, ABA withdrew its complaint.

2004-09 September Winds Motor Coach, Inc. & The Tecumseh Trolley & Limousine Service v. Toledo Area Regional Transit Authority **TRO-5**

On May 27, 2004, September Winds and The Tecumseh Trolley complained that TARTA contracted to provide accessible vehicles to Lakefront Lines, a private charter operator for WWII Memorial Day activities. The complainants also alleged that Lakefront Lines is TARTA's booking agent. Further, the complainants allege that there is a similar arrangement between Lakeland and TARTA for the Jamie Farr Golf Tournament scheduled for August 5-8, 2004.

2004-10 Allerton Charter Coach, Inc. v. Champaign, Urbana Mass Transit District **TRO-5**

On May 26, 2004, Allerton complained that the MTD provided charter service on 75 occasions between June 21, 2003 and April 14, 2004, despite the fact that Allerton had submitted a response that it was "willing and able" in response to MTD's public notice of intent to provide charter service.

2004-11 Oleta Coach Lines Inc. v. Williamsburg Area Transport, Colonial Williamsburg and Yorktown Trolley **TR0-3**

On June 7, 2004, Oleta Coach Lines Inc. complained that Williamsburg Area Transport, and Colonial Williamsburg and Yorktown Trolley started new service on Memorial Day that is taking away its business. On August 2, 2004, FTA's Regional Administrator issued his decision that the service provided by Williamsburg Area Transport was mass transportation rather than prohibited charter service. Since neither Colonial Williamsburg nor Yorktown Trolley receive FTA funding, FTA's charter service regulation is inapplicable to them. On August 9, 2004, Oleta appealed the Regional Administrator's decision.

2004-12 Washington Metropolitan Area Transit Authority **TR0-3**

On June 10, 2004, WMATA requested a special exception to perform charter service for the formal state funeral for the late President of the United States, Ronald W. Reagan, to be held on Friday, June 11, 2004. On June 10, 2004, FTA approved WMATA's request.

2004-13 Southeastern Pennsylvania Transportation Authority **TRO-3**

On July 27, 2004, FTA learned that a SEPTA New Flyer bus was seen in Boston during the Democratic National convention transporting people between WGBH radio/TV station and the Sheraton Hotel and that the bus driver was categorically denying disabled riders the right to board the buses for liability reasons.

2004-14 MaxiFun! Tours v. Springfield Mass Transit District TRO-5

On July 28, 2004, MaxiFun! Tours complained that Springfield Mass Transit District buses provided shuttle service from the Springfield Renaissance Hotel and the Springfield Hilton Hotel to off-site activities for the American Legion Convention from July 15 through July 18, 2004. .

2004-15 Bailey Coach v. York County Transportation Authority (aka Rabbit Transit) TR0-3

On September 10, 2004, Bailey Coach telefaxed a complaint against York County Transportation Authority.

2004-16 September Winds & Casino Cruises and Dreams v. Toledo Area Regional Transit Authority TRO-5

In October 2004, September Winds complained that TARTA buses were being used for the Applebutter Festival in Grand Rapids, Ohio as parking lot shuttle buses.

2004-17 Private Charter Operator v. Montgomery Area Transit System TRO-4

On October 25, 2004, Capital Trailways of Alabama complained that Montgomery Area Transit System (MATA) was operating charter service for the Nationwide Tour Championship golf tournament in Prattville, Alabama on October 25-31, 2004. On October 26, 2004, FTA ordered MATA to canvass the area for private operators to perform the service and if there was such a private operator to cease and desist operating the service.

2004-18 The Tecumseh Trolley & Limousine Service v Toledo Area Regional Transit Authority TR0-5

On October 18, 2004, Tecumseh complained that TARTA provided charter service for the Applebutter Fest in Grand Rapids, Ohio.

2004-19 The Tecumseh Trolley & Limousine Service v Capital Area Transit Administration TRO-5

On October 30, 2004, Tecumseh complained that CATA provided charter service for the Ag Expo and private fraternity houses.

2004-20 The Tecumseh Trolley & Limousine Service v Lenawee Transportation, Adrian, Michigan **TRO-5**

On October 28, 2004, Tecumseh alleged that Lenawee was going to provide prohibited charter service for the Clinton Fall Festival. When Tecumseh complained Lenawee cancelled and sent the job to a bus company in Detroit.

School Bus Complaints

2004-01 BX Consulting, Inc. v. Hampton Roads Transportation Commission **TRO-3**

On October 8, 2004, BX Consulting alleged that HRT has been providing school bus service for the City of Hampton Roads.

School Bus Complaints

2002-01 Laidlaw Education Services v Rochester-Genesee Regional Transportation Authority **TRO-2**

On May 22, 2002, Laidlaw alleged that RGRTA was providing prohibited exclusive school bus service. On July 15, 2002, the FTA Regional Administrator determined that there was no violation of the school bus regulation; rather, RGRTA was performing permissible "tripper service." On August 13, 2002, Laidlaw attempted to appeal the decision to the Administrator. On October 15, 2002, FTA advised Laidlaw that the regulation did not provide for an appeal to the Administrator and that the decision of the Regional Administrator was final.

2004-01 BX Consulting, Inc. v Hampton Roads Transportation Commission **TRO-3**

On October 8, 2004, BX Consulting alleged that HRT has been providing school bus service for the City of Hampton Roads.

Questions for the Record
From Congressman Paul Kanjorski
Following the September 30, 2004 Hearing
"How Can we Maximize Private Sector Participation in Transportation?"
Before the Subcommittee on Energy Policy,
Natural Resources, and Regulatory Affairs
Committee on Government Reform
U.S. House of Representatives

1. Does the private sector currently provide the services that the proposed D.C. Circulator would provide?

We are not aware of any private sector operator currently providing mass transportation service along the two D.C. Circulator routes that are currently proposed. It is our understanding that there are a number of privately contracted shuttle services that operate transportation services with limited access (primarily for Federal employees and contractors) along partial segments of the proposed corridors. In addition, a privately owned tram offers tours around the Mall and monuments under contract to the National Park Service. However, none of these operations are providing public mass transportation service.

2. Why do we need to provide public funding for a service that the private sector is adequately providing?

The Federal Transit Administration (FTA) has not and could not under its statute provide operating funds for this service, and is not providing capital funds related to this service. Further, as previously noted, we are not aware of any private sector operator currently providing mass transportation services along the currently proposed routes.

3. For how long will this initiative require Federal subsidies?

FTA is not providing funding for the proposed D.C. Circulator service.

4. Does Washington Metro's decision to purchase buses for this project from a Belgian-based company violate any Buy-American provisions?

FTA funds are not being used to purchase the vehicles. Therefore, the Buy America and Buy American provisions of Federal transit law administered by FTA do not apply.

5. Has the private sector been adequately consulted?

FTA has no jurisdiction over this matter, since no FTA funds are involved. However, we understand that consultation with the private sector is on-going.

TOM DAVIS, VIRGINIA
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BERNARD SANDERS, VERMONT,
INDEPENDENT

October 8, 2004

BY FACSIMILE
The Honorable Dan Tangherlini
Director, Department of Transportation
Government of the District of Columbia
2000-14th Street, N.W. – 6th Floor
Washington, DC 20009

Dear Mr. Tangherlini:

This letter follows up on the September 30, 2004 hearing of the Subcommittee on Energy Policy, Natural Resources and Regulatory Affairs, entitled "How Can We Maximize Private Sector Participation in Transportation? – Part II." 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 October 29, 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. Advantages to Private Sector Participation in Transit. In think tank expert Dr. Adrian Moore's written Statement for the Subcommittee's May 18, 2004 hearing, he explained, "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" (p. 6) and "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" (p. 1).

What advantages and disadvantages has your experience revealed relating to private sector participation arrangements in mass transit? And, can you estimate dollars or time saved under these arrangements?

Q2. Private Sector Participation. On July 23, 2004, you sent a letter to Martz Gold Line/Gray Line about the proposed Circulator in DC, stating, "The Circulator is an appropriate **public** transit service" and "After gaining cost and operating experience in Phase I, it is the partner group's **current intention** to invite competitive bidding on Phase II services from private contractors" (emphases added). In your written testimony for the Subcommittee's September 30th hearing, you indicated a change in approach for Phase I, saying, "Just last week, ... we agreed to explore how we might arrange for the operation of these buses to permit managed competition. Three options appear to be possible" (p. 4). One continued to be operation by the Washington Metropolitan Transit Agency (WMATA) only.

Will the federally-subsided WMATA, the public transit agency, be allowed to compete with private transit providers for delivery of the Phase II services, which would replace the current Tourmobile Services? If so, how will taxpayers be assured that WMATA does not submit a not fully allocated bid?

Q3. Public Costs for Proposed Circular.

a. The DC Downtown Business Improvement District (BID)'s website on its proposed Circulator system states that current estimates are $11.9 million in capital costs and $6 million annually in operating costs. Do these costs include: (a) any financial subsidy, and (b) full required buy-out costs for the franchisee Landmark Services Tourmobile, Inc. (including fair value possessory interest in government improvements, concessioner improvements, tourmobiles and supertrams, merchandise and supplies, and equipment)? If so, how much is estimated for the subsidy and how much for the buy-out? If not, what are your separate estimates for the subsidy and the buy-out?

b. What is the DC Department of Transportation's estimate for the difference in total **public** costs (Federal and local) between the current franchisee arrangement and the proposed Circulator system? Do you think this is a good deal for the American taxpayer?

c. Lastly, the Subcommittee was told by the American Bus Association that the proposed Circular would "cost more and charge less." Is this accurate?

TOM DAVIS, VIRGINIA,
CHAIRMAN

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BERNARD SANDERS, VERMONT,
INDEPENDENT

October 8, 2004

BY FACSIMILE
The Honorable Dan Tangherlini
Director, Department of Transportation
Government of the District of Columbia
2000-14th Street, N.W. – 6th Floor
Washington, DC 20009

Dear Mr. Tangherlini:

This letter follows up on the September 30, 2004 hearing of the Subcommittee on Energy Policy, Natural Resources and Regulatory Affairs, entitled "How Can We Maximize Private Sector Participation in Transportation? – Part II." Please respond to the enclosed followup questions from Congressman Paul Kanjorski 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 October 29, 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

CONGRESSMAN PAUL E. KANJORSKI

COMMITTEE ON GOVERNMENT REFORM
SUBCOMMITTEE ON ENERGY POLICY, NATURAL RESOURCES AND REGULATORY AFFAIRS

HEARING ON PRIVATE SECTOR PARTICIPATION IN TRANSPORTION

QUESTIONS FOR WITNESSES JENNIFER DORN, FEDERAL TRANSIT ADMINSTRATION AND DAN TANGHERLINI, DC DEPARTMENT OF TRANSPORTATION REGARDING THE D.C. CIRCULATOR

SEPTEMBER 30, 2004

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1. Does the private sector currently provide the services that the proposed D.C. Circulator would provide?

2. Why do we need to provide public funding for a service that the private sector is adequately providing?

3. For how long will this initiative require federal subsidies?

4. Does Washington Metro's decision to purchase buses for this project from a Belgian-based company violate any Buy American provisions?

5. Has the private sector been adequately consulted?

GOVERNMENT OF THE DISTRICT OF COLUMBIA
DEPARTMENT OF TRANSPORTATION

Office of the Director

October 29, 2004

The Honorable Doug Ose
Chairman
Subcommittee on Energy Policy,
Natural Resources and Regulatory Affairs
Committee on Government Reform
House of Representatives
Congress of the United States
2157 Rayburn House Office Building
Washington, DC 20515-6143

Dear Congressman Ose:

In response to your correspondence of October 8, 2004 please find attached answers from the District of Columbia Department of Transportation to questions by the Subcommittee on Energy Policy, Natural Resources and Regulatory Affairs, and by Congressman Paul E. Kanjorski. These questions were transmitted to DDOT by the Subcommittee following the September 30, 2004 hearing entitled "How Can We Maximize Private Sector Participation in Transportation."

DDOT is pleased to provide these responses to your questions. If you require additional information, please contact me at 202-673-6813.

Sincerely,

Dan Tangherlini
Director

2000 14th Street, N.W., Washington, D.C. 20009 (202) 673-6813

Responses to Questions From

Committee on Government Reform
Subcommittee on Energy Policy, Natural Resources and Regulatory Affairs

Hearing on Private Sector Participation in Transportation

September 30, 2004

By District of Columbia
Department of Transportation

Q 1. What advantages and disadvantages has your experience revealed relating to private sector participation arrangements in mass transit? And, can you estimate dollars or time saved under these arrangements.

A 1. DDOT believes that there may be significant cost savings to the government by using private sector participation in mass transit. DDOT believes that as long as a commitment is made to provide safe and reliable service by paying drivers a living wage and benefits, cost savings can be realized.

With respect to Phase I of the Downtown Circulator, DDOT estimates that WMATA's could operate the service for approximately $72 per platform hour plus about $4 per hour for management and oversight. DDOT has been told that the private sector is currently providing regular open door service under contracts to governmental or quasi-governmental agencies in the Greater Washington region for as little as $40 to $50 per platform hour. Every dollar savings per platform hour will reduce the direct operating cost of the Circulator by about $100,000 per year.

Q 2. Will the federally subsidized WMATA, the public transit agency, be allowed to compete with private transit providers for delivery of the Phase II services, which would replace the current Tourmobile Services? If so, how will taxpayers be assured that WMATA does not submit a not fully allocated bid?

A 2. Implementation of Phase II of Circulator service is not being proposed at this time, and is not contemplated during the period when the National Park Service has an active concession agreement with Tourmobile. Future Circulator routes are included as one alternative in the current NPS Washington, DC, Visitor Transportation Study, and DDOT will work with NPS and others on the implementation of Phase II of the Circulator following the outcome of that study.

With respect to Phase I, the current plan, that will be proposed to the WMATA board, is for WMATA to issue the RFP, award the operating contract and manage this contract on behalf of DDOT for a fee. DDOT knows the published, fully loaded, operating cost that WMATA would charge if it had the contract. If no

private sector bid is deemed competitive with WMATA's service and price then DDOT has the option of awarding the contract to WMATA. Given the significant disparity between WMATA's operating costs and those being paid to private operators elsewhere in the region, this is an unlikely scenario.

Q 3. Public Costs for Proposed Circulator

a. The Downtown Business Improvement District (DBID)'s website on its proposed Circulator system states that current estimates are $11.9 million in capital costs and $6 million annually in operating costs. Do these costs include: (a) any financial subsidy, and (b) full required buy-out costs for the franchisee Landmark Services Tourmobile, Inc. (including fare value possessory interest in government improvements, concessioner improvements, tourmobiles and supertrams, merchandise and supplies and equipment)? If so, how much is estimated for the subsidy and how much for the buy-out? If not, what are your separate estimates for the subsidy and the buy-out?

b. What is the DC Department of Transportation's estimate for the difference in total public costs (Federal and local) between the current franchisee arrangement and the proposed Circulator system? Do you think this is a good deal for the American taxpayer?

c. Lastly, the Subcommittee was told by the American Bus Association that the proposed Circulator would "cost more and charge less." Is this accurate?

A 3. a. (a) $11.9 million is the estimated cost of twenty-nine 40-passenger buses to be used in Phase I operation of the Downtown Circulator. These funds are available from the settlement of a local lawsuit known as the DC Riders' Trust Fund.

$6.8 million is the estimated annual operating cost of Phase I of the Circulator. DDOT has requested $2 million of these funds from federal appropriation, $2 million from local DC appropriations, and estimates that $1.8 million will be funded from passenger fares, and $1 million from private businesses and other interested parties along Circulator routes. DDOT hopes that the Circulator will prove to be so successful, and expects that additional private funds will be raised, so that no larger federal subsidy will be required to operate Phase I in the future.

(b) If NPS has some obligation to buy out its franchise agreement with Tourmobile after its term expires, DDOT is not, and would not be, a party to such an arrangement. The Subcommittee's question suggests that Tourmobile's franchise agreement with NPS is somehow perpetual in nature, which we do

not believe is the case. Finally, only NPS could provide the Subcommittee with the financial information regarding Tourmobile requested in this question.

b. DDOT is reluctant to get into a specific discussion about the current NPS franchise agreement with Tourmobile, its value or its costs because these figures are not available to DDOT. The mission of our agency is to improve mobility for citizens and visitors to the District of Columbia. To that end we look for every way we can find to ensure that people can move into, out of, and around the city with the greatest convenience, in the least amount of time and at the least cost. DDOT measures mobility by the total number of people who can move easily, rather than by just the total cost of moving them. For example, moving half a million people per year with no public subsidy (while another five or six million people take private cars and taxis, or choose not to come downtown at all) may be a less desirable outcome than moving six million people per year on public transportation for a four million dollar subsidy. This is certainly true if the net effect of subsidizing these additional five to six million rides reduces traffic congestion, reduces air pollution, saves each rider time, and increases DDOT's ability to contribute to the security of the city. DDOT believes that the true public cost of failing to provide over 70% of people who visit parts of our city with acceptable transportation options is far higher than the small financial subsidy required to provide these services.

   DDOT is also working hard to ensure that no agency or organization in the District can easily limit transportation access to its area. For example, if a major university were to pursue a policy that limited the access of general traffic through its campus, this agency would object. In the same vein, DDOT believes that the Park Service policy of allowing unlimited private vehicle traffic to the Mall but limiting open door transit traffic, does not support the city's mobility goals.

c. DDOT is not familiar with what information the American Bus Association has provided to the Subcommittee. Phase I Circulator service has been designed to move the maximum number of people possible. It will be offered for bid to private contractors who, presumably, will offer the District the most efficient service at the lowest possible price. Customers will be charged a nominal fare in order to encourage maximum ridership. It would be necessary to understand the ABA's comments before responding to this question.

Responses to Questions From
Congressman Paul E. Kanjorski

Committee on Government Reform
Subcommittee on Energy Policy, Natural Resources and Regulatory Affairs

Hearing on Private Sector Participation in Transportation

September 30, 2004

By District of Columbia
Department of Transportation

Q 1. Does the private sector currently provide the services that the proposed D.C. Circulator would provide?

A 1. There is no private sector transportation service that provides frequent, inexpensive, regularly scheduled, open door bus service between Union Station and Georgetown via the Convention Center and K Street, or between the Convention Center and the SW Waterfront via downtown. While several interpretive tour services come to some of the downtown destinations along Circulator routes, their less frequent schedules, routes, and average adult ticket price of $20 per day make them non-overlapping services with the Circulator.

Q 2. Why do we need to provide public funding for a service that the private sector is adequately providing?

A 2. Services provided by the private sector are not comparable and not overlapping with the Circulator. (See answer #1, above.)

Q 3. For how long will this initiative require federal subsidies?

A 3. Very modest federal subsidies have been made available for the Circulator to mitigate dramatic reductions in access and mobility within Downtown DC due to federal closings of Pennsylvania Avenue and E Street around the White House. Average bus subsidies for public transit service nationally exceed 60% of operating costs. DDOT has requested federal funds that will cover about 30% of the operating cost for Phase I of the Circulator. Local government subsidy will fund an additional 30% of costs, with an introductory passenger fare of only 50-cents plus contributions from private businesses to cover remaining costs. This combination of funding sources will make this service among the most efficient and affordable bus transit services in the region. DDOT hopes that the Circulator will prove to be so successful, and expects that additional private funding sources will be raised, so that no larger federal subsidy will be required to operate Phase I of the Circulator in the future. However DDOT would

gladly decline any future Federal subsidies for the Circulator in exchange for a reopened Pennsylvania Avenue, E Street and First Street near the Capital as well as the removal of the security check points on Constitution and Independence Avenues.

Q 4. Does Washington Metro's decision to purchase buses for this project from a Belgian based company violate any Buy American provisions?

A 4. Buy-American provisions do not apply to this purchase. The 29 Van Hool buses that will be used for Phase I Circulator service were purchased with settlement funds from a local lawsuit, called the DC Transit Riders' Fund. No federal, appropriated, or restricted funds were used for this purchase. Further, the buses were not purchased from the Belgian manufacturer, but rather were re-purchased from the Alameda County Transit Authority in Oakland, California--the original purchaser of these vehicles.

Q 5. Has the private sector been adequately consulted.

A 5. Private sector transportation providers were consulted during the planning stages of this service. Further, at the strong urging of the private sector, Circulator service operations will be offered for bid to private sector contractors.

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BERNARD SANDERS, VERMONT,
INDEPENDENT

October 8, 2004

BY FACSIMILE
Steven A. Diaz, Esq.
Law Office of Steven A. Diaz
2300 M Street, N.W. #800
Washington, DC 20037

Dear Mr. Diaz:

This letter follows up on the September 30, 2004 hearing of the Subcommittee on Energy Policy, Natural Resources and Regulatory Affairs, entitled "How Can We Maximize Private Sector Participation in Transportation? – Part II." 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 October 29, 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. Fiduciary Responsibility. In your written testimony, you stated, "Although it is sometimes said that the Federal Transit Administration is 'not a regulatory agency' it defies common sense to say that billions of dollars of federally appropriated funds are simply given out with no concomitant Federal fiduciary obligation" (p. 4). I agree that the Federal Transit Administration (FTA) has a fiduciary responsibility to assure that Federal grant funds are expended in accordance with Federal law. What are your views of the appropriate oversight role for each Federal grantor agency, including FTA?

Q2. DOT Implementation and Enforcement.

a. The Department of Transportation's (DOT's) FTA has not yet issued implementing rules for the 1994 private sector participation requirements for mass transit. As a consequence, grantees may be unclear of precisely what is expected from them. Do you recommend that FTA issue an implementing rule for these statutory provisions, and do you think that such rules would underpin FTA's enforcement actions?

b. Would any new nonbinding guidance be adequate and enforceable? If not, why not?

c. What is your view of FTA's enforcement to date of the statutory requirements for private sector participation in mass transit? Would enforcement actions by FTA help existing private sector providers?

LAW OFFICE
STEVEN A. DIAZ

October 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
B-377 Rayburn House Office Building
Washington, D.C. 20515-6143

Dear Mr. Chairman:

I wish to take this opportunity to thank you and the Subcommittee on Energy Policy, Natural Resources and Regulatory Affairs for the honor of inviting me to offer my views on the utilization of the private sector in the programs administered by the Federal Transit Administration ("FTA"). I especially appreciate the many courtesies extended by the staff of the Subcommittee, notably Ms. Barbara Kahlow, Majority Staff Director. The purpose of this letter is to respond to the follow-up questions posed to me by the Subcommittee in your letter of October 8, 2004.

Following are the questions which the Subcommittee has posed and my replies:

Q1. "Fiduciary Responsibility. In your written testimony, you stated, "Although it is sometimes said that the Federal Transit Administration is 'not a regulatory agency' it defies common sense to say that billions of dollars of federally appropriated funds are simply given out with no concomitant Federal fiduciary obligation" (p.4). I agree that the Federal Transit Administration (FTA) has a fiduciary responsibility to assure that Federal grant funds are expended in accordance with Federal law. What are your views of the appropriate oversight role for each Federal grantor agency, including FTA?"

REPLY: When Congress appropriates funds under certain terms and conditions it is axiomatic that the Executive Branch must utilize such funds accordingly. Any serious question of this proposition was well settled with the so-called "impoundment" cases before the U.S. Supreme Court back in the 1970's when the Nixon Administration claimed the right to partially withhold Federal appropriations in the discretion of the President. *See, e.g., Train v. City of New York*, 420 U.S.35 (1975). Further, all grant-making agencies of the Federal Government, including the Department of Transportation, are bound by the requirements of the "Common Rule" (*see,* 49 CFR Parts 18 and 19) as well as by their own rules, regulations and guidelines, whether or not based in the Constitution or a statute (*see, United States ex rel. Accardi v. Shaughnessy,* 347 U.S. 260 (1954); *see also, Service v. Dulles,* 354 U.S. 363 (1957); and, *Vitarelli v. Seaton,* 359 U.S. 535 (1959)). Therefore, it is beyond cavil that there is a clear legal requirement that grantor agencies, including the FTA, scrupulously control the use of Federal grants. Such a proposition could also be said to follow the transparent requirements of

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democratic government which mandate that Federal employees faithfully execute the laws of the land, which is part of the oath of office.

The FTA should make sure that the purposes and intent of the Federal Transit Act ("Act") are fully implemented, not seek ways, means and devices to allow grantees to undermine or fail to give full effect to the limits on the allowable uses of funds, and, of course, control any affirmative misuse of funding. Thus, the FTA is necessarily a "regulatory" agency to the extent that it is the agency through which appropriated funds are applied to the purposes Congress has authorized under the Act. Based upon the case studies presented and other information available to the Congress, the Subcommittee must determine whether the Federal transit program is following the purposes and intent of the Act. If not, Congress might consider imposing greater control over the FTA's use and supervision of appropriated funds.

Q2. "DOT Implementation and Enforcement.

a. The Department of Transportation's (DOT's) FTA has not yet issued implementing rules for the 1994 private sector participation requirements for mass transit. As a consequence, grantees may be unclear of precisely what is expected from them. Do you recommend that FTA issue an implementing rule for these statutory provisions, and do you think that such rules would underpin FTA's enforcement actions?"

REPLY: a. With regard to issuing a rule implementing the 1994 private sector participation requirements, there is necessarily an important question of agency compliance with congressional intent when, after ten years, a rule has not yet been promulgated. It is without doubt important for the FTA to issue such a rule, with all deliberate dispatch. There is no reasonable explanation for a ten year hiatus in which not even a draft rule or any other rulemaking step has even been started. This, however, is consistent with the FTA's rescission of the Reagan Administration guidance on Private Enterprise Participation. A full analysis of that rescission is contained in the public record docket comments I filed with the FTA on behalf of private law clients, a copy of which is attached for your consideration.

A rule is the first step in notifying the grantees and the public of how the program works and what is expected in order to comply with program requirements. With a rule, the FTA has an administrative basis for individual enforcement actions under defined and fair procedures. Mere adoption of such a rule would send a clear signal of the importance and priority the FTA assigns to private sector matters. The impact of such a rule would be both salutary and beneficial to the private sector and the public interest. Of course, implementation and consistency would ultimately determine the efficacy of any rule.

Q2.b. "Would any new nonbinding guidance be adequate and enforceable? If not, why not?"

REPLY: b. Nonbinding guidance could, within the construct of the *Accardi* case, cited above, and its progeny, provide some basis for relief, but only if congressional intent in the statute made such relief possible, as is discussed below. However, agency "guidance" under the present framework would not be adequate and enforceable. A full rule published in the CFR would have immediate administrative impact, if implemented (which has been the problem to date). The publication of a rule is a minimum step if a policy is to be elevated to enforcement status within the agency. The attitude of agency staff, in turn, gets the full attention of agency grantees. A rule is clearly more important and more effective than "guidance." In this regard, however, the question of agency enforcement of its own rules is paramount.

Enforcement of private sector considerations has been a problem at the FTA, as noted in the case studies presented during the two hearings held by the Subcommittee. Even where the FTA has published rules after public notice and comment, even when such rules have specifically purported to contain a right to judicial review (such as the FTA School Bus Rule, 49 CFR Part 605), the agency has failed to impose sanctions for violations of rules and has argued successfully to the Federal courts that Congress did not intend FTA rules to be "enforceable" (that is, to have adverse decisions under such rules judicially reviewed). *See, Area Transportation, Inc. v. Ettinger,* 219 F. 3d 671 (2000) and *cf.* 49 CFR Section 605.31.

The creation of an express "private right of action" in a Federal statute is the most secure method of assuring enforcement of private sector protections by providing access to the judicial process and empowering an effective remedy and review of FTA implementation. Without this, the FTA is free to continue with its historically inadequate protection of the private sector from unfair government subsidized competition. The standard for such congressional intent, as measured by the Federal courts, is whether "affirmative evidence" shows such intent.

In the important case *Alexander v. Sandoval,* 532 U.S. 275 (2001), construing the right to enforce the disparate-impact regulations promulgated under Title VI of the Civil Rights Act of 1964, the Supreme Court, in rejecting such a right, stated the following: "Like substantive federal law itself, private rights of action to enforce federal law must be created by Congress. *The judicial task is to interpret the statute Congress has passed to determine whether it displays an intent to create not just a private right but also a private remedy.* Statutory intent on this latter point is determinative. Without it, a cause of action does not exist and courts may not create one, no matter how desirable that might be as a policy matter, or how compatible with the statute." *Id.*, at 286-287. (Citations omitted; emphasis supplied.)

To provide the kind of oversight intended by Congress in the Administrative Procedure Act ("APA"), 5 U.S.C. §702, *et seq.*, or to provide for any substantive review of final FTA action, a statute providing a clear and unequivocal private right of action and for the entry of a "private remedy" is necessary.

Q2c. "What is your view of FTA's enforcement to date of the statutory requirements for private sector participation in mass transit? Would enforcement actions by FTA help existing private sector providers?"

REPLY: FTA at the present time seeks to reinforce the programmatic desires of its public sector grantees, for the most part uncritically. Though the FTA certainly holds its grantees to standards, the exceptions to the intent of the Federal Transit Act are far too common to be considered as "incidental." The record developed by the Subcommittee in its recent hearings demonstrates how FTA implementation often falls far short of the mark. The hearings necessarily did not cover the full gamut of private sector abuses, but the case studies presented open an important issue of reform.

Enforcement actions by FTA, which would impose real and meaningful penalties for violations of Federal rules and policies, would be a vital and enormously beneficial step forward in getting more value for the appropriated transit dollar. There is no better way to assure that the FTA itself takes control over program abuses than to allow aggrieved parties to have the right of judicial review when the FTA fails to act or fails to act adequately. Merely knowing that a judge could review its decisions would make the FTA more disciplined and effective in controlling abusive, unfair and anticompetitive behavior by its grantees.

Conclusion.

In summary, it is clear to me that the Subcommittee is concerned with the question of how to make structural reforms which will lead to better enforcement of the intent of Congress regarding the leveraging of public investment in transit infrastructure with private investment.

The first step is for the FTA to adopt formal rules after full public comment protecting private transit investment, to be published in the Federal Register. The purpose and intent of such rules must clearly reflect the policies and procedures set forth in the Federal Transit Act in order to provide a framework for the exercise of administrative discretion as mandated by Congress.

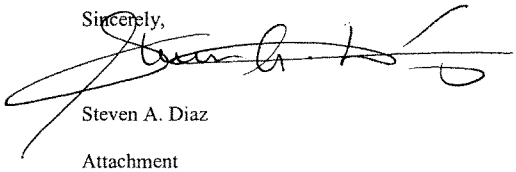
In the future it would be desirable to provide in statute, with sufficient specificity to meet the requirements established by the U.S. courts, remedies to make clear that the FTA does not have the ultimate and unappealable discretion to enforce its regulations only to

the extent it may choose. The significant case studies before the Subcommittee make it clear that outside neutral oversight (*i.e.*, judicial review) is necessary to protect the private sector against unfair government subsidized competition as the FTA has failed to do so within the scope of congressional intent. Indeed, as noted above, the FTA, through the Justice Department, has successfully argued that decisions taken under its existing rules published in the Federal Register are not subject to review, even when such rules explicitly purport to provide for judicial review.

The final element in effective reform of the implementation of the private sector participation requirements of the Federal Transit Act is continuing periodic oversight by Congress. While Congress cannot review every case of abuse, this should be left to the courts which exist for that purpose, Congress can monitor and periodically review the implementation of the Act. Such oversight and the hearings which accompany it, serve to provide a policy overview of the effect and impact of the Executive Branch administration of the Act and the attainment of the most financial leverage which will produce to most and best transportation services for the available appropriations.

Again I thank the Subcommittee for the opportunity of expressing these views. I wish you success in your efforts and would be pleased to provide any additional information you may require.

Sincerely,



Steven A. Diaz

Attachment

BEFORE THE FEDERAL TRANSIT ADMINISTRATION

In Re: NOTICE OF PROPOSED RECISION OF PRIVATE ENTERPRISE PARTICIPATION GUIDANCE	} } }	DOCKET NO. 93-B

DOCKET COMMENTS

AND REQUEST FOR RULEMAKING

RECEIVED
1994 JAN 25 PM 5:08
FTA-CHIEF COUNSEL

SUBMITTED JOINTLY BY

THE INTERNATIONAL TAXICAB AND LIVERY ASSOCIATION

AND

THE UNITED BUS OWNERS OF AMERICA

January 25, 1994

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United Bus Owners of
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DOCKET COMMENTS
AND REQUEST FOR RULEMAKING

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AND REQUEST FOR RULEMAKING

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BEFORE THE FEDERAL TRANSIT ADMINISTRATION

In Re: NOTICE OF PROPOSED RECISION OF PRIVATE ENTERPRISE PARTICIPATION GUIDANCE	} } }	DOCKET NO. 93-B

DOCKET COMMENTS
AND REQUEST FOR RULEMAKING

SUBMITTED JOINTLY BY
THE INTERNATIONAL TAXICAB AND LIVERY ASSOCIATION
AND
THE UNITED BUS OWNERS OF AMERICA

I. INTRODUCTION AND REQUEST FOR RULEMAKING.

These comments are submitted in response to the Notice of Proposed Recision of Private Enterprise Participation Guidance as published in the Federal Register on Friday, November 26, 1993 (Notice). Because the Notice is ambiguous about whether the Federal Transit Administration (FTA) is treating this matter as a rulemaking, these comments are intended both as comments to the Docket (No. 93-B) and as a petition for rulemaking under the provisions of section 553 of the Administrative Procedures Act (APA) (5 U.S.C.A. section 553(e)) and section 3017 of the Intermodal Surface Transportation Efficiency Act of 1991 (ISTEA) (49 U.S.C.A. section 1608(i)(3)). The sponsoring organizations submitting these comments are opposed to the Notice on both substantive and procedural grounds.

II. THE COMMENTORS.

The authors of these comments are the International Taxicab and Livery Association (ITLA) and the United Bus Owners of America (UBOA). ITLA and UBOA are separate, independent, and unaffiliated national trade associations that have joined together for the single purpose of responding to the Notice of Recision of the Private Enterprise Participation Guidance. Although the two organizations sponsoring these comments are independent of one another, their common views of the facts, circumstances, and law relating to this matter have allowed them to offer a unified set of comments. In view of the facts that ITLA has over 875 member companies and that UBOA has approximately 1000 member companies, it is important to note that the estimated overlapping membership of these organizations is believed not to exceed 10 companies.

A. THE INTERNATIONAL TAXICAB AND LIVERY ASSOCIATION (ITLA).

The ITLA is one of America's oldest national trade associations, having been organized in 1917. The ITLA is composed of small enterprises engaged in the motor vehicle for hire business operating taxicabs, vans, minivans, and paratransit vehicles (i.e., vehicles less than 30 feet in length). The ITLA membership is actively engaged in local transportation of persons with disabilities, and have historically been the primary providers of specialized transportation for the disability community and the elderly.

The typical U.S.-based member company in the ITLA operates 24 vehicles (the range is one vehicle to 2500). ITLA has approximately 825 member companies in the United States and 55 members in 16 other countries.

The ITLA is divided into five membership divisions: contracted and paratransit services; premium services; taxicab services; international operators; and associate (suppliers). Major membership services include: research, publications, trade meetings and conferences, government relations, and public relations.

B. THE UNITED BUS OWNERS OF AMERICA (UBOA).

UBOA is a national trade association of commercial bus owners, operators, manufacturers, and other businesses with a strong interest in the passenger motor carrier industry. Founded in 1971, UBOA has approximately 1000 member companies in the United States, Mexico, and Canada. UBOA conducts trade shows, industry seminars and workshops, and provides regulatory and legislative information to its members.

III. THE PRIVATE ENTERPRISE REQUIREMENTS OF THE FEDERAL TRANSIT PROGRAM.

A. BACKGROUND.

The private mass transportation industry in the United States is a key element of the transit infrastructure of this country. According to U.S. Department of Transportation figures, the private paratransit components of this industry are responsible for generating 355,200 jobs, and carry some 2 billion passengers, annually (Federal Transit Administration, "A Statistical Profile of the Private Taxicab and Paratransit Industry" (June 1988)). This means that at least one-fifth of all transit trips in the entire nation are taken with private mass transportation services. Private intercity bus operators generate an additional 201,000 employments and carry 325 million passengers annually (American Bus Association, Fact Book (1988)). Further, private mass

transportation providers in the United States are uniformly small businesses, often family run, and frequently have been a proven opportunity for minority and women owners and managers (see Exhibit 1). Further, it is the minority and disability communities that are most dependent upon mass transportation, and these communities rely particularly on privately owned or operated mass transportation (see Exhibits 1 and 2, attached).

From the time that Congress first adopted the Federal Transit Act (Act) in 1964, the Act has contained specific provisions for the inclusion and the protection of private transit providers in transit programs receiving financial assistance from the federal government. Generally, these provisions have been designed to encourage private investment in transit infrastructure (see sections 2(b)(1), 2(b)(2), 2(b)(3), 3(e), 8(g)(4), 8(h), 8(o), 9(e)(1), 9(f), and 16(b)(2) of the Act and Exhibits 1, 2, 3, 4, 5, 6, 7, and 8), to provide for integrated and cooperative public and private transit activities (see sections 2(b)(1), 2(b)(2), 8(g)(4), 8(h), 9(f), and 16(b)(2) of the Act, and Exhibits 3, 4, 5, 6, and 7), and to secure the economic benefits of competition for the taxpaying public (see sections 2(b)(2), 3(e), 8(g)(4), 8(h), 8(o), 9(e)(1), 9(f), and 16(b)(2) of the Act, and Exhibits 3, 4, 5, 6, and 8). Each of these purposes and values is an essential part of the most recent Congressional authorization of the Federal Transit Administration (FTA), the ISTEA (note especially Exhibits 3, 4, 6, and 7).

Although certain specific protections and activities are explicitly and implicitly contained in the Act, no process or procedure is prescribed in the statute for the enforcement of these requirements. Enforcement of these provisions is therefore left to the rulemaking process. Nonetheless, the mandate of private sector involvement in federally assisted transit programs is beyond cavil. The Act explicitly requires that the services of private transit providers are to be utilized "to the maximum extent feasible" as a condition of receiving federal transit assistance (see sections 3(e), 8(o) and 9(e)(1) of the Act). It is this standard of utilizing private providers "to the maximum extent feasible" that the FTA must enforce. Although it is undisputed that local officials are to be given wide latitude in making decisions consistent with local conditions and requirements, it is axiomatic that those decisions must also be made consistent with the terms and conditions imposed upon funds appropriated by the Congress. The FTA is under an affirmative duty to assure such compliance as a condition of making transit funding available to local officials (see sections 3(e), and 9(e)(1)).

It is in this context that the issues of the scope and efficacy of the FTA's private enterprise participation requirements arise. These comments address the history, the operating environment, the policy, and the law that affect any decision concerning the utility

and the effectiveness of the FTA's private enterprise participation requirements.

B. THE STATUTORY FRAMEWORK.

1. The Private Enterprise Requirements.

Since its inception some 30 years ago as an initiative of President Lyndon Johnson, the FTA has been under affirmative statutory mandate to promote the participation of private transit operators in programs assisted by federal transit grants (see sections 2(b)(1), 2(b)(2), 2(b)(3), 3(e), 8(o) - formerly 8(e), and 9(e)(1) - formerly 9(f) of the Act). The importance of the private sector participation provisions of the statute at the time of the adoption of the Federal Transit Act (originally the Urban Mass Transportation Act) is clear from these provisions. Today, requirements mandating protection for private transit operators appear in no less than six sections of the Federal Transit Act: viz., sections 3(e), 8(g)(4), 8(h), 8(o), 9(e)(1), and 9(f). Over the years, some of these sections have been renumbered, rephrased, and elaborated upon, but the private sector participation requirements they mandate have remained essentially unchanged in spirit and effect through all the reauthorization acts and the terms of seven presidents. These provisions are in effect today, significantly after the Congress expressly debated, and rejected, some of the most important claims raised in the subject Notice. In particular, Congress has rejected the notion of enforcing the private sector provisions of the Act as part of the periodic review of local transportation programs, specifically disallowing such enforcement techniques in section 8(i)(5) of the Act, while retaining both the basic private enterprise participation grant conditions and the requirement that the Secretary make a private sector finding as part of each individual grant. Section 8(i)(5) of the Act provides, in pertinent part, that:

> "The Secretary shall assure that each metropolitan planning organization in each transportation management area is carrying out its responsibilities under applicable provisions of Federal law, and shall so certify at least once every 3 years. ... The Secretary shall not withhold certification under this section based upon the policies and criteria established by a metropolitan planning organization or transit grant recipient for determining the feasibility of private enterprise participation in accordance with section 8(o) of the Federal Transit Act."

Congress intended to avoid draconian programwide penalties (such as the loss of eligibility for all transit funding) for violation of the private sector requirements of the Act in favor of the traditional administrative case by case enforcement, which assures both timely enforcement of the private enterprise participation

requirements and the opportunity for proportional and balanced penalties for noncompliance with these requirements. This is made clear by the remarks of Senator Alan Cranston during the Senate floor debate on ISTEA, during which Senator Cranston said, in part:

> "[T]he bill retains provisions in the existing law that require locally developed transportation plans and programs to encourage the participation of private enterprise to the maximum extent feasible. The conference report makes it clear that these provisions are not to be construed to impair local authority to determine the feasibility and benefits of private sector participation with respect to any program element or project." Congressional Record, November 27, 1991.

Congress intended to assure the utilization and the leveraging of private sector resources in the federally assisted transit program, not to deny transit funding to eligible communities. The legislative history makes it clear that this straightforward reading of the language of section 8(i)(5) is exactly what Congress intended. That is why the Congress rejected any effort to review the entirety of a local program vis-a-vis private sector participation practices but did not disturb the long established administrative practice of enforcement on a project by project basis. Any clear reading of the ISTEA and its legislative history therefore disallows changes in administrative procedures of the kind contemplated by the Notice, which would do away with a case by case review of private sector violations in favor of a periodic programmatic approach.

Section 3(e) of the Act provides, in pertinent part, that: "No financial assistance shall be provided under this Act ...unless the Secretary finds that such program, to the maximum extent feasible, provides for the participation of private mass transportation companies". (Emphasis added.)

Section 8(g)(4) of the Act provides, in pertinent part, that: "Before approving a long range plan, each metropolitan planning organization shall provide ... private providers of transportation ... with a reasonable opportunity to comment on the long range plan, in a manner that the Secretary deems appropriate." (Emphasis added.)

Section 8(h) of the Act provides, in pertinent part, that: "The metropolitan planning organization designated for a metropolitan area, in cooperation with the State and affected transit operators, shall develop a transportation improvement program for the area for which such organization is designated. In developing the program, the metropolitan planning organization shall provide ... private providers of transportation ... 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 metropolitan planning organization and the Governor."

Section 8(o) of the Act provides, in pertinent part, that: "The plans and programs required by this section shall encourage to the maximum extent feasible the participation of private enterprise. Where facilities and equipment are to be acquired which are already being used in service in the urban areas, the program must provide that they shall be so improved ... that they will better serve the transportation needs of the area." (Emphasis added.)

Section 9(e)(1) of the Act provides, in pertinent part, that "The provisions of sections 3(e) ... shall apply to this section and to every grant made under this section [emphasis added]" (i.e., no grant shall be made unless the Secretary shall find that the grantee provides for the utilization of private transportation providers to the maximum extent feasible).

Section 9(f) of the Act provides, in pertinent part, that: "Each recipient [of federal transit assistance] shall: ... (2) develop a proposed program of projects concerning activities to be funded in consultation with interested parties, including private transportation providers; (3) publish a proposed program of projects in such a manner to afford ... private transportation providers ... an opportunity to examine its content and to submit comments on the proposed program of projects and on the performance of the recipient; ... In preparing the final program of projects to be submitted to the Secretary, the recipient shall consider any such comments and views, particularly those of private transportation providers, and shall, if deemed appropriate by the recipient, modify the proposed program of projects." (Emphasis added.)

These sections fall into two categories: those that mandate participation of private transportation providers "to the maximum extent feasible" in the program of any federal transit grant recipient (i.e., sections 3(e), 8(o), and 9(e)(1)), and those that mandate the participation of private transportation providers in the entire process of planning and reviewing the projects of federally assisted transit programs (i.e., sections 8(g)(4), 8(h), and 9(f)). There is also a section that requires that enforcement of the private enterprise participation mandates must occur on an individual grant basis (i.e., section 8(i)(5)), as discussed below.

Sections 3(e), 8(o), and 9(e)(1) patently and absolutely impose the condition of utilization of private transportation providers "to the maximum extent feasible" upon all recipients of federal transit assistance funds. It is the provisions of these sections that impose upon the FTA the duty to assure utilization of private transportation providers to the maximum extent feasible before awarding any particular grant. As expressly stated in section 3(e) (and incorporated by reference into the provisions of section

9(e)(1)): "No financial assistance shall be provided ... unless the Secretary finds that [the recipient program], to the maximum extent feasible, provides for the participation of private mass transportation companies." A specific private enterprise participation finding is a condition of each grant, and not a function of any "periodic overview", such as is suggested in the Notice (which proposes reliance on triennial reviews done for the preceding three year period as an appropriate vehicle for enforcement of the private sector requirements of the Act). The precondition of a finding of private enterprise compliance for each grant in a program that makes grants at least quarterly each year, requires a case by case review of private sector practices (cf., the provisions of section 8(i)(5), which expressly prohibit the denial of grant funds based on the periodic review of the section 8 planning process, but which does not curtail the existing practice of examining compliance in a specific individual circumstance).

Because the Secretary must make an affirmative finding of private sector utilization to the maximum extent feasible before making each grant, and in view of the broad network of mutually reinforcing private sector provisions, it is patent that the Congress did not intend the private sector provisions to be treated casually. As noted by Senators George Mitchell and Bob Dole, leveraging private resources into the federally assisted transit program is an integral, and necessary, part of the entire ISTEA concept (see Exhibits 3 and 4, attached). This is a key element of the national bipartisan consensus on surface transportation.

Just as utilization of the resources of private transportation providers is a mandatory precondition of each grant of federal transit assistance, it is emphatically the mandate of Congress that the FTA will not withhold grants based upon any overall programmatic review of the private enterprise participation policies of individual grantees or MPOs. That is why section 8(i)(5) was adopted. This provision means that Congress does not want periodic enforcement of the private sector participation requirements because Congress does not want to "capture" an entire program of projects for any grantee or metropolitan planning organization in the web of an across the board ineligibility for funding which undoubtedly would do great harm. Instead, Congress, logically and pragmatically, expects the enforcement of the private sector participation requirements to be achieved in an ongoing and nondisruptive manner, localized to individual activities. That is why, after debating the private enterprise procedures of the FTA, Congress did not make any change in the project by project review of private sector requirement compliance.

The existing private enterprise participation requirements are consistent with the legislative history of section 8(i)(5) of the Act. During the debates leading to the adoption of the ISTEA - of which the Act is a part, Senator Cranston, a leader among those

concerned about the scope of the private sector participation requirements, noted the maintenance of the private enterprise participation requirements, as cited above at page 5. Senator Cranston's remarks during the ISTEA debate support the view that the private sector participation requirements were expected to be continued, but not to be used to make an entire program of projects ineligible for federal assistance. This is exactly what the ISTEA Conference Committee Report says with regard to section 8(i)(5). The Conference Committee states that:

> "In accordance with this provision [8(i)(5)], localities shall be afforded wide flexibility in establishing criteria to be used in determining the 'feasibility' of private involvement in local programs. However, nothing in this provision shall diminish the responsibility of the Secretary to encourage grantees of federally funded projects to provide for the maximum feasible participation of private enterprise in accordance with Section 8(e)." H.R. Conf. Rept. No. 404, 102d Cong., 1st Sess. 414 (1991).

Congress intended to promote private sector participation in federally assisted transit activities, not to restrict the availability of transit funding.

The scope of the mandate to utilize private transportation providers "to the maximum extent feasible" is at the core of any review of enforcement of the private sector requirements of the federal transit assistance program. It is this formulation of utilization "to the maximum extent feasible" that requires some process for evaluation in determining what constitutes "maximum extent feasible". That is why an administrative process is necessary to implement the congressional private enterprise mandate.

When using the phrase "to the maximum extent feasible" in other rulemakings, the FTA has set the standard that unless such a requirement is satisfied, evidence of the intent to comply is required (see, e.g., 49 CFR 37.141(b)). This phrase is used by the FTA in the regulation implementing the Americans With Disabilities Act (ADA) to effectuate the mandate that paratransit plans be submitted timely. That regulation sets forth, in pertinent part, that:

> "To the maximum extent feasible, all elements of the coordinated plan shall be submitted on January 26, 1992. If a coordinated plan is not completed by January 26, 1992, those entities intending to coordinate paratransit service must submit a general statement declaring their intention to provide coordinated service ... In addition, the plan must include the following certifications from each entity involved in the coordination effort:

(1) A certification that the entity is committed to providing ADA paratransit service as part of a coordinated plan.

(2) A certification from each public entity participating in the plan that it will maintain current levels of paratransit service until the coordinated plan goes into effect." 49 CFR 37.141(b).

This language manifests that compliance to "the maximum extent feasible" means that compliance is expected, not merely encouraged, by the FTA. The term "maximum extent feasible" is also used in the ADA regulation at 49 C.F.R. 37.43 and 37.75. The use of this language consistently in mandatory provisions of the ADA rule manifests not only the intent of the FTA to require certain conduct of parties affected by the regulation, but also demonstrates the agency's comprehension of the phrase as having mandatory effect.

Nothing more is urged than that the FTA give the same urgency and force to the use of the phrase "to the maximum extent feasible" by the Congress that it gives to that phrase in its own regulations.

2. The Procurement Requirements.

The requirement to involve the private sector to the maximum extent feasible complements the provisions of section 3(a)(2)(C) of the Act, which provides, in pertinent part, that "No grant or loan funds shall be used ... to support procurements utilizing exclusionary or discriminatory specifications." Any factor utilized to deprive the private sector of the statutory right to participate in a federally assisted transit program to the maximum extent feasible plainly would be exclusionary and discriminatory in this sense, inasmuch as that factor (e.g., local prohibition on contracting out or labor agreements purporting to limit the right of transit grantees to contract out notwithstanding compliance with the labor protection provisions of section 13(c) of the Act) precludes open competition.

FTA Circular 4220.1(B) restates the procurement standards by which federal transit grantees are bound. The procurement requirements are unquestionably part of the federal government's oversight of the integrity and efficiency with which grant funds are spent (see Exhibit 9). In this regard, every procurement of a federally assisted service or product is required to be accomplished under open and competitive means except for goods which must be "sole sourced" under applicable standards or for those limited services covered under the Brooks Act (which applies to architectural and engineering services) (see, Exhibit 9). The FTA has taken a very strong position on procurement integrity, and has extended competition even into areas where local grantees traditionally have

not utilized competitive procurement methods, notably including the services of legal counsel (see Exhibit 9). It is therefore a matter of procurement oversight which also compels the FTA to assure the utilization of open competition in securing transit services.

C. THE REGULATORY REQUIREMENTS.

It has been acknowledged many times that the private enterprise participation requirements are widely misunderstood (see Exhibit 10, attached). It is unfortunate that the Notice itself repeats many of the most common myths and errors about what the policy is and how it works. This section sets out the actual requirements of the policy.

1. The Private Enterprise Participation Provisions.

The private enterprise participation requirements themselves are a remarkably simple and straightforward statement of the statutory requirements of the Federal Transit Act.

The Private Enterprise Participation Policy of 1984 (see Exhibit 11, attached) merely sets forth the intention to implement the statutory mandate to encourage the utilization of private enterprise in federally assisted transit programs to the maximum extent feasible. That policy specifically states that:

> "[A]s a general matter, [FTA] recognizes that local decisionmakers should be afforded maximum flexibility in developing plans and programs to meet local transportation service requirements. At the same time, [FTA] is obligated to ensure that local decisionmakers fully and fairly consider the private sector's capacity to provide needed transportation services." See Exhibit 11 at page 5.

The 1984 policy statement goes on to require notification to private operators concerning proposed services and to require that private parties have an opportunity to comment upon the development of local transit plans. All of this sounds like, and is, the earliest precursor of the private sector element of the planning requirements of the ISTEA. Exhibit 11, at pages 5 and 6.

The 1984 policy statement for the first time created a formal process for complaints from the private sector about private enterprise participation compliance by grantees. But this policy statement was also the root of the doctrine that the FTA will only hear complaints on limited procedural grounds. The grounds for appeal allowed by the 1984 policy are: 1. that the grantee has not established a private enterprise participation process, 2. that the local process has not been followed, and 3. that the local process does not provide for the fair review of disputes. These are the same criteria for private sector appeals that are applied at the

present time (see Exhibit 26, attached). No appeal ever heard by the FTA has resulted in the determination that a private provider must be utilized or substituting the judgment of the FTA for that of a grantee on the merits of a public/private service decision (see section III. C. 2., below).

The legislative reaction to the 1984 private enterprise participation policy statement came in section 327 of the Department of Transportation and Related Agencies Appropriations Bill of 1985. That measure prohibited the FTA from conditioning grants on specific levels of private sector involvement, from establishing quotas for private sector involvement in the transit program, or from mandating local decisions regarding private sector involvement. There was no such requirement in the 1984 policy statement, or in any other FTA action. Nonetheless, section 327 did not alter the private enterprise mandates of the Act, and report language specifically reiterated the continuing importance of the private enterprise mandates of the Act (see H.R. Com. Rept. 99-976, and Exhibit 12, attached).

The Documentation Circular of 1986 (FTA Circular 7005.1, see Exhibit 12, attached) requires each grant recipient to develop its own process for the consideration of private enterprise participation. The Documentation Circular requires notice to, and early consultation with, private providers on plans involving new or restructured service; periodic examination, at least every three years, of each route to determine if private service would be more efficient; a description disclosing the criteria for evaluating if new or restructured service could be provided more effectively by private operators; the use of costs as a factor in the public/private decision; and, a dispute resolution process for objections to the initial decision. Further, FTA Circular 7005.1 requires metropolitan planning organizations to submit with their transit improvement plans a description of the involvement of the private sector in the development of the projects; a description of the proposals received from the private sector and how they were evaluated; a description of impediments to holding service out for competition and measures taken to reduce such impediments; and, a description and status of private sector complaints.

Significantly, FTA Circular 7005.1 provides that "[t]he nature and length of documentation will be left to the grantee's discretion. It is [FTA's] expectation that the documentation will be kept to a minimum ..." (see Exhibit 12).

The legislative reaction has been minimal. As noted above, the ISTEA added section 8(i)(5), which reinforces Circular 7005.1's case by case approach, and the basic private enterprise provisions have been renewed, unchanged. There was an objection by the City of Phoenix, Arizona to the rejection by the FTA of a "successor clause" which effectively discriminated against contractors who would comply with the provisions of section 13(c) of the Act but

might not agree to the labor agreement of a predecessor contractor. This concern led to the adoption of a limited provision, applicable to Phoenix only, allowing the use of the "successor clause" (see Department of Transportation and Related Agencies Appropriations Act of 1991, D.L. 501-516, section 338 and Department of Transportation and Related Agencies Appropriations Act of 1993, P.L. 102-388, section 342.). This provision was not made effective programwide or for any other situation on the two occasions which the Congress has considered this issue. The Congress has not otherwise acted on the private enterprise program of the FTA, except on a constituent basis (see, e.g., Exhibit 13, attached).

Section 16 of the Act provides particular assistance for the transit needs of elderly persons and those with disabilities. Section 18 of the Act provides for transit assistance for rural communities. Programs under these sections are subject to the private enterprise participation requirements of the FTA under Circulars 7005.1 and 9070.1C (section 16) and 9040.1C (section 18). Section 16 of the Act provides that assistance is available only under limited circumstances specifically enumerated in section 16(b)(2) as where "services ... are unavailable, insufficient or inappropriate or to public bodies approved by the State to coordinate services for elderly persons and persons with disabilities or to public bodies which certify ... that no nonprofit corporations or associations are readily available in an area to provide the service..." Such service has historically been provided by the for-profit private paratransit industry, which is relied upon by the community of persons with disabilities, even after the passage of the ADA (see Exhibit 2). The impact of the private enterprise participation requirements on the section 18 program is highly beneficial (see Exhibit 3). While the provision of transit services to these vulnerable communities is especially important, there is absolutely no reason to differentiate the economics and infrastructure considerations of these programs from any other facet of the federal transit program.

The need to provide safe, efficient, and economic service at the lowest cost to the public is paramount in all mass transit. In the case of vulnerable communities, reliability and a proven record of service are especially important, because mobility options may be particularly limited. It is for this reason that the established and historic performance of the private sector is especially useful in the section 16 and 18 programs (see, e.g., Exhibits 2 and 3). In point of fact, special programs such as those provided for in sections 16 and 18 of the Act are especially vulnerable to noncompetitive tendencies because of the traditional "social services" aspect of their activities. But, as Osborne and Gaebler point out, there is no arena of public service which is not improved by competition (see Osborne and Gaebler, Reinventing Government, (1992) at pages 80-84).

On November 29, 1993, a Freedom of Information Act (FOIA) request was filed with the FTA by Holland and Knight, attorneys for these commentors (the FOIA request)(see Exhibit 14, attached). The absence of any record of undue burdens created by the application of the private enterprise requirements in the sections 16 and 18 programs, as established by the lack of documentation in the response to the FOIA request, demonstrates that this program is not unduly burdensome. There will always be dissenters, and no doubt there may be some critical comment of the sections 16 or 18 private sector provisions, but the fact remains that the private sector serves these programs well. If the FTA intends to remove the private enterprise participation program from its requirements, shouldn't the agency first at least have an objective survey of the extent of private service under these programs, and some reliable information about the quality of this private service? To the knowledge of these commentors, there is no such information currently available on a programwide basis. Trading anecdotes is no substitute for informed decisionmaking.

2. Enforcement.

There have been only 12 private enterprise complaints before the FTA according to the material produced in response to the FOIA request (see Exhibits 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, and 26, attached). The oldest of these was decided on March 24, 1987, and the most recent on November 24, 1993. That is an annual average of less than two. The private enterprise complaint process is certainly no burden on any grantee. In fact, the most complaints filed against any grantee is three, and that grantee (New Jersey Transit) was found in May of 1988 and again in January of 1993 not to have adopted a written local procedure for the handling of disputes (i.e., these complaints easily could have been avoided).

Of the 12 private sector decisions rendered by the FTA, eight have been outright dismissed because there were no procedural errors and the FTA consistently has refused to disturb local public/private decisions. Two of the decisions have resulted in remands to the grantee to adopt, and follow, a local process (neither of these matters ever came back to the FTA for further review). And, two matters have resulted in findings of violations of the FTA private enterprise requirements. In every case where a violation of FTA private enterprise requirements has been found, the grantee has been allowed to sustain the particular public/private decision it made (or to make its own subsequent decision based on the application of the fully allocated costs guidelines). In only one case was the grantee told that if it should elect to proceed with a public service option that, under the particular circumstances of that matter, the subject transit activity would be ineligible for federal assistance. This is not a record of heavy-handed federal interference in local decisionmaking. It is to be remembered that the FTA makes approximately 900 grants, and encumbers nearly 4

billion dollars, per year, and there are approximately 3,500 grant recipients around the country.

D. ANALYSIS OF THE NOTICE.

In the Notice, the FTA takes the position that the administrative private enterprise participation requirements are an undue burden on public transit because: 1) a review of transit routes every three years creates an undue burden; 2) use of fully allocated costs is inappropriate and inhibits competition; 3) the requirements do not recognize local institutional barriers to private sector participation; and, 4) the appeal process interferes with the ability of local authorities to make decisions most suitable to local conditions. Each of these points is unsupported by the facts and is contrary to the guidance and implementation of the private enterprise participation requirements as actually administered by the FTA.

Preliminarily, it should be noted that much of the Notice is based on unsupported assertions of burdens, complaints, comments, or conclusory evaluations without any underlying information or documentation. Specifically, the Notice contends that FTA Circulars 7005.1, 9040.1C, and 9070.1B "outline certain elements and procedures relating to private enterprise participation ..." and that "[r]ecipients have found some of these elements burdensome." 58 Federal Register 62409. In that regard, the FOIA request specifically sought "...any records, including background materials, letters, complaints or correspondence of any kind, that led to the consideration of the [Notice]..." (see Exhibit 14, attached). The only document produced by the FTA that is responsive to this request is a letter dated November 19, 1993, written in response to the FTA's then already self-started reconsideration of the private enterprise requirements, from the Amalgamated Transit Union's Legislative Director, Robert A. Molofsky, citing a single matter in which the use of fully allocated costs putatively did not produce an economically advantageous transit contract (this particular claim is highly disputed, see Exhibits 27 and 28, attached). There is no other record of any kind sustaining the claim of private enterprise participation related problems in a program that annually makes over 900 grants and encumbers nearly 4 billion dollars.

Clearly, Mr. Molofsky's letter, which starts with the phrase "As the Federal Transit Administration undertakes its reconsideration of the Department's longstanding transit privatization policies ...", was a product of the review, and not a cause of it (note the date of Mr. Molofsky's letter, November 19, 1993, only one week prior to the publication of the Notice in the Federal Register). Other than the Molofsky letter, the documents produced are devoid of any complaints for several years, and the old complaints are limited in number and deal only with specific situations. There is no record of requests for a reconsideration

or a recall of the private enterprise program of the FTA, and there is certainly no legislative retreat from a very plain mandate of private sector involvement in federally subsidized transit. In fact, to the contrary, the FTA did produce in response to the FOIA request a transcript of an exchange between the FTA and Representative Robert Carr, now the chairman of the House Appropriations Committee Subcommittee on Transportation (see Exhibit 13, attached), in which Mr. Carr indicates that the FTA may not have been vigorous enough in the enforcement of the private enterprise requirements.

1. The Requirement of Route Review Is Not Unduly Burdensome.

Among the anomalies raised by the Notice is the assertion that review of transit routes every three years is an undue burden, while the Notice itself calls for a triennial review of private sector practices and section 8 of the Act requires federal review of the planning process of all transit activities at least every three years. These requirements are set against the annual submission of a program of projects by each grantee. Surely the emphasis on planning (and hence, coordination) would require a periodic review of the efficiency of federally assisted transit activities, and only "closes the loop" in assuring that efficiency and effectiveness in the delivery of transit services are in fact not taken for granted. Competition, as a value, requires periodic review of results.

Whatever the FTA's view on three year reviews of private sector options for established transit routes, the claim that this review is "burdensome" is utterly without foundation. Not a single document, record, or other matter was produced by the FTA in response to the request for "...any records, including background materials, letters, complaints or correspondence of any kind..." regarding the statement in the Notice that "based on reports received from its recipients, FTA believes that [the three year route review] provision entails a significant administrative burden for many..." (see Exhibit 14). While these commentors cannot forecast the contents of other comments to the docket, the absence of a record to support the Notice in this regard suggests, at best, that an objective study needs to be done to measure the effectiveness of the private enterprise requirements, and to weigh the costs and benefits of the program. Otherwise, the FTA will be proceeding on an arbitrary course with no more than an anecdotal record.

2. Fully Allocated Cost Analysis.

Concern about using "fully allocated costs" is misplaced in that the disclosure of all costs is designed to level the playing field in light of federal and other subsidies which are available to public operators. It is to be remembered, "fully allocated costs" is an analytical baseline, more of a disclosure than an absolute

sum. See, UMTA '91 Resource Book, at page CC 2 (see Exhibit 10, attached). A grantee must use fully allocated costs if the agency bids in a formal procurement process in open competition for a third party contract with private providers (which receive no government subsidy and for whom any bid is made on the basis of fully allocated costs including all overhead). FTA Circular 7005.1. However, "fully allocated costs" may be evaluated and discounted for elements of cost which cannot be saved when making a public/private service alternative decision for an agency's own service (see, FTA Circular 7005.1, and Exhibit 10, attached).

Local authorities have the final word on the public/private option within their own service. The Federal Transit Administration only accepts appeals concerning such matters (so-called "section 3(e) complaints") on three grounds: 1) that there is no written local process, 2) that the local process has not been followed, or, 3) that the local process is fundamentally unfair (i.e., on due process grounds) (see section III.D., above). Complaints that a grantee must undertake a formal bidding process, and must prepare a formal bid submission for in-house service rather than utilizing less expensive means of evaluating in-house service alternatives are groundless.

The argument that comparing "fully allocated costs" artificially forces the grantee to accept higher costs for operations than would be set if "avoidable costs" or other more "realistic" measurements of the cost of providing the service in-house were used is also groundless. The determination of fully allocated costs, as noted above, may be discounted for costs that cannot be saved when determining the feasibility of using private contractors. (See, FTA Circular 7005.1 and UMTA '91 Resource Book, supra). Consideration of contracting out "to the maximum extent feasible" is required by the statutory language of the Federal Transit Act, notably sections 3(e), 9(e)(1), and 16(b)(2). This is to be distinguished from open competition with unsubsidized providers for third party transit contracts, where fully allocated costs are the only fair way to compare costs. After all, no one pays the overhead of private operators allowing them to reduce their bids. Public transit agencies are not subsidized to compete unfairly with private enterprise.

It is curious that an agency that requires competitive procurement procedures for the purchase of all products and services except for proper "sole source" procurements and those enumerated in the Brooks Act (engineering and architectural services), would be reluctant to apply these same procurement conditions to the purchase of contract transportation services. This is especially true inasmuch as the FTA requires competition even for such sensitive and peculiarly local decisions as the selection of general counsel, which is historically and by local preference usually not subject to competitive procedures by local governments in the United States (see section III.B.2., above).

Notwithstanding these facts and anomalies, it is supercilious to complain about the alleged rigors of the competitive procurement process, when the threshold question of whether to provide new or restructured transit service is permissibly addressed by a feasibility analysis process in which the transit grantee itself makes the determination of the "feasibility" of competing the service, especially inasmuch as the local public operator gets to adjust the fully allocated cost of its service for features which cannot be saved (see Exhibit 10). In view of the extensive planning requirements of ISTEA, the National Environmental Policy Act (NEPA), and the Clean Air Act, such a modest planning burden can hardly be deemed unreasonable. However, it is unquestionably unreasonable that a decision to undertake service should be made without a consideration of alternatives. This is especially true where cost is only one factor to be considered (the local transit agency being free to enumerate other factors it wishes to consider, and the grantee itself being the final arbiter of whether to provide the service in-house or under contract) (see Exhibits 10 and 29).

There are several ways to comply with the private enterprise participation requirements of the FTA. Certainly, competing each new or restructured service is one means of compliance. As noted above, competition is the preferred means of procurement for federally assisted purchases of goods or services (see, FTA Circular 4220.1(b) and Exhibit 9. Open competition for the provision of transit services is arguably the best way to obtain new or additional service inasmuch as the competitive process alerts all interested parties to the most efficient and effective service techniques. This concept is developed in the book Reinventing Government by David Osborne and Ted Gaebler. Osborne and Gaebler explain the benefits of competition and the evils of monopoly, including government monopoly, in providing services. In fact, Osborne and Gaebler specifically cite the private enterprise participation requirements of the FTA as an example of an effective implementation of competitive reform (see Exhibit 8, attached).

But, the private enterprise participation requirements of the FTA do not mandate that procurement processes be used in determining whether to provide new or restructured service in-house or under contract. What is required is notice to, and early consultation with, private operators as the local grantee determines the feasibility of contracting for services. See, FTA Circular 7005.1, and UMTA '91 Resource Book, at pages CC 1 - 2 and CC 5 - 11. These features (notice, consultation, and utilization of the private sector to the maximum extent feasible) are not creatures of the FTA's private enterprise participation requirements; they are mandates of the Federal Transit Act (see, section III.B.1., above).

Without a federal mandate many localities would never allow competition and federal grant proceeds would not be spent in the

most efficient manner. This is the way it was before the private enterprise participation requirements were adopted. In New Jersey, alone, at least three RFP's to compete for the provision of new or restructured service have already been withdrawn based on the announcement of the publication of the Notice (see Exhibit 30, attached).

The FTA posits that public operators are at an unfair and unrealistic disadvantage under the Private Enterprise Policy because they are forced to consider artificially high prices when determining public/private options under the fully allocated cost requirement. This argument spins the entire problem incorrectly. The problem, which is resolved by the private enterprise requirements, is to prevent federally subsidized public operators from unfairly competing against unsubsidized private operators for third party contracts. This is a clear statutory mandate under the provisions of sections 3(e) and 9(e)(1) of the Federal Transit Act.

Further, the Federal Transit Act requires the Secretary of Transportation to make an affirmative finding that prospective grantees are utilizing the private sector "to the maximum extent feasible" as a condition of making grants of federal transit assistance. Note that the language is to involve the private sector to "the maximum extent feasible", not merely to the extent convenient to local authorities. This is a fundamental principle of the Federal Transit Act. This leveraging of private sector investment is a fundamental tenet of the ISTEA (see Exhibit 3). Notwithstanding these requirements, a grantee may discount fully allocated costs - showing how and why, in determining the feasibility of contracting any of its own service.

In response to the FOIA request for documentation supporting the statement: "[t]he experience of many recipients, however, shows that in the context of their operations the fully allocated cost methodology is not always an appropriate gauge of the true cost of providing a particular service..." (see Exhibit 14), the FTA produced no documentation whatsoever. This is another of the enigmatic and inexplicable representations of the Notice.

The impact of private enterprise participation in transit is surveyed in the new study entitled "An Analysis Of The Competitive Procurement of Transit Service Between 1984 and 1991", prepared by the Comsis Corporation for the ITLA. The Comsis Corporation is renowned for its expertise in transit, and ran the Public Private Transportation Network for the FTA for a number of years. A copy of this study is attached as Exhibit 31. The benefits of contracting in transit are well explained in this study.

3. Local Institutional Barriers.

Local institutional and policy constraints on private sector involvement do exist; this is not disputed (see, e.g., the Notice

at 58 Federal Register 62409). Such barriers consist of local mandates providing for government monopoly of mass transit services, labor agreements disallowing the use of "outside" private contractors, and other matters. The Notice contends that such "institutional" barriers should be recognized and be given preference over the private enterprise participation requirements of federal statute. This is one of the most peculiar aspects of the Notice.

Federal financial assistance necessarily comes with overriding federal conditions. For example, the federal cross-cutting requirements, including procurement requirements, follow the federal dollar to whichever entity enters the program. This is a condition of receiving a federal subsidy. This is a well established principle (see section III.B.2., above). On policy matters concerning local "institutional" prerogatives, many programs substitute federal conditions for local practices as part of having a uniform national program. For example, the Americans With Disabilities Act (ADA) mandates very detailed requirements to assure the attainment of the national goal of integrating persons with disabilities into the economic and social mainstream. Before the ADA, most mass transit in America was inaccessible, often due to local institutional barriers. The same may be said for NEPA, which supplants even stringent local environmental quality legislation when federally funded projects are involved.

It is inconsistent for an agency that tells grant recipients that they must follow federal procurement requirements and compete the selection of legal counsel, a peculiarly local and policy prerogative, that they are free to thwart the purposes and conditions of federal transit assistance merely by agreeing with third parties to do so.

If the concern about institutional barriers is labor protection, then one must consider that section 13(c) of the Act contains express provisions for the protection of labor. If the Congress intended to exempt contrary provisions of labor agreements from the private enterprise mandates of the Act, it would have done so (cf., the Phoenix situation, discussed above on pages 11 and 12). In fact, Congress has done just the opposite. When such issues have come before the Congress it has refused to pass systemic legislation to give local labor agreements sway over the private enterprise requirements (see pages 11 and 12, above).

Although the Notice argues that by not yielding to local institutional barriers the FTA "denies flexibility" to its grantees, it is rather the local barriers to competition which deny grantees of the flexibility to be creative and to change fixed patterns. Breaking down institutional barriers is a necessary precondition to enabling competition to develop new and more efficient means to deliver transit services.

Finally, if private transit providers are walled out by local conditions, how can the finding be made that private enterprise is being utilized to the maximum extent feasible? This so tips the statutory balance between labor protections and private enterprise protections as to negate the private sector requirements of the Act.

4. The Appeal Process Does Not Interfere With Local Decisionmaking.

The Notice contends that local transit authorities are forced to make decisions favoring the utilization of private operators due to federal government interference under the private enterprise participation requirements. It is argued that local officials know best what transit options are suited to local conditions and should be free to choose among service options without FTA supervision.

The private enterprise participation requirements do not mandate particular local choices regarding public and private service alternatives. The requirements merely impose a disclosure of true costs, and an analysis of what can and cannot be saved, and such other service or performance characteristics as may be determined by the grantee to be significant before a grantee makes any such decision. Fully allocated costs must be used when a grantee bids in open competition for third party contracts, but section 3(e) of the Act clearly prohibits federally subsidized competition with the private sector. See FTA Circular 7005.1 sections 3 and 5, and UMTA '91 Resource Book, at pages CC 1 - 2 and CC 5 - 11, and the discussion in section III.C.2., above). No particular aspect of a grantee's feasibility analysis controls the public/private service provision selection so long as the determination flows "reasonably from the analytical process". UMTA '91 Resource Book, at page CC 2. Price is merely a factor, not the only factor in such an analysis; each grantee is free to decide what other decision factors should be used according to local conditions and preferences. FTA Circular 7005.1 section 5. Further, there has never been a decision by the FTA making the public/private service provision selection for any grantee (see section III.C.2., above).

As noted above, local grantees have the power to make the choice between public and private service alternatives in their own discretion. What is ignored in the Notice is that it is a congressionally mandated condition of receiving FTA assistance that the private sector be utilized to the "maximum extent feasible". The private enterprise participation requirements of the FTA merely assure that grantees will consider the possibilities before deciding what will work best for them as they spend FTA grant funds. There is no other procedure by which the private sector mandates of the ISTEA are actively engaged. Triennial reviews coming as late as three years after the fact provide no meaningful redress or enforcement potential.

In response to the FOIA request for documentation, the FTA provided the private sector complaint decisions, which are fully discussed above in section III.B.2. The total of 12 complaints, with 8 dismissals for failure to state a cognizable claim, 2 remands for failure to provide a process for hearing complaints locally, and 2 findings of violations with no penalties imposed, stresses the lack of burden created by the FTA appellate process. Because the private enterprise requirements force local agencies to deal directly with private sector concerns on their own, they are almost always worked out locally, as they should be. The fact is that the FTA private enterprise complaint process has supported local control over public/private decisionmaking.

IV. PROCEDURAL OBJECTIONS.

A. THE NOTICE IS NOT LEGALLY ADEQUATE.

The FTA is required to make all significant requirements in the activities authorized under the Act through rulemaking procedure 49 U.S.C., section 1608, which provides:

> "**(i) Rulemaking procedures**
>
> **(1) Procedures**
>
> The Secretary shall provide an agenda listing all areas in which the Secretary intends to propose rules governing activities under this chapter within the following twelve month period. The Secretary shall publish the proposed agenda in the Federal Register as part of the Secretary's semi-annual rulemaking agenda which lists rulemaking activities of UMTA. The Secretary shall also transmit the agenda required by the first sentence of this paragraph to [various committees] on the day that the Secretary's semi-annual rulemaking agenda is published in the Federal Register.
>
> **(2) Views**
>
> Except for emergency rules, the Secretary shall give interested parties not less than sixty days to participate in any rulemaking under this chapter through submission of written data views, arguments with or without the opportunity for oral presentation, except when the Secretary for good cause finds that public notice and comment are unnecessary due to the routine nature or matter of insignificant impact of the rule, or that an emergency rule should be promulgated. The Secretary may extend the 60-day period if the Secretary determines that such a period is insufficient for diligent persons to prepare comments or that other

> circumstances justify an extension of time. An emergency rule shall terminate 120 days after the date on which it is promulgated.
>
> **(3) Limitation**
>
> The Secretary shall propose or implement rules governing activities under this chapter only in accordance with this section except for routine matters and matters of no significant impact."

The provisions of 49 U.S.C. section 1608 (i)(3) exempt only "routine matters and matters of no significant impact" from this rulemaking requirement. Although the conference report gives the example of the issuance or revision of grant application circulars as matters of routine import under this section (see H.R. Conf. Rep. No. 404 at 418), the Notice itself acknowledges the proposal as "a relatively significant change". As such, the Notice raises a substantive matter of major significance to grantees and private operators, alike. The Notice is, therefore, neither routine nor a matter of no significant impact. Consequently, the rulemaking requirement of 49 U.S.C. section 1608 applies to this notice.

Further, the Notice represents a revocation of what had been considered to be, for some time, the "settled course of behavior", which carried with it a presumption of rationality, that the Agency was properly interpreting the will of Congress. Changes from such a settled direction have been closely reviewed by the courts. See, e.g., Motor Vehicle Mfrs. Ass'n v. State Farm Mut., 463 U.S. 29, 42 (1983): "Accordingly, an agency changing its course by rescinding a rule is obligated to supply a reasoned analysis for the change beyond that which may be required when an agency does not act in the first instance." The significance of the proposed change is admitted in the Notice which says, in pertinent part:

> "[FTA] is providing notice of its proposed action to rescind these Circulars . . . because this action would represent a relatively significant change of recent FTA philosophy . . . ." 58 Federal Register 62,410 (Nov. 26, 1993).

In undertaking this type of review, which is clearly necessary here, the agency is not free to act independent of the administrative record. The problem with the FTA analysis is that it has completely failed to adhere to the requirement that a nexus exist between the need for changes and the underlying, supportive facts. Under State Farm, an agency cannot successfully rely on factors not so designated by Congress; fail to consider an important aspect of the problem; offer to explain its decision contrary to the evidence before the agency; or advance an implausible position which could not be understood as "a difference

in view or the product of agency expertise." Id., 463 U.S., at 43.

That the Notice is vitally important to the FTA is clear from a literal reading of the Notice itself. Such a reading also shows that the Notice is intended to address a different approach, rather than a careful analysis, based upon the record, and addressing the criteria supplied consistently by the courts. Thus, although there is the language stating compliance with legislative amendments, the true nature of the FTA approach is shown in sections II and III, above.

The discussion provided in these comments and petition show that the purported compliance of the Notice with the "direction of ISTEA" is simply wrong. Important standards rooted in the public's right to have "settled expectations" by which to govern its commercial conduct, require that FTA decisionmaking be supported by the administrative record relied upon for its action, as well as consideration of maintaining the present course. We have not seen this needed dedication to the record for this Notice.

B. THE NOTICE DOES NOT REFLECT THE RECORD BEFORE THE AGENCY.

Notwithstanding the statement in the Notice that comments on the Proposed Recision of Private Enterprise Participation Guidance are being solicited in response to "...considerable interest ... expressed by various members of the public, as well as members of Congress, in FTA's review of these private enterprise issues", the Notice was published on Friday, November 26, 1993, for a 60-day comment period ending on January 25, 1994, despite the facts that the House of Representatives adjourned on November 26, 1993, and the Senate adjourned on November 27, 1993, and both houses of Congress are scheduled to return on January 25, 1994 (the date set for the President's State of the Union address). These facts were available to the FTA prior to the publication of the Notice. If the agency were truly interested in engaging the views of the Congress, opening a comment period for precisely the duration of the Christmas/New Year recess is clearly not a time to do so. This curiosity of timing is also peculiarly coincidental with the fact that the only congressional correspondence received by the FTA about the private enterprise requirements of the federal transit assistance program within the 3 years immediately preceding the opening of the docket (No. 93-B), supports the existing requirements (see Exhibits 1, 3, 4, 5, 6, and 7). This correspondence is from Senator George Mitchell, Senator Bob Dole, Senator Bob Graham, Senator Mark Hatfield, and Representative Alan Wheat. It is even more curious that the only recent congressional correspondence on the private enterprise requirements received by the FTA prior to publication of the Notice has not been placed in the docket (No. 93-B), despite the representation that the Notice is responsive to congressional interest. This correspondence was also not produced in response to the FOIA request. As to

considerable interest expressed by members of the public, the only such record produced by the FTA in response to the FOIA request is a letter dated June 12, 1991, from the Alliance for Progressive Transit, which supports the fully allocated cost methodology (see Exhibit 32, attached). The FTA was silent about the correspondence from Mayors Schmoke and Jordan, the Eastern Paralyzed Veterans Association, and David Osborne (see Exhibits 1, 8, 33 and 34, attached).

Further, the FOIA request sought "...any records, including background materials, letters, complaints or correspondence of any kind, that led to the consideration of the [Notice]" supporting the statement in the Notice that "[the notice was responsive to other inquiries]". No document of any kind was produced in response to this request other than the Alliance for Progressive Transit letter which supports "fully allocated costs" (see Exhibit 32). Again, this is most curious inasmuch as the Notice appears to have no underlying foundation, express representations to the contrary notwithstanding. Even more troubling is the fact that the Department of Transportation did receive correspondence on the subject of the private enterprise requirements of the FTA in the period immediately prior to the issuance of the Notice from David Osborne, one of the President and Vice President's primary advisors on the management of the federal government and the National Policy Review initiative (see Exhibit 8, attached). A copy of Mr. Osborne's letter was sent directly to the FTA's Deputy Administrator. Mr. Osborne's letter, however, is directly opposed to the action proposed in the Notice. Mr. Osborne's letter does not appear in the docket (No. 93-B). Similarly, a letter from the Eastern Paralyzed Veterans Association (EPVA) is in the files of the Department of Transportation, and was copied to senior FTA officials (see Exhibit 2, attached), but was not produced in response to the FOIA request. The EPVA letter opposes the action proposed in the Notice. Unlike the other correspondence mentioned above, the EPVA letter does appear in the docket (No. 93-B) .

Letters to the Department of Transportation, copies to senior FTA officials, from Mayors Kurt Schmoke of Baltimore, Maryland, and Frank Jordan of San Francisco, California (see Exhibits 33 and 34, attached), were also sent prior to the publication of the Notice, but these, too, neither appear in the docket (No. 93-B) nor were produced in response to the FOIA request. These letters also support the existing private enterprise requirements.

The known correspondence of the period of more than 2 years preceding the Notice all opposes the action proposed in the Notice. All of this correspondence, except for the letter from the Eastern Paralyzed Veterans Association, is absent from the docket (No. 93-B). Considering that none of this correspondence was produced in response to the FOIA request, it would appear that these communications have escaped notice in the agency. Nonetheless, these communications are all favorable to the existing

private enterprise participation requirements and contrary to the proposal of the Notice.

As we have seen throughout these comments, there is a lack of evidence for the concerns expressed in the Notice. In fact, in most cases, the available documentation contradicts each claim asserted in the Notice. The review of the private sector appeals reveals an almost invisible federal hand in the implementation of the private sector requirements of the Act. The putative burdens of the fully allocated cost methodology are a myth of misconception and lack of information. The only institutional barrier is the desire on the part of some not to be threatened by open competition, without regard for the cost of the program or the best interests of transit service. The alleged burdens of reviewing transit routes for economically alternative ways to operate them disappear in light of the emphasis on planning inherent in the ISTEA and the total absence of any showing of "burden" or hardship beyond the speculation in the Notice itself. There is truly no basis in law or in fact for the proposed recision of the private enterprise participation requirements of the Federal Transit Administration.

C. THE FTA HAS PREDETERMINED ITS FINAL ACTION ON THE NOTICE.

The FTA has made a patently arbitrary and capricious decision to revoke the private enterprise participation administrative requirements of the federal transit program. That decision, and the Notice which announces it, reflect a misstatement of the requirements themselves, are contrary to the provisions of the FTA's authorizing legislation and its legislative history, and misrepresent the material in the agency's own files and the agency's own interpretations of the regulatory requirements and the enforcement history of the program. Further, the Notice reflects the absolute lack of any objective quantification or evaluation of the effect or impact of the private enterprise participation requirements within the FTA program. In short, the Notice declares the abandonment of statutorily mandated requirements without any substantive justification or authority.

Further evidence of the fact that the FTA did not open the comment period for docket No. 93-B prepared to evaluate fully and fairly all comments submitted, but rather with a fixed and predetermined purpose merely to "paper" its previously decided action, can be found in the fact that two of the four FTA professional career staff members (the Director of the OPSI and a program analyst) who

were assigned to the Office of Private Sector Initiatives (OPSI) which is responsible for the administration of the private enterprise program were summarily reassigned during the week in which the Notice was published to duties completely outside the FTA Office of Budget and Policy which has jurisdiction over the programmatic private enterprise activities of the agency. To replace these employees, the Deputy Associate Administrator of the FTA for Budget and Policy (one of the senior staff persons assigned to the task force to revoke the private enterprise program of the agency) was placed in charge of the OPSI, in addition to his other duties. No other person has been assigned to replace the OPSI staff.

Other actions which signal the certain intent of the FTA without regard to the notice process include the cancellation of the Public Private Transportation Network (which provided technical assistance on public/private partnerships), the cancellation of the Private Sector Coordinators program (which provided technical assistance on contracting out activities), the announced intention to withdraw of FTA support for the Competitive Services Board (a body of public and private providers which met to resolve particular contracting issues), and the termination of the publication of the "Private Sector Briefs" (a publication of developments in public/private cooperation in transit).

In addition, both the Administrator and the Deputy Administrator of the FTA have made clear and forceful public declarations of their intent with regard to the private enterprise requirements. These statements leave no room for doubt or speculation as to the timing or finality of their decisions. Speaking before the annual meeting of the American Public Transit Association (APTA) in New Orleans on October 6, 1993, the FTA Administrator said, in part,:

> "Item number three: the FTA's private sector policy.
>
> One of the first impacts of Vice President Gore's National Performance Review is going to be the FTA's re-invention of our private sector participation policy.
>
> No big deal, really.
>
> ...But we'll soon be issuing a new private sector circular that will reduce your paperwork by something like 90%.
>
> We went to an interesting source to find the substance for our new circular: --we read the FTA Act.
>
> I firmly believe we can make much progress by exploring new kinds of public-private partnerships for reaching our goals...

> ...And you should expect to see initiatives and demonstrations in this area.
>
> But public-private partnerships are just that ... they're partnerships.
>
> The days of high-priced FTA consultants flying all over the country making all kinds of noise about enforcement of the old private sector policy..
>
> ..they're history."

The full text of the Administrator's remarks on the noted occasion, as supplied by the FTA, are attached hereto as Exhibit 35. This speech was delivered 2 months after David Osborne provided his written support for the private enterprise participation program (see Exhibit 8).

Further, the Deputy Administrator, in an interview given to "Passenger Transport", the APTA trade publication, echoed the Administrator's own previous remarks. The substantial difference is that the Deputy Administrator's interview appeared after the Notice was published and the docket opened. A copy of this interview is attached as Exhibit 36.

Such circumstances make clear the purpose of the behavior of the FTA regarding its own career staff, a very senior advisor to the President of the United States, members of Congress, elected local officials, and interested members of the public. The only explanation for this state of facts is that the FTA has predetermined its final action on the Notice.

These actions clearly establish a predetermination of agency action without regard for the comments to the docket or the agency's own records and are prejudicial to those impacted by this rule and are arbitrary, capricious and contrary to law.

V. CONCLUSION

As discussed in these comments, the facts and the law do not support either the Notice itself or the action proposed in the Notice. The enforcement listing of the FTA's private enterprise participation requirements documents the lack of federal interference in local decisionmaking. The record does not reflect any of the burdens alleged in this Notice, nor any benefits to be attained by revoking the private enterprise participation requirements. Given the clear legislative mandate for private enterprise involvement in federally assisted transit programs, no need or reason for any change in this program has been demonstrated.

Given the massive shortfall of funding for the transit needs of the United States, there is, however, every reason to promote the contribution of the over one half million men and women who earn their livelihoods providing transit services in the private sector.

Dated: January 25, 1994

Respectfully Submitted