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ONE HUNDRED EIGHTH CONGRESS

# Congress of the United States

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October 8, 2004

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### 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 DOT also noted that, in 1994, the prior Administration rescinded the Reagan Administration's October 1984 nonbinding guidance on private sector participation.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.
- On March 13th, I asked DOT to promptly review this protest.
- On March 18th, a DOT regional office directed the grantee to stay its proposed takeover ("FTA further requests that SRT hold any action on the subject contract or service in abeyance pending the outcome of our review of SRT's response").

- Nonetheless, on March 25th, the grantee moved ahead without any consequence from DOT, i.e., despite DOT's written direction to the grantee not to move forward.
- On August 5th, absent specific documentation of compliance with the July 2001 SOP, you issued a decision for the March 6, 2003 emergency protest, finding that the grantee met "minimum" compliance ("RT has met the minimum statutory requirements for public notice and comment in section 5307; and that while it appears that RT could have done more to explore the use of private sector providers in this situation, RT has met the minimum requirements of section 5306").
- On August 6th, I asked 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").
- After the Subcommittee's May 18, 2004 hearing, in its June 28th post-hearing answer, DOT stated, "FTA will continue to monitor Sacramento Regional Transit's adherence to its standard operating procedures for public and private sector participation both informally and through the triennial review process."
- On July 14th, SACRT's General Manager/Chief Executive Officer admitted to me that SACRT did not implement the 2001 SOP until 2003.
- On July 22, 2004, SACRT produced its notification documents from 1998 to present. They revealed that the Amador case was the only case since 1998 in which SACRT did not provide public notification for its proposed Program of Projects in the sole daily publication of general circulation (the Sacramento's The Daily Recorder, which is similar to the Federal Government's Federal Register).
- On September 24, 2004, in its answer to one of my post-hearing questions, DOT stated, "In 2000, FTA's Triennial Review found a deficiency in how SACRT notified the public on proposed projects. This deficiency was corrected on July 3, 2001, when SACRT adopted a Standard Operating Procedure ... FTA did not inquire as to why SACRT did not publish notice in The Daily Recorder" (emphasis added).
  - 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?