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ONE HUNDRED EIGHTH CONGRESS

# Congress of the United States

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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**"<sup>1</sup> (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.

<sup>1</sup> 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/EPNRR/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.

Messrs. 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.