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ONE HUNDRED EIGHTH CONGRESS

# Congress of the United States

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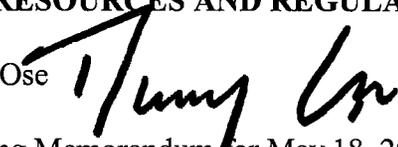
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May 11, 2004

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

FROM: Doug Ose 

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

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

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

#### Statutory and Regulatory Provisions

The 1966 law that established DOT identified six reasons to establish the Cabinet-level department. The first two reasons were to assure the coordinated, effective administration of Federal transportation programs, and to "facilitate the development and improvement of coordinated transportation service, to be provided by private enterprise **to the maximum extent feasible**"<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)).

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.

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

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

The 1964 mass transit law also provided that:

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

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

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

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

### Executive Orders and Initiatives

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

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

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

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

### Public-Private Partnerships

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

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

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

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

#### Amador Case Study

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

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

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

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