

**Statement of
Jennifer L. Dorn
Administrator
Federal Transit Administration
United States Department of Transportation
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U.S. House of Representatives
Hearing on the Private Sector Participation in Transportation
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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.