

December 15, 2010

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Via E-mail & Messenger

Mr. Robert J. Tuccillo  
Associate Administrator & CFO  
Office of Budget & Policy  
Federal Transit Administration  
1200 New Jersey Avenue, S.E.  
Washington, D.C. 20590

**Re: Request For Extension Of Time To Respond To FTA's  
November 24, 2010 Letter To New Jersey Transit; Records Request**

Dear Mr. Tuccillo:

As you may be aware, Patton Boggs LLP has been engaged by the New Jersey Transit Corporation ("NJ Transit") to assist in responding to FTA's November 24, 2010 letter to James Weinstein, Executive Director, NJ Transit ("Demand Letter"), including the formal claim asserted therein for payment of approximately \$271 Million, as well as potential interest, penalties and other charges (the "FTA Demand" or "FTA Claim").

In a December 10, 2010 letter to Dorval Carter, FTA's Chief Counsel, and in follow-up conversations with Scott Biehl, FTA's Deputy Chief Counsel, on December 13 and 14, we requested a standstill of the administrative process in order to, *inter alia*, have the opportunity to discuss the issues with the FTA and determine if the parties share common ground on any of those issues. Alternatively, we requested a 30 day extension to respond to the FTA Demand. We believe an extension is necessary: (1) so that NJ Transit can have access to the complete set of relevant documents required to enable it to effectively respond to FTA's Demand; and (2) to provide the parties sufficient time (as in the case of a standstill) to discuss the matter and determine if there may be common ground.

After conferring with senior FTA officials, Mr. Biehl indicated that the FTA would not agree to a standstill. He further advised that the extension we requested was not likely, although he suggested that we put our request in writing to you. This letter constitutes NJ Transit's formal request for a 30 day extension until January 29, 2010 to file its Response (i.e., its request for a review of the validity and amount of FTA's claim) to FTA's Demand Letter. See FTA Order 2060.1A, Internal Procedures for Debt Collection (July 2, 2008), at ¶ 7.c.(4).

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NJ Transit respectfully requests an extension because a minimum of 30 additional days is appropriate given the significant amount at stake, the complex history of the ARC project and to ensure that NJ Transit is in a position to submit a complete response to FTA's Demand Letter so that a just and fair decision could be reached here. As you know, the administrative process results in a decision by FTA that is potentially binding on NJ Transit and could lead to proceedings in U.S. District Court that may be limited to the record developed in the administrative process here. As a result, NJ Transit must ensure that its Response and FTA's decision are based upon a complete administrative record.

Furthermore, as noted in FTA's Demand Letter, at 2, and confirmed by applicable authority, *e.g.*, FTA Order 2060.1A, Internal Procedures for Debt Collection (July 2, 2008), at ¶ 7.b.(2)(c); 49 C.F.R. § 89.21(e); *see* 31 U.S.C. § 3716(a)(2); 31 C.F.R. § 901.3(b)(4)(ii)(B)(1), "NJT has the right to inspect and copy FTA records related to this claim, with any reasonable costs of copying and inspection to be borne by NJT." (Emphasis added.) Indeed, a critical purpose of NJ Transit's right to inspect and copy records is to facilitate the development and submission of a complete administrative record should judicial review of FTA's final agency decision occur. This important purpose would be undermined if the FTA does not promptly provide us access to all relevant records well in advance of the date by which NJ Transit must submit its Response to FTA's Demand Letter.

In addressing NJ Transit's right to inspect and copy FTA records related to the FTA Claim, yesterday afternoon FTA provided NJ Transit with about 11 documents totaling approximately 125 pages. (Mr. Biehl indicated that NJ Transit could request any additional records that it requires.) While NJ Transit appreciates being provided with those documents, FTA's response to NJ Transit's right to "inspect and copy FTA records related to this claim" is incomplete and inconsistent with FTA's obligations. Given that the ARC project was a multi-billion dollar undertaking and that the alleged debt is about \$271 million, there are far more than 11 documents that constitute FTA's "records related to this claim." Moreover, NJ Transit was already in possession of all but one of these documents. Consequently, NJ Transit renews its request that it be allowed to inspect and copy FTA's records related to FTA's Claim as soon as possible and well in advance of the Response due date. To facilitate the identification, and inspection and copying, of FTA's records related to its Claim, NJ Transit has attached an illustrative list of records to be inspected and copied by NJ Transit. *See* Exhibit A.

Consequently, an extension is needed to provide adequate time for FTA to respond to NJ Transit's records request and for NJ Transit to review those documents and to incorporate relevant information from them into its Response to FTA's Demand Letter. NJ Transit's records request must be appropriately responded to by FTA so that NJ Transit can support its

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case and facilitate the development of a complete administrative record. Moreover, we anticipate that the inspection and copying of documents may occur in both Washington, D.C. and FTA's New York City regional office. Again, as discovery may be limited in District Court, and to ensure the fair and just result here that all parties desire, it is critical that NJ Transit be allowed to review all relevant documents and that NJ Transit have adequate time to study and then reference such documents in its Response to FTA's Demand.

An extension is also warranted by the timing of the issuance of FTA's Demand Letter and the practical limitations on NJ Transit's time for responding. The formal demand to NJ Transit for payment of the alleged \$271 million debt was included in FTA's Demand Letter dated November 24, 2010 -- the day before Thanksgiving -- which was officially received by NJ Transit via certified mail (return receipt requested) on Monday, November 29, 2010. Thus, NJ Transit's Response to FTA's Claim of debt is currently due on Wednesday, December 29, 2010, which falls in the middle of the holiday season.

As the holidays and the deadline for NJ Transit to submit its Response to FTA's Claim rapidly approach, NJ Transit requests your prompt response to this letter by no later than noon on Friday, December 17, 2010. Specifically, please advise: (a) whether FTA grants NJ Transit's request for an extension until January 29, 2011 to file its Response to FTA's Claim; and (b) as to the date(s) by which FTA will grant NJ Transit access to FTA's records (including the records identified in Exhibit A to this letter).

Thank you for your consideration. NJ Transit also continues to believe that a suspension of the administrative process for a reasonable period of time best serves the interests of the parties and respectfully requests that you also reconsider implementing such a suspension. Whether or not a suspension or an extension is granted, NJ Transit requests that FTA not assess interest, penalties or other charges. Please contact us with any questions that you may have.

Sincerely,  


Robert S. Brams  
Michael J. Schaengold  
Counsel for  
New Jersey Transit Corporation

Enclosure

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cc: Dorval Carter, Esq.  
Scott Biehl, Esq.  
Mr. James Weinstein  
Robert Hanna, Esq.  
Marc-Philip Ferzan, Esq.  
Terrence Brody, Esq.

## EXHIBIT A

### NEW JERSEY TRANSIT'S REQUEST FOR RECORDS & DOCUMENTS

As noted in FTA's November 24, 2010 letter to NJ Transit and provided for by applicable authority, *e.g.*, FTA Order 2060.1A, Internal Procedures for Debt Collection (July 2, 2008), at ¶ 7.b.(2)(c); 49 C.F.R. § 89.21(e); *see* 31 C.F.R. § 901.3(b)(4)(ii)(B)(1); 31 U.S.C. § 3716(a)(2), "NJT has the right to inspect and copy FTA records related to this claim[.]" The records<sup>1</sup> to be inspected and copied by NJ Transit (i.e., the records related to FTA's Claim for payment of the debt ("Debt") arising out of the ARC project) include, but are not limited to, the following illustrative categories:

A.<sup>2</sup> Records relating to FTA's decision to enter into the ESWA and the ESWA Amendment, including the cost, scope and the sources and uses of funds included therein; and records relating to FTA's decision to advance the ARC project at each New Starts milestone and related to FFGA negotiations. Such records include, but are not limited to:

1. All records related to the August 2009 Early Systems Work Agreement ("ESWA") and the April 2010 amendment of that ESWA, including (but not limited to) records related to the development, drafting, negotiation, approval, execution, review, evaluation and performance of the August 2009 ESWA and the April 2010 ESWA amendment.

2. All records related to the development, review, evaluation, drafting and negotiation of the Full Funding Grant Agreement ("FFGA") for the ARC project, which was not signed or finalized by FTA or NJ Transit.

3. All records related to or concerning FTA's decision to approve the ARC project into preliminary engineering ("PE") and final design ("FD"), and all records related to or concerning FTA's annual rating decisions.

4. All records created, written, drafted, produced, approved or received by FTA's Project Management Oversight Contractors ("PMOC") and/or Financial Management Oversight Contractors ("FMOC"), including all PMOC and/or FMOC reports, memoranda, studies, analyses or the like.

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<sup>1</sup> The term "records" is used in its broadest sense and includes, but is not limited to, information, data or documents contained in: any electronic, magnetic, computer or other (e.g., hard copy) form or storage; and/or electronic mail (including any attachments thereto). Such records include (but are not limited to) memoranda, contracts, grants, notes, letters, reports, studies, analyses, evaluations, reviews, estimates, financial or accounting documents, faxes, calendar entries and all non-identical copies (including drafts) of all requested records or documents. The term "records" also includes, but is not limited to, anything falling within the definition of "writings," "recordings" or "photographs" as set forth in Federal Rule of Evidence 1001. The term "records" includes FTA and Department of Transportation (including any agency of the Department and the Office of the Secretary) records.

<sup>2</sup> The description of records included in the "categories" A., B., C., D. and E. herein is provided for convenience and contains only a summary of some of the documents requested in the numbered paragraphs that follow. The specific language of the numbered paragraphs, and not that of categories A. through E., controls the parameters of the records NJ Transit is entitled to inspect and copy.

5. With respect to request no. 4, above, all records responding to, critiquing, reviewing, analyzing or commenting on such PMOC and/or FMOC records. In addition, all records related to the termination or dismissal of the original PMOC for the ARC project and the selection of another PMOC.

B. Records relating to the projected or estimated cost of, and risks related to, the ARC project, including any risk-based methodology by which FTA developed such estimates or projections. Such records include, but are not limited to:

1. All records that review, evaluate, analyze, discuss or comment on the projected or estimated costs of the ARC project, including records relating to the potential for cost overruns, cost increases, financial risks or the need to adjust project cost estimates. This request includes, but is not limited to, all records related to financial, cost and risk assessments of the ARC project in 2008, 2009 and 2010, including (but not limited to) records drafted, created, written by or commented on by the PMOCs or FMOCs.

2. All records related to any risk analyses and risk analysis models for the ARC project.

3. All records relating to meetings between NJ Transit and FTA (including the Department of Transportation) concerning project performance, costs, cost overruns, cost increases, schedules and risks.

4. All records related to or concerning alternatives proposed to or proposals by the FTA (and Department of Transportation) to cover the cost overruns or cost increases anticipated on the ARC project, including any studies, reviews or analyses assessing, discussing or exploring whether additional or other sources of funding for the ARC project exist or could be found.

5. All records related to or concerning cost mitigation efforts, programs or strategies that would or might have kept the ARC project within budget or would have limited the cost overruns or cost increases.

6. All records related to or concerning NJ Transit's ability to provide or contribute funds to the ARC project, including but not limited to NJ Transit's ability to cover or fund cost overruns or cost increases.

7. All records relied upon by the FTA in the preparation, drafting and writing of: (i) the FTA Administrator's June 2010 speech (to the APTA rail conference in Vancouver) estimating or projecting the cost of the ARC project as being between 9 and 10 billion dollars; and (ii) any other speeches by the FTA Administrator, or other senior FTA officials, estimating or projecting the cost of the ARC project or discussing the risks of the ARC project.

C. Records relating to FTA actions, determinations and decisions upon suspension or termination of the ARC project, including records relating to FTA's demand for repayment. Such records include, but are not limited to:

1. All records related to the decision to cancel, terminate, shutdown or suspend the ARC project and/or to seek or pursue payment of the alleged Debt.

2. All records (including but not limited to studies, analyses, estimates, accountings, memoranda, and reviews) concerning or related to the FTA's demand for payment of the alleged Debt and decision to issue its demand for payment.

3. All records that support or demonstrate FTA's entitlement or non-entitlement to recovery of the alleged Debt.

4. All records (including but not limited to policies, procedures, regulations, directives, and other documents) related to or concerning FTA's (or any other agency of the Department of Transportation, including the Office of the Secretary) requests, demands or efforts to recover grant, ESWA or New Start funds on projects that were not completed or that were terminated, cancelled or aborted.

5. With respect to request no. 4, above, all records demonstrating that such funds: (i) were recovered by the Government, (ii) were not recovered by the Government, and/or (iii) were not attempted to be recovered by the Government.

6. All records that support or discuss the contention that, with respect to the ARC project, ARRA and CMAQ funds: (i) have to be returned to FTA or the Department of Transportation; or (ii) do not have to be returned to FTA or the Department of Transportation.

7. All records (including but not limited to guidance, circulars, internal memoranda, opinion of counsel, advisory opinions, and records of past practice) related to or concerning the project sponsor's ability to obligate and expend non-section 5309 federal funds on project development activities, specifically including (but not limited to) activities encompassed under preliminary engineering, final design, related pre-award authority, and a Letter of No Prejudice.

8. All records related to or concerning the potential or possible use of the ARC project's preliminary engineering, final or other design work, or construction or other work in or for future transportation, construction or other projects.

D. Records relating to FTA (including Department of Transportation) correspondences, external and internal, in connection with the ARC project. Such records include, but are not limited to:

1. All records related to or relied on in the preparation of the FTA's letters to NJT's Executive Director, including (but not limited to) such letters dated April 14, 2010, November 8, 2010 and November 24, 2010.

2. All records related to or relied on in the preparation of letters (or other correspondence) to the Governor of New Jersey, including (but not limited to) the letter dated March 26, 2010.

3. All records of senior Government officials (i.e., at the level of the office of the assistant secretary or higher) related to the ARC project, including records provided to officials in other Government agencies (including but not limited to the White House and Members of Congress).

4. All records related to or concerning FTA's (and/or any other agency of the Department of Transportation, including the Office of the Secretary) review of, position with

respect to, comments on, response to, and/or analysis of the IG's Report, entitled Actions Needed to Mitigate Risks Associated with the Access to the Region's Core Project, Federal Transit Administration, Report No. MH-2010-066 (May 17, 2010).

E. Other records necessary for a complete administrative record. Such records include, but are not limited to:

1. All records or documents that are (or will become) part of the administrative record related to FTA's demand for payment of the Debt and/or the ARC project.
2. A list of all responsive records or documents that were not provided to NJ Transit because of an asserted privilege with a summary of the privilege claimed and the reason for invoking the privilege (i.e., a privilege log).