



March 26, 2012

U.S. Department of Transportation  
1200 New Jersey Avenue, SE  
Docket Operations, M-30  
West Building Ground Floor  
Room W12-140  
Washington, DC 20590-0001

**RE: Docket No. FTA-2010-0009**

Dear Docket Clerk:

On behalf of the more than 1,500 member organizations of the American Public Transportation Association (APTA), I write to provide comments on the Federal Transit Administration's (FTA) Notice of Proposed Rulemaking (NPRM) on Major Capital Investment Projects, which was released for comment on January 25, 2012, at 77 FR 3848.

***About APTA***

APTA is a non-profit international trade association of public and private member organizations, including public transit systems; high-speed intercity passenger rail agencies; planning, design, construction and finance firms; product and service providers; academic institutions; and state associations and departments of transportation. More than ninety percent of Americans who use public transportation are served by APTA member transit systems.

**General Comments**

We commend FTA for its efforts to streamline the ratings, approval, and implementation process for New Starts/Small Starts. We strongly support the move towards simplified, more comprehensible measures, and we believe the changes outlined in the proposed rule will support those goals. We offer the comments below to assist FTA in completing the final rule.

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Given the discretionary nature of the New Starts and Small Starts program, under current law, it is important that the evaluation measures that FTA uses to rate proposed projects are able to clearly differentiate among the projects such that the basis for FTA approvals and funding recommendations is transparent. Towards this end, APTA suggests that FTA explore the possibility of establishing different “breakpoints” for different categories of projects. For instance, one set of breakpoints, for urban circulator projects, might assign a medium rating for cost effectiveness where cost per passenger would fall within a predetermined range.

## **Section by Section Comments**

### Subpart A—General Provisions

#### §611.103 Eligibility

- We support the proposed grandfathering provisions in paragraph (b), but recommend FTA allow sponsors of projects already approved into preliminary engineering (PE) or project development (PD) to opt for consideration under the updated rule, thus giving them an opportunity to improve their projects’ ratings.

#### §611.105 Definitions

- APTA strongly supports the elimination of the baseline alternative and use of the no build alternative in its place. Defining the no build to include the current transportation system and transportation improvements included in the Transportation Improvement Program (“TIP”), will greatly simplify the project rating and evaluation process. Because the TIP is a fluid document that changes regularly as project schedules and funding scenarios are updated, we suggest that the new rule clarify that the no-build alternative consider projects on the TIP at the time the Application for Entry into PE is prepared. Also, all projects on the TIP at that time should be considered in the no build alternative, including any expansion project included on the TIP and any instances where the TIP only includes funding for design, but the fiscally constrained long range plan includes funding for construction.

#### *Betterments*

- We support the provision that the cost of betterments be excluded from the cost effectiveness calculation. In the preamble to the NPRM, FTA has defined betterments as “those items above and beyond the items needed to deliver the mobility benefits of the project and that would not contribute to other benefits such as operating efficiencies.” We urge FTA to add a definition of betterments in the Definitions section (§611.105) of the proposed rule.
- FTA notes that “Betterments may include, for example, features needed to obtain LEED certification for the transit facilities or additional features to provide extra pedestrian access to surrounding development or aesthetically-oriented design features.” We believe FTA should, when adding the definition to section 611.105, specifically state that this list is illustrative only. A finite list of “betterments” would unduly limit the ability of transit agencies to propose that certain project costs not be considered in the ratings. For instance, the cost of

concurrent non-project activities as defined in FTA Circular 5010.1D would appropriately be excluded from the cost effectiveness calculation owing to their separate funding sources. Moreover, projects in certain areas of the country could have betterments that are not applicable nationwide and are therefore not likely to make a finite “betterment” list. Finally, in areas such as energy efficiency, fuel usage, customer information systems, etc., technology is advancing quickly and emerging technologies may end up being excluded because they do not appear on the FTA list of betterments.

- It will be important that FTA define betterments in a way that does not allow sponsors to eliminate the cost of elements that actually are needed to achieve the mobility benefits anticipated by the project. For this reason and also because of changing technology as noted above, some FTA review is likely to be necessary in determining what constitutes a “betterment”. To minimize the need for FTA review, we suggest that FTA should prepare a list of categories of betterments to serve as examples but that are not strictly limiting. Categories could include:
  - pedestrian or bicycle access and safety improvements at stations;
  - alternative fuel vehicles and associated improvements.;
  - sustainability improvements for buildings, including stormwater management;
  - cultural, aesthetic, or historically appropriate information, art, or design details;
  - transit work that would enhance the primary project, such as low vibration track, additional signalization beyond what’s necessary to operate the project, station improvements; and
  - concurrent non-project activities and other locally funded project features that do not contribute to project benefits accounted for in the project justification criteria and measures.
- While leaving the issue in Guidance provides FTA flexibility, the lack of definition and further discussion of the application of betterments in the NPRM could result in subsequent guidance eliminating this proposed change to calculating project cost for purposes of determining which costs are included in the cost effectiveness measure. We suggest that provision to remove the cost of betterments from the cost effectiveness calculation be included in the final rule.

#### *Alternatives analysis*

- The proposed rule defines alternatives analysis as “a corridor-level analysis that is an assessment of a wide range of public transportation alternatives designed to address a transportation problem in a corridor or subarea and results in the adoption of a locally preferred alternative by the appropriate State and/or local agencies and official boards through a public process.” APTA recommends modifying the proposed definition to read “...results in adoption of a locally preferred mode and general alignment...” to distinguish those decisions made in alternatives analysis from those made in subsequent stages of project development.

#### *Final design*

- The NPRM proposes to define final design as “the final phase of project development for New Starts projects, and includes (but is not limited to) the preparation of final construction plans (including construction management plans), detailed specifications, construction cost

estimates, and bid documents. During final design all remaining local funding must be committed.” APTA recommends that the definition be revised to recognize that design-bid-build is not the only acceptable approach to project delivery. This might be accomplished by adding a sentence such as “Depending upon the project delivery method utilized, final design and construction may be carried out concurrently” to the definition.

- Reference in this definition to funding being “committed” does not account for frequent situations when the local funding partner is hesitant to commit its share until the FTA has committed its share. Also, for many agencies, the duration of the major capital investment project may exceed the usual multi-year window in which funds are provided from a state or municipality, so from a purely technical standpoint, funds can’t be “committed.” To this end, we suggest that greater flexibility be provided so that agencies can advance projects if there’s a reasonable expectation that the local share will be committed even if funds themselves are not in hand.
- Another complication surrounding the proposal that all funds be committed during final design is the possibility that the local share could increase if delays occur due to prolonged full funding grant agreement (FFGA) negotiations. This too should be accounted for in the final definition.

#### *Full funding grant agreement (FFGA)*

- As proposed by FTA, FFGA means “a contract that defines the scope of a project, the Federal financial contribution, and other terms and conditions.” APTA would expand and modify the current definition to read as follows: “a contract that obligates available budget authority to a New Starts project or to an operable segment of a New Starts project. The agreement defines the scope to be completed by the grantee, the Federal financial contribution, and other terms and conditions.” This language allows a project to be built in phases, while considering the benefit of the full completed project in awarding funds. Further, it is consistent with the existing law in Title 49 U.S.C. §5309(g)(2)(B)(iv), which allows that FFGAs may cover operable segments of a project.

#### *Project*

- Given that the ratings process that is the subject of this rule uses the word “project” many times, we recommend that the word be defined as “the major capital transit investment that is proposed for implementation with New Starts or Small Starts funding assistance. Where necessary, implementation of a project may be phased by dividing it into operable segments.”

#### *Project development*

- As proposed by FTA, project development is “a phase in the Small Starts process during which the scope of the proposed project is finalized; estimates of project costs, benefits and impacts are refined; National Environmental Policy Act (“NEPA”) requirements are completed; project management plans and fleet management plans are further developed; and local funding is committed. It also includes (but is not limited to) the preparation of final construction plans (including construction management plans), detailed specifications, construction cost estimates, and bid documents.” APTA proposes that “the preparation of

final construction plans (including construction management plans)” be removed from the definition, as the list is not all-inclusive and final construction plans need not be in place prior to the Project Construction Grant Agreement ("PCGA") in the case of a Design-Build project.

#### §611.107 Relation to the planning processes

- APTA recommends that this section include a paragraph (b) (4) be added stating “Alternatives analysis may be performed in conjunction with the studies and documents required under 23 CFR Parts 450.212 and 450.318, 23 CFR Part 771, and the NEPA process.” By adding this sentence, FTA would help to clarify that alternatives analysis and the NEPA process can be conducted in ways that are not duplicative.
- The rule and FTA guidance should recognize that corridor-level alternatives analysis studies can occur as part of system planning. Where this occurs, and when FTA requirements are satisfied, a separate and subsequent alternatives analysis that reexamines prior work solely for FTA becomes confusing, time consuming, and expensive.

#### Subpart B—New Starts

##### §611.201 Eligibility

- APTA supports the revised section.

##### §611.203 Project justification criteria

- APTA supports the continued use of a multiple-measure approach for evaluating New Starts projects. This ensures that all measures are evaluated and that a wide variety of project benefits are considered in making a funding decision.
- FTA has indicated interest in the development of "warrants" based on project characteristics and/or the corridors to be served. APTA supports that approach as a means to simplify the project evaluation process.
- While we are concurrently submitting more detailed comments to the draft Policy Guidance on this point, we urge FTA to recognize the wide range of project conditions, motivations, corridors and technologies funded under the New Starts program and to avoid a single set of warrants to evaluate all projects.

##### §611.205 Local financial commitment criteria

- APTA supports the use of prequalification for local financial commitment rating.
- APTA recommends that the definition of “local overmatch” as part of the assignment of the local financial commitment rating include not only non-New Starts local project “over-match” to the project being rated, but also include a transit agency’s local financial commitment to fund an overall system of new capacity projects in conjunction with the proposed New Starts project. We will submit more detailed comments on the Policy Guidance.

§611.207 Overall New Starts project ratings

- APTA supports limiting re-rating of projects after entry into preliminary engineering.
- We support updating ratings only when there has been material change in project scope and cost. This will reduce cost and streamline the project rating, evaluation and approval process.

§611.209 Project development process

- Given the definition of Project Development in 611.105, this section should be renamed.
- APTA supports including in the NPRM the circumstances under which pre-award authority will be used for projects entering preliminary engineering and final design.
- We urge FTA to expand the use of pre-award authority to early construction activities following the publication in the *Federal Register* of the final NEPA determination with a clear understanding that there is no guarantee of federal funding. Early construction activities that could reduce risk to project schedule if performed prior to the start of construction could include: site prep, demolition of existing structures, improvements to the existing track and signal systems or new maintenance or yard facilities to reduce impacts to the existing operations during construction, *etc.*
- APTA proposes the following language be added to proposed section §611.209, subsection (c)(3) on Full Funding Grant Agreements (FFGAs): “When FTA decides to provide New Starts funds for construction of a New Starts project or operable segment, FTA will negotiate an FFGA with the project sponsor during final design. For project sponsors using an alternative project contract method of delivery such as Design-Build or Public-Private Partnership, however, FTA and the sponsor will agree upon the approval steps and schedule that lead to the award of the FFGA.”

§611.211 Before and After Study

- We note that FTA is proposing to make the Before and After Study Plan a requirement of Preliminary Engineering. We support this change.

Subpart C—Small Starts

§611.303 Project justification criteria

- APTA supports the continued use of a multiple-measure approach for evaluating Small Starts projects. This ensures that all measures are evaluated and that a wide variety of project benefits are considered in making a funding decision.
- FTA has indicated interest in the development of "warrants" based on project characteristics and/or the corridors to be served. APTA supports that approach as a means to simplify the project evaluation process.
- While we are concurrently submitting more detailed comments to the Draft Policy Guidance on this point, we urge FTA to recognize the wide range of project conditions, motivations, corridors and technologies funded under the Small Starts program and avoid a single set of warrants to evaluate all projects.

§611.305 Local financial commitment criteria

- APTA supports the use of prequalification for local financial commitment rating. We will submit more detailed comments on the Draft Policy Guidance.
- We urge FTA to recognize that there are frequently limitations on agencies to make financial commitments. Many of these limitations come from state law. For example, agencies frequently are required to develop capital plans that are in five year increments. New Starts projects often extend out beyond this five year horizon. Additionally, many projects rely on annual authorization from their state legislature, which is frequently limited by law to one or two year cycles.

§611.307 Overall project ratings

- APTA supports limiting rating of projects upon entry into project development and prior to a PCGA.
- We support updating ratings only when there has been material change in project scope and cost. This will reduce cost and streamline the project rating, evaluation and approval process.

§611.309 Project development process

- APTA supports including the circumstances under which pre-award authority will be used for projects in the final rule. We suggest that expanded pre-award authority, as described above, would reduce the use of Letters of No Prejudice (LONP). This would further streamline the project development process, by obviating the need for FTA approval of LONPs.

Appendix A to Part 611—Description of Measures Used for Project Evaluation

A. New Starts

I. Project Justification

*Mobility Improvements*

- APTA supports measurement of mobility improvements. We recommend that the measure record both passengers using the new project and passenger miles, not boardings.
- While assigning some credit for improved access to transit dependent riders is appropriate, assigning a factor of two to weight these benefits appears arbitrary. The proposed measure doesn't account for household size and eligible drivers, local policies to incentivize one and/or no car households in a project corridor, or differing definitions regarding household income. Moreover, there is a lack of consistent definition among regions of the country regarding who is a transit dependent rider. Instead, we propose that FTA invite project sponsors to report on benefits to the transit dependent riders as an "other factor". We are submitting detailed comments concerning this measure in our analysis of the proposed Policy Guidance.

### *Environmental Benefits*

- APTA supports monetization of environmental benefits. However, given the many variables and potential subjectivity of inputs, the monetization of benefits should not be presented in a way that it could be misperceived as forming part of a cost-benefit analysis.
- As noted in our detailed comments on the proposed Policy Guidance, we urge the FTA to avoid turning the environmental benefits measure into a “catch-all” category. Our comments on the proposed Policy Guidance also note that “warrants” could be readily applied to this category to acknowledge that many transit projects in dense urban areas do not result in VMT reduction, but do serve to retain existing densities and energy-efficient land use patterns that also support walkable and bikeable communities, which result in benefits to human health.

### *Operating Efficiencies*

- APTA recommends that FTA retain its existing measure of operating efficiency, “forecast change in operating cost per passenger mile,” and not adopt the proposed “cost per place-mile”. The proposed measure implies that the desired outcome of transit projects is capacity, whether that capacity is used or not. We would not expect highway agencies to evaluate projects in terms of lane miles, with more lane miles being better than fewer lane miles, regardless of the demand for that capacity. Further detail is provided in our Policy Guidance comments.

### *Cost Effectiveness*

- We generally support the change to measure the mobility benefits of a project in terms of trips made on the project, though we suggest that FTA define mobility benefits in the final rule to also include passenger miles.
- As cost effectiveness is based around “cost per trip” and does not account for the other benefits addressed in Economic Development, Environmental Benefits, and elsewhere, we suggest clarifying the measure by naming it “Mobility Cost Effectiveness”.
- The measure also does not capture the travel-time savings of riders in parts of the existing system for major capital investment projects whose goal is to relieve transit congestion. This benefit was clearly captured in the transportation system user benefit measure. We suggest that this benefit clearly be called out as a benefit that can be captured in “other factors” at the option of the project sponsor.
- We disagree with FTA’s proposal to evaluate projects on the basis of current conditions or, at most, a 10 year forecast based on the projects in the TIP. This is inconsistent with basic planning practices and requirements in metropolitan areas, where the horizon is twenty or more years in the future. Project sponsors will find it necessary to forecast riders into the future in order to properly size their projects, and to address NEPA requirements. The proposed approach would ignore other planned facilities in the project corridor, as well as planned growth and development. While we greatly appreciate the effort of FTA to simplify the project evaluation process, a new requirement to develop additional forecasts based on current conditions and 10 year horizons makes the process more burdensome, and does not

provide information useful to project sponsors. This issue is discussed in detail in our comments on Policy Guidance.

#### *Public Transit Supportive Land Use*

- We support the revised measure. Please consult our Policy Guidance comments for further detail.

#### *Economic Development*

- We support the proposed measure including the option for a project sponsor to conduct a scenario-based analysis of indirect changes to vehicle miles travelled ("VMT") resulting from changes in development patterns that are expected to occur with the implementation of the project.
- Longer term, we urge FTA to undertake research that would allow it to take into account broader measures of economic development, beyond simply land use plans and policies and direct job creation. To the extent that projects can enhance the opportunities for a corridor or a metropolitan area to attract new growth and jobs, the rating system should take that into account.
- As noted in our comments on the proposed Policy Guidance, this is another area where we believe warrants could be employed to acknowledge that many projects serve to retain existing levels of development rather than attract new development.

#### II. Local Financial Commitment

- We urge FTA to consider applying the use of "warrants" similar to those used for Small Starts projects when evaluating local financial commitment.

#### B. Small Starts

##### I. Project Justification

#### *Cost Effectiveness*

- We support the change in the measure for calculating cost effectiveness, though we suggest that FTA define mobility benefits in the final guidance to include only passengers on the project.
- Further, we support the use of the current system and funded improvements in the TIP as the "no build" alternative to which the proposed project is compared. We support the calculation of ridership based on the proposed project compared to the "no build" as greatly simplifying the information used to evaluate projects.
- FTA has proposed that project sponsors may also develop a calculation around the horizon year, defined as ten years under the proposed rule, which is inconsistent with current forecasting methods in metropolitan areas which are based on a twenty year horizon. This is inconsistent with current law, which specifies projections based on opening year for Small Starts projects.

*Public Transit Supportive Land Use*

- We support the revised measure.

*Economic Development*

- We support the proposed measure including the option for a project sponsor to conduct a scenario-based analysis of indirect changes to vehicle miles travelled ("VMT") resulting from changes in development patterns that are expected to occur with the implementation of the project.

II. Local Financial Commitment

- APTA supports the development of "warrants" as a means to simplify the local financial commitment evaluation process.

We appreciate the opportunity to assist FTA in this important endeavor, and thank you for listening to industry comments and concerns when developing the final rule. For additional information, please contact James LaRusch, APTA's chief counsel and vice president corporate affairs, at (202) 496-4808 or [jlarsch@apta.com](mailto:jlarsch@apta.com).

Sincerely yours,



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