

---

**BEFORE THE  
UNITED STATES DEPARTMENT OF TRANSPORTATION,  
FEDERAL TRANSIT ADMINISTRATION**

---

**NEW JERSEY TRANSIT CORPORATION'S OPPOSITION TO THE  
FEDERAL TRANSIT ADMINISTRATION'S NOVEMBER 24, 2010  
REPAYMENT DEMAND**

Robert S. Brams  
Michael J. Schaengold  
Jared M. Fleisher  
PATTON BOGGS LLP  
2550 M Street, NW  
Washington, DC 20037  
(202) 457-5650  
[rbrams@pattonboggs.com](mailto:rbrams@pattonboggs.com)  
[mschaengold@pattonboggs.com](mailto:mschaengold@pattonboggs.com)  
[jfleisher@pattonboggs.com](mailto:jfleisher@pattonboggs.com)

Counsel for  
New Jersey Transit Corporation

January 25, 2011

TABLE OF CONTENTS

**INTRODUCTION** .....3

**DISCUSSION** .....6

**FTA IMPROPERLY SEEKS THE RETURN OF PAYMENTS NOT COVERED UNDER**

**THE ESWA STATUTE** .....6

**THE ESWA STATUTE APPLIES ONLY TO NEW STARTS FUNDS**.....7

**THE REPAYMENT PROVISION DOES NOT APPLY TO SECTION 5307 AND**

**CMAQ FUNDS** .....10

**THE ESWA GRANT DOCUMENTS EXPLICITLY EXCLUDE SECTION 5307**

**AND CMAQ FUNDS AND FUNDING EXPENDED PRIOR TO THE**

**ESWA**.....12

**FTA’S REPAYMENT DEMAND IMPROPERLY SEEKS FUNDS BEYOND THE**

**SCOPE OF THE ESWA STATUTE AND GRANT AGREEMENTS** .....14

**THE ESWAS DID NOT ADVANCE ANY NEW STARTS FUNDS TO THE ARC**

**PROJECT** .....18

**THE ARC PROJECT FAILED TO PROCEED FOR REASONS OUTSIDE OF NJ**

**TRANSIT’S CONTROL AND, THEREFORE, NJ TRANSIT HAS NO OBLIGATION**

**TO REPAY ANY FUNDS**.....19

**The Magnitude of FTA’s Re-Estimate of the Project Cost, and the**

**Absence of Sources or Means to Fund the Re-Estimate, Were**

**Factors Beyond NJ Transit’s Control that Prevented the Project**

**from Proceeding** .....19

**NJ Transit Would Have Been Required To Fund Billions Of**

**Dollars Of Increased Costs**.....20

**NJ Transit Lacked The Financial Capacity To Commit Billions**

**Of Dollars More To The Project**.....24

**Given the Fiscal and Economic Crisis Impacting New**

**Jersey, NJ Transit Could Not Absorb Further**

**Costs or Debt**.....24

**FTA Raised Serious Concerns About the Local Capacity**

**to Deliver the Project at \$8.7 Billion**.....29

<b>In Light Of The Fiscal And Economic Crisis, DOT's And     FTA's October 2010 Proposals To Provide Financial     Assistance Were Inadequate .....</b>	<b>33</b>
<b>FTA Acknowledged That The Project Was Halted For Reasons     Beyond NJ Transit's Control.....</b>	<b>34</b>
<b>FTA's Decision in the Final Phase of the New Starts Process to     Change Its Assumptions and Conclusions Regarding Project     Cost and Risk, Without Commensurate Changes in the Project     Itself, Was Beyond NJ Transit's Control.....</b>	<b>35</b>
<b>NJ Transit Relied on the FTA-Approved \$8.7 Billion Estimate .....</b>	<b>35</b>
<b>FTA's Processes, Methods, Assumptions and Conclusions in     Conducting the Re-Estimate were Beyond NJ Transit's     Control. ....</b>	<b>41</b>
<b>The Dramatic Increase in the Estimate Resulted in Significant     Part from Changes in FTA's Own Assumptions and     Conclusions, Further Demonstrating that the Re-     Estimate was Beyond NJ Transit's Control.....</b>	<b>43</b>
<b>EQUITABLE AND POLICY CONSIDERATIONS MANDATE THAT NO REPAYMENT     OBLIGATION SHOULD BE IMPOSED ON NJ TRANSIT .....</b>	<b>47</b>
<b>THE WORK COMPLETED HAS ENDURING VALUE TO OTHER PROJECTS IN     THE SAME CORRIDOR .....</b>	<b>48</b>
<b>FTA'S REPAYMENT DEMAND WILL REQUIRE NJ TRANSIT TO CANCEL     \$271 MILLION IN PROJECTS TO RELIEVE CONGESTION AND     MAINTAIN THE STATE OF GOOD REPAIR IN THIS CORRIDOR .....</b>	<b>50</b>
<b>FTA'S FAILURE TO ALLOW INSPECTION AND COPYING OF ITS RECORDS     VIOLATES FTA'S .....</b>	<b>51</b>
<b>CONCLUSION.....</b>	<b>54</b>

## **NEW JERSEY TRANSIT'S OPPOSITION TO THE FTA'S REPAYMENT DEMAND**

In a November 24, 2010 letter, the Federal Transit Administration (“FTA”) issued to New Jersey Transit Corporation (“NJ Transit”) a notice of outstanding debt and repayment demand of \$271,101,291 (the “Demand”) of federal funds in connection with the Access to the Region’s Core project ( “ARC Project”). *See* Declaration of Robert S. Brams (“Brams Decl.”), at ¶ 1, Exhibit 1. Pursuant to that letter and applicable authority, *e.g.*, Brams Decl., at ¶ 2, Exhibit 2 (FTA Order 2060.1A, Internal Procedures for Debt Collection (July 2, 2008)), at ¶¶ 7.b.(2)(b) & 7.c.(2); 49 C.F.R. § 89.21(f); *see* 31 U.S.C. §§ 3711(e)(1)(C)(iv), 3711(e)(2), 3716(a)(3); 31 C.F.R. § 901.3(b)(4)(ii)(B)(2), NJ Transit hereby opposes the Demand in its entirety and requests review of both the validity and amount of the Demand.<sup>1</sup>

### **INTRODUCTION**<sup>2</sup>

The ARC Project envisioned the construction of two new rail transit lines under the Hudson River between New Jersey and Manhattan and an extension (with underground pedestrian access) to New York City’s Penn Station. At an estimated cost of \$8.7 billion, the ARC Project was already the largest public transit project in the United States. Through FTA’s New Starts process, the Project had progressed to the Final Design stage and was in line for a Full Funding Grant Agreement (“FFGA”), which would have committed FTA to provide \$3 billion for the Project. In reliance on the \$8.7 billion project cost, New Jersey committed \$2.7 billion to the Project and the Port Authority of New York and New Jersey (“Port Authority”) committed \$3 billion. Pending negotiation of the FFGA, FTA awarded two Early Systems Work Agreements (“ESWAs” or “Work Agreements”) to NJ Transit in order to advance certain New Starts funds to the Project.

---

<sup>1</sup> FTA extended NJ Transit’s deadline to respond to FTA’s November 24, 2010 Demand to January 25, 2011. Thus, NJ Transit’s opposition to FTA’s Demand is timely submitted.

<sup>2</sup> All facts identified in NJ Transit’s Opposition and Exhibits, including all declarations, are incorporated herein by reference.

Despite reaffirming the \$8.7 billion project cost as “reasonable” and “reliable” in its February 2009 and 2010 reports to Congress and in the April 2010 amended ESWA, FTA drastically and unexpectedly increased the Project estimate late in the New Starts process from \$8.7 billion to a range of \$10.9 billion to \$13.7 billion, holding NJ Transit responsible for all cost overruns above \$8.7 billion. Though FTA subsequently lowered its estimates when it realized the Project would not proceed, these estimate reductions were not adequate because NJ Transit and its local funding partners would still be required to fund billions of dollars more than previously agreed. Given the severe economic and fiscal crisis facing New Jersey, and the fact that NJ Transit and its partners did not have the financial resources to support the much higher commitment, the Project did not proceed. Nevertheless, FTA issued its Demand. In addition to repayment, FTA improperly seeks interest, penalties, and costs of collection, and threatens other debt collection remedies.

FTA’s Demand is without merit and unfairly and improperly places the burden of cancellation -- the only responsible course of action once FTA issued substantially higher cost projections -- on NJ Transit and the citizens of the State of New Jersey. In order to support its sweeping repayment demand, FTA incorrectly claims a right to recover virtually all federal funds expended in connection with the ARC Project. FTA’s demand is far broader than the ESWA statute’s controlling language, which limits any potential repayment obligation to “Government payments made under the work agreement [i.e., the ESWA].”

In fact, of the \$271 million FTA demands, the vast majority -- \$225.5 million -- consists of: (1) funds that were expended prior to the execution of the August 2009 ESWA; and (2) the State’s own formula funds that New Jersey was entitled to as a matter of right, and chose to apply to the Project. Since the ESWAs are not the source of these funds, FTA may not properly seek repayment under the ESWA statute. Moreover, NJ Transit would have been entitled to and received all of the funds at issue whether or not the Work Agreements had been awarded.

With respect to the State's formula funds, on December 14, 2010, Secretary of Transportation LaHood offered to pay back to NJ Transit \$128 million of those funds, but only if NJ Transit first pays FTA the entire \$271 Million. Since the Secretary's proposal acknowledges that the formula funds ultimately belong to the State, there is no basis in law for requiring that NJ Transit pay these funds to FTA only to have them subsequently returned.

In addition to seeking funds not covered by the ESWA statute, FTA's Demand must also be denied in its entirety because the ESWA statute requires repayment only if the project is not carried out "for reasons within the control" of the applicant. Here, the Project did not proceed for reasons beyond NJ Transit's control. As noted, FTA's estimate of project costs increased dramatically -- without commensurate changes in the Project's status or scope -- while at the same time New Jersey, like the country, was experiencing the worst recession since the Great Depression. Plainly, NJ Transit could not afford FTA's multi-billion dollar overruns. Indeed, New Jersey's fiscal condition was among the worst of all states across all key indicators.

Even FTA, along with the Department of Transportation's Inspector General, raised serious concerns about the local capacity to fund the Project at \$8.7 billion and to absorb "any" cost overruns, let alone billions of dollars in additional costs contemplated by the new estimates. Moreover, FTA acknowledged that its cost increase was beyond NJ Transit's control by proposing to commit additional New Starts funds to the project. Pursuant to its own published guidance, FTA can only commit additional New Starts funds when "FTA determines that the increase in costs is beyond the grantee's control." Thus, because the Project did not proceed for reasons beyond NJ Transit's control, NJ Transit has no liability for any repayment.

It is unfortunate for all parties that the ARC Project could not proceed. However, NJ Transit should not bear the burden of cancellation under the circumstances here; rather consideration should now be given to future worthwhile projects in New Jersey. The engineering

and design work completed -- which accounts for most of the funds in question -- has enduring value to other projects in this central and vital transportation corridor. Forcing NJ Transit to repay \$271 million will require NJ Transit to postpone or cancel other vital transportation projects that would reduce congestion in the corridor, enhance the condition of critical infrastructure and create needed jobs. In short, requiring NJ Transit to repay to FTA amounts already spent will only exacerbate the State's transportation and economic challenges. It would be in the interests of all parties involved, and NJ Transit stands ready, to instead work together to advance positive transportation solutions that will improve the quality of life and create jobs for New Jersey.

Accordingly, NJ Transit respectfully requests that the FTA deny its Demand in its entirety.

### **DISCUSSION**<sup>3</sup>

FTA's Demand for "all Federal financial assistance expended for ARC" under the ESWAs hinges on the ESWA statute, which provides: "[i]f an applicant does not carry out the project for reasons within the control of the applicant, the applicant shall repay all Government payments made under the work agreement." 49 U.S.C. § 5309(g)(3)(B)(iv) (emphasis added). As we demonstrate below, the ESWA statute's plain language and coverage is much narrower than FTA contends in its Demand. Further, we demonstrate that NJ Transit has no repayment obligation under the statute.

#### **I. FTA IMPROPERLY SEEKS THE RETURN OF PAYMENTS NOT COVERED UNDER THE ESWA STATUTE**

FTA's sweeping Repayment Demand must be denied first because it seeks funds not covered by the statute. 49 U.S.C. § 5309(g)(3)(B)(iv). The ESWA statute, related statutory provisions and the

---

<sup>3</sup> NJ Transit has attempted to exercise its well-settled right "to inspect and copy FTA's records related to FTA's claim." In response to this legal obligation, FTA has provided 35 documents, all but two of which NJ Transit already had and most of which are publicly available. Given that the ARC project was a multi-year, multi-billion dollar undertaking and that the alleged debt is \$271 million, it is inconceivable that there are no additional Government records that constitute FTA's "records related to this claim." By failing to provide NJ Transit access to FTA's records related to the claim, FTA has violated statute and regulation, severely prejudiced NJ Transit and invalidated any subsequent administrative ruling adverse to NJ Transit.

ESWAs confirm that the controlling provision “all Government payments made under the work agreement” refers only to § 5309 New Starts funds. Of FTA’s \$271,101,291 Repayment Demand, however, \$219,511,379 consists of formula funds that NJ Transit and New Jersey received as a matter of entitlement for highway and transit projects and chose to apply to the Project. These funds include \$128,009,405 in Congestion Mitigation and Air Quality (“CMAQ”) funds and \$91,501,954 in Urbanized Area Formula funds authorized under 49 U.S.C. § 5307 (“Section 5307 funds”) and appropriated through the American Recovery and Reinvestment Act (“ARRA”), Pub. L. No. 111-5.

Only \$51,589,932 of the amount in question consists of New Starts funds authorized under 49 U.S.C. § 5309 (“New Starts funds”) that NJ Transit received because of the ARC Project. Further, \$6,069,932 of the New Starts funds is from a FY2006 grant that was spent and closed before the ESWA’s award and, therefore, cannot be a “payment[] made under the work agreement.” Thus, as an initial matter, FTA has no basis in law to demand repayment of \$225,581,291 of the funds in question – the \$219,511,379 in formula funds plus the \$6,069,932 closed New Starts grant – which constitute the vast majority of its repayment demand.<sup>4</sup>

#### **A. THE ESWA STATUTE APPLIES ONLY TO NEW STARTS FUNDS**

The statute defines an ESWA as an instrument to obligate or “commit to pay out” New Starts funds. Because the statute is referring only to obligating and paying out New Starts funds, it can in turn refer only to paying back New Starts funds.

---

<sup>4</sup> The FTA’s discretionary New Starts program is the federal government’s primary financial resource for supporting locally-planned, implemented and operated transit “guideway” capital investments. *See* Brams Decl., at ¶ 3, Exhibit 3 (FTA, Introduction to New Starts), at 1, [http://www.fta.dot.gov/planning/newstarts/planning\\_environment\\_2608.html](http://www.fta.dot.gov/planning/newstarts/planning_environment_2608.html). New Starts refers to new fixed guideways (i.e., a new rail line) or extensions to existing fixed guideway systems. *Id.* As opposed to funds apportioned by statutory formula, grantees must qualify for New Starts funds by proceeding through the FTA project development process as set forth in 49 U.S.C. § 5309. *Id.* at 3.

Specifically, Section 5309(g)(3)(B)(i) defines an ESWA as an instrument to “obligate an amount of budget authority specified in law.” Section 5309(g)(4)(A) (“Limitation on Amounts”) then limits the “total amount” of budget authority that FTA can obligate for New Starts projects under all ESWAs and FFGAs to the amount of New Starts funding that is currently authorized, plus an additional amount of anticipated future New Starts funding known as FTA’s Contingent Commitment Authority.<sup>5</sup> *See* 49 C.F.R. § 611.7 (“the total amount of Federal obligations” under FFGAs, ESWAs and potential obligations under Letters of Intent “will not exceed the amount authorized for New Starts under 49 U.S.C. 5309” plus FTA’s ability to make a “contingent commitment” of future New Starts funds).

By capping the “total amount” of obligations that FTA can make under ESWAs at the amount of available New Starts funds, the statute unambiguously refers to obligating New Starts funds, and only New Starts funds. What is obligated, by definition, is what is subsequently paid out. *See, e.g.,* Brams Decl., at ¶ 4, Exhibit 4 (Government Accountability Office (“GAO”) Glossary of Terms Used in the Budget Process), at 70 (defining “obligation” as a “definite commitment” that “require[s] the Government to make payments.”)<sup>6</sup> In other words, what the ESWA obligates or “commits to pay out” defines what is subsequently meant by the term “payments made under the

---

<sup>5</sup> Section 5309(g)(4)(A) provides that “[t]he total estimated amount of future obligations of the Government and contingent commitments to incur obligations covered by all outstanding letters of intent, full funding grant agreements, and early systems work agreements under this subsection for major new fixed guideway capital projects may be not more than the greater of the amount authorized under sections 5338(a)(3) and 5338(c) for such projects or an amount equivalent to the last 3 fiscal years of funding allocated under subsections (m)(1)(A) and (m)(2)(A)(ii) for such projects[.]” (Emphasis added). The sections listed – i.e., §§ 5338(a)(3), 5338(c), 5309(m)(1)(A) and 5309(m)(2)(A)(ii) -- all authorize and allocate New Starts funding.

<sup>6</sup> As defined in the GAO Glossary of Terms Used in the Federal Budget Process, at 70, “obligation” means “[a] definite commitment that creates a legal liability of the government for the payment of goods and services ordered or received. ... An agency incurs an obligation, for example, when it places an order, signs a contract, awards a grant, purchases a service, or takes other actions that require the government to make payments to the public or from one government account to another.” (Emphasis added.)

work agreement.” *Id.* As the ESWA obligates New Starts funds, the payments in question are New Starts funds.

The ESWA can only be obligating New Starts funds because it would be nonsensical for Congress to cap the obligation of other federal funds -- such as CMAQ and Section 5307 funds -- based solely on the amount of available New Starts funds. *See* 49 U.S.C. 5309(g)(4)(A). FTA does not do so, and counts only New Starts funds against the statutory commitment cap set by Section 5309(g)(4)(A).<sup>7</sup> Further, applicants under the New Starts program are encouraged to combine their New Starts request with funds from other federal sources precisely so that the limited New Starts commitment authority can cover more projects.<sup>8</sup> If the statutory term “obligation” referred to anything other than New Starts funds in this context, than the total amount of federal funds from all sources under ESWAs would be capped at the limited amount of New Starts commitment authority. This is contrary to what Congress intended.

The grant documents in this matter directly confirm that the ESWAs obligated only New Starts funds, while the Section 5307 and CMAQ funds were obligated through separate grant agreements.<sup>9</sup> Funds from other federal sources, such as Section 5307 funds and CMAQ funds, support the scope of the ESWA, but they are not “payments made under the work agreement.”

---

<sup>7</sup> Exhibit 14 (FTA Letter Granting ESWA dated Aug. 14, 2009), at 2 (noting that FTA “does not have sufficient commitment authority to enter into an FFGA for the \$3 billion of New Starts funding that FTA intends to commit to the project); *see also* Brams Decl., at ¶ 5, Exhibit 5 (GAO-09-784 Better Data Needed to Assess Length of New Starts Process, and Options Exist to Expedite Project Development) (Aug. 2009), at 20-21 (discussing FTA’s contingent commitment authority).

<sup>8</sup> *See* Brams Decl., at ¶ 6, Exhibit 6 (FTA Guidelines and Standards for Assessing Local Financial Commitment), at 2-3. (“The non-Section 5309 New Starts share of project costs is rated to reward projects that propose higher non-New Starts funding shares. The intent of this rating factor is that, all else being equal, lower Section 5309 New Starts shares allow the New Starts program to fund a greater number of projects with the same resources.”). Of course, the commitment of non-New Starts funds refers to local funds as well as other federal funds.

<sup>9</sup> The ESWA and amended ESWA (NJ-03-0169 and NJ-030-0169-01) obligated only New Starts funds. *See* Brams Decl., at ¶¶ 7-8, Exhibits 7 and 8. The CMAQ funds were obligated by grant agreements NJ-90-X086, NJ-95-X002, NJ-95-X003, and NJ-95-X008. *See* Brams Decl., at ¶¶ 9-12, Exhibits 9-12. The ARRA or Section 5307 funds were obligated by grant agreement NJ-96-X002. *See* Brams Decl., at ¶ 10, Exhibit 10.

FTA's guidance on FFGAs is instructive on this point. An FFGA is the step following an ESWA in FTA's process for making funding commitments to projects, and Congress uses the same statutory language to define and limit obligations under ESWAs and FFGAs.<sup>10</sup> Under the statute, an FFGA, like an ESWA, is an instrument to commit New Starts funds. *See* 49 U.S.C. § 5309(g)(2)(B)(i); see also Brams Decl., at ¶ 13, Exhibit 13 (FTA Circular 5200.1A Full Funding Grant Agreement Guidance), at 1, 5 (2002) (“FFGAs are... the designated means for providing new starts funds;” FFGAs make a “commitment to provide multi-year Federal funds under the 49 USC 5309 New Starts program”). Also like ESWAs, FFGAs can be supported by funds from other federal sources, such as CMAQ and Section 5307 funds. *Id.* at 32 (discussing situations where “more than one source of Federal funds supports an FFGA”). FTA's guidance makes clear that “payments” under the FFGA refers only to New Starts funds appropriated by Congress. *Id.* at 5, 30 (2002) (stating that the “annual pay-out of funds established by the terms of the FFGA” and the “payout schedule and amounts established by the FFGA” refer to New Starts funding subject to Congressional appropriations, and referring to how FTA must “develop[] the final new starts payment schedule” by taking “into account the entire caseload of FFGA payment schedules and the anticipated annual budget levels for the new starts program”). Therefore, FTA has interpreted the same language in the parallel context of FFGAs as referring only to New Starts funds. FTA's own guidance contradicts the much broader construction FTA is now advancing.

## **B. THE REPAYMENT PROVISION DOES NOT APPLY TO SECTION 5307 AND CMAQ FUNDS**

---

<sup>10</sup> ESWAs and FFGAs are both defined and authorized in 49 U.S.C. § 5309(g). *See* 49 U.S.C. § 5309(g)(2)(B)(i) (“A full funding grant agreement under this paragraph obligates an amount of available budget authority specified in law and may include a commitment, contingent on amounts to be specified in law in advance for commitments under this paragraph, to obligate an additional amount from future available budget authority specified in law.”) As with ESWAs, section 5309(g)(B)(4) limits obligations for FFGAs to New Starts funds. *See* n.4, *supra*.

The repayment provision cannot apply to Section 5307 funds because Section 5307 specifically says it does not apply. *See* 49 USC 5307(k)(2). The CMAQ funds here were administered and governed under Section 5307.<sup>11</sup> *See* Brams Decl., at ¶¶ 9-12, Exhibits 9-12 (CMAQ Grants NJ-90-X086-00, NJ-95-X002-00, NJ-95-X003-00, NJ95-X008-00) (demonstrating that the funds were administered under the Section 5307 program). Thus, the statute again makes clear that the repayment provision does not apply to these funds.

Section 5307 is the controlling law here for all of the formula funds (i.e., the Section 5307 and CMAQ funds), which are funds that are the state's guaranteed return on the gas taxes it pays to the Federal government.<sup>12</sup> Section 5307(k)(1) specifies 17 other statutory sections and subsections applicable to Section 5307 funds, and Section 5307(k)(2) specifically deems all other provision as inapplicable.<sup>13</sup> Because Section 5309 is not specifically incorporated, *see* Section 5307(k)(1), the repayment provision therein is "inapplicable" and provides no basis for FTA to recover the Section 5307 funds.

All of the CMAQ funds in question were transferred to the Section 5307 program to be spent on the ARC project. *See* Brams Decl., at ¶¶ 9-12, Exhibits 9-12 (CMAQ Grants NJ-90-X086-00, NJ-95-X002-00, NJ-95-X003-00, NJ95-X008-00); Brams Decl., at ¶ 15, Exhibit 15 (FTA Fiscal Year 2010 Apportionments, Allocations, & Program Information (Feb. 16, 2010), 75 Fed. Reg.

---

<sup>11</sup> CMAQ funds are apportioned through the Federal Highway Administration ("FHWA"), but can be "flexed" to FTA for transit purposes. *See* 23 U.S.C. § 104(k) ("Transfer of Highway and Transit Funds").

<sup>12</sup> Both CMAQ and Section 5307 funds are provided from the Highway Trust Fund which consists primarily of revenues from the motor fuels tax. *See* Brams Decl., at ¶ 14, Exhibit 14 (Congressional Budget Office: Overview of the Highway Trust Fund) ("The Highway Trust Fund is the source of funding for most . . . programs . . . administered by the Federal Highway Administration (FHWA) and the Federal Transit Administration (FTA) . . ."), at 1. New Starts funds come from the General Fund, not the Highway Trust Fund.

<sup>13</sup> In full, 49 U.S.C. § 5307(k) provides: "Relationship to Other Laws. (1) Applicable provisions.—Sections 5301, 5302, 5303, 5304, 5306, 5315(c), 5318, 5319, 5323, 5325, 5327, 5329, 5330, 5331, 5332, 5333, and 5335 apply to this section and to any grant made under this section. (2) Inapplicable provisions.— (A) In general.—Except as provided by this section, no other provision of this chapter applies to this section or to a grant made under this section."

7048, 7070) (“All FHWA CMAQ and STP funds transferred to FTA will be transferred to one of the three FTA formula programs...”). It is well established that, except for federal matching requirements, CMAQ funds take on the legal character of the program under which they are administered. *See* Brams Decl., at ¶ 16, Exhibit 16 (Final Program Guidance for the CMAQ Program under SAFETEA-LU (Oct. 2008)), at 19 (“Once the FTA determines a project eligible, CMAQ funds will be transferred from the FHWA to the FTA, and the project will be administered according to the requirements of the FTA’s Urbanized Area Formula Grant Program [i.e., Section 5307 program]”);<sup>14</sup> Brams Decl., at ¶ 18, Exhibit 18 (FTA Circular 9030.1D) (May 1, 2010) (“Flexible funds transferred to FTA are administered and managed under the same requirements of the Section 5307 Program”). Accordingly, once transferred, the CMAQ funds became Section 5307 funds for legal and administrative purposes. Thus, legal authority does not exist for FTA’s demand for the CMAQ and Section 5307 funds at issue.

### **C. THE ESWA GRANT DOCUMENTS EXPLICITLY EXCLUDE SECTION 5307 AND CMAQ FUNDS AND FUNDING EXPENDED PRIOR TO THE ESWA**

Consistent with the statute, the ARC ESWAs obligate only New Starts funds and expressly exclude or “subtract out” all of the CMAQ, Section 5307 and previously awarded New Starts funds in question from their Total Eligible Cost.<sup>15</sup> As discussed, these funds were obligated through “separate” grant agreements.<sup>16</sup> It is not possible for funds “subtracted out” of the ESWA and obligated by different grant agreements to be “payments made under the [ESWA].” *See* 49 U.S.C. § 5309(g)(3)(B)(i). As such, no repayment obligation can apply.

---

<sup>14</sup> Brams Decl., at ¶ 17, Exhibit 17, accessed at [http://www.fhwa.dot.gov/environment/air\\_quality/cmaq/](http://www.fhwa.dot.gov/environment/air_quality/cmaq/).

<sup>15</sup> “FTA uses the ... term ‘Total Eligible Cost’ to designate the basis upon which FTA determines the amount of Federal funding that may be awarded.” *See* Brams Decl., at ¶ 13, Exhibit 13 (FTA Circular 5200 1A, Full Funding Grant Agreement Guidance), at 49.

<sup>16</sup> The ESWA states that, while the New Starts payments are made “under the ESWA,” the ARRA (i.e., Section 5307) and CMAQ funds are made under “separate” grant applications “in addition to this [ESWA] grant.” *See, e.g.*, Brams Decl., ¶ 7, Exhibit 7 (ESWA NJ-03-0169-00), at 17-19.

Further, \$106 million of these funds were actually expended prior to the execution of the ESWA, including \$100 million in CMAQ funds from FY2005, FY2007 and FY2008 spent on Preliminary Engineering<sup>17</sup> and the \$6 million closed FY2006 New Starts grant.<sup>18</sup> Funds obligated and expended prior to the ESWA again cannot, as a matter of law or logic, be a “payment made under the work agreement.” *See* 49 U.S.C. § 5309(g)(3)(B)(i).

In this regard, the original ESWA grant states:

This grant outlines future New Starts funds that will be allocated to the ESWA. ... In addition to this grant, \$125M of Federal Highway Administration flex funds have been or will be used to fund this project. An additional \$130,000,000 of ARRA funds are anticipated as well. The ARRA [i.e., Section 5307] funds and the flex funds [i.e., CMAQ funds] have been subtracted out of the ESWA cost (\$1,352,000,000). As a result, the ‘Total Eligible Cost’ for this grant is \$1,097,000,000.

*See* Brams Decl., at ¶ 7, Exhibit 7 (Aug. 29, 2009, ESWA No. NJ-03-0169-00), at 14, 22, 24 (emphasis added).

The amended ESWA grant repeats this language, but with updated detail:

This grant, as amended, outlines New Starts funds that will be allocated under the ESWA. ... In addition to this grant, \$304,050,000 of Federal Highway Administration flex funds have been or will be used to fund this project. ... An additional \$130,000,000 of ARRA funds have been awarded under NJ-96-X002. A closed New Start grant provided \$6,069,932. The ARRA [i.e., Section 5307] funds ... , ...the flex funds [i.e., CMAQ funds] ...and the closed New Starts grant ... are not included in the total eligible cost of this grant as amended. As a result, the “Total Eligible Cost” for this grant, as amended, is \$1,676,930,068. [Emphasis added.]

*See* Brams Decl., at ¶ 8, Exhibit 8 (April 14, 2010, Amended ESWA, No. NJ-03-0169-01), at 14-15; *cf. id.* at 18.

---

<sup>17</sup> The ESWA, under the heading “Previous Federal Funding,” specifically identifies the CMAQ funds that were awarded prior to the ESWA, stating that “[p]revious federal CMAQ funds awarded for ARC Preliminary Engineering include NJ-90-X086 (\$766,000); NJ-95-X002 (\$34,756,000); and NJ-95-X003 (\$94,680,000).” *See* Brams Decl., at ¶ 7, Exhibit 7, at 15; *see also* Brams Decl., at ¶ 8, Exhibit 8, at 19 (listing the same “prior CMAQ funds awarded for PE, which are, respectively, FY2005, FY2007 and FY2008 funds”) (emphasis added). Note that a subsequent budget revision reduced the amount in NJ-95-X003, such that the amount of prior CMAQ funds in question expended on PE totals \$100 million.

<sup>18</sup> The amended ESWA specifically identifies, and then subtracts out, closed FY2006 New Starts grant NJ-03-0138 totaling \$6,069,932l. *See* Brams Decl., at ¶ 7, Exhibit 7 (Aug. 29, 2009, ESWA No. NJ-03-0169-00), at 14, 22, 24.

The ESWAs also explicitly identify their award and payments as New Starts funds. After stating “FTA hereby awards a grant as follows,” the ESWA proceeds to identify the “Amount of this FTA Award” as \$14,700,000 in New Starts funds for the original ESWA, *see* Brams Decl., at ¶ 7, Exhibit 7 (ESWA NJ-03-0169-00), at 23, and \$47,520,000 in New Starts funds for the amended ESWA.<sup>19</sup> *See* Brams Decl., at ¶ 8, Exhibit 8 (Amended ESWA NJ-03-0169-01), at 38.

Thus, consistent with the statute, the ESWA grant agreements manifestly do not obligate -- indeed, they specifically exclude -- the CMAQ and Section 5307 funds and the “closed” FY2006 New Starts grant in question. *See* 49 U.S.C. § 5309(g)(3)(B)(i); 49 U.S.C. § 5309(g)(4)(A). Accordingly, these funds are not “payments made under the work agreement,” and there is no legal basis for FTA to seek repayment. *See* 49 U.S.C. § 5309(g)(3)(B)(i); 49 U.S.C. § 5309(g)(3)(B)(iv).

#### **D. FTA’S REPAYMENT DEMAND IMPROPERLY SEEKS FUNDS BEYOND THE SCOPE OF THE ESWA STATUTE AND GRANT AGREEMENTS**

FTA’s Demand ignores the statute’s plain language. In addition to misreading the statute, FTA’s logic appears to be -- even though the Section 5307 and CMAQ funds were subtracted from the ESWA or awarded beforehand -- that these separate and previous grants are “part” of the overall work agreement and, therefore, subject to the repayment provision. FTA’s Demand, however, cannot be justified by characterizing the ESWA as an “umbrella agreement.” This argument does nothing to alter the legal definition of “Government payments made under the work agreement,” which is limited to New Starts funds obligated by the ESWA. *See* 49 U.S.C. § 5309(g)(3)(B)(i); 49 U.S.C. § 5309(g)(4)(A). FTA cannot substitute its own definition for that dictated by the statute.

---

<sup>19</sup> The ESWA and amended ESWA obligated a total of \$62 million. Of this amount, \$51.5 million was expended and is sought by FTA in its Repayment Demand. FTA has stated that it intends to de-obligate the remaining, unspent amount. *See* Brams Decl., at ¶ 1, Exhibit 1 (FTA Nov. 24, 2010, Demand Letter), at 2.

Nonetheless, even on its own terms, FTA's interpretation lacks merit. First, the ESWA was not drafted as an umbrella agreement. In fact, the ESWA and amended ESWA include very little contractual language.<sup>20</sup> The ESWAs obligated \$45.5 million of the New Starts funds in question. All remaining funds were obligated through separate grant agreements.<sup>21</sup> FTA did not incorporate the non-New Starts grants or the previous New Starts grant by reference in an attempt to subject them to common terms and conditions. It is worth emphasizing that, by comparison, an FFGA includes 26 standard contractual sections and eight required attachments in drafting an "umbrella agreement" for the project – none of which are included in the ESWA grant document. *See* Brams Decl., at ¶ 13, Exhibit 13 (FTA Circular 5200.1C Full Funding Grant Agreement Guidance), at 52. While the statute controls in defining "Government payments made under the work agreement" as New Starts funds, it only further undermines FTA's claim that FTA knows how to construct an umbrella agreement and did not do so here.

Second, the reason the CMAQ and Section 5307 funds are listed in the overall amount of the ESWA (before being subtracted out) has nothing to do with being a "payment" under the ESWA. Previously expended funds are reflected in the overall amount (before being subtracted out) because FTA has to account for "all costs ... necessary to complete the scope of work." *See* Brams Decl., at ¶ 13, Exhibit 13 (FTA Circular 5200.1C Full Funding Grant Agreement Guidance), at 22. As discussed, a critical evaluation factor for New Starts projects is the amount of non-New Starts funding. All of the non-New Starts funds had to be accounted for as they represent NJ Transit's

---

<sup>20</sup> To date, FTA has apparently entered into only five ESWAs, (*see* Brams Decl., at ¶ 21, Exhibit 21 – Dec. 14, 2010, Letter from Sec. LaHood to N.J. Senators, at 1), and, thus, does not have extensive experience with ESWAs or the contractual language, of which there is very little, therein.

<sup>21</sup>The CMAQ funds were obligated by grant agreements NJ-90-0086, NJ-95-0002, NJ-95-0003, and NJ-95-0008. The ARRA or Section 5307 funds were obligated by grant agreement NJ-96-0002. The previously spent New Starts funds were obligated by grant agreement NJ-03-0138.

required matching commitment.<sup>22</sup> The “separate” Section 5307 and CMAQ grants support the scope of work, and the “previous” grants contributed to the scope of work, but they are not “payments made under the work agreement” under the statute.<sup>23</sup> *See* 49 U.S.C. § 5309(g)(3)(B)(i); 49 U.S.C. 5309(g)(4)(A).

Third, FTA cannot demand repayment on the related theory that the ESWA “authorized the use of the funds” on the project. *See* Silber Decl., at ¶ 16, Exhibit 14 (FTA Letter Granting ESWA dated Aug. 14, 2009), at 1. Again, that point is distinct from what constitutes a “government payment under the work agreement.” Nonetheless, it is noteworthy that almost all of the CMAQ and Section 5307 funds in question -- approximately \$215 million out of \$219.5 million -- were spent on Preliminary Engineering, Final Design and Real Estate acquisition activities and could have been expended absent an ESWA. *See* Brams Decl., at ¶ 25, Exhibit 25 (ARC Table of Federal Expenditures).<sup>24</sup> All New Starts candidate projects, whether under an ESWA or otherwise, have automatic authority and routinely spend Section 5307 and CMAQ funds on Preliminary Engineering and Final Design activities (including real estate acquisition) once approved to enter each respective stage and do not need an ESWA to do so. *See, e.g.*, Brams Decl., at ¶ 26, Exhibit 26 (FTA 2009 Additional Guidance on New Starts/Small Starts Policies and Procedures), at 9 (describing

---

<sup>22</sup> E-mail correspondence between NJ Transit and FTA directly confirms that the previously expended funds, for example, were included in the project budget because they were properly to be counted as a match against the New Starts share. *See* Brams Decl., at ¶ 22, Exhibit 22 (P. Garino to R. Branche E-Mail).

<sup>23</sup> The legislative history also confirms that the statutory phrase “Government payments” has a much more specific and limited meaning. ESWAs were created in the Intermodal Surface Transportation Act of 1991 (“ISTEA”), P.L. No. 102-240. The ESWA provision first appeared in the Senate version of the legislation, the Federal Transit Act of 1991 (S. 1994). As introduced, S. 1994 provided in pertinent part that, “[i]f an applicant fails to implement the project for reasons within the applicant’s control, the applicant shall repay all costs under the early systems work agreement[.]” *See* Brams Decl., at ¶ 23, Exhibit 23 (emphasis added). As subsequently reported out of the Senate Banking, Housing and Urban Affairs Committee after mark-up and amendment, the relevant portion was specifically changed to read “shall repay all Federal payments made under the early systems work agreement.” *See* Brams Decl., at ¶ 24, Exhibit 24 (S. Rept. 102-79) (emphasis added).

<sup>24</sup> As noted, \$106 million of these funds *were* expended on Preliminary Engineering activities before the ESWA - including funds from as early as FY2005 -- although FTA now claims these are somehow “payments made under the work agreement.” *See supra*, n.17.

automatic pre-award authority to expend funds on engineering, design, real estate and other activities without an ESWA).<sup>25</sup>

Despite the substantial expenditure of Federal formula funds on early stage activities, many New Starts projects do not ultimately go forward.<sup>26</sup> The legislative history demonstrates that Congress did not intend for funds spent on preliminary engineering and design to be repaid under an ESWA. The original legislative framework for ESWAs was set forth in the Senate Banking Committee's Staff Discussion Draft of its reauthorization proposal, entitled the "Metropolitan Transportation Initiative."<sup>27</sup> The framework is substantially reflected in what became law in ISTEA, Pub. L. No. 102-240.<sup>28</sup> After defining the meaning of an ESWA and outlining the repayment provision, the legislative history states that "Grantees ... would not be required to repay th[e] costs of preliminary design and engineering," noting that this would not provide a "level playing field." (Emphasis added.)

Thus, as a threshold matter, FTA has no basis in law to demand repayment of \$225.5 million of the funds in question – the \$219.5 million in Section 5307 and CMAQ funds plus the \$6 million

---

<sup>25</sup> See *id.* ("Under existing practice, upon FTA approval to enter preliminary engineering, FTA extends pre-award authority to incur costs for preliminary engineering. Upon FTA approval to enter final design, FTA extends pre-award authority to incur costs for final design."). FTA also extends authority for real estate acquisition after the completion of the environmental process, which occurred in January 2009 for the ARC project. *Id.* Further, this is the method by which these activities are most often paid: "Preliminary engineering is typically financed with 49 U.S.C. Sec. 5303 ['Metropolitan transportation planning'] and Sec. 5307 funds, local revenues, and flexible funds under the ... CMAQ program[]." See Brams Decl., at ¶ 27, Exhibit 27 (FTA Major Capital Investment Projects Final Rule), 65 Fed. Reg. 76864, 76869 (December 7, 2000); Brams Decl., at ¶ 18, Exhibit 18 (FTA Circular C 9030.1D, May 1, 2010), at II-9 ("Section 5307 funds are most often applied to a new start project's earlier stages—planning and project development, preliminary engineering (PE), and final design (FD)").

<sup>26</sup> See, e.g., Brams Decl., at ¶ 28, Exhibit 28 (FTA 2006 Final Guidance on New Starts Policies and Procedures), at 4 ("[r]ecently, a number of [New Starts] projects have [] failed to advance through project development").

<sup>27</sup> Brams Decl., at ¶ 29, Exhibit 29 (Senate Banking Committee: "Metropolitan Transportation Initiative: Staff Discussion Draft," April 17, 1991), at 14-15.

<sup>28</sup> *Id.*

closed New Starts grant. These funds are not “Government payments made under the work agreement.”

#### **E. THE ESWAs DID NOT ADVANCE ANY NEW STARTS FUNDS TO THE ARC PROJECT**

Demanding repayment of the New Starts funds in question runs counter to the underlying purpose of the repayment provision, which is to recoup funds that were advanced when the grantee ultimately does not carry out the project for reasons within its control. This function of providing an advance commitment or “down payment” of New Starts funds has been explicitly acknowledged in connection with this project. *See, e.g.*, Brams Decl., at ¶ 30, Exhibit 30 (FTA News Release, Aug. 14, 2009) (“Federal Transit Administrator Peter Rogoff today announced that his agency will make a ‘down payment’ toward an eventual commitment of \$3.0 billion [i.e., the total New Starts share]” by approving the ESWA for the ARC project) (emphasis added).<sup>29</sup> In this instance, however, the \$45.5 million in New Starts funds was already earmarked for the project in appropriations legislation before the ESWA was executed. *See* Brams Decl., at ¶¶ 33-34, Exhibits 33-34 (FY2008 and FY2009 Earmarks), at 273 and 243, respectively; *see also* Brams Decl., at ¶ 7, Exhibit 7 (ESWA), at 15; Brams Decl., at ¶ 8, Exhibit 8 (Amended ESWA), at 19. The ESWA thus did not advance any funds. The ESWA was scheduled to advance \$200 million in FY2010, and those funds were appropriated by Congress, but they were not released for obligation on the project.<sup>30</sup> FTA’s repayment demand thus consists entirely of funds that NJ Transit either: (1) already spent before the ESWA; (2) already

---

<sup>29</sup> FTA News Release available at [http://www.fta.dot.gov/printer\\_friendly/news\\_events\\_9770.html](http://www.fta.dot.gov/printer_friendly/news_events_9770.html); *see also* Brams Decl., at ¶ 31, Exhibit 31 (FTA News Release, *Transportation Secretary LaHood Announces Additional \$765 Million to Continue and Expand Work on Access to the Region’s Core Project*), accessed at [http://www.fta.dot.gov/printer\\_friendly/news\\_events\\_11551.html](http://www.fta.dot.gov/printer_friendly/news_events_11551.html) (“Further ‘down payment’ reaffirms Administration’s intent to provide \$3 billion toward project”) (emphasis added); Brams Decl., at ¶ 32, Exhibit 32 (GAO 09-763T, NEW STARTS PROGRAM CHALLENGES AND PRELIMINARY OBSERVATIONS ON EXPEDITING PROJECT DEVELOPMENT), at 13 (describing the utility of ESWAs as an “early commitment of federal funding”).

<sup>30</sup> *See* Silber Decl., at ¶ 17, Exhibit 16 (FTA Annual Report on New Starts for FY2010), at 6-7; Brams Decl., at ¶ 35, Exhibit 35 (FY2010 Appropriations Act).

secured through Congressional earmarks; or (3) was entitled to by statutory formula. Consequently, the ESWA did not actually give or advance to NJ Transit any funds in the first place

## **II. THE ARC PROJECT FAILED TO PROCEED FOR REASONS OUTSIDE OF NJ TRANSIT'S CONTROL AND, THEREFORE, NJ TRANSIT HAS NO OBLIGATION TO REPAY ANY FUNDS**

FTA cannot recover any funds from NJ Transit because the ESWA statute applies only “[i]f an applicant<sup>31</sup>] does not carry out the project for reasons within the control of the applicant[.]” 49 U.S.C. § 5309(g)(3)(B)(iv) (emphasis added). As demonstrated below and **as acknowledged by FTA**, *see infra* at Part II.A.iv, NJ Transit’s inability to carry out the ARC project was caused by reasons beyond its control. Therefore, NJ Transit has no repayment obligation. Moreover, in light of its inability to afford to proceed with the project, NJ Transit could not responsibly do so.

### **A. The Magnitude of FTA’s Re-Estimate of the Project Cost, and the Absence of Sources or Means to Fund the Re-Estimate, Were Factors Beyond NJ Transit’s Control that Prevented the Project from Proceeding**

In January 2009, the FTA-approved estimate for the ARC project was set at \$8.7 billion upon entry, at that time, into the Final Design stage. FTA’s share of project costs was fixed at \$3 billion. NJ Transit’s financial plan called for a \$2.7 billion commitment from the State and \$3 billion commitment from the Port Authority. During final FFGA negotiations in August 2010, long after NJ Transit had entered into the ESWAs and expended virtually all the funds in question, FTA increased its estimate to between \$10.9 billion and \$13.7 billion. *See* Declaration of James Weinstein

---

<sup>31</sup> It is beyond argument that, under the ESWA and amended ESWA, NJ Transit was the applicant. *See* Brams Decl., at ¶ 36, Exhibit 36 (Jan. 8, 2010 NJ Transit Letter to FTA); Brams Decl., at ¶ 7, Exhibit 7 (ESWA), at 1, 11, 23, 24 (identifying NJ Transit as having submitted the “Application” and as the sole “recipient” or “grantee”); Brams Decl., at ¶ 8, Exhibit 8 (Amended ESWA), at 1, 11, 12, 19, 21, 38, 39 (same). With respect to the status of NJ Transit, the relevant New Jersey statute provides that “[t]here is hereby established in the Executive Branch of the State Government the New Jersey Transit Corporation, a body corporate and politic with corporate succession.” N.J. STAT. ANN. 27:25-4(a) (2011). Significantly, “[a]ll expenses incurred by the [NJ Transit] corporation in carrying out the provisions of this act shall be payable from funds available to the corporation therefor and no liability or obligation shall be incurred by the corporation beyond the extent to which moneys are available. No debt or liability of the corporation shall be deemed or construed to create or constitute a debt, liability, or a loan or pledge of the credit of the State.” N.J. STAT. ANN. 27:25-17 (2011). Under New Starts law, both the State of New Jersey and the Port Authority are eligible to be applicants and could have been but were not the applicant here.

(“Weinstein Decl.”), at ¶ 8, Exhibit 2 (ARC Executive Steering Committee Report of October 26, 2010), at 1. On October 8, 2010, after the ARC Executive Steering Committee unanimously determined that the project could not proceed at the higher estimates, FTA issued revised estimates of \$9.8 billion as the low end cost, \$10.9 billion as the mid range cost and \$12.7 billion as the high end cost. FTA advised that there was an approximately 10% probability of the project being completed at or below the low range cost, approximately 40% to 50% probability of the project being completed at or below the mid range cost, and an approximately 83% probability of the project being completed at or below the high range cost.<sup>32</sup> *See id.* at 2; Weinstein Decl., at ¶ 11.

As set forth below, NJ Transit lacked the financial means to commit to FTA’s substantially increased cost estimates.

**i. NJ Transit Would Have Been Required To Fund Billions Of Dollars Of Increased Costs**

NJ Transit and its local funding partners were legally and practically responsible for all costs over the fixed federal New Starts share of \$3 billion, which FTA set upon the January 2009 entry of the project into Final Design. *See* Brams Decl., at ¶ 28, Exhibit 28 (FTA 2006 Final Guidance on New Starts Policies and Procedures), at 9 (“Once the project is approved into final design, any increase in project costs will be borne by the sponsoring agency and its non-section 5309 New Starts funding partners.”); Brams Decl., at ¶ 37, Exhibit 37 (March 26, 2010 Letter from Sec. LaHood to Gov. Christie), at 1 (“[A]ny costs exceeding this amount [\$8.7 billion] will be the responsibility of the State and its non-Federal funding partners”).<sup>33</sup> Moreover, NJ Transit had to demonstrate the

---

<sup>32</sup> Significantly, these re-estimated costs do not include approximately \$775 million that NJ Transit would have had to agree to expend to construct a new Portal Bridge as a requirement for the ARC project. *Id.*

<sup>33</sup> *See* 49 C.F.R. § 611.7(d)(4) (“In any instance in which FTA decides to provide financial assistance under section 5309 for construction of a new start project, FTA will negotiate an FFGA with the grantee during final design of that project. Pursuant to the terms and conditions of the FFGA: (i) A maximum level of Federal financial contribution under the

financial capacity to carry out the project based on FTA’s re-estimate in order for the project to proceed. *See* 49 U.S.C. § 5309(c)(1)(B)(i) (“The Secretary may not approve a grant for a project under this section unless the Secretary determines that the applicant has or will have the ... financial ... capacity to carry out the project”); 49 U.S.C. § 5309(d)(2)(c) (“The Secretary may approve a grant under this section ... only if the Secretary ... determines that the project is supported by an acceptable degree of local financial commitment[.]”).<sup>34</sup> As discussed below, NJ Transit and its local funding partners had to demonstrate the capacity to fund the project at well over \$11.7 billion for the project to proceed.

To satisfy the financial capacity requirements, NJ Transit had to demonstrate the “specific commitment” of the funds necessary to complete the project at the increased level required by FTA’s re-estimate. *See* Brams Decl., at ¶ 13, Exhibit 13 (FTA Circular 5200.1A Full Funding Grant Agreement Guidance), at 59 (2002) (financing plan must include “supporting documentation (including specific funding commitments) evidencing stable and dependable funding sources”); *see also* 49 U.S.C. § 5309(d)(4)(B) (“[i]n assessing the stability, reliability, and availability of proposed sources of local financing . . . the Secretary shall consider the degree to which financing sources are dedicated to the proposed purposes”); Declaration of Andrew Sidamon-Eristoff (“Sidamon-Eristoff Decl.”), at ¶ 22; Weinstein Decl., at ¶ 13. FTA’s guidance further requires that “[a]ll non-federal funds must be formally approved and programmed to fund the nonfederal share of the proposed

---

section 5309 new starts program will be fixed; (ii) The grantee will be required to complete construction of the project, as defined, ... and to absorb any additional costs incurred or necessitated[.]) (emphasis added).

<sup>34</sup> *See* Brams Decl., at ¶ 38, Exhibit 38 (FTA Financial Capacity Policy Circular 7008.1A), at 4 (“FTA will not enter into FFGAs until the plans for financing have been completed and a Financial Capacity Assessment has been performed . . . . The plans for financing must demonstrate that the grantee can complete the FFGA project and continue to operate its existing service with available resources.”) (emphasis added).

project before FTA will recommend or approve a project for a FFGA.”<sup>35</sup> Brams Decl., at ¶ 39, Exhibit 39 (FTA Guidance for Transit Financial Plans), at 9.

The financial plan must also demonstrate the ability to cover cost overruns and contingencies. *See* 49 U.S.C. § 5309(d)(4)(A)(ii) (“The Secretary shall require that ... the proposed project plan provides for the availability of contingency amounts that the Secretary determines to be reasonable to cover unanticipated cost increases”).<sup>36</sup> On multiple occasions, FTA informed NJ Transit of this requirement.<sup>37</sup> *See, e.g.*, Silber Decl., ¶ 16, Exhibit 15 (FTA Memorandum of May 3, 2010 in Response to OIG Draft Report), at 29 (“NJ Transit has been informed ... that when it submits a revised financial plan in support of the FFGA request, it must include adequate details on how NJ Transit plans to cover cost overruns...”).

Therefore, to proceed with the project, NJ Transit and its local funding partners had to demonstrate the financial capacity to carry out the project based on FTA’s higher cost estimate, including specific funding commitments backed by stable and dependable funding sources. *See also* Weinstein Decl., at ¶ 13. Final negotiations between FTA and NJ Transit were based on a specific

---

<sup>35</sup> Brams Decl., at ¶ 6, Exhibit 6 (FTA Guidelines and Standards for Assessing Local Financial Commitment), at 4, states:

Committed sources are programmed capital funds that have all the necessary approvals (legislative or referendum) to be used to fund the proposed project without any additional action... Examples include dedicated or approved tax revenues, state capital grants that have been approved by all required legislative bodies, cash reserves that have been dedicated to the proposed project, and additional debt capacity that requires no further approvals and has been dedicated by the transit agency to the proposed project.

<sup>36</sup> *See* Brams Decl., at ¶ 38, Exhibit 38 (FTA Circular 5010.1D - Grant Management Requirements), at V-7 (financial plan under the New Starts program must demonstrate “the ability to complete the project on schedule in the face of ... unanticipated conditions, or budget overruns”); Brams Decl., at ¶ 6, Exhibit 6 (FTA Guidelines and Standards for Assessing Local Financial Commitment), at 3 (requiring FTA to assess a grantee’s “financial capacity to cover capital cost increases or funding shortfalls”).

<sup>37</sup> Even before the dramatic re-estimate, FTA expressed concerns to Governor Christie about the ability to cover even much more modest overruns: “In February 2010, the FTA Administrator and the Secretary spoke with New Jersey’s new Governor about the Department’s concerns regarding funding, the potential for cost overruns on this project, and how any overruns would be funded.” *See* Silber Decl., ¶ 16, Exhibit 15 (FTA Memorandum of May 3, 2010 in Response to OIG Draft Report), at 27.

figure of \$11.7 billion, which consists of FTA’s mid-range estimate of \$10.9 billion plus the \$775 million needed to construct the Portal Bridge as a separate, but required, element of the project.<sup>38</sup> *See* Weinstein Decl., at ¶ 10, Exhibit 2 (ARC Executive Steering Committee Report), at 3 (reporting negotiations were based on the “total cost of the project ... [of] \$11.7 billion,” the “FTA mid-range cost estimate together with the Portal Bridge South”); *see also* Weinstein Decl., at ¶ 13. NJ Transit also would have to make arrangements to fund a capital reserve account (“CAPRA”) to provide contingency for the 50% to 60% probability the cost of the ARC project would exceed the mid-range estimate.<sup>39</sup> *See* Brams Decl., at ¶ 43, Exhibit 43 (July 24, 2009 FTA Action Memorandum Recommending Approval of ESWA), at 10; Brams Decl., at ¶ 44, Exhibit 44 (April 1, 2010 FTA Action Memorandum Recommending Approval of Amended ESWA), at 11; *see also* Weinstein Decl., at ¶ 13, Exhibit 2 (ARC Executive Steering Committee Report), at 4 (discussing the “contingency required by the government for the mid-range cost estimate”). Thus, in addition to having to assume responsibility for any and all overruns, NJ Transit had to demonstrate the specific financial capacity and sources to fund well over \$2.2 billion more than the original commitment of \$2.7 billion of State funds for the Project to proceed - and in fact much more than that because of additional required contingency

Beyond committing necessary funds for the billions of dollars of projected overruns, NJ Transit also had to demonstrate the ability to “maintain and operate the entire public transportation

---

<sup>38</sup> *See also* Brams Decl., at ¶ 40, Exhibit 40 (OIG Report), at 10 (“In August 2010, FTA reiterated to NJT that it will need to identify a complete and reasonable financial plan for the ... replacement of the Portal Bridge ... prior to executing the Full Funding Grant Agreement.”).

<sup>39</sup> Before FTA’s re-estimate, FTA’s May 2009 Financial Capacity Assessment recommended a CAPRA for the project. *See* Weinstein Decl., at ¶ 15, Exhibit 3, at 6. FTA’s memorandum recommending approval of the Amended ESWA specifically discussed requiring a CAPRA “to ensure funds would be available for any overruns that could occur as the project moves through construction” and noted that CAPRA funding arrangements “must be committed to the ARC Project before execution of an FFGA” and will be considered as part of the financial assessment. *See* Brams Decl., at ¶ 41, Exhibit 41 (FTA ESWA Amendment Memorandum dated April 14, 2010), at 3. FTA has required grantees to fund a CAPRA in multiple instances. *See* Brams Decl., at ¶ 42, Exhibit 42 (Dulles Metro Letter from FTA Administrator), at 5 (“[F]unding arrangements for the CAPRA must be committed to the Project before execution of an FFGA”).

system without requiring a reduction in existing public transportation services or level of service to operate the proposed project.<sup>40</sup> 49 U.S.C. § 5309(d)(2) (emphasis added). NJ Transit, however, lacked the financial capacity to meet the August or October 2010 re-estimates without a severely negative impact to its existing public transportation services of level of service. *See* Weinstein Decl. ¶ 24, 35.

## ii. NJ Transit Lacked The Financial Capacity To Commit Billions Of Dollars More To The Project

At \$8.7 billion, the ARC Project was already the largest public transit project in the United States. At the time of FTA's re-estimate and during subsequent negotiations, the State and national economy were in severe distress. Indeed, FTA has acknowledged this on numerous occasions.

- **Given the Fiscal and Economic Crisis Impacting New Jersey, NJ Transit Could Not Absorb Further Costs or Debt**

Nationwide, states are experiencing a “fiscal crisis of unprecedented severity,” *see* Brams Decl., at ¶ 49, Exhibit 49 (Center on Budget and Policy Priorities, STATES CONTINUE TO FEEL THE RECESSION'S IMPACT), at 3. New Jersey's fiscal condition was among the worst of all states across all key indicators, including its budget deficit, unfunded debt burden, current state and local tax burden, and unfunded long term pension liabilities. *See* Sidamon-Eristoff Decl., ¶ 10-12. While it

---

<sup>40</sup> *See* 49 U.S.C. 5309(d)(4)(A)(iii) (the “Secretary shall require that - . . . local resources are available to recapitalize and operate the overall proposed public transportation system . . . without requiring a reduction in existing public transportation services or level of service to operate the proposed project.”) (emphasis added); Brams Decl., ¶ 38, Exhibit 38 (FTA Financial Capacity Policy Circular 7008.1A), at 4 (“The plans for [FFGA] financing must demonstrate that the grantee can complete the FFGA project and continue to operate its existing service with available resources”) (emphasis added).

would be an extraordinary challenge for any state to commit billions in additional dollars (on top of an \$8.7 billion project) in this economic and fiscal climate, New Jersey's fiscal condition simply did not allow it. *See* Sidamon-Eristoff Decl., ¶ 21-23; Weinstein Decl., at ¶ 23-35.

The recession has resulted in the “steepest decline in state tax receipts on record” and 2010 state budget shortfalls were the “largest on record.” *Id.* at 1. Reflecting the breadth of the crisis, “48 of 50 states faced large budget shortfalls in fiscal years 2009 and 2010.” *Id.* Further, even after making very deep spending cuts over the last 2 years, “at least 46 states struggled to close shortfalls when adopting budgets for the current fiscal year 2011.” *Id.* In light of the slow economic recovery, “[s]tates’ fiscal conditions remain extremely weak” and “current economic projections suggest that, due to declining federal assistance, fiscal year 2012 will be more difficult than 2010 or 2011.” *Id.* at 3. In light of declining federal assistance, the director of the Center on Budget and Policy Priorities’ state fiscal project, Nicholas Johnson, has concluded that FY2012 will “be the most difficult budget year for states ever.”<sup>41</sup> *See* Sidamon-Eristoff Decl., ¶ 16, Exhibit 16 (*Washington Post*, RECESSION-BRUISED STATES’ REVENUE SANK 30 PERCENT IN 2009, CENSUS BUREAU REPORTS, Jan. 5, 2011) (emphasis added).<sup>42</sup>

---

<sup>41</sup> The National Governors Association, in its 2010 Fiscal Survey of States (“NGA Report”) reports similar conclusions:

After two of the most challenging years for state budgets . . . [and] one of the worst time periods in state fiscal conditions since the Great Depression states still forecast considerable fiscal stress. Additionally, in fiscal 2012 a significant amount of state funding made available by the *American Recovery and Reinvestment Act of 2009* will no longer be available. The significant wind down of this support will result in a continuation of extremely tight fiscal conditions for states . . .

Sidamon-Eristoff Decl., ¶ 16, Exhibit 15 (NGA Report (Dec. 2010)), at vii. The NGA Report details the spending cuts that states have had to undertake, including deep reductions in spending for education, public assistance, Medicaid, corrections and transportation. *Id.* at 9-14. The Report then notes that “State general fund expenditures have been so negatively affected by this recession that both fiscal 2009 and fiscal 2010 saw nominal declines in state spending. These back to back declines, only the second and third time that state general fund spending has declined in the history of this report, also marks the first time in which states have had consecutive years of lower general fund spending.” *Id.* at vii.

<sup>42</sup> Accessed at [http://hosted.ap.org/dynamic/stories/U/US\\_BROKEN\\_BUDGETS\\_YEAR\\_OF\\_RECKONING?SITE=TXHAR&SECTION=HOME&TEMPLATE=DEFAULT](http://hosted.ap.org/dynamic/stories/U/US_BROKEN_BUDGETS_YEAR_OF_RECKONING?SITE=TXHAR&SECTION=HOME&TEMPLATE=DEFAULT)

The Census Bureau's 2009 Annual Survey of State Government Finances (Dec. 2010) reports that "total state revenue ... decline[d] 30.8 percent" in 2009. *See* Brams Decl., at ¶ 50, Exhibit 50, at 1. As a result, "Governors and state legislators across the country are now confronted with a series of painful choices about future service cuts and tax increases. . . . Given the growing fiscal problems, many states are moving more aggressively to rein in their costs." *See* Sidamon-Eristoff Decl., ¶ 16, Exhibit 16 (*The Washington Post*, RECESSION-BRUISED STATES' REVENUE SANK 30 PERCENT IN 2009, CENSUS BUREAU REPORTS, Jan. 5, 2011).<sup>43</sup>

States are taking unprecedented steps to address their fiscal crises. *See, e.g.*, Brams Decl., at ¶ 51, Exhibit 51 (*Reuters*, NEW JERSEY GOVERNOR DECLARES FISCAL EMERGENCY, Feb. 11, 2010);<sup>44</sup> Brams Decl., at ¶ 52, Exhibit 52 (*The Washington Post*, ILLINOIS FACES STEEP TAX INCREASE TO MEET FISCAL CRISIS, Jan. 8, 2011), at 1 (describing the proposal to raise Illinois state income tax by 75% to address the "desperate financial situation" and noting "a similar scenario is playing out in many states" where "state leaders [face] an unpalatable choice of deep spending cuts, steep tax hikes or more debt");<sup>45</sup> Brams Decl., at ¶ 53, Exhibit 53 (*Los Angeles Times*, GOVERNOR JERRY BROWN WANTS TO TAME THE STATE BUDGET DEFICIT WITH TAX EXTENSIONS, DEEP CUTS, Jan. 9, 2011); Brams Decl., at ¶ 54, Exhibit 54 (*Las Vegas Sun*, BIGGEST SPENDING CUTS, TAX INCREASES IN NEVADA HISTORY WON'T CLOSE BUDGET GAP, ASSEMBLY SPEAKER SAYS, Jan. 5, 2011).<sup>46</sup> The condition of state finances is an area of Congressional concern, with the Senate Banking Committee questioning Federal Reserve Board Chairman Bernanke on the fiscal crisis affecting states "in the

---

<sup>43</sup> Accessed at <http://www.washingtonpost.com/wp-dyn/content/article/2011/01/05/AR2011010505798.html?sid=ST2011010505911>

<sup>44</sup> Accessed at <http://www.reuters.com/article/idUSTRE61A49V20100211>

<sup>45</sup> Accessed at [http://www.washingtonpost.com/wp-dyn/content/article/2011/01/07/AR2011010705834\\_2.html?sid=ST2011010706892](http://www.washingtonpost.com/wp-dyn/content/article/2011/01/07/AR2011010705834_2.html?sid=ST2011010706892)

<sup>46</sup> Accessed at <http://www.latimes.com/news/local/la-me-state-budget-20110109,0,549540.story>

wake of recent projections ... that state and local fiscal crises could result in defaults on hundreds of billions of dollars of municipal bonds.” See Brams Decl., at ¶ 55, Exhibit 55 (*The Bond Buyer*, SENATORS SEEK WAYS TO ASSIST FAILED STATES, Jan. 10, 2001).<sup>47</sup>

New Jersey’s financial and economic conditions have reflected the worst of this trend. See Brams Decl., at ¶ 56, Exhibit 56 (*Pew Center on the States, BEYOND CALIFORNIA: STATES IN FISCAL PERIL* (Nov. 2009), at 6-7 (New Jersey’s fiscal crisis derives from “revenues and expenditures [being] out of alignment” and the State “putting off tough decisions”); see also Sidamon-Eristoff Decl., ¶ 6, Exhibit 4 (State of New Jersey, FY2011 Budget in Brief), at 18. New Jersey’s per capita budget deficit is the largest in the nation. New Jersey’s projected state budget deficit at the outset of FY2011 was \$10.7 billion, representing 36% of the previous fiscal year’s Adjusted Budget. *Id.* at 18; Sidamon-Eristoff Decl., at ¶ 7. Nationally, the average deficit was 17%. *Id.*; Sidamon-Eristoff Decl., at ¶ 10. Only 2 states faced higher shortfalls as a percentage of the overall budget, and New Jersey’s budget gap *per taxpayer* was the largest in the nation by a wide margin. Sidamon-Eristoff Decl., ¶ 6, Exhibit 4 (State of New Jersey, FY2011 Budget in Brief), at 18; Sidamon-Eristoff Decl., at ¶ 10. This FY2011 shortfall presented “perhaps the most challenging budget in [the State’s] history,” Sidamon-Eristoff Decl., ¶ 6, Exhibit 4 (State of New Jersey, FY2011 Budget in Brief), at 1, and forced New Jersey to defer its \$3 billion pension contribution and to reduce school aid by \$1.7 billion, municipal aid by \$334 million, and higher education assistance by \$178 million to meet the State Constitutional requirement for a balanced budget. Sidamon-Eristoff Decl., at ¶ 9; N.J. CONST. (1947), Art. VIII, § 2, ¶ 2. New Jersey faced an \$8.25 billion budget shortfall at the outset of

---

<sup>47</sup> Accessed at [http://www.bondbuyer.com/issues/120\\_6/-1021925-1.html?ET=bondbuyer:e2713:2205636a:&st=email&utm\\_source=editorial&utm\\_medium=email&utm\\_campaign=BB\\_Daily\\_Briefing\\_010711](http://www.bondbuyer.com/issues/120_6/-1021925-1.html?ET=bondbuyer:e2713:2205636a:&st=email&utm_source=editorial&utm_medium=email&utm_campaign=BB_Daily_Briefing_010711).

FY2010,<sup>48</sup> and a \$10.47 billion deficit has been projected for FY2012. *See* Brams Decl., at ¶ 49, Exhibit 49 (Center on Budget and Policy Priorities, STATES CONTINUE TO FEEL THE RECESSION’S IMPACT), at 5.

New Jersey has faced these extensive structural deficits despite having, at 11.8% of income, the highest state and local tax burden in the country. *See* Brams Decl., at ¶ 58, Exhibit 58 (*Tax Foundation, THE FACTS ON NEW JERSEY’S TAX CLIMATE*), at 1;<sup>49</sup> Sidamon-Eristoff Decl., at ¶ 10. New Jersey has had one of the five largest aggregate debt burdens of any state. Sidamon-Eristoff Decl., at ¶ 12. “In all categories measuring states’ debt burdens – whether the comparison is per capita or in total – New Jersey is in the top five.” *See* Sidamon-Eristoff Decl., ¶ 6, Exhibit 4 (State of New Jersey, FY2011 Budget in Brief), at 19.<sup>50</sup>

The State’s budget deficit and unfunded debt burden have materially impacted New Jersey’s credit rating. In September 2010, Moody’s Rating Agency revised its credit outlook for New Jersey to “negative,” affecting the ratings of 18 New Jersey bond programs including TTF bonds.<sup>51</sup> *See* Sidamon-Eristoff Decl., at ¶ 14, Exhibit 11 (Moody’s Rating Report, Sep. 22, 2010), at 4 (emphasis added). Moody’s stated that “[t]he assignment of a negative outlook reflects our belief that the state will be challenged to fund its structural budget gap, particularly in light of its failure to fund pension contributions in the 2010 and 2011 budgets and the expiration of federal stimulus funding in fiscal

---

<sup>48</sup> In addition, due to lower than expected revenue collections, New Jersey had to confront an additional mid-year budget gap of \$2.2 billion. Sidamon-Eristoff Decl., at ¶ 6. This brought the budget deficit for FY2010 to \$10.65 billion, approaching 40% of the state’s budget. On February 11, 2010, Governor Christie declared a state of fiscal emergency to address the additional gap. *See* Sidamon-Eristoff Decl., ¶ 6, Exhibit 3 (Executive Order No. 14).

<sup>49</sup> <http://www.taxfoundation.org/research/topic/44.html>

<sup>50</sup> New Jersey’s tax-supported debt was \$33.8 billion, ranking 3rd nationally in total net tax-supported debt and 4th in net tax-supported debt per capita. *See* Sidamon-Eristoff Decl., ¶ 6, Exhibit 4 (State of New Jersey, FY2011 Budget in Brief), at 33; Sidamon-Eristoff Decl., at ¶ 12.

<sup>51</sup> Moody’s rates New Jersey’s outstanding general obligation and appropriation debt Aa2. TTF bonds are rated one increment worse, at Aa3. All have a negative outlook. *See* Sidamon-Eristoff Decl., at ¶ 14, Exhibit 11 (Moody’s Rating Report, Sep. 22, 2010), at 4.

2012 as well as our expectation that New Jersey’s economic recovery will be slow.” *Id.* at 1. As Moody’s concluded, “[t]he state’s fiscal operations continue to weaken reflecting both long standing issues such as underfunded pension and retiree health benefit obligations and year-over-year revenue declines and expenditure pressures, in large measure, reflecting the recent economic downturn.”<sup>52</sup> *Id.* at 2.

New Jersey’s fiscal condition and constraints were and remain such that New Jersey lacked any reasonable sources or means of funding and could not assume responsibility, or demonstrate the financial capacity for the cost increases in the FTA’s multi-billion dollar re-estimates or the \$11.7 billion plus amount referenced above. Sidamon-Eristoff Decl., at ¶ 23. To continue performance of the ARC project, given FTA’s dramatic cost increases, would have been fiscally and financially irresponsible for the State and NJ Transit. Sidamon-Eristoff Decl. ¶ 23; Weinstein Decl. ¶ 10.

As a result, given the magnitude of FTA’s re-estimate and the unprecedented fiscal and economic crisis facing New Jersey – both factors beyond NJ Transit’s control – the project could not proceed.

- **FTA Raised Serious Concerns About the Local Capacity to Deliver the Project at \$8.7 Billion**

In assessing the local financial capacity to deliver the project based on NJ Transit’s financial plan, FTA itself expressed serious concern about the ability to fund the project at \$8.7 billion, cover cost increases, and maintain state of good repair on the existing system. *See* Weinstein Decl., at ¶ 15, Exhibit 3 (FTA May 2009 Financial Capacity Assessment), at 5, 23 (even at \$8.7 billion, “NJT [was]

---

<sup>52</sup> These conclusions are consistent with those of the other major rating agencies. As noted in Standard & Poor’s (“S&P”) September 2010 report, any positive aspects of New Jersey’s economy are offset by an “above-average debt burden . . . and a large unfunded pension liability,” which S&P refers to as a “credit weakness.” *See* Sidamon-Eristoff Decl., at ¶ 15, Exhibit 12 (S&P Report), at 1-2. Fitch Rating Agency also reports that the state’s historic economic strengths are offset by a “high debt burden and a multitude of spending pressures, including continuing capital needs, as well as significant unfunded pension and employee benefits obligations.” *See* Sidamon-Eristoff Decl., at ¶ 15, Exhibit 13 (Fitch Report), at 1.

at risk of not having the financial capacity to implement the Project, sustain current operations, and maintain a state of good repair” and “NJT does not appear to have sufficient financial capacity to accommodate ARC Project cost increases or funding shortfalls”); *see id.* at 13 (“[i]t is unclear if any residual financial capacity exists among the Project’s funding partners to fund cost increases”) (emphasis in original). The DOT Inspector General (“IG”) reached similar conclusions. *See* Brams Decl., at ¶ 40, Exhibit 40 (OIG Report), at 11 (stating that the “long term availability of local funding is ... uncertain” at the \$8.7 billion level and noting that “FTA had concerns about the Port Authority’s and [NJ] Turnpike Authority’s capacity to provide promised funding . . . .”). Under these circumstances, it is simply not reasonable for FTA to contend that NJ Transit and its local funding partners could take on billions of dollars in additional costs above the \$8.7 billion.

FTA’s concern was based on the local funding partners’ lack of any available sources or means to cover funding shortfalls or cost increases. NJ Transit’s financial plan included a \$3 billion commitment from the Port Authority and a \$2.7 billion commitment from the State, which consisted of \$1.25 billion in toll revenue from the New Jersey Turnpike Authority (“NJTA”) with the remainder in CMAQ funds. *See* Brams Decl., at ¶ 45, Exhibit 45 (Letter from Gov. Christie to Sec. LaHood dated April 6, 2010), at 1; Brams Decl., at ¶ 78, Exhibit 78, at 8; Silber Decl., at ¶ 17, Exhibit 17 (FTA Annual Report on New Starts for FY2011, Appendix A), at A-84.<sup>53</sup> Notably, NJ Transit’s financial plan did not include any significant funding (relative to the ARC project’s total cost) from the New Jersey Transportation Trust Fund (“TTF”), the State’s and NJ Transit’s primary means for funding transportation capital projects, as the TTF did not have the available funding

---

<sup>53</sup> The financial plan also included the \$130 million in ARRA funds awarded to NJ Transit. *See* Silber Decl., at ¶ 17, Exhibit 17 (Annual Report on New Starts for FY2011), at A-84.

capacity.<sup>54</sup> The TTF was identified as the primary source for covering cost overruns, as well as providing short term cash flow to the project. *See* Weinstein Decl., at ¶ 15, Exhibit 3 (FTA Financial Capacity Assessment), at 13; Brams Decl., at ¶ 78, Exhibit 78 (NJ Transit Financial Plan), at 16-17.

As FTA concluded, none of these sources had available capacity to cover significant cost increases. The CMAQ funds available for the project are essentially fixed in amount.<sup>55</sup> *See* Brams Decl., at ¶ 78, Exhibit 78 (NJ Transit Financial Plan), at 9-10; Weinstein Decl., at ¶ 15, Exhibit 3 (FTA Financial Capacity Assessment), at 13-14. The NJTA and Port Authority had not firmly committed to assume any further cost increases.<sup>56</sup> Exhibit 3 (FTA Financial Capacity Assessment), at 16, 22. Due to economic conditions, both faced substantial challenges in fulfilling their combined \$4.25 billion commitment to the Project and lacked any means to fund beyond that amount.<sup>57</sup> *See* Brams Decl., at ¶ 40, Exhibit 40 (OIG Report) at 12 (“FTA had concerns about the Port Authority’s and Turnpike Authority’s capacity to provide promised funding, totaling \$4.25 billion, and delayed the financial capacity assessment for these funding sources.”); *see also* Brams Decl., ¶ 79, Exhibit 79 (Port Authority FY2011 Budget), at 5 (describing the impact of the “sharp economic decline” on the

---

<sup>54</sup> The TTF is responsible for funding the capital programs of the New Jersey Department of Transportation (“NJDOT”) and NJ Transit, as well as the State’s contribution to municipal transportation budgets. Weinstein Decl. at ¶ 19.

<sup>55</sup> In establishing the reliability of the federal formula funds in its financial plan, NJ Transit had to demonstrate future availability based on the anticipated growth in such funds. *See* Brams Decl., at ¶ 78, Exhibit 78 (NJ Transit Financial Plan), at 9-10.

<sup>56</sup> The March 2009 General Project Agreement between the Port Authority and NJ Transit states only that “[s]hould THE Tunnel Project’s cost exceed [\$8,765,850,000] or should the parties secure less than [\$3,000,000,000] from FTA Section 5309 New Starts funds, both parties shall agree to work together in good faith to secure additional funding sources for THE Tunnel Project.” *See* Brams Decl., at ¶ 46, Exhibit 46 (PA General Project Agreement), at 46. As FTA and the IG emphasized, this was not a specific commitment and provided no assurance of additional funding. *See e.g.*, Brams Decl., at ¶ 40, Exhibit 40 (OIG Report), at 13.

<sup>57</sup> The toll revenue was provided as part of a complete package of highway toll increases negotiated with NJTA. *See* Weinstein Decl., at ¶ 15, Exhibit 3 (FTA May 2009 Financial Capacity Assessment), at 12. The Port Authority’s legal authorization was for \$1 billion, which was then “subject to . . . an increase of up to a total aggregate amount of \$2 billion as the Project’s financing plan evolves during the approval process.” *See* Brams Decl., at ¶ 47, Exhibit 47 (Port Authority April 6, 2010 Letter), at 2. On April 6, 2010, the Port Authority provided Secretary LaHood with its full \$3 billion “firm commitment” to the ARC project. *Id.* at 1.

Port Authority's financial condition, including "declining revenue due to falling activity levels at our bridges and tunnels, airports, PATH rail, and port terminals... increasing debt service...[and] lower financial income"); Brams Decl., ¶ 80, Exhibit 80 (Tale of Two Financial Reports for the Turnpike Authority), at 1 (the Authority's net assets are negative \$72 million, and when "liability due to the retirees' health care benefit plan of \$983 million... is taken into account, the Authority had negative financial condition of almost a billion dollars).<sup>58</sup>

Most importantly, the TTF -- both "the lynchpin of NJ Transit's capital funding" and the funding source for cost-overruns -- also lacked additional funding capacity for significant overruns on the ARC Project. *See* Weinstein Decl., at ¶ 15, Exhibit 3 (FTA Financial Capacity Assessment, May 2009), at 6, 22. Beginning in mid-2011, all TTF revenues will be "fully programmed to cover current and authorized debt service through fiscal year 2028," leaving "no funds for ARC and other capital projects that are dependent on future allocations from the TTF." *See* Silber Decl., at ¶ 16, Exhibit 14 (FTA Letter Approving ESWA), at 2; *see also* Brams Decl., at ¶ 48, Exhibit 48 (*Regional Plan Association, SPIRAL OF DEBT: THE UNSUSTAINABLE STRUCTURE OF NEW JERSEY'S TRANSPORTATION TRUST FUND*), AT 6. Specifically, while annual revenues dedicated to the TTF are approximately \$883 million, outlays from TTF are \$2.2 billion per year, with the gap funded through the issuance of debt. Brams Decl., at ¶ 48, Exhibit 48. As a result, the TTF's debt load exceeds \$11 billion, and all revenues are now needed to service that debt. *Id.* at 9.

FTA expressed serious concern about the TTF's ability to support even NJ Transit's current capital budget, let alone extraordinary cost increases on the ARC project. Given the amount of funding required for debt service, FTA determined that even "[s]ustaining the current level of expenditures ... into the future would require at least an 80 percent increase in annual

---

<sup>58</sup>Accessed at <http://newjersey.statebudgetwatch.org/2010/12/30/the-theses-of-two-financial-reports-for-turnpike-authority/>

appropriations for the next six years alone – an unprecedented increase.” *See* Weinstein Decl., at ¶ 15, Exhibit 3 (FTA Financial Capacity Assessment, May 2009), at 22.

NJ Transit is also facing severe financial pressures in its operating budget. Confronted with a \$300 million funding gap entering FY2011, NJ Transit had to implement a 22% fare increase in 2010 -- the largest since 1981 -- and extensive service reductions. *See* Weinstein Decl., at ¶¶ 30, 32. Even with the fare increase, NJ Transit’s FY2011 operating budget could not even keep pace with inflation. *Id.* at ¶ 33. As noted, FTA’s assessment expressed serious concern that NJ Transit would be “at risk of not having the financial capacity to implement the Project, sustain current operations, and maintain a state of good repair” in the event of any significant overruns beyond \$8.7 billion. *See* Weinstein Decl., at ¶ 15, Exhibit 3 (FTA Financial Capacity Assessment), May 2009, at 56.

**iii. In Light Of The Fiscal And Economic Crisis, DOT’s And FTA’s October 2010 Proposals To Provide Financial Assistance Were Inadequate**

The October 2010 final proposals by DOT and FTA to provide limited additional financial assistance were insufficient. DOT’s offer to extend a Railroad Rehabilitation and Improvement Financing (“RRIF”) loan for a portion of the project cost would have to be repaid with interest. *See* Weinstein Decl., at ¶ 10, Exhibit 2 (ARC Executive Steering Committee Report), at 3. As NJ Transit and New Jersey have no available revenue sources to make those payments, the loan would add significantly to the State’s very substantial unfunded debt burden and exacerbate a primary source of its “negative” credit outlook. This would only place the State into deeper debt, and does not solve, but instead worsens the fundamental economic and fiscal crisis facing the State. *See* Sidamon-Eristoff Decl., ¶ 11-12.

Similarly, FTA’s offer to commit an additional \$378 million in New Starts funds, *see infra* at Part II.A.iv, matched by proportionate contributions from NJ Transit and the Port Authority, would fund only to the low end October 2010 re-estimate, for which there is a 90% likelihood that the

project cost would exceed that amount.<sup>59</sup> See Weinstein Decl., at ¶ 10, Exhibit 2 (ARC Executive Steering Committee Report), at 3. An additional \$378 million in New Starts funds was not sufficient to address a multi-billion dollar cost increase.

Finally, DOT's proposal to secure a Public Private Partnership for some element of the project "would take a significant amount of time to develop and implement ... [with] no guarantee it would be at an acceptable price or on acceptable terms" and with "New Jerseyans...responsible in some fashion for the costs to pay for it." See Brams Decl., at ¶ 59, Exhibit 59 (*Transportation Nation, SO YOU'RE THINKING OF STARTING AN INFRASTRUCTURE BANK*, Dec. 8, 2010) (quoting Pennsylvania Governor Ed Rendell, a leading proponent of infrastructure investment and public private partnerships, as stating that the "last-minute attempt ... to weld together a public-private partnership to take on the risk of cost overruns" on the ARC Project "was a noble idea, but one that's nearly impossible to pull off").

Accordingly, the final proposals by DOT were simply insufficient in light of the magnitude of the cost increase and the fundamentals of the State's fiscal and economic condition.

#### **iv. FTA Acknowledged That The Project Was Halted For Reasons Beyond NJ Transit's Control**

In offering additional New Starts funds for the ARC project as described above, FTA acknowledged that the cost increase was beyond NJ Transit's control. Pursuant to FTA Guidance:

FTA will entertain requests for higher levels of New Starts funding when, during final design but prior to execution of the FFGA, FTA determines that the increase in costs is beyond the grantee's control. ... FTA will decide on a case by case basis whether these circumstances apply to a given project and what dollar amount is attributable to these occurrences. FTA would participate in these cost increases proportionate to the previously agreed to percentage share between FTA and the project sponsor.<sup>60</sup> [Emphasis added.]

---

<sup>59</sup> This does not include the \$775 million required to reconstruct Portal Bridge South as a condition of the Project or funds to cover a CAPRA contingency fund requirement.

<sup>60</sup> This policy was reiterated in FTA's Major Capital Investment Proposed Rule, 72 Fed. Reg. 43328, 43366 (Aug. 3, 2007), which provides that "FTA and the project sponsor have agreed on the final New Starts program funding amount

Brams Decl., at ¶ 28, Exhibit 28 (FTA 2006 Final Guidance on New Starts Policies and Procedures), at 9. Through its response, in which it offered an additional \$378 million in New Starts funds, and pursuant to its guidance, FTA has acknowledged that the cost increases at issue here were “beyond the grantee’s control.”

**B. FTA’s Decision in the Final Phase of the New Starts Process to Change Its Assumptions and Conclusions Regarding Project Cost and Risk, Without Commensurate Changes in the Project Itself, Was Beyond NJ Transit’s Control**

**i. NJ Transit Relied on the FTA-Approved \$8.7 Billion Estimate**

NJ Transit proceeded reasonably and in good faith based on FTA’s January 2009 \$8.7 billion estimate, which was finalized as a condition of approving the ARC project into Final Design. Under the New Starts program, FTA approved the ARC Project into Final Design only after determining – based on the risk assessment – that the project’s scope and cost estimate were sufficiently firm and reliable. *See* Silber Decl., ¶ 6, Exhibit 2 (FTA Jan. 27, 2009 Letter Approving Entry into Final Design), at 3. NJ Transit entered into the ESWAs based on this Baseline Cost Estimate, *see* Silber Decl., at ¶ 16, Exhibit 14, and Brams Decl., at ¶ 41, Exhibit 41 (Letters Granting Amended ESWA), and would not have done so had it been known that FTA would dramatically re-estimate the project’s costs. *See* Silber Decl., at ¶ 54; Weinstein Decl., at ¶ 9.

The January 2009 cost estimate was conducted over six months and six workshops with senior NJ Transit and FTA officials. This risk assessment process identified known and potential project risks based on detailed consideration of: (a) factors specific to the ARC Project, and (b) FTA’s experience and lessons learned from other major transit capital projects. *See* Brams Decl., at ¶ 61, Exhibit 61 (FTA Jan. 2009 Risk Assessment), at 1-4; *see* Silber Decl., at ¶ 7. Historical data

---

that generally may not be exceeded in any subsequent Full Funding Grant Agreement. *See* Brams Decl., at ¶ 60, Exhibit 60. FTA will entertain requests for higher levels of New Starts funding when, during final design but prior to execution of the Full Funding Grant Agreement, FTA determines that the increase in costs is beyond the project sponsor’s control.” *Id.* (Emphasis added.)

reflecting FTA's experience with cost, risk and contingency management on major transit projects was used to project scenarios for the ARC Project. *Id.*

Before the risk assessment (leading to the January 2009 cost estimate), the estimate for the Project was \$7.6 billion. Silber Decl., at ¶ 8. The risk assessment resulted in a range of costs reflecting both optimistic and pessimistic risk scenarios. Silber Decl., at ¶ 8. The assessment identified approximately \$2 billion in specific risks. *Id.* FTA concluded that NJ Transit could deliver the project at \$8.7 billion with a high-degree of mitigation such as aggressive cost and schedule controls. *Id.*; see also Brams Decl., at ¶ 62, Exhibit 62 (FTA Contractor Performance Assessment Report, April 2010), at 14. FTA increased the cost from \$7.6 billion to \$8.7 billion by adding significant additional contingency as a cushion for project risks. Silber Decl., at ¶ 8. Total contingency for project risks was \$1.88 billion, or 22% of the project's base cost, and was included in the \$8.7 billion estimate. *Id.*

FTA repeatedly reaffirmed the validity of the January 2009 estimate. FTA is required to review and rate projects annually against New Starts criteria and to report its ratings and funding recommendations to Congress. See 49 U.S.C. 5309(k)(1). In outlining its recommendation for \$200 million in annual appropriations for the ARC project in FY2010 and FY2011, FTA reported to Congress that the \$8.7 billion estimate was "reliable" and "reasonable." Silber Decl., at ¶ 17, Exhibit 16 (FTA Annual Report on New Starts for FY2010) (Feb. 2009), at A-122, A-125; Silber Decl., at ¶ 17, Exhibit 17 (FTA Annual Report on New Starts for FY2011) (Feb. 2010), at A-82, A-85 ("current project cost estimate [of \$8.7 billion] is considered reliable at this stage of development" and "[a]t this stage of project, development, scope and cost are considered reasonable"). The April 2010 amended ESWA reaffirmed the \$8.7 billion estimate. See Brams Decl., at ¶ 41, Exhibit 41 (FTA Letter Granting Amended ESWA).

Other indicia of reliability made proceeding on the basis of the \$8.7 billion estimate reasonable. At the time of the cost estimate, the ARC Project was developed and engineered to a greater extent than the typical project entering into Final Design. *See* Silber Decl., at ¶ 9. The ARC project went through an Extended Preliminary Engineering phase specifically to further refine scope, cost and risk for the risk assessment.<sup>61</sup> *See* Silber Decl., at ¶ 9, Exhibit 5 (FTA Letter Approving Early Preliminary Engineering Scope of Work, March 14, 2008), at 1. Accordingly, the basis for the risk assessment was even more advanced than is typical at that stage, which FTA recognized as providing a basis for more accurate risk assessment. Further, as work on the ARC Project continued to progress in 2009 and 2010, substantial risk areas were mitigated, including a significant amount of the geotechnical risk associated with the underground tunneling and caverns.<sup>62</sup> *See also* Silber Decl., at ¶ 39.

It is an accepted principle in the construction industry that variability in project cost and risk decreases as projects become more advanced in their design development. Silber Decl., at ¶ 11; *see also* Silber Decl., at ¶ 11 n.1, Exhibit 9 (FTA Project and Construction Management Guidelines, 2003), at 54, 56 (“Cost estimation is a process that provides progressively more accurate information ... As a project moves through the engineering and design process, cost increases due to the refinement of design are less likely and, consequently, the contingency is reduced”). FTA materials and guidance -- and other industry experts -- confirm that risk ranges are expected to narrow as projects move forward in the New Starts project development process, for the reason that

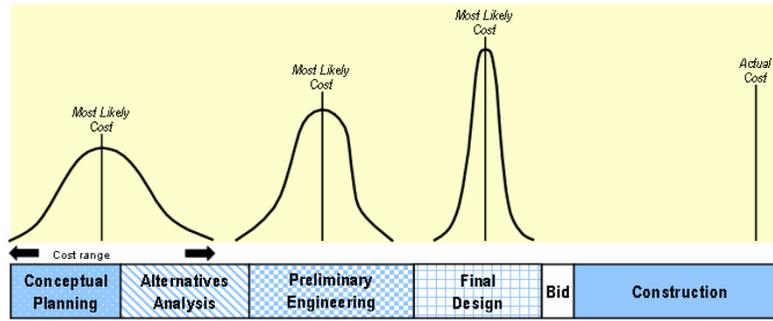
---

<sup>61</sup> *See* Silber Decl., at ¶ 9, Exhibit 5 (FTA Letter Approving Early Preliminary Engineering Scope of Work, March 14, 2008), at 1 (describing the purpose of extended PE “to further solidify the project’s costs” and “assist in the completion of the risk assessment”).

<sup>62</sup> *See* discussion on p.42, *infra*.

uncertainty over project costs typically *decreases* over the normal lifespan of a project.<sup>63</sup> This expected narrowing of risk ranges is depicted in Figure 1 below, taken from FTA.

**Figure 1: Project Cost and Uncertainty Over Time**



Source: FTA Risk Assessment - Newark, NJ Construction Roundtable (2004)

For these reasons, while the final risk assessment during FFGA negotiations is important, it is highly unusual for such an extraordinary cost increase to be identified by FTA at the final stage of the New Starts process, especially in the absence of any significant scope change in the project itself. Weinstein Decl., at ¶ 9; Silber Decl., at ¶ 45. FTA has stressed the importance of conducting risk assessments at earlier stages in the New Starts process, as occurred here, precisely so as to avoid such “undesirable surprises.” See Silber Decl., at ¶ 11, Exhibit 12 (March 25, 2004 Testimony of FTA Administrator on FTA’s Risk Assessment Practice) (“Currently, we are focusing risk assessments on those projects that are further along in project development, but will eventually use this important tool to assist sponsors with projects in preliminary engineering... We know that the

<sup>63</sup> See Brams Decl., at ¶ 64, Exhibit 64 (FTA Risk Assessment - Newark, NJ Construction Roundtable, 2004); Brams Decl., at ¶ 65, Exhibit 65 (Risk Management for New Starts Projects), at 2; see also Silber Decl., at ¶ 11 n.1, Exhibit 8 (FTA 2008 Guidance on New Starts Policies and Procedures), 73 Fed. Reg. 46352, at 46355 (“[C]urrent practice reduces the uncertainty in the capital cost estimate as project development progresses.”).

earlier project sponsors identify and understand...[risks], the better our projects will be, and the fewer undesirable ‘surprises’ communities will face in later stages of development”).<sup>64</sup>

For these reasons, making dramatic revisions to project cost during final FFGA negotiations is not how a heavily regulated, multi-year process with multiple formal “checkpoints” and annual reviews is intended to operate. *See* Silber Decl., at ¶ 16, Exhibit 15 (FTA Memorandum of May 3, 2010 in Response to OIG Draft Report), at 25 (noting that the New Starts process follows “clear steps and specific requirements for projects in the New Starts program to progress from stage to stage of the project development process”). It is contrary to the logic of the phased project development process, which advances projects into successive stages of development for the very reason that their project scope and costs have become more firm. *See, e.g.* Brams Decl., at ¶ 67, Exhibit 67 (FTA Presentation on the New Starts/Small Starts Program, 2008), at 20 (purpose of Preliminary Engineering is to “develop a firm scope and cost estimate with appropriate contingencies” and not to “develop a preliminary cost estimate that likely will increase during final design as project cost is better defined”). Thus, NJ Transit reasonably relied on the FTA-approved January 2009 estimate.

NJ Transit’s due diligence and industry-standard risk management program also supported the expectation that the project cost estimate would remain reasonably stable. *See* Silber Decl., at ¶ 10. Within the risk range established by the 2008 risk assessment, the \$8.7 billion estimate was established based on NJ Transit’s capacity to mitigate project risks. *Id.*; *see also* Brams Decl., at ¶ 62, Exhibit 62 (FTA Contractor Performance Assessment Report, April 2010). NJ Transit’s risk management program followed industry best practices and involved experts from around the world. *Id.* The risk management team held regular meetings at which a range of experts would

---

<sup>64</sup> *See also* Brams Decl., at ¶ 63, Exhibit 63 (GAO, *Use of Contractors is Generally Enhancing Transit Project Oversight*), at “Highlights” (“As part of FTA’s effort to oversee larger, more complex projects, FTA has directed its ... [contractors] to conduct oversight activities earlier in project development, helping identify potential problems earlier”); Silber Decl., at ¶ 11, Exhibit 13 (FTA Project Management Lessons Learned: Early Risk Assessment), at 2 (“By initiating the risk assessment review process early in a project’s development, many benefits are recognized.”).

independently evaluate specific project risks and conduct both qualitative and quantitative analyses as part of an active, ongoing and comprehensive risk identification and management program. *Id.*; *see also* Silber Decl., at ¶ 10, Exhibit 6 (Risk Management Plan – Rev. April 4, 2010), at 19; Silber Decl., at ¶ 10, Exhibit 7 (ARC FFGA Workshop Notes, June 23, 2010), at 5. NJ Transit’s risk management program indicated a continuing ability to mitigate project risks and deliver the project at or near \$8.7 billion. *See* Silber Decl., at ¶ 10.

NJ Transit also properly responded to FTA’s formal project management oversight requirements, timely providing deliverables<sup>65</sup> and participating in a regular schedule of meetings with FTA staff and FTA’s PMOC to fulfill their information requests and oversight needs.<sup>66</sup> *See* Silber Decl., at ¶ 19, 22. Despite these frequent and regular meetings, at no time did FTA give any indication that the baseline cost estimate would be dramatically increased. *See id.* at ¶ 18, 33.

On June 7, 2010, at the American Public Transportation Association’s Rail Conference in Vancouver, FTA Administrator Rogoff stated that the cost of the ARC Project would be between \$9 billion to \$10 billion. *Id.* at ¶ 34. This was the first indication that NJ Transit received from FTA identifying a specific cost increase. Approximately 2 months later, on August 16, 2010, FTA dramatically increased the project cost to between \$10.9 billion and \$13.7 billion. NJ Transit’s receipt of an estimate increase of this magnitude certainly came as surprise to NJ Transit. For the

---

<sup>65</sup> FTA found that NJ Transit’s plans and deliverables were sufficient in approving the project into final design and awarding the ESWAs. *See* Silber Decl., at ¶ 16, Exhibit 14 (FTA Letter Granting Award of ESWA), at 1. NJ Transit subsequently followed the timeline set in FTA’s “roadmap” for providing budget and schedule revisions and finalizing the Project Execution Plan (“PEP”), as required for FFGA negotiations and approval. *See* Silber Decl., at ¶ 16, Exhibit 15 (FTA Memorandum in Response to OIG Draft Report), at 26 (stating that the “deadline for completing ... these documents [i.e., the PEP] is tied to the award of the FFGA”). Reflecting the quality and rigor of NJ Transit’s deliverables, including its diligent effort to supply FTA with a PEP, FTA suggested that the ARC project pioneered several best practices and that FTA “is looking at how to best incorporate some of the tools that are in the ARC project execution plan into standard processes.”

<sup>66</sup> It is important to note that FTA Region II’s return transmittals and communications with the ARC project managers were often delayed, and that FTA Region II expressed concerns about its staff and resources and ability to respond quickly to all requests. *See* Silber Decl., at ¶ 24.

practical reasons described above, NJ Transit personnel had never before experienced such a dramatic cost increase at this late stage in the development process. *See* Weinstein Decl., ¶ 9; Silber Decl., ¶ 45.

**ii. FTA's Processes, Methods, Assumptions and Conclusions in Conducting the Re-Estimate were Beyond NJ Transit's Control.**

FTA was in control of the processes, methods, assumptions and conclusions in making this dramatic re-estimate. *See* Silber Decl., at ¶ 42, 54. The risk assessment process leading to FTA's announcement of the re-estimate was neither collaborative nor transparent. *Id.* at ¶ 36, 40-43; Weinstein Decl., at ¶ 13. NJ Transit was not made aware of FTA's methodology for conducting the re-estimate and, as a result, had no opportunity to provide meaningful input. Silber Decl., at ¶ 36, 40-41. Reflecting its commitment to carrying out the project and its lack of control, NJ Transit strongly disagreed with FTA's re-estimate; attempted to demonstrate that the project could be delivered at or near \$8.7 billion; and even presented its own revised range to account for FTA's concerns with \$9.5 billion as the most likely cost. *See* Brams Decl., at ¶ 68, Exhibit 68 (NJT Final Risk Range);<sup>67</sup> *see also* Silber Decl., at ¶ 37-39, 52, 54. FTA, however, was in control of the re-estimating process, as evidenced by final negotiations taking place based on FTA's final mid-range estimate of \$10.9 billion, plus the contingency for the 50% to 60% probability of exceeding that cost as called for by FTA's re-estimate.<sup>68</sup> Silber Decl., at ¶ 53. With the \$775 million required to construct

---

<sup>67</sup> In light of the FTA's concern that NJ Transit and its funding partners lacked the capacity for "any overruns," even the \$9.5 billion cost would have presented an extraordinary challenge to fund.

<sup>68</sup> *See* discussion on p. 21, *supra*.

the Portal Bridge, final negotiations were based on a \$11.7 billion figure, plus the contingency. *See, generally*, Weinstein Decl.; Silber Decl.

On June 23, 2010, FTA held its risk workshop with NJ Transit in preparation for FTA's risk assessment. *See* Silber Decl., at ¶ 10, Exhibit 7 (FFGA Workshop Notes), at 1-6; *see also* Silber Decl., at ¶ 35. During the workshop, FTA indicated the risk assessment would take the form of a Beta Risk Assessment, a statistical analysis set forth in FTA's Oversight Procedure 40 ("OP 40"). *Id.* It was later revealed on August 16, 2010 that FTA used a second risk assessment approach based on FTA's Oversight Procedure 53 ("OP 53") to arrive at the \$10.9 billion to \$13.7 billion range. *See* Silber Decl., at ¶ 42, Exhibit 4 (FTA Aug. 16, 2010 Risk Assessment Notes), at 1-3; *see also* Silber Decl., at ¶ 36.

The OP 53 methodology was entirely different and involved "lump sum" additions of cost and risk in specific categories as opposed to a statistical analysis. *See* Silber Decl., at ¶ 42, Exhibit 4 (FTA Aug. 16, 2010 Risk Assessment Notes), at 1; *see also* Silber Decl., at ¶ 42. NJ Transit was not invited to, and could not, participate in FTA's re-estimating process as NJ Transit was not even aware of the methodology. *See* Silber Decl., at ¶ 36, 40. Further, during the period from the June 23 risk workshop leading to FTA's August 16 re-estimate, FTA did not provide NJ Transit with any preliminary information as to cost range, trends or even order of magnitude estimates. *Id.* at ¶ 40. After the re-estimate, NJ Transit requested FTA's back up data, which FTA promised to provide, but never did. *Id.* at ¶ 42-43. FTA's re-estimate was thus conducted without any meaningful input from NJ Transit. *Id.* at ¶ 36

Where NJ Transit had the opportunity, it expressed serious concerns about FTA's process and made every attempt to demonstrate that the Project could be delivered at a lower cost – one that it could afford. *Id.* at ¶ 37-40; *see also* Silber Decl., at ¶ 10, Exhibit 7 (FFGA Workshop Notes), at 1-6. NJ Transit responded to FTA's initial list of additions to the project's base cost with over 100

specific disagreements, although FTA did not use this data because it changed its methodology. *See* Silber Decl., at ¶ 40. During the June 23 risk workshop, ARC project staff, senior managers and representatives from the engineering and construction management consulting team also expressed substantial concern about FTA's risk assessment methodologies and attempted to demonstrate why the Project could be delivered at or near \$8.7 billion. *See* Silber Decl., at ¶ 37. NJ Transit explained the significant utility of its ongoing risk mitigation and management program to keep the Project on budget. *See* Silber Decl., at ¶ 38; Silber Decl., at ¶ 10, Exhibit 7 (FFGA Workshop Notes), at 5.

Most significantly, NJ Transit also attempted to demonstrate how several major risk areas had been mitigated, emphasizing for example that the design of the cavern and tunnel work responsible for most of the geotechnical risk had advanced to the point where significant risk was already mitigated.<sup>69</sup> *See* Silber Decl., at ¶ 39; *see also* Silber Decl., at ¶ 10, Exhibit 7 (FFGA Workshop Notes), at 6; Silber Decl., at ¶ 39. In fact, the cavern was 100% designed by August 2010. *See* Silber Decl., at ¶ 39. FTA, which was in control of the re-estimating process and its sharply higher estimate, apparently did not consider this information. *Id.*, at ¶ 42. Consequently, FTA's drastic re-estimate of the project cost was beyond NJ Transit's control.

It was only after the ARC Executive Steering Committee unanimously determined that the project could not proceed at the higher cost that FTA returned with the revised October 2010 cost estimate that became the basis for final negotiations as discussed above. *See also* Weinstein Decl., at ¶ 10, Exhibit 2 (ARC Executive Steering Committee Report of October 26, 2010), at 3.

**iii. The Dramatic Increase in the Estimate Resulted in Significant Part from Changes in FTA's Own Assumptions and Conclusions, Further Demonstrating that the Re-Estimate was Beyond NJ Transit's Control**

---

<sup>69</sup> Other substantial risk areas had been mitigated. For example, market risk due to single bidder premiums for the underground construction contracts was one of FTA's most significant, ongoing concerns. *See* Silber Decl., at ¶ 42, Exhibit 4 (FTA Notes for Meeting with ARC on Risk Assessment, Aug. 16, 2010), at 6. By summer 2010, multiple bidders had been identified for the early tunneling and underground contracts. *See* Silber Decl., at ¶ 39; Silber Decl., at ¶ 10, Exhibit 7 (ARC FFGA Workshop Notes, June 23, 2010), at 6.

There were no significant scope changes to the project subsequent to January 2009 corresponding to FTA's substantially increased cost estimate. *See* Silber Decl., at ¶ 44. While there were some project refinements which added incremental costs,<sup>70</sup> actual scope changes and cost increases on the project -- even if demonstrating cost growth -- were not at all commensurate with the magnitude of FTA's re-estimate. *Id.*

Instead, it appears that a number of FTA's additions of cost and risk were based, not on material changes in the Project itself, but on changes in FTA's own assumptions and conclusions that deviated from its previous risk assessment that resulted in the \$8.7 billion estimate. Silber Decl., at ¶ 46. These changes, which were often made for reasons unrelated to the ARC Project itself, were responsible for significant additional cost that pushed the estimate to the dramatically higher range.

Despite analyzing the same issues and categories in both risk assessments, there are several instances where FTA added additional cost and risk in the subsequent assessment without any corresponding change in NJ Transit's management of the project or the project itself. Silber Decl., at ¶ 47. For example:

- FTA specifically added \$70 million to the base cost in 2008 for real estate risk, in addition to risk covered by the contingency added at the time. *See* Silber Decl., at ¶ 47(a), Exhibit 19 (ARC Final Design Risk Assessment), at 4. In its August 2010 re-estimate, FTA added \$376 million in base cost and \$540 million in risk “as this is an area [i.e., real estate] where most projects have experienced cost increases.” *See* Silber Decl., at ¶ 42, Exhibit 4 (FTA Aug. 16, 2010 ARC Risk Meeting Notes), at 3. Suggesting a lack of basis in the ARC Project for this increase, FTA subsequently reduced the cost and risk for real estate in arriving at its revised and final October 8, 2010 cost estimate. *See* Silber Decl., at ¶ 47.<sup>71</sup>

---

<sup>70</sup> Between January 2009 and August 2010, there were some project refinements which resulted in incremental project cost increases that totaled between \$200 million to \$300 million, such as the addition of a loop track in the New Jersey Meadowlands and other Contractor Change Requests (“CCRs”). However, these changes were absorbed by the project's \$1.8 billion contingency, in keeping with industry practice. *See* Silber Decl., at ¶ 44. Further, these increases were offset by an FTA-approved more favorable project escalation or annual inflation rate, which restores \$270 million to the project's contingency. *Id.*

<sup>71</sup> FTA appears to have added this cost in the first instance despite the general and extensive downturn in the real estate market. *See* Silber Decl., at ¶ 47.

- FTA’s August 2010 re-estimate added significant additional cost for contractor profits, *see* Silber Decl., at ¶ 42, Exhibit 4 (FTA Aug. 16, 2010 ARC Risk Meeting Notes), at 2, while FTA’s 2008 estimate also specifically addressed “contractor contingency and profits” in arriving at the \$8.7 billion estimate. *See* Silber Decl., at ¶ 47(a), Exhibit 19 (ARC Final Design Risk Assessment), at 3. FTA appears to have added this cost despite the protracted downturn in construction activity and increased contractor competition. *See* Silber Decl., at ¶ 47.

In other cases, FTA did not directly change its position but, instead, added cost and risk that it did not include in the previous estimate (but could have), and that it included this time for reasons independent of the ARC Project. For example:

- Based in part on “experience with other projects,” FTA also added \$150 million to the cost as well as \$100 million per year to the risk ranges due to FTA anticipating CCRs. *See* Silber Decl., at ¶ 42, Exhibit 4 (FTA Aug. 16, 2010 ARC Risk Meeting Notes), at 2. FTA was concerned that significant scope changes would occur, although NJ Transit advised FTA it knew of none. *See* Silber Decl., at ¶ 47
- FTA also added \$200 million in “stakeholder risk,” i.e., the risk of stakeholders either adding scope or delaying construction, because those risks materialized in the New York Metropolitan Transportation Authority’s (“MTA”) ongoing megaprojects -- the East Side Access and Second Avenue Subway projects -- but were “not accounted for in their budgets.” *See* Silber Decl., at ¶ 42, Exhibit 4 (FTA Aug. 16, 2010 ARC Risk Meeting Notes), at 2.

Most significantly, the primary basis for FTA’s increased risk ranges (which brought the estimate from \$10.7 billion to \$13.7 billion) was potential schedule delays, which FTA projected in part based on “the two MTA megaproject[s].” *See* Silber Decl., at ¶ 42, Exhibit 4 (FTA Aug. 16, 2010 ARC Risk Meeting Notes), at 3 (“it [is not] likely that your current schedule of 153 months will be me[ ]t because the more relevant comparable projects, includ[ing] the two MTA megaproject[s], [are] in the 180 month range”); *see also* Silber Decl., at ¶ 48. FTA thus determined that the ARC project could take two years longer to complete, and added \$3 billion worth of risk as a result, based significantly on delays FTA was experiencing on the Second Avenue Subway and East Side Access mega-projects. *Id.* Again, this was a factor external to the ARC Project itself, and it also ignored the major differences in the respective projects and the extensive schedule work that had been done on

the ARC Project to mitigate risks. *Id.* In fact, the duration for the major project phases on the ARC Project, such as Preliminary Engineering and Final Design, had been significantly shorter for than for the MTA's East Side Access and Second Avenue Subway. *Id.*

FTA stated explicitly that changes in its estimate reflected FTA's current experience with the other mega-projects in the New York/New Jersey region. *See Silber Decl.*, at ¶ 50. This was also publicly reported:

The new questions over the tunnel's cost come in the wake of reviews by the FTA of other high-profile New York regional transit projects - some well over budget and significantly behind schedule...The federal agency has not yet come up with its projections on the Trans-Hudson Express Tunnel, said [James] Weinstein [Executive Director of NJ Transit]. But following a five-month review, it told the state that "based on experience with other major tunneling-projects in the region, additional contingency factors could impact the project's overall cost estimate."

*See Brams Decl.*, at ¶ 69, Exhibit 69 (*Newark Star Ledger*, NJ HALTS WORK ON NJ-NY TUNNEL DUE TO BUDGET ISSUES, Sep. 12, 2010) (emphasis added); *see also* Brams Decl., at ¶ 70, Exhibit 70 (*New Jersey Business Journal*, WORK STOPPAGE LEADS TO FRETTING OVER TRANS-HUDSON TUNNEL, Sep. 13, 2010).

The cost overruns on the MTA mega-projects were heavily scrutinized. In amending the FFGAs for those projects to reflect the increased costs, FTA Administrator Rogoff informed Congress that "clearly, the news regarding the cost overruns and schedule delays is grim." *See Silber Decl.*, at ¶ 51, Exhibit 21 (Administrator Rogoff Letter, June 18, 2010), at 1. FTA Region II, which was responsible for oversight of both projects as well as the ARC Project, was subject to great scrutiny due to these overruns. *See Silber Decl.*, at ¶ 51. On March 25, 2010, DOT's IG initiated an audit of FTA's oversight of these projects resulting from the cost overruns and schedule delays. Brams Decl., at ¶ 71, Exhibit 71 (OIG Audit Announcement, March 25, 2010).

FTA should take into account experience with other projects in assessing cost and risk, which it did in reaching the \$8.7 billion estimate. *See Silber Decl.*, at ¶ 7. However, FTA's

determination to change its own assumptions and conclusions and add extraordinary cost and risk to the ARC Project, often for reasons independent of the Project, was plainly beyond NJ Transit's control. Silber Decl., at ¶ 54. Further, nor could NJ Transit -- or any applicant -- be said to assume the risk that FTA would change its position in such a manner, in the face of reasonable reliance on its previous estimate, and despite the lack of any compelling change in the project itself.

### **III. EQUITABLE AND POLICY CONSIDERATIONS MANDATE THAT NO REPAYMENT OBLIGATION SHOULD BE IMPOSED ON NJ TRANSIT**

In addition to, and consistent with, the above discussion, fundamental principles of equity and public policy require that FTA's repayment demand be denied. Many of the points raised above, while based in the statute, have strong equitable components. Just as it contravenes the statute, it would be inequitable for New Jersey to be compelled to repay its own formula funds, the state's guaranteed return on the gas taxes it pays to the Federal government. Indeed, it would also be inequitable for New Jersey:

- To repay funds expended before the ESWA was entered into.
- To repay funds expended on preliminary engineering and design when it could have expended those funds absent the ESWA.
- To repay funds when the ESWA did not actually provide any funds, as all of the funds in question were either already spent or appropriated before the ESWA, or were formula funds New Jersey would have received irrespective of the ESWA.
- To repay funds when the project could not go forward for reasons beyond its control.

Further, it would be inequitable to compel NJ Transit to repay funds when NJ Transit and its local funding partners were being asked to take on virtually all of the extraordinary cost increases for a project of significance to the entire "New York/New Jersey region and the northeastern United

States.” *See* Silber Decl., ¶, Exhibit 15 (FTA Memorandum of May 3, 2010 in Response to OIG Draft Report), at 24.<sup>72</sup> In addition, as demonstrated below, it would be inequitable and against public policy to compel NJ Transit to repay any funds when the work completed has enduring value to future projects in this central and vital transportation corridor, and when repaying the funds in question will only force NJ Transit to postpone or cancel other important transportation projects for the State.

**A. THE WORK COMPLETED HAS ENDURING VALUE TO OTHER PROJECTS IN THE SAME CORRIDOR**

Although the ARC project will not proceed, the vast majority of the funds in question were spent on preliminary engineering and design work that will have substantial value to any future trans-Hudson project as well as other projects in the corridor. *See* Weinstein Decl., at ¶ 36. The state and local governments in the metropolitan region continue to recognize the need to increase trans-Hudson capacity. Weinstein Decl., at ¶ 37. Further, the ARC alignment is situated along the existing principal transportation corridor connecting northern New Jersey with Manhattan, and also parallels a critical portion of Amtrak’s Northeast Corridor (“NEC”). Weinstein Decl., at ¶ 38. Given the breadth of the investigation conducted along the ARC alignment, the data will readily attract inquiry and potential use by an alternate means of providing connectivity between New Jersey and Manhattan whether by heavy rail, light rail, or bus. *Id.*

Because the preliminary engineering and design work forms a body of data and knowledge with independent value beyond that of the ARC Project, it has enduring value to a number of potential projects in this corridor and can significantly reduce the cost and time involved in

---

<sup>72</sup> It is also worth emphasizing that entering into the ESWA was something that NJ Transit had to do to keep the project on budget and on schedule. FTA acknowledged that “not granting an ESWA would *definitely have jeopardized* the ability of NJT to keep the project on schedule and within budget” and noted that “FTA’s decision to grant an ESWA to NJT was based on that certainty,” calling the ESWA “a necessary interim step.” *See* Silber Decl., at ¶ 16, Exhibit 15 (FTA Memorandum of May 3, 2010 in Response to OIG Draft Report), at 26.

developing those projects. *Id.* at ¶ 37. The preliminary engineering conducted for the ARC project includes a number of complete data and analytical products such as detailed geotechnical data, utility information, property owner record drawing information, environmental data, aerial topographical surveys, wetland delineations, real estate/right-of-way data, and design data. *Id.* at ¶ 40. This data library offers the potential to significantly minimize the investigatory information, data and study needs of other projects that are built in or near the study area. *Id.* The ARC data can significantly assist planners and engineers in the appropriate review of alternative alignments for future transportation and other projects between New York City and New Jersey. *Id.*

Planners of any future trans-Hudson transit project or other transportation project in this area could make use of base tunneling and other preliminary engineering plans performed for ARC, as these have applicability for tunneling and underground excavation projects in general along and near the ARC study zone. *Id.* at ¶ 41. For instance, the ARC's geotechnical information would reduce the need for another project to undertake the volume of geological studies that otherwise would be necessary for tunneling, underground or deep excavation construction activities. *Id.* The same is true for the other categories of base plans, procedures, data, studies and analyses developed during preliminary engineering, including environmental investigations and property reviews. *Id.*

Indeed, New York Mayor Michael Bloomberg's Office -- in conjunction with a number of other agencies and groups, including major developers of the proposed Hudson Yards area -- is currently exploring the feasibility of using an ARC-like alignment to extend the MTA's No. 7 Subway Line under the Hudson River to Secaucus, N.J. *Id.* at ¶ 43. The ARC project's preliminary engineering data and information, in all its forms, can be of direct value and use to this effort, particularly in informing planners of this proposal of geological, environmental and other conditions and challenges in the area. *Id.* at ¶ 44.

Requests for ARC preliminary engineering data have already been received. *Id.* at ¶ 42. For example, the New York City Department of Transportation has requested ARC topographic, utility and vault survey data along 34th Street in Manhattan, as part of the City's plan to design a transitway to improve bus mobility along the 34th Street corridor. *Id.*

As the work conducted has enduring value to a number of potential projects in this corridor, is currently being used and has the potential to significantly reduce the cost of developing those projects, it would be inequitable and against public policy to force NJ Transit to repay FTA.

**B. FTA'S REPAYMENT DEMAND WILL REQUIRE NJ TRANSIT TO CANCEL \$271 MILLION IN PROJECTS TO RELIEVE CONGESTION AND MAINTAIN THE STATE OF GOOD REPAIR IN THIS CORRIDOR**

NJ Transit properly concluded that it could not go forward with the ARC project because it could not afford it. *See e.g.*, Weinstein Decl., at ¶ 35. However, the future growth in ridership demand that was the basis of the need for the ARC Project remains. *Id.*, at ¶ 47. NJ Transit continues to face a near doubling of ridership demand over the next 20 years. *Id.* at ¶ 48. NJ Transit's capital planning and budgets are structured to address these demands within available resources. *Id.*

A \$271 million payment to FTA would require NJ Transit to postpone or cancel several planned capital program projects and very negatively impact NJ Transit's rolling stock purchases and various other capital projects that comprise critical elements of its annual capital plan to address capital needs and maintain the rail system in a state of good repair. *Id.* at ¶ 49. This is particularly true given NJ Transit's current financial condition. *Id.* at ¶ 25.

FTA's Demand, which significantly constrains NJ Transit's ability to alleviate congestion and serve transit riders in this very corridor, threatens NJ Transit's ability to: (a) purchase new, dual-level rail cars that can carry more passengers and that would increase trans-Hudson rail capacity by approximately 20%; (b) undertake rail improvement and rehabilitation projects to improve the state

of good repair and relieve bottlenecks; and (c) make upgrades to the century-old, swing-span Portal Bridge on the NEC that has repeatedly malfunctioned, resulting in an average delay of 15 minutes and reducing speeds on that portion of the NEC from 90 mph to 60 mph. *Id.* at ¶ 50-54

While NJ Transit cannot afford the ARC Project, forcing it to repay \$271 million will only require NJ Transit to postpone or cancel other vital transportation projects to reduce congestion in the corridor, enhance the condition of critical infrastructure and create needed jobs. *Id.* at ¶54. In short, it will only exacerbate the State’s transportation and economic challenges. Such an outcome is not in the best interests of Federal or State government. Moreover, NJ Transit stands ready to work with FTA to advance positive transportation solutions that will improve the quality of life and create jobs for New Jersey.

Accordingly, in addition to the legal arguments set forth above, equity and policy considerations demonstrate that repayment should not be required.

#### **IV. FTA’S FAILURE TO ALLOW INSPECTION AND COPYING OF ITS RECORDS VIOLATES FTA’S EXPLICIT LEGAL OBLIGATIONS, SEVERELY PREJUDICES NJ TRANSIT AND INVALIDATES ANY ADMINISTRATIVE RULING ADVERSE TO NJ TRANSIT**

NJ Transit has attempted to exercise its right to inspect and copy FTA’s records related to FTA’s Claim, *see, e.g.*, Brams Decl., at ¶ 72, Exhibit 72 (NJ Transit’s Dec. 15, 2010 Letter to FTA), at 2; Brams Decl., at ¶ 73, Exhibit 73 (NJ Transit’s Dec. 23, 2010 Letter to FTA), at 2-3, and, to facilitate the process, has identified specific documents that are illustrative of those to be inspected and copied by NJ Transit.<sup>73</sup> *See* Brams Decl., at ¶ 72, Exhibit 72 (Exhibit A to NJ Transit’s December 15 Letter to FTA); Brams Decl., at ¶ 74, Exhibit 74 (NJ Transit’s Dec. 23, 2010 Additional Records Request Letter to FTA), at 1. In response, FTA stated that “[y]ou have already been given copies of the records and documents on which I based my November 24 demand for

---

<sup>73</sup> One obvious category of relevant records are documents related to FTA’s 2010 cost estimate projections and revisions. For example, FTA informed NJ Transit that it would provide the back-up data related to certain of its 2010 re-estimates but failed to do so. Weinstein Decl. ¶ 13.

repayment of the \$271,101,291 in Federal funding expended by NJT under the ESWA.” *See* Brams Decl., at ¶ 75, Exhibit 75 (Dec. 20, 2010 FTA letter) (emphasis added). In this regard, on December 15, 2010, FTA provided NJ Transit with 8 documents, 7 of which NJ Transit already possessed. *See* Brams Decl., at ¶ 77, Exhibit 77, at 2-3, for a list of the documents contained in the December 15 production.

NJ Transit is not limited to inspecting and copying only those “records and documents on which [FTA] based [its] November 24 demand for repayment.” As noted in FTA’s November 24 letter, at 2, “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.”<sup>74</sup> *See* Brams Decl., at ¶ 1, Exhibit 1. (emphasis added). NJ Transit’s “right to inspect and copy FTA records related to this claim” is expressly confirmed by FTA Order 2060.1A, Internal Procedures for Debt Collection (July 2, 2008), at ¶ 7.b.(2)(c), which provides that the alleged debtor has the “right to inspect and copy FTA records related to the claim.” *See* Brams Decl., at ¶ 2, Exhibit 2. (Emphasis added.) Similarly, 49 C.F.R. § 89.21(e), which applies here, states that “the debtor may inspect and copy the records of the agency related to the claim.”<sup>75</sup> (Emphasis added.)

In a January 11, 2011 letter, FTA provided 27 additional documents, virtually all of which NJ Transit already had in its possession and most of which are publicly available. *See* Brams Decl., at ¶ 77, Exhibit 77. Given that the ARC project was a multi-year, multi-billion dollar undertaking – e.g., FTA approved the start of preliminary engineering in August 2006 -- and that the alleged debt is

---

<sup>74</sup> NJ Transit has previously agreed to pay any reasonable costs of copying and inspection of FTA’s records.

<sup>75</sup> Other statutory and regulatory authority confirms this requirement. *E.g.*, 31 U.S.C. § 3716(a)(2) (Federal agencies may collect debt “by administrative offset only after giving the debtor ... an opportunity to inspect and copy the records of the agency related to the claim”) (emphasis added); 31 C.F.R. § 901.3(b)(4)(ii)(B)(1) (prior to administrative offset, debtor must be provided “[t]he opportunity to inspect and copy agency records related to the debt”) (emphasis added). Further, it is well established that the phrase “related to” is broadly construed. *E.g.*, *Morales v. Trans World Airlines*, 504 U.S. 374, 383 (1992); *Shaw v. Delta Air Lines, Inc.*, 463 U.S. 85, 98 (1983); *Coregis Ins. Co. v. American Health Found.*, 241 F.3d 123, 128-29 (2d Cir. 2001); *Gregory v. Home Insurance Co.*, 876 F.2d 602, 606 (7th Cir. 1989).

\$271 million, it is inconceivable that there would be only about 35 documents and only two internal Government records that constitute FTA's "records related to this claim."<sup>76</sup>

NJ Transit has the right to inspect and copy records in order to facilitate the development and submission of a complete administrative record and to ensure the fair and just resolution of this matter. FTA's failure to comply with its legal obligations concerning NJ Transit's right to inspect and copy FTA's records has, *inter alia*, directly inhibited the achievement of this goal, caused this administrative review process to be unfair and incomplete, and prevented NJ Transit from developing and supporting its arguments because, for example, NJ Transit does not have access to the facts that would explain FTA's actions. Consequently, NJ Transit has been deprived of its due process rights and prejudiced by FTA's failure to allow NJ Transit "to inspect and copy the records related to FTA's claim."

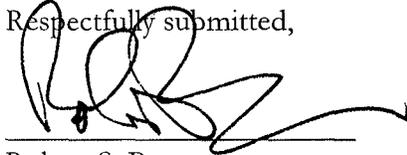
---

<sup>76</sup> FTA's January 11, 2011 letter includes an "Index of Exhibits" for the 35 documents that FTA has provided to NJ Transit. *See* Brams Decl., at ¶ 77, Exhibit 77, at 2-3. This Index and the documents themselves reveal that FTA knew that – with about 2 exceptions -- it was providing documents already in the possession of NJ Transit because the listed documents include correspondence between FTA or DOT and NJ Transit, the ESWA, the ESWA as amended, copies of CMAQ and other grants, NJ Transit Quarterly ARC Progress Reports, FTA Master Agreements, and other publicly available documents. Since there has been, for example, a very large amount of correspondence between FTA and NJ Transit concerning this project over the last five years, it is highly implausible that the "records related to FTA's claim" would only include – aside from publicly available documents plus correspondence between the parties -- two internal Government memoranda.

## CONCLUSION

For the foregoing reasons, NJ Transit respectfully requests that FTA's repayment demand<sup>77</sup> be denied.

Respectfully submitted,



Robert S. Brams  
Michael J. Schaengold  
Jared M. Fleisher  
Patton Boggs LLP  
2550 M Street, NW  
Washington, DC 20037  
(202) 457-5650  
[rbrams@pattonboggs.com](mailto:rbrams@pattonboggs.com)  
[mschaengold@pattonboggs.com](mailto:mschaengold@pattonboggs.com)  
[jfleisher@pattonboggs.com](mailto:jfleisher@pattonboggs.com)

Counsel for  
New Jersey Transit Corporation

January 25, 2011

---

<sup>77</sup> Should FTA erroneously uphold any part of its Demand, FTA is precluded from assessing interest, penalties, or administrative charges on any amounts allegedly owed by NJ Transit. In this regard, Section 5309(g)(3)(iv) states that “[i]f an applicant does not carry out the project for reasons within the control of the applicant, the applicant shall repay all Government payments made under the work agreement plus reasonable interest and penalty charges the Secretary establishes in the agreement.” (Emphasis added.) The ESWAs at issue here do not establish or even reference interest or penalty charges. *See* Brams Decl., at ¶ 7, Exhibit 7 (Aug. 29, 2009 ESWA No. NJ-03-0169-00); Brams Decl., at ¶ 8, Exhibit 8 (April 14, 2010 Amended ESWA, No. NJ-03-0169-01). Moreover, because it is a part of the New Jersey state government, *see* N.J.S.A. 27:25-4(a) (NJ Transit “is hereby constituted as an instrumentality of the State exercising public and essential governmental functions, and the exercise by the [NJ Transit] corporation of the powers conferred by this act shall be deemed and held to be an essential governmental function of the State.”), the Department of Transportation’s own regulations preclude the assessment of interest, late payment penalties, and collection charges and collection by offset against NJ Transit. *See* 49 C.F.R. § 89.3(c).