AMERICAN
PUBLIC
TRANSPORTATION
ASSOCIATION

July 20, 2006

Docket Management Facility
U.S. Department of Transportation
400 Seventh Street, S.W.
Nassif Building, PL-401
Washington, DC 20590-0001

RE: Department of Transportation Docket Number 2006-23985

Dear Docket Clerk:

On behalf of the more than 1,500 member organizations of the American Public Transportation Association (APTA), I write to provide comment on the U.S. Department of Transportation's (DOT) Notice of Proposed Rulemaking (NPRM) concerning Transportation for Individuals with Disabilities, published February 27, 2006, at 71 FR 9761. We respond below to the proposed regulatory changes and will respond separately concerning the eight additional issues described in the Notice.

About APTA

APTA is a non-profit international trade association of more than 1,500 public and private member organizations, including transit systems; planning, design, construction and finance firms; product and service providers; academic institutions; and state associations and departments of transportation. More than ninety percent of Americans who use public transportation are served by APTA member transit systems.

Introduction

The nation's public transit agencies have worked diligently to meet and often exceed the requirements of the Americans with Disabilities Act (ADA) to provide transportation options to persons with disabilities. APTA and its members strongly support the goals of the ADA, but we believe the proposed changes to DOT's ADA regulations violate the principles of federalism embodied in Executive Order 13132 and that adoption of those proposed changes in their current form would have significant negative consequences for the tens of millions of people who use public transportation. These negative consequences would directly result from the proposed rules on reasonable modification and level boarding affecting almost every public transit provider. Additionally, we believe the proposed changes lack adequate definition and may, in fact, exceed DOT's rulemaking authority. Finally, we object to embodiment of the Disability Law Coordinating Council within the DOT ADA regulations.

Transit's Accommodation of Individuals with Disabilities

Public transit agencies have long been in the forefront of providing service to persons with disabilities with many systems achieving full or close to full accessibility even before passage of the ADA. Transit agencies routinely partner with their riders with disabilities to design transit and paratransit systems that reflect the needs and priorities of the community, often providing service far beyond the requirements of the ADA where it is practical and desirable.

Examples of the supportive relationship and community-driven enhancements are legion. Palm Beach County's (PalmTran) Connection service invites riders to meetings with its contract service providers, equipment demonstrations, and other transportation meetings, then uses rider feedback to continuously improve its paratransit service. Riders and representatives of the area's disability community are formally integrated into the San Mateo County Transportation District's (SamTrans) paratransit vehicle design and selection processes. ACCESS in Pittsburgh provides tens of thousands of paratransit trips exceeding ADA requirements and has pioneered model eligibility programs. Seattle was one of the first systems in the country to pursue a full accessibility policy for its fixed route services. New Jersey Transit pioneered collaborative paratransit eligibility processes, working with local service agencies to provide 100% in-person assessments. Fixed route service and vehicle operated by the Lane Transit District in Eugene, Oregon, were fully accessible *seven years* prior to the enactment of the ADA.

With passage of the Safe, Accountable, Flexible, Efficient Transportation Equity Act – A Legacy for Users (SAFETEA-LU) and the advent of the New Freedom program (providing for new service enhancements and improvements beyond those required by the ADA), communities will be better equipped to provide enhanced transportation services to riders with disabilities without detracting from existing accessible services. One of the most important aspects will be the continued ability of transit providers to tailor these enhancements, often beyond the scope of ADA paratransit, to the needs and desires of their riders. In lieu of blanket requirements that fundamentally and adversely impact our transit systems and passengers, DOT should provide leadership to foster freedom, choice, mobility, and independence for persons with disabilities by encouraging transit agencies and the disability community to continue to work together to pursue those goals for the benefit of all riders and by supporting the New Freedom program.

The Proposed Regulatory Changes Violate the Principles of Federalism Embodied in Executive Order 13132

In acknowledging its duties under Executive Order 13132 (EO 13132) in the Regulatory Analyses and Notices section of the NPRM, DOT asserts "[t]hese proposals do not represent significant departures from existing regulations and policy and are not expected to have noteworthy cost impacts on regulated parties." As discussed throughout these comments and in comments submitted by others such as the Coalition of Public Transit Operators,[1] aspects of the proposed regulatory changes carry such substantial

[1] Designated as item 115 in the docket.

additional cost burdens and programmatic revisions that to implement them without performing a Federalism Assessment would contravene EO 13132. The proposed changes to paratransit and level boarding requirements each amount to significant financial burdens that fail to comply with Section 6 of EO13132. In the following paragraphs, we explain our analysis of the requirements of EO 13132 and the ways in which the proposed regulatory changes violate those requirements.

The proposed regulatory changes clearly have federalism implication. That these issues are "most appropriately addressed by the level of government closest to the people" is self evident in the repeated public statements of responsible DOT officials throughout the history of its rulemaking under the Americans with Disabilities Act (ADA). From the earliest DOT publications dealing with the concept of origin-to-destination service until the unprecedented DOT guidance issued September 1, 2005, the decision of whether to offer door-to-door or curb-to-curb service has been "exactly the sort of detailed operational decision best left to the development of paratransit plans at the local level.[2]" In the 15 years that DOT deferred to this interpretation and application of the regulation by the Federal Transit Administration, the transit industry has been consistently told that the "exact location of pick-up and drop-off sites are an operational issue not governed by the regulations.[3]" For rail operations, FTA guidance has consistently recognized that station design is a local matter and that "every transit system in the U.S. is different.[4]"

The proposed regulatory changes have substantial direct compliance costs. The proposed requirement to provide door-to-door service, as explained below, could make it extremely difficult for a transit agency to efficiently combine paratransit trips, leading to greatly expanded vehicle inventories and a need for many more drivers to operate those vehicles. The proposed requirements for full length level boarding of commuter rail vehicles will require similarly expensive modifications to stations across the nation and, quite possibly, significant alterations of schedules to account for increased dwell time in stations.

The proposed regulatory changes are not required by statute. Existing practices in paratransit services and commuter rail boarding have been in place for the entire life of the ADA and the DOT program. To proclaim, after 15 years of acceptance of the practices of transit agencies carefully overseen by the FTA, that the statute requires these modifications is beyond reason and undermines the partnerships and good working relationships that have developed at the local level and provide millions of persons with disabilities transit accessibility, often beyond the level of service required by the ADA. In addition, the level boarding requirements of this NPRM are beyond the clear intent of the ADA, as demonstrated in House Report 101-485. In that report, recognizing the inherent problems of shared passenger/freight rail use, the Committee specifically stated it was *not* their intention to require track modifications and recognized that mini-high platforms, ramps, and lift devices were acceptable means of working with the low platforms required for freight

[2] 56 FR 45604, September 6, 1991.
[3] FTA's January 31, 2001 response to complaint No. 00-0263.
[4] FTA Office of Civil Rights Bulletin, Rail Station Platform Requirements, July 15, 2004.

operations. An extensive explanation of this legislative history is included in the comments submitted by the Southern California Regional Rail Authority (Metrolink).[5]

The proposed regulatory changes are unfunded. DOT has neither sought nor obtained additional funding to implement these changes, relying instead on its mistaken assertion that the changes carried no significant cost.

DOT has neither consulted with state and local officials nor produced a federalism summary impact statement. This much is evident from the *Federal Register* notice itself.

As such, the proposed regulatory changes contravene EO 13132 and should be withdrawn until such time as DOT can and does comply with EO 13132.

DOT's Proposed Addition of the Concept of Reasonable Modification to Its ADA Regulations

APTA believes that although the concept of reasonable modification is laudable, the manner in which DOT seeks to address it is flawed. DOT should acknowledge that the concept of additional reasonable modification, beyond the accommodations prescribed in the current DOT regulations, represents a significant change from the historical requirements under the ADA as interpreted by DOT in its regulations and practices; that transit agencies already accomplish necessary or appropriate alterations of their service through local processes with FTA oversight; that full, immediate implementation by transit providers would be cost-prohibitive; and that a well-reasoned, properly funded approach based on the consensus views of transit providers and their paratransit riders would lead to better service for those riders. Moreover, we believe that Congress, with the enactment of the New Freedom program, has created a statutory answer that will provide a more diversified service that ultimately could allow implementation of reasonable modifications and other enhancements where appropriate.

A Significant Change

This proposal represents a substantial change in long established paratransit practices. Although DOT expresses a belief that the Department of Justice (DOJ) regulations and their requirement for reasonable modification always applied to transit, that assertion is hardly persuasive. It is difficult to understand how DOT could have "assumed that §37.21(c) would incorporate the DOJ provisions" when those very provisions clearly state "[t]o the extent that public transportation services, programs, and activities of public entities are covered by subtitle B of Title II of the ADA (42 USC 12141) they are not subject to the requirements of this part.[6]" Further, the NPRM omits the important third sentence of DOT's own rule in 49 CFR 37.21: "In any case of apparent inconsistency, the provisions of this part shall prevail." 49 CFR Part 37 contains no mention of reasonable modification.

[5] Designated as item 73 in the docket.
[6] 28 CFR 35.102(b).

DOT also relies on *Burkhart v. Washington Area Metropolitan Transit Authority*[7] in support of this assertion. The *Burkhart* court, in fact, declined to address the transit agency's assertion that Part A, Title II of the ADA does not apply to transit providers covered by Part B since the challenge was not properly preserved for appeal. Even accepting, *arguendo*, that the *Burkhart* decision supports the DOT position, that decision was not rendered until six years after the ADA regulations were promulgated. DOT made no effort to apply the DOJ rules to public transit operations at any time during those six years. DOT continued to remain silent on the subject thereafter, although the *Burkhart* case put DOT on clear notice that their assumption was not shared by the regulated community.

It was, in fact, *Melton v. Dallas Area Rapid Transit (DART)*[8] that actually considered the issue after appropriate briefing and argument. The *Melton* court found it undisputed that DART was exempt from the DOJ regulations finding, *inter alia*, that paratransit services are, in and of themselves, a reasonable modification.

Most telling is the fact that FTA reviewed and approved the paratransit plan at issue in the *Melton* case as it has so many others that never provided for reasonable modification, as defined by DOT in the NPRM, as a departure from the plan. Undoubtedly, the DOT proposal to graft reasonable modification onto the DOT regulations is a significant change from long established practice.

Perhaps the single most telling indicator that the proposed regulatory changes are significant is the fact that, in the 15 years of ADA-influenced public transit, this proposed rulemaking and the proclamations of the Disability Law Coordinating Council embodied in its September 2005 guidance represent the first time DOT has elected to directly act on these matters rather than defer to FTA. For 15 years FTA, not DOT, has provided definitive interpretations, through FTA bulletins, question and answer postings, compliance reviews, and letters of findings, none of which even hinted at an additional requirement to provide extra reasonable modification as demanded by the proposed regulation.

The cost of compliance

Implementation of this proposed regulatory change promises to be *per se* unduly burdensome and a fundamental change to virtually every paratransit service in the nation. The notice suggests that reasonable modification would be required under three distinct sets of circumstances that make door-to-door service desirable, permanent circumstances, such as a rider's condition; temporary circumstances, such as construction activities; and where daily variables such as weather conditions make door-to-door service desirable.

Current paratransit practices rely heavily on shared trips to somewhat alleviate the significant costs (in 2003 alone, transit agencies spent $2.36 billion – far more than recorded in the National Transit Database and 8.8% of their operating budgets – on paratransit services for 110.8 million rides)[9] associated with these programs. A door-to-door service

[7] 112 F.3d 1207 (DC Cir. 1997)
[8] 391 F.3d 691 (5th Cir. 2004), cert. denied, 125 S.Ct. 2273 (2005)
[9] APTA reported this figure in the *Public Transportation Fact Book*, The figure accounts for those agencies not required to provide data for the National Transit Database.

requirement necessitates deviation from this practice, since it could be inherently unsafe to leave some passengers in a running vehicle without the operator present, even if the operator were only away for a brief period. The alternative to single trips for riders with certain disabilities requiring door-to-door service, adding an attendant to the paratransit vehicle, would significantly increase the most expensive aspect of paratransit service. In the NPRM, DOT implies a belief that it is *not* inherently unsafe for operators to leave their vehicles for short periods but that belief unreasonably discounts the improbability of accurately determining which riders may or may not be left unattended in a running vehicle.

The proposed rule changes could have implications for every trip, even if the trip did not include a rider whose disability required door-to-door service at every location he or she visits. Dispatchers would have to gather substantial information concerning thousands of destinations to determine if a particular rider, able to navigate to and from the curb at his or her home, would be able to do so at the other end of his trip. In many cases, even the rider will not have this information.

In considering temporary circumstances, transit providers would again have to maintain massive databases to track temporary conditions that might necessitate modifications for some riders (such as sidewalk repair), then apply that information to individual riders to determine if each rider could navigate to and from the curb. When daily variables are considered, the opportunity to take advantage of shared trips as a cost saving measure is significantly reduced, if not eliminated. Transit providers would necessarily have to assume each and every paratransit rider requires door-to-door service, in many systems requiring greatly expanded fleets of paratransit vehicles and operators, with little net gain in the total number of passengers served.

The NPRM ignores the impact on the unfortunate passenger on board whose scheduled trip is delayed by an unanticipated modification to accommodate another passenger. Transit systems should not be put in the position of pitting one passenger's civil rights against another's.

Any requirement for door-to-door service gives rise to a substantial risk of tort liability for transit providers. Riders may require door-to-door service because they live in or visit an inaccessible location, whether it is inaccessible because of stairs leading to the door, snow and ice, or some other variable. Insurance costs that now would have to include responsibility for getting riders through un-shoveled snow, up and down stairs, and through such other hazards could certainly rise to unaffordable levels in some cities. Moreover, these same conditions are likely to lead to increased costs based on more frequent driver injuries, lost time, and concomitant increases in those insurance costs as well.

Litigation costs would inevitably rise under the proposed rules. Defining what may constitute a 'reasonable modification' in a personalized transit setting, then determining if such a modification amounts to an undue burden or fundamental alteration of the nature of an entity's service would surely be the subject of many, many *Melton*-type cases, further draining critical resources from the business of transporting riders. Some transit agencies would be obligated to spend inordinate amounts of time and resources on individual passenger claims, rather than managing their systems.

Additionally, requests for accommodations beyond mere alteration of pick-up and drop-off points, all of which would be subject to formal analysis, complaint, appeal, and litigation, may well include request for alternative fare media, exclusive trips, reduced scheduling windows, extended wait times to accommodate meals or restroom use immediately prior to boarding, entry into private streets or complexes, or 'dog-free' vehicles. Each of these requests (and others) has been made of Link Transit, a small transit agency providing service in central Washington State. In evaluating these requests, Link Transit found providing the accommodations would entail enormous cost increases. Link Transit agreed, for instance, to enter into trailer parks and large apartment complexes with private streets as an accommodation *beyond* the ADA and experienced an 11% increase in costs, not including the costs associated with accidents involving awnings, trees, and overhangs that do not (and are not required to) comply with height standards applicable on public streets.

A reasonable alternative

APTA believes the basic choice of curb-to-curb service vis-à-vis door-to-door service should remain a local choice with transit providers providing individualized enhancements or alternatives on an exception basis as locally practical and affordable. The alternative expressed in this rulemaking would reverse that process and make the exception the rule. This change would require transit providers to shift substantial resources from other operations to their paratransit programs to fund programs of reasonable modifications. This shift of operational funding would threaten some agencies' ability to maintain existing levels of service in the future. Moreover, although DOT does not agree with the result in the *Melton* case, it should note carefully that, before litigating this matter in the courts, the *Melton* plaintiff asked for an accommodation, the transit agency considered the request, and determined it was essentially unsafe. Although the plaintiff chose not to utilize the FTA review process, FTA had reviewed a case described by the *Melton* court as "factually similar" and FTA agreed with the transit agency. The system works and works well. The *Melton* plaintiff had ample opportunity to ask for outside review by FTA, at least one other similarly situated rider took advantage of that opportunity, and FTA agreed the requested accommodation was not required by the ADA.

Beyond this status quo, the goals of the ADA would be far better served if, in lieu of this rulemaking, DOT commissioned research aimed at seeking practical means of improving paratransit services for all riders. At the same time, DOT should review activities under the New Freedom program to learn from the experiences of forward thinking transit agencies such as PalmTran, SamTrans, and many others in addition to those noted above so that best practices can be shared. Most importantly, DOT should leave consideration of what, if any, extraordinary enhancements to paratransit service under the ADA, as it has been construed for over fifteen years, are most desirable in individual communities to local riders, residents, and providers. This concept of local choices to supplement ADA service is the basis for the New Freedom program and DOT should advocate for expansion of the program.

APTA supports enhanced accessibility and increased mobility options for riders with disabilities. However, given the rising day-to-day costs of doing business, APTA fears that by way of these additional regulations, transit systems are being placed at undue economic risk and will face untold financial burden. The unintended consequences would ultimately impact all transit system users.

Commuter and Intercity Rail Station Platform Accessibility

As is the case with reasonable modifications, the proposals for commuter rail platform accessibility would require significant practical, operational issues as well as greatly expanded costs. These issues are currently being reviewed in separate efforts undertaken by the FTA and the Transportation Research Board. APTA urges DOT to refrain from integrating the proposals into 49 CFR Part 37 until there has been ample time for both DOT and the regulated community to review the results of these studies and access the impacts of the proposed rules.

The proposal violates the statutory obligations of freight railroads and interferes with the authority of the Surface Transportation Board. As noted and explained in detail in the comments submitted by Metrolink[10], in cases where commuter railroads operate on tracks owned and operated by freight railroads, the facilities are under the *exclusive* jurisdiction of the Surface Transportation Board[11] and the proposed rule conflicts with the requirement in 49 USC 11101(a). The freight railroads that own many of the facilities used to provide commuter rail are obligated by law to respond to reasonable requests for common carrier service and "[c]ommitments which deprive a carrier to respond to reasonable requests for common carrier service are not reasonable." The elevated platforms required by the proposed rule would inhibit the freight railroads' ability to respond to such requests by severely restricting the width of traffic that could pass these elevated platforms. Additionally, state agencies responsible for establishing safe clearances (such as the California Public Utilities Commission through its General Order No. 26-D) have already exercised that authority. Compliance with the proposed rule would cause some commuter railroads to be in violation of existing state rules.

The proposal would degrade operations. We believe costs, dwell times, and headways would suffer significantly and unnecessarily under the proposed rules. The proposals would require deployment of boarding assistance devices at every car. To accomplish this, transit agencies would have to either increase dwell times (to allow crews to deploy and retrieve bridge plates for each car) or multiply personnel costs (to add personnel to train crews solely to deploy and retrieve bridge plates). Additionally, commuter trains could be required to stop multiple times at some stations where only a limited number of cars can access the platform at one time. These multiple stops would each contribute to extended dwell time. Dwell time is vitally important since many of the rail lines used by commuter railroads are at full capacity with minimal headways between trains. This extended dwell time would cause a ripple effect that could, on busy lines such as METRA's many shared right of way rail lines in Illinois or the MBTA's shared lines in

[10] Designated as item 73 in the docket.
[11] 49 USC 10501.

Massachusetts, limit the ability of commuter rail entities to operate in conjunction with the freight railroads that own the tracks.

The long useful life periods of rail equipment and facilities must be considered. In considering the long life cycle of railroad cars, the proposals would do little to assist riders with disabilities for many years to come while imposing immediate costs on railroads. A railcar delivered today is likely to still be in service in 2040 or even 2050. Rail stations and platforms may well be in service even longer. As such, even if the proposed standards were implemented, commuter railroads would be required to blend a combination of accessibility means and methods throughout the foreseeable future. For instance, most commuter railcars currently used by west coast transit agencies board at a height of 25" 'above top of rail' (ATR). The proposed rule would require 15" ATR platform heights. As a result, mini-high platforms or lifts would be required for decades to come, even at stations that fully comply with the proposed rule. Given these circumstances, it is especially disturbing to note that DOT believes it would be the rare instance that would require continued use of mini-high platforms or lifts should this proposed rule become final. Cars that require mini-high platforms to allow access by persons with disabilities today are unlikely to be accessible through bridge plates tomorrow.

Retrofitting existing stations and/or rail cars would involve a Herculean effort. The California Department of Transportation, in its comments to the docket[12], has identified approximately $364,000,000 in station compliance costs simply to address the relatively uncomplicated stations that serve only its intercity services, and anticipates a far larger cost when it considers those stations that serve both intercity and commuter operations. Even if the requirements were limited to new stations, the problems of dwell times, accommodating multiple equipment heights, and others discussed throughout these comments would persist, and extraordinary costs would still be required.

Regulating heights ATR for all manner of passenger service will complicate access issues rather than simplify them. DOT has assumed only two standards exist for interstate rail operations and seeks to impose these standards on commuter railroads. In fact, the variety and ages of interstate rail equipment and facilities means there are no such standards in interstate rail operations.

- In southern Florida, Amtrak trains have a floor level of about 51" ATR, platforms are 25" ATR or 8" ATR, and DOT would set the standard at 48" ATR.
- In California, DOT would establish a standard of 15" ATR but AMTRAK equipment operates a fleet of Superliner cars there with a floor height of 17" to 18.5" as well as Amfleet cars with floor heights of approximately 51" ATR while most commuter railroads in the state operate equipment with a floor height of 25" ATR.
- In the Dallas – Fort Worth area where Trinity Rail Express operates commuter service, AMTRAK employs cars with floor heights ranging from 17" to 51".

[12] Designated as item 107 in the docket.

- A simple visit to Washington's Union Station serves to demonstrate the variations in platform heights, even in a single station. Standardizing floor heights in equipment is of little value when there is no reliable means of predicting the height of the platform at the end of the line.

The proposed regulatory changes are impractical, at best, in several other respects.

- The proposed changes do not account for the over dimension freight requirements for national defense. The Department of Defense comments[13] explain those requirements and their inherent incompatibility with the proposed rule.
- The discussion of level boarding requirements suggests that mini-high platforms would be an acceptable alternative where level boarding might be impractical ("… could the rail system use an approach… such as mini-high platforms") but later suggests that mini-high platforms constitute a safety hazard. This puts operators in an awkward and legally tenuous position since the 'acceptable alternative' incorporates a known safety hazard. This apparent inconsistency invites litigation against commuter rail providers.
- The discussion in the proposed rule would forbid obstructions within six feet of a platform edge but does not discuss how this would impact placement of mini-high platforms. If mini-high platforms must be moved six feet from platform edges, dangers and difficulties would only be exacerbated. The perceived danger of mini-high platforms is much more simply mitigated by blocking access to the small space (currently 2'7") between the mini-high platform and the edge of the platform.
- The discussion in the proposed rule would require, after consultation with one or more agencies (it is unclear whether commuter rail operators would deal with FTA, FRA, or both, or what role the Disability Law Coordinating Council would play in determining feasibility of solutions) mini-high platforms at each car, exacerbating the very safety hazard noted elsewhere in the NPRM, multiplying dwell times by orders of magnitude, channeling more passengers without disabilities to fewer doors not taken up by mini-high platforms, and inflicting a substantial cost on railroads.
- Where mini-high platforms would be allowed, despite the costs and safety implications, it would still be unlikely that enough mini-high platforms could be installed to allow each different car configuration in current inventories to regularly allow access to each and every car.
- The unusually long bridge plates required (one railroad calculates that a minimum 6'8" bridge plate would be required to overcome a 5" vertical gap while meeting the 1:8 requirement) would be impractical or impossible to store on board trains and would likely require two crew members to deploy, substantially adding to personnel costs and dwell time.
- Settling, normal equipment wear, and passenger loading can cumulatively cause a 5" change in a rail car's floor height, as noted in the Federal Railroad

[13] Designated as item 18 in the docket.

Administration report in the docket. As a result, even under the *best* of circumstances, the 6'8" long bridge plates would be necessary.

- Given the need to accommodate 6'8" bridge plates at every car, the likelihood that it would require two people to move a single bridge plate of that length, and the likelihood that bridge plates of that length would be stored at stations rather than on board trains, a typical six car train normally operated with two conductors would spend an inordinate amount of time in each station to accommodate deployment and redeployment of six long bridge plates, one at a time. The alternative, adding crew to each train simply to deploy and redeploy bridge plates, could be cost prohibitive.
- Even without considering the likely need for longer bridge plates and two people to move each one, Trinity Rail Express has determined that it would be forced to choose between tripled dwell time (and the significant impact it would have on its largely single-track system) and a 15 percent increase in operating costs to provide additional crew to deploy and redeploy bridge plates.
- The NPRM ignores the fact that the freight railroads that own the track over which many commuter railroads travel will not allow commuter rail authorities to build any but low platforms. This policy is meant to accommodate wide freight loads and, given that evidence of platform strikes even on these less vulnerable low platforms, is apparently a sound one. These same freight railroads will not, in the experience of the Virginia Railway Express, allow gauntlet tracks (each with a minimum of two switches) to be used, also for safety reasons.
- Even if a freight railroad allowed installation of a gauntlet track, one railroad has determined that even a single application would likely cost in excess of $15,000,000, *exclusive* of land acquisition costs, relocation of bridges, and any required environmental costs.
- As noted by the National Association of Railroad Passengers[14], the cumulative costs of compliance with the proposed regulatory changes may well force operators to close down entire lines, the antithesis of enhanced mobility.

Non-Traditional Services

APTA fully supports the intent of proposed change to 49 CFR 37.23, to ensure operations not be shifted to the private sector to avoid ADA requirements. We believe, however, that the language as drafted may have the unintended effect of interfering with transit agencies' ability to support non-traditional, private programs that give riders with and without disabilities greater options. Link Transit participates in a number of innovative programs, fully described in their comments[15], that support, among others, homeless women and children, a developmental disability service agency, and a community hospital, as well as providing user-side subsidies to persons with disabilities in sparsely served areas. Many of our members support, sponsor, or contribute to similar programs with a wide variety of

[14] National Association of Rail Passengers, *NARP News*, Vol. 40, No. 3, March, 2006.
[15] Designated as item 13 in the docket.

human service organizations. We recommend DOT carefully review the proposed rule to ensure it does not inadvertently foreclose community outreach and support programs such as these.

Disability Law Coordinating Council

The success of any regulatory body depends in substantial part on its consultation with the affected communities. The Disability Law Coordinating Council (DLCC) published guidance in four September 1, 2005 announcements without such consultation, resulting in significant unintended consequences. These unintended consequences included unsafe conditions for riders (as seen in the guidance on using Segways as mobility devices on public transit), impracticality, and extreme costs (as seen in the origin-to-destination and level boarding guidance later incorporated into the current rulemaking). We question the assertion that the DLCC is "functioning effectively." Quite the contrary, the DLCC's actions to date have been counterproductive.

DOT has offered no plausible explanation of why, after three years of operation, it believes the DLCC should now be enshrined in regulation. If the DLCC is limited to providing internal advice and coordination for DOT, there is no reasonable need for a regulatory provision. Moreover, the NPRM does not discuss what authority to interpret the ADA and implementing regulations would be vested in the DLCC, how it will ensure consistency among the modal administrations, or what opportunities for input or appeal would be available for those affected by its actions. There is also no indication of what balance would be struck between DLCC and FTA authority.

We also continue to believe that, by substituting the DLCC and DOT actions for those entrusted to FTA for 15 years, dealing uniquely with transit providers, that DOT would be acting in violation of the binding obligation provisions of 49 USC 5334. Any action or interpretation promulgated by the DLCC or any other office within DOT that purports to extend a binding obligation on grantee agencies in actions unique to transit and long-controlled by FTA must be subjected to public notice and comment under that provision.

Regulatory Deficiencies

In addition, the proposed regulatory changes are incomplete, unclear, and somewhat contradictory.

- There is no proposed standard for infeasibility or undue burden. DOT has not noted any threshold cost or other consideration it would consider. This amorphous standard would doubtlessly lead to protracted litigation for transit providers and further call into question the competing authorities of DOT, FTA, and FRA in interpreting this regulation.
- Similarly, the proposed 49 CFR 37.169 would grant local agencies the authority to determine if circumstances constitute an undue burden but gives no indication of how DOT and its modal administrations would review these decisions, how any DOT appellate process would work, or what interim

requirements might attach during such a process. DOT should defer to the local agencies and allow those local agencies to employ their already existing appellate review procedures that commonly attach to administrative decisions.

- There is a great deal of information in the discussion that does not appear in the proposed regulatory language – again inviting continuing variations in interpretations both among modal administrations and among regional offices. It is unlikely the DLCC would or could review each and every such determination to provide consistency of application in light of the paucity of guidance in the rule itself.
- There is no attempt to provide guidance on what a person with disabilities must demonstrate to obtain enhanced paratransit services, what reviews DOT might conduct of those decisions, or how those decisions would be preserved.
- There is no attempt to provide guidance on what limits might be involved in fixed route bus stop variation. Without, at least, some rudimentary guidance or examples, transit agencies are at risk because these decisions implicate safety concerns and significant training (and significant training costs) for bus drivers in what standards to apply. The nature of this requirement further invites inconsistency and opens transit agencies to significant and costly litigation.
- When considering what might constitute a reasonable modification, it is apparent that something reasonable in one city may be unreasonable in another, promoting inconsistency for persons with disabilities who travel in different cities.
- There is no reasonable limitation on the 'direct threat' rules. A transit agency would thus be required to take a patient with dementia, known to wander if unattended, on a trip without an escort, since consideration of a threat to oneself would no longer be allowed. Clearly, these circumstances would lead to avoidable tragedies, a loss of faith in public transportation, and immense litigation.
- The proposed rule concerning level boarding, which purports to apply retroactively to stations built almost fifteen years ago, exceeds DOT's authority to promulgate regulations. As fully described in the Metrolink comments, discussed above, retroactive regulatory actions are disfavored and only acceptable where specific statutory authority for such extraordinary actions exists. *See Brimstone R. Co. v. United States*, 276 U.S. 104 (1928).

In conclusion, although APTA fully supports the goals of enhanced accessibility, mobility, and service to persons with disabilities, we believe the proposed changes to DOT's ADA regulations carry significant unintended consequences and procedural flaws. The proposed changes should be withdrawn until such time as the technical and financial means are available to field these program enhancements and DOT has completed a proper rulemaking process that complies with Executive Order 13132. It is imperative that DOT's efforts support, not detract from the ultimate goal of freedom, choice, mobility, and independence for persons with disabilities.

Sincerely yours,

William W. Millar
President

WWM/cbo