

January 23, 2010.

Why the City is unlikely to get a Letter of No Prejudice soon.

The Governor said during her presentation last Monday introducing the architects' panel on street level light rail that,

“...the Notice to Proceed has not been issued and cannot be issued until there is a Record of Decision on the federal EIS and a Letter of No Prejudice. Neither of those things has occurred yet.”

There appears to be some confusion about the Letter of No Prejudice and when, or if, the Mayor could start construction of the rail. We'll try to clarify this, helped by our recently receiving several documents through Freedom of Information requests:

First, if the Governor is presented with the Final EIS, and signs off, and the FTA subsequently issues a Record of Decision, it ONLY certifies that the environmental process is complete; it has little to do with FTA granting funds to the City. Grant money is covered in the next stage of the New Starts process, which is termed Final Design.

The City says it expects a Letter of No Prejudice (LONP) shortly after the Record of Decision issues. LONPs allow local transit agencies to spend local money before receiving federal grants.

The reason for LONPs is that FTA does not want transit agencies to jump the gun by spending their own money before FTA is quite confident that federal funds will eventually be granted.

The FTA wishes to prevent a situation where the local agency spends its own funds in starting to construct a rail line and subsequently the FTA finds during the Final Design process that the final projected costs and financial plan do not match. In such a case FTA would find themselves in the difficult position of stopping a project halfway and then be subject to political arm twisting by members of Congress to fund an unworthy project.

We believe it unlikely that the City will get an LONP shortly after the Record of Decision issues for the following reasons:

The latest [Final Guidance from FTA on LONPs](#) makes it clear than FTA will allow using local money for planning, land condemnation, utility relocation, and vehicle purchases. FTAA does warn agencies against vehicle purchases if they have no experience with the vehicles such as the City having no experience with trains.

However, FTA does not grant LONPs for construction activity before FTA is close to granting a Full Funding Grant Agreement. The earliest that could be is at least six months away when the City is well into the Final Design process.

On September 2, 2009, the FTA's Financial Management Oversight Contractor wrote that¹,

- The City had overstated the amount they would collect from GE tax revenues and understated the operating costs.

¹ FY 2011 New Starts Financial Assessment. FTA. September 2, 2009.

- The \$1.55 billion federal New Starts funding is well above that of projects in medium to large metropolitan areas, but has been accepted by FTA for planning purposes.
- The City should get “an independent forecast of GET surcharge revenues,” presumably because Parsons Brinckerhoff has hundreds of millions of dollars in company revenues dependent on the rail project being built.
- The City should also substantiate its capacity to provide back-up funds for the Project should there be a cost increase or funding shortfall.
- There is a question of whether the operating subsidy required by the Project could be absorbed by the City without tangible cuts in City services or increases in other taxes.

A month later, on October 7, 2009, an FTA internal memo² stated,

“A look ahead by FTA’s financial contractor suggests that these difficulties may cause the financial plan to fail the financial stress tests that will be applied when the City requests entry into final design. Consequently, financial issues may pose difficulties sufficient to put at risk the City’s anticipated initiation of final design in early 2010.”

The FTA’s Financial Management Oversight Contractor wrote³,

“The City’s intention to obtain a Letter of No Prejudice (LONP) so that Phase I construction can commence prior to the FFGA is unusual, and is conspicuous in scope.”

FTA’s Final Guidance warns,

“FTA reminds project sponsors and the public that neither pre-award authority nor an LONP has ever been a guarantee of future federal funding. Moreover, FTA here highlights that contrary to past practice, an LONP no longer serves as an indicator of a project being a promising candidate for a Full Funding Grant Agreement (FFGA) or Project Construction Grant Agreement (PCGA).”

It is a warning that should be heeded. Mayor Harris jumped the gun on the Bus/Rapid Transit project in 2003 by starting to build it before getting an LONP. The FTA promptly rescinded the Record of Decision and all federal funding destined for the project.

Even if the City gets an LONP, the City Council should heed the language of the Final Guidance that, “an LONP no longer serves as an indicator of a project being a promising candidate for a Full Funding Grant Agreement (FFGA).”

For these reasons we believe that the City is unlikely to receive a Letter of No Prejudice prior to July of this year even if the Final EIS and the Record of Decision were to issue shortly.

² FTA internal Memo requesting the concurrence of Leslie Rogers, FTA’s Region IX Administrator, to approve the City’s entrance into the Preliminary Engineering phase. Concurrence dated 10-7-2009.

³ FY 2011 New Starts Financial Assessment. FTA. September 2, 2009.