BEFORE THE

UNITED STATES DEPARTMENT OF TRANSPORTATION

FEDERAL TRANSIT ADMINISTRATION

FINAL DECISION OF THE FEDERAL TRANSIT ADMINISTRATION

DEBT COLLECTION ACTION

NEW JERSEY TRANSIT CORPORATION

ACCESS TO THE REGION'S CORE PROJECT

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I. OVERVIEW

The New Jersey Transit Corporation ("NJT") has requested an administrative review of the Federal Transit Administration's ("FTA") determination that NJT owes a debt to the United States Government in the amount of $271,101,291. Pursuant to the Federal Claims Collection Act of 1966, as amended, and FTA's Debt Collection Order, I hereby issue this Final Decision in my capacity as FTA's Chief Financial Officer.

FTA's claim against NJT arose out of the State of New Jersey's voluntary and willful termination of the Access to the Region's Core Project (hereinafter "ARC Project" or "Project") that received Federal funds from FTA under an Early System Work Agreement ("ESWA") and FTA's Master Agreements.[1] Under the statute authorizing the use of an ESWA, a recipient must repay all Government payments made under the ESWA if the recipient fails to carry out the project for reasons within its control. In addition to this statutory repayment provision, under the Master Agreements governing FTA-funded projects, including the ARC project, FTA has the right to require a recipient to refund all Federal funds expended on the project if the recipient willfully fails to make adequate progress on the project. FTA is entitled to repayment from NJT under both the repayment provision and the applicable Master Agreements.

After New Jersey terminated the Project, FTA demanded that NJT repay the $271,101,291 in Federal payments made under the ESWA. FTA advised NJT that it had the right to request a review of the validity or amount of FTA's claim. On January 25, 2011, NJT submitted an opposition to FTA's claim and included supporting documents and declarations. New Jersey contended that it should not have to repay the Federal funds it expended on the ARC

[1] FTA's Master Agreement contains the standard terms and conditions governing the administration of a project supported with Federal assistance awarded by FTA through a grant agreement. The Master Agreement is incorporated by reference into every grant agreement FTA executes, and is updated annually.

Project under the ESWA because it terminated the Project for reasons outside its control and the statutory repayment provision did not apply to the funds it received.

After carefully considering NJT's submission and the administrative record as a whole, I have concluded that the State of New Jersey is indebted to the United States in the amount of $271,101,291.

II. SUMMARY OF KEY FINDINGS

1. NJT, an instrumentality of the State of New Jersey,[2] expended a sum total of $271,101,291 in Federal funds under the ESWA and the Master Agreements for the ARC Project. The sum total of $271,101,291 was comprised of $51,589,932 in Federal funds provided under FTA's New Starts program; $91,501,954 in Federal funds provided under the American Recovery and Reinvestment Act ("ARRA"); and $128,009,405 in Federal funds provided under the Department of Transportation's ("DOT") Congestion Mitigation and Air Quality ("CMAQ") program.[3] At the time that the ARC Project entered Final Design,[4] NJT and FTA negotiated a figure of $8.7 billion as the baseline cost estimate—or the total estimated cost of the Project—based on the results of a 2008 Risk Assessment that preliminarily estimated the cost of the Project to range from $8.4 billion to $12 billion. The baseline cost estimate of $8.7 billion was still in place at the time the ESWA was executed on August 20, 2009, and it always was subject to further negotiations between NJT and FTA. Moreover, consistent with long

[2] *See* New Jersey Public Transportation Act of 1979, codified as amended at N.J. STAT. ANN. § 27:25-4(a) (2010) ("There is hereby established in the Executive Branch of the State Government the New Jersey Transit Corporation."). The New Jersey Governor appoints each of the eight members of NJT's Board of Directors. N.J. STAT. ANN. § 27:25-4(b) (2010). For purposes of this debt collection action, FTA will treat the State of New Jersey and NJT as one and the same.

[3] NJT has not disputed that $271,101,291 of Federal funds were expended for the ARC Project under Grant Numbers NJ-03-0169-00; NJ-03-0169-01; NJ-03-0138-02; NJ-95-X002-00; NJ-90-X086-00; NJ-95-X003-00; NJ-95-X008-00; and NJ-96-X002-01. *See* NJT Opposition to Demand (Jan. 25, 2011); Agency Doc. 19, NJT Quarterly Report (Sept. 30, 2010); Agency Doc. 7, ARC Expenditures as of 9/30/10.

[4] "Final Design" is the last phase of project development for a "New Starts" project funded by FTA. This phase is intended to provide a smooth transition between project development and project implementation. The project development phases are further explained below.

established FTA policy, FTA informed NJT—and NJT understood at all times—that NJT was responsible for any and all actual costs incurred on the Project that exceeded the baseline cost estimate.

2. On January 8, 2010, NJT requested an amendment to the ESWA to capture additional Federal funding, expand the scope of work, and further accelerate construction of the ARC Project. By letter dated April 6, 2010, New Jersey Governor Chris Christie requested that FTA agree to "an expeditious award" of an ESWA amendment, and, at the request of Transportation Secretary Ray LaHood, Governor Christie explicitly reaffirmed the State's commitment to the Project. On April 14, 2010, NJT and FTA amended the ESWA. Based on the upper range of the estimates provided by FTA and agreed to by NJT, NJT and the Governor were aware that the costs of the ARC Project might run in excess of $12 billion when (1) NJT and the Governor requested the ESWA amendment, (2) the Governor reaffirmed the State's commitment to the Project, and (3) NJT and FTA subsequently executed the amendment.

3. In October 2010, on NJT's behalf, Governor Christie terminated the ARC Project on the recommendation of the NJT ARC Executive Steering Committee. The administrative record shows the ARC Project was unilaterally terminated by the "applicant"—NJT—for "reasons within the control of the applicant," within the meaning of 49 U.S.C. § 5309(g)(3)(B)(iv).

4. NJT insisted that funds expended for engineering and design for the ARC Project—including New Starts, CMAQ and ARRA funds—be included in an ESWA, which requires FTA to recover all Government payments made under the ESWA if a recipient terminates a project for reasons within its control. Importantly, NJT chose to request an ESWA, chose to include the grants at issue in the ESWA, and chose to abide by all conditions associated

with the ESWA in exchange for the funding and the unique and significant benefits that an ESWA provides to a grantee. As a consequence of NJT's voluntary choices, the Federal payments made under the ESWA must now be repaid in accordance with 49 U.S.C. § 5309(g)(3)(B)(iv) and the Master Agreements.

5. The financial challenges facing the State of New Jersey do not excuse NJT's non-compliance with the terms of the ESWA and the Master Agreements, nor do they negate FTA's statutory obligation under 49 U.S.C. § 5309(g)(3)(B)(iv) to obtain repayment of the $271,101,291 in Federal funds expended under the ESWA, as mandated by the Federal Claims Collection Act, as amended and codified at 31 U.S.C. Chapter 37, and the Federal Claims Collection Standards codified at 31 C.F.R. Chapter IX.

III. BACKGROUND

The ARC Project was the largest planned public works project in the United States. NJT and the Port Authority of New York and New Jersey ("Port Authority") developed the ARC Project—a nine-mile commuter rail line between Secaucus, New Jersey and midtown Manhattan—to alleviate the crippling congestion and daily delays experienced by more than 135,000 daily passengers along a segment of the Northeast Corridor that is currently serviced by a limited capacity, 100-year old tunnel. The ARC Project would have increased capacity on this segment of the Northeast Corridor to more than 250,000 daily passengers, thereby supporting sustained economic growth in the New York-New Jersey region.

As set forth below, the Governor and NJT terminated the ARC Project in October 2010, while work was ongoing under an ESWA. At that time, the Project was the largest in the history of the Federal transit program, with an expected Federal New Starts commitment of $3 billion. In addition to the New Starts funds committed to the Project, the Port Authority committed $3

billion and the State of New Jersey committed $2.7 billion, which included $1.25 billion from the New Jersey Turnpike Authority and $1.35 billion in Federal Highway Administration "flexed" CMAQ funds. NJT intended to contribute $100 million to the Project from the New Jersey Transportation Trust Fund. In the history of the New Starts program, no grantee has ever terminated a project while an ESWA was in effect.

A. FTA's New Starts Process and the Use of an ESWA

The ARC Project was part of FTA's discretionary "New Starts" program, the Federal Government's primary financial resource for supporting locally planned, implemented, and operated public transit fixed-guideway capital investments.[5] Through this program, FTA identifies and recommends new fixed-guideway transit projects—including heavy, light, and commuter rail; ferry; and certain bus projects—for Federal funding. As the United States Government Accountability Office ("GAO") has noted, FTA's New Starts program is considered "a model for other transportation programs" because of its use of a rigorous and systematic evaluation process to make decisions about moving projects forward and forecasting their costs.[6]

Transportation projects seeking New Starts funding typically proceed through three phases of planning and development: (1) Alternatives Analysis, in which a locally preferred alternative is selected; (2) Preliminary Engineering; and (3) Final Design. At the successful culmination of this planning and development process, FTA may advance a project into construction by entering into a Full Funding Grant Agreement ("FFGA") with its grantee. An FFGA is a multi-year contractual agreement between FTA and the project sponsor that formally defines the project scope, cost and schedule. An FFGA establishes the maximum level of

[5] The primary statutory guidance for FTA's New Starts process is located at 49 U.S.C. § 5309 (2006).
[6] UNITED STATES GOVERNMENT ACCOUNTABILITY OFFICE, GAO-08-844, PUBLIC TRANSPORTATION: IMPROVEMENTS ARE NEEDED TO MORE FULLY ASSESS PREDICTED IMPACTS OF NEW STARTS PROJECTS at 2 (July 2008).

Federal financial assistance and outlines the terms and conditions of Federal financial participation.

In some cases, as with the ARC project, a project sponsor in Final Design may be ready to begin construction or otherwise start carrying out a project before a full commitment of Federal funds can be made through an FFGA. If certain requirements are met, FTA may provide Federal funds for a New Starts project through an ESWA. An ESWA defines a specific scope of work for a New Starts project and dedicates Federal funds to enable a grantee to carry out that work.[7] Relying on this initial award of Federal funds, a grantee may enter into construction contracts, acquire real estate, or finance other activities that will make efficient, long-term project management easier. An ESWA promotes the completion of a project more rapidly and at less cost by making a substantial amount of Federal funds available to the grantee, through the execution of fund-obligating grants included in the ESWA prior to the execution of an FFGA. Throughout the development of an ESWA, FTA and the grantee negotiate the scope of work and the funding sources, and the parties mutually agree to these terms when they execute the ESWA. When executed, the ESWA becomes a binding agreement between the parties.

The ESWA statute provides that an ESWA "obligates an amount of available budget authority specified in law."[8] By its very terms then, the funds provided by an ESWA are not limited to New Starts funds and thus may include funds from a variety of Federal funding sources so long as they are derived from available budget authority. Such available budget authority could include FTA's New Starts program at 49 U.S.C. § 5309, FTA's Urbanized Area Formula Program at 49 U.S.C. § 5307, DOT's CMAQ program, or other Federal funding sources, such as ARRA. In this case, FTA and NJT agreed to the use of several Federal funding

[7] A grantee is also required to match the Federal funding in an ESWA with local funds. *See* 49 U.S.C. § 5309(h). As such, the ESWA includes funds from Federal and local funding sources.
[8] 49 U.S.C. § 5309(g)(3)(B)(i).

sources for the ARC project, including ARRA, CMAQ and New Starts, and they further agreed, at NJT's request, to incorporate grants from these various Federal funding sources into the ESWA. After the incorporation of these grants into the ESWA, the monies that had been or were to be expended under the grants became subject to the repayment provisions of section 5309 that require repayment of "all Government payments made under the work agreement." Each of the ARRA, CMAQ and New Starts grants from which expenditures were made as part of the $271,101,291 in "Government payments" in dispute here are likewise identified in the ESWA as providing funding for the ARC Project under the ESWA.

B. The 2008 Risk Assessment for the ARC Project

As is typical in a New Starts project, before the ARC Project was approved into Final Design, NJT and FTA undertook a joint, collaborative effort to assess the risks of the Project and negotiate a baseline cost estimate for the Project. The baseline cost estimate is significant because it: (1) is used in applying the New Starts criteria for project justification under the requirements of 49 U.S.C. § 5309; (2) provides all parties involved with a reasonable forecast of the financial commitment necessary to complete the project; and (3) helps establish the maximum Federal New Starts contribution. As a project moves through each stage of development, FTA and its grantee—in this case, NJT—constantly and collaboratively update the risk assessment and negotiated baseline cost estimate. Since the maximum Federal share generally is established when a project enters Final Design, the grantee is well aware that, if the grantee requests and subsequently executes an ESWA, the grantee is responsible for all costs exceeding the baseline cost estimate.

On August 7, 2008, with input from NJT, FTA prepared a draft preliminary cost estimate for the Project with a range of $9.5 billion to $12.4 billion, and shared this draft with NJT for its

review and comment.[9] In response, NJT provided FTA with two sets of comments and additional input on the draft.[10] Through these responses, NJT attempted to demonstrate that it could deliver the Project within an estimated cost range of $7.495 to $7.520 billion.[11] Upon consideration of NJT's comments and input, FTA substantially revised the Risk Assessment and produced a revised cost estimate range of $8.4 billion to $12 billion, to which NJT agreed.[12] From this Risk Assessment, NJT and FTA negotiated and ultimately agreed that the estimated cost of the Project was $9.1 billion; FTA subsequently approved the Project into Final Design.[13] This $9.1 billion figure included an agreed upon $1.8 billion contingency from which NJT could drawdown funds if it experienced cost overruns and realized risks identified in the Risk Assessment.[14]

Although NJT and FTA agreed that the estimated cost of the Project would be $9.1 billion, the parties further agreed to use a lower figure—$8.7 billion—as the actual baseline cost estimate on the basis of the depreciated value of railcars that NJT was to procure for the Project.[15] Additionally, FTA relied upon and counted on NJT's assurances that NJT would deliver the Project at this cost and aggressively mitigate risk and potential cost overruns when

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[9] *See* Declaration of Brigid Hynes-Cherin at ¶ 17; FTA Hynes-Cherin Ex. 2, FTA's Draft 2008 Risk Assessment at 6 (Aug. 7, 2008).
[10] *See* Hynes-Cherin Decl. at ¶ 18; FTA Hynes-Cherin Ex. 3, Grantee Response to FTA Letter (Aug. 11, 2008); FTA Hynes-Cherin Ex. 4, Grantee Response to FTA Letter at 9 (Aug. 14, 2008).
[11] *Id.*
[12] *See* Hynes-Cherin Decl. at ¶ 19; FTA Hynes-Cherin Ex. 5, 2008 Risk Assessment at 7 (Aug. 26, 2008). *See also* NJT Silber Ex. 19, 2008 Risk Assessment at 7 (Aug. 26, 2008).
[13] *See* Hynes-Cherin Decl. at ¶ 37; FTA Hynes-Cherin Ex. 8, FTA Letter to NJT Approving Entry into Final Design (Jan. 27, 2009).
[14] *See* Hynes-Cherin Decl. at ¶ 37.
[15] *See* Hynes-Cherin Decl. at ¶ ¶ 26-29; FTA Hynes-Cherin Ex. 8, FTA Letter to NJT Approving Entry into Final Design (Jan. 27, 2009). NJT intended to purchase the railcars early with its own funds and use them in its existing service until the ARC Project was ready for revenue operations. *Id.* at ¶ 27. NJT subsequently planned to "sell" the railcars to the Project for their depreciated value. *Id* at ¶ 28; FTA Hynes-Cherin Ex. 8, FTA Letter to NJT Approving the ARC Project Into Final Design at 1 (Jan. 27, 2009). *See also* NJT Silber Ex. 19, 2008 Risk Assessment at 7 (Aug. 26, 2008).

FTA agreed to use the $8.7 billion figure as the baseline cost estimate.[16] Under an FFGA, NJT would be responsible for any costs exceeding the final baseline cost estimate of the Project.[17] As the Project proceeded to construction and the parties neared the execution of an FFGA, NJT and FTA were to engage in further negotiations which would narrow the scope of the cost range for the Project and identify a more accurate baseline cost estimate, no different from a typical New Starts project. NJT and FTA knew that the parties would need to negotiate a new baseline cost estimate prior to the execution of an FFGA, because FTA had to ensure that NJT continued to have the financial capacity to carry out and complete the Project.[18] As with all New Starts projects, prior to committing additional Federal funds through an FFGA, FTA, in collaboration with its grantee, NJT, would need to conduct an updated risk assessment and negotiate a revised baseline cost estimate.

C. New Jersey Requests an Early System Work Agreement

After NJT and FTA agreed to a baseline cost estimate and FTA approved the ARC Project for entry into Final Design in January 2009, NJT turned its attention to obtaining additional Federal funds through an ESWA.[19] NJT intended to award several large contracts for real estate, construction, and professional services by early 2010.[20] To facilitate the execution of such contracts, NJT wanted to demonstrate a significant commitment of Federal funds to the Project.[21] Anecdotally, contractors are often more willing to bid on contracts when the project sponsor can demonstrate a substantial commitment of funds to the project, especially Federal

[16] *See* Hynes-Cherin Decl. at ¶¶ 24, 25, 33.
[17] *See* FTA 2006 Guidance on New Starts Policies and Procedures at 9, available at http://www.fta.dot.gov/planning/newstarts/planning_environment_5203.html (May 16, 2006).
[18] Pursuant to 49 U.S.C. § 5309(d), before FTA decides whether to execute an FFGA for a project, Congress requires FTA to apply a series of evaluation criteria to a project to determine whether the grantee has the financial capacity to carry out and deliver the project.
[19] *See* Hynes-Cherin Decl. at ¶ 44.
[20] *Id.* at ¶ 51 (citing NJT Letter to FTA Requesting an ESWA (June 24, 2009)).
[21] *Id.*

commitment when the Federal Government is a funding partner. This increases competition and drives down overall project cost. But NJT recognized that an FFGA would not be executed for the ARC Project until late 2010,[22] which would cause delays unacceptable to NJT. As a result, NJT sought to obtain the necessary funds through an ESWA, negotiating its terms with FTA starting in early 2009 and making an official request by letter dated June 24, 2009.[23]

NJT explained in its request that an ESWA was "critical" to allow NJT to maintain the Project's schedule and budget, and to "demonstrate a federal funding commitment to the project in support of local funding commitments already in place."[24] NJT proposed a scope of work for the ESWA that included (1) the Manhattan Tunnel Contract; (2) the Tonnelle Avenue Underpass Contract; (3) Early Property Acquisition; (4) Professional Services; and (5) Contingency.[25] NJT insisted that the ESWA include New Starts funds, ARRA funds, and CMAQ funds—some of which had previously been obligated—and included such funds in its ESWA proposal.[26] By letter dated August 14, 2009, FTA approved the scope of work and total ESWA amount proposed by NJT.[27]

On August 20, 2009, NJT and FTA executed the ESWA, as reflected in Grant NJ-03-0169-00.[28] An ESWA is processed through FTA's grants management system—the Transportation Electronic Award Management System ("TEAM"). TEAM is an electronic database accessible to both FTA and applicants via the Internet, whereby applicants apply for

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[22] *Id.*
[23] *Id.* at ¶¶ 44-60; Agency Doc. 27, NJT Letter to FTA Requesting an ESWA at 1 (June 24, 2009).
[24] Agency Doc. 27, NJT Letter to FTA Requesting an ESWA at 1 (June 24, 2009).
[25] *Id.*; Agency Doc. 2, ESWA, Grant Number NJ-03-0169-00 at Part 2 (Aug. 20, 2009)
[26] Hynes-Cherin Decl. at ¶¶ 46-61.
[27] *Id.* at ¶ 61; Agency Doc. 1, FTA Letter to NJT Approving the ESWA at 2 (Aug. 14, 2009). In this letter, FTA reiterated the total baseline cost estimate for the Project of $8.7 billion, which both parties agreed to when the Project entered Final Design.
[28] Agency Doc. 2, ESWA, Grant Number NJ-03-0169-00 at Parts 2, 3 (Aug. 20, 2009). The terms of the ESWA, including the scope of work and sources of funds, are further defined in the June 24, 2009 letter from NJT to FTA and the August 14, 2009 letter from FTA to NJT.

and FTA approves grants and other agreements. Applicants enter important project information into TEAM, including the project description, scope, budget, and milestones.[29] FTA reviews this information, and if necessary, FTA provides the applicant with comments regarding the extent to which the application is satisfactory.[30] Once FTA is satisfied with the application, it approves the document in TEAM by executing an electronic agreement.[31]

Federal funds provided to a project under an ESWA are obligated to the grantee under grant agreements, also executed through TEAM, that are included in, and support the scope of work outlined in, the ESWA. Funds from different appropriation sources cannot be joined in a single grant due to the inability of FTA's financial management systems to process different program funds within a single grant application. As a result, separate grant documents are necessary to obligate funds from different sources provided under the ESWA.

For the ARC Project, the ESWA was executed, in accordance with NJT's request, in the amount of $1,352,000,000, which included both Federal and local funding.[32] With regard to Federal funds, the ESWA committed $395,020,000 in New Starts funds and authorized the use of $130,000,000 in ARRA funds and $125,000,000 in CMAQ funds, making the total Federal share $650,020,000.[33] Funds provided under the ESWA were obligated either

[29] The grant applicant also enters information regarding its organization, such as its address, its contact information, union information, an urbanized area identification number, congressional district information, and its Data Universal Numbering System number. In addition, the applicant enters project information which identifies whether the application is for a new grant, a grant amendment, or a budget revision, and the project's start date and end date. See FTA Circular 9300.1B, Capital Investment Program Guidance and Application Instructions, Appendix A at 1-2 (Nov. 1, 2008).
[30] *Id.* at 4.
[31] *Id.*
[32] Agency Doc. 2, ESWA, Grant Number NJ-03-0169-00 at Parts 2, 3 (Aug. 20, 2009) (a purpose of the grant was "to outline the components of the ESWA for $1,352,000,000").
[33] *Id.* at Part 2.

contemporaneously with the ESWA or through separate grant agreements that were incorporated into the ESWA and supported its scope of work.[34] In particular:

- A portion of the New Starts funds committed by the ESWA ($14,700,000) was obligated contemporaneously with the ESWA, in the same grant agreement that executed the ESWA.[35]
- Two days before the ESWA was executed, NJT and FTA entered into a grant agreement obligating the $130,000,000 in ARRA funds included in the ESWA.[36] The ESWA specifically incorporated this ARRA grant.[37] Moreover, the ESWA's scope of work included the specific work covered by the grant, *i.e.*, construction of the Tonnelle Avenue Underpass and final design services.[38]
- A few weeks after the ESWA was executed, NJT and FTA entered into a grant agreement obligating $50,000,000 of the CMAQ funds included in the ESWA.[39] These funds were budgeted for professional services, property acquisition, and the Manhattan Tunnel construction, all of which were included in the ESWA's scope of work.[40] The ESWA specifically incorporated this CMAQ grant.[41]
- The ESWA also incorporated CMAQ funds previously obligated for preliminary engineering work through three separate grant agreements. The ESWA specifically

[34] Note, however, a substantial portion of the funds provided under the ESWA were still unobligated at the time NJT terminated the ARC Project.
[35] *See* Agency Doc. 2, ESWA, Grant Number NJ-03-0169-00 at Parts 3, 9.
[36] *See* Agency Doc. 38, NJ-96-X002-00 (Aug. 18, 2009) (obligating $130 million in ARRA funds for the Tonnelle Avenue Underpass and professional services for final design). This grant agreement was amended on March 4, 2010. *See* Agency Doc. 14, NJ-96-X002-01 (Mar. 4, 2010).
[37] *See* Agency Doc. 2, ESWA, Grant Number NJ-03-0169-00 at Part 2 ("A grant application of $130,000,000 of ARRA funds is pending.").
[38] *Id.*
[39] *See* Agency Doc. 13, Grant Number NJ-95-X008-00, at Part 2 (September 4, 2009) ("The $50 M of CMAQ funding in this grant is part of a total of $125 M of CMAQ funds that is authorized as part of an Early Systems Work Agreement (ESWA) outlined under pending FTA grant NJ-03-169.").
[40] *See id.* at Part 3; Agency Doc. 2, ESWA, Grant Number NJ-03-0169-00 at Part 2.
[41] *See* Agency Doc. 2, ESWA, Grant Number NJ-03-0169-00 at Part 2 ("A grant application of $50,000,000 of CMAQ funds is also pending.").

referenced the grant numbers and amounts of those grants.[42] Preliminary engineering was included in the ESWA's scope of work.[43]

In total, Federal funds provided to the ARC Project under the August 20, 2009 ESWA were obligated through six grant agreements that were incorporated into the ESWA and supported its defined scope of work.

D. NJT Seeks an Expanded ESWA

Shortly after the parties executed the ESWA, NJT requested an amendment to increase the ESWA's scope of work and provide additional funds for the Project. On October 23, 2009 NJT submitted an amended ESWA in TEAM.[44] On January 8, 2010, NJT sent FTA a letter officially requesting an ESWA amendment covering $2.117 billion in project costs—"a $765 million increase over the original $1.352 billion original ESWA"—and additional project elements, including the Palisades Tunnels, Amtrak Towers, and Kearny Yard Earthwork.[45] NJT contended that the amendment was "critical not only to maintain schedule and budget, but also to demonstrate a federal funding commitment to the project to match the local funding commitments that have been in place."[46] According to NJT, an ESWA amendment would "continue to unleash more than $5.7 billion in funding allocated by local sources."[47]

Before approving NJT's request, FTA wanted assurance that newly-elected New Jersey Governor Chris Christie would continue to support the ARC Project.[48] In February 2010, Secretary LaHood met with Governor Christie to discuss the ARC Project. In that meeting, the

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[42] *See* Agency Doc. 2, ESWA, Grant Number NJ-03-0169-00 at Part 2 ("Previous 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). Budget Revision to NJ-95-X003 will reduce ARC funding in the grant . . . .").
[43] *Id.* ("The ESWA covers professional services expenses for preliminary engineering . . . .").
[44] Agency Doc. 29, NJT Letter to FTA Requesting an Amendment to the ESWA at 1 (Jan. 8, 2010).
[45] *Id.*
[46] *Id.* at 3.
[47] *Id.*
[48] *See* Hynes-Cherin Decl. at ¶ 69.

Governor expressed the State's continued support for the Project.[49] By letter following the meeting, Secretary LaHood advised the Governor that the Federal New Starts commitment to the Project would be capped at $3 billion under a future FFGA, and, as is typical with New Starts projects, "any costs exceeding this amount will be the responsibility of the State and its non-Federal funding partners."[50] Secretary LaHood sought the Governor's assurance of a continued commitment to a project implementation plan that would keep the Project on schedule and on budget to mitigate the potential impact of delays and cost overruns on the State of New Jersey.[51]

In his response letter to Secretary LaHood dated April 6, 2010, Governor Christie stated that he recognized that the Project was "critical for the transit riders of New Jersey and the region," and he therefore wrote to, "restate [his] commitment" to the Project, including the funds controlled by the State.[52] In the letter, Governor Christie did not condition the State's commitment to the Project on the Project remaining within any particular estimated cost range. The Governor stated that he looked forward to "an expeditious award of the second Early Systems Work Agreement," and directed NJT's Executive Director James Weinstein to work with FTA to finalize an FFGA that would commit $3 billion of Federal New Starts funds for the project "as soon as possible."[53]

On April 14, 2010, a week after receiving this written commitment from the Governor, FTA and NJT amended the ESWA, providing additional Federal funds for the ARC Project through additional grants and expanding the scope of work in accordance with NJT's request.[54]

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[49] Agency Doc. 3, Secretary Ray LaHood Letter to Governor Chris Christie at 1 (Mar. 26, 2010).
[50] *Id.*
[51] *Id.*
[52] Agency Doc. 4, Governor Chris Christie Letter to Secretary Ray LaHood at 1 (Apr. 6, 2010).
[53] *Id.* at 1-2.
[54] Agency Doc. 6, Amendment to the ESWA, Grant NJ-03-0169-01 at Part 9 (Apr. 14, 2010). The terms of the Amended ESWA, including the scope of work and the sources of funds, are further defined in the January 8, 2010 letter from NJT to FTA, and the April 14, 2010 letter from FTA to NJT. *See* Agency Doc. 29, NJT Letter to FTA

Under the amended ESWA, FTA and NJT committed $2,117,050,000 for the ARC Project.[55] FTA's commitment included an additional $206,069,932 in New Starts Funds and an additional $179,050,000 in CMAQ funds, bringing the total Federal share to $1,035,139,932.[56] A portion of the newly available funds provided under the ESWA were obligated through grant agreements executed either contemporaneously with the amended ESWA or incorporated into the ESWA. In particular:

- A portion of the New Starts funds committed by the amended ESWA ($47,520,000) was obligated contemporaneously with the amended ESWA, through a grant agreement contained in the same TEAM document as the amended ESWA.[57]
- The amended ESWA incorporated $6,069,932 in New Starts funds that had been previously obligated in a separate grant agreement for preliminary engineering, which fell under the ESWA's scope of work.[58]
- The amendment further referenced the ARRA grant and four CMAQ grants that had been incorporated into the initial ESWA.[59]

The amended ESWA also contained detailed budget descriptions for each activity included within the amended ESWA's scope of work (*e.g.*, Manhattan Tunnel, Tonnelle Avenue,

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Requesting an Amendment to the ESWA (Jan. 8, 2010); Agency Doc. 5, FTA Letter to NJT Approving an Amendment to the ESWA at 1 (Apr. 14, 2010).

[55] Agency Doc. 6, Amendment to the ESWA, Grant NJ-03-0169-01 at Part 2 (Apr. 14, 2010).

[56] *Id.* The balance of the funds came from local sources.

[57] *See* Agency Doc. 6, ESWA, Amendment to the ESWA, Grant NJ-03-0169-01 at Parts 2, 3, 9 (Apr. 14, 2010).

[58] *See* Agency Doc. 6, Amendment to the ESWA, Grant NJ-03-0169-01 at Part 2 (Apr. 14, 2010) ("This includes . . . $6,069,932 of prior New Starts funding used for Preliminary Engineering from a grant that has since closed."). *See also* Agency Doc. 9, New Starts Grant NJ-03-0138-02 (Mar. 8, 2007) (obligating New Starts funding to support Preliminary Engineering for the ARC Project).

[59] *See* Agency Doc. 6, ESWA, Amendment to the ESWA, Grant NJ-03-0169-01 at Part 2 (Apr. 14, 2010) ("In addition to this grant, $304,050,000 of Federal Highway Administration flex funds have been or will be used to fund this project. The following is the breakdown of the $304,050,000: Prior CMAQ funding awarded for PE consists of FY 2007 funds in the amount of $34,756,000 from NJ-95-X002, $766,000 from NJ-90-X086, and $64,478,000 from NJ-95-X003 (A budged revision is pending to reduce NJ-95-X003 to $64,478,000 from $77,680,000). In addition, FY 2009 CMAQ funds (non-PE) were awarded in the amount of $50,000,000 (NJ-95-X008) . . . . An additional $130,000,000 of ARRA funds have been awarded under NJ-96-X002.").

Property Acquisition, etc.).[60] Each description contained a breakdown of the funding sources supporting that particular activity. These descriptions make clear that the activities under the scope of work were funded by various combinations of local, CMAQ, ARRA, and New Starts funds, all of which were provided under the ESWA. For instance, after itemizing the sources of New Starts and local funding eligible for costs incurred for work on the Manhattan Tunnel, the amended ESWA itemized the CMAQ grants that supported those costs. It then added the local, New Starts, and CMAQ funds together to reach the total amount of funding provided under the ESWA:

> 'Total Eligible Cost' of [the Manhattan Tunnel] line item is $471,474,550. Current New Starts funding funds $15,700,000. Future New Starts grant amendments to this grant will fund $90,132,373. Port Authority funding funds $362,941,000. TTF funding funds $2,701,177. In addition to funding provided through this grant, as amended, there are other grants that also support costs associated with [the Manhattan Tunnel] line item. Specifically, the FY09 CMAQ grant (NJ-95-X008) funds $30,000,000. Funding in the amount of $30,000,000 will be included in the FY10 CMAQ grant. Funding in the amount of $40,000,000 will be funded by CMAQ grants in FY11 and beyond. *The total amount of funding provided through the ESWA, as amended, for Manhattan Tunnel direct cost[s] is $571,474,550.*[61]

The descriptions provided for the other activities under the amended ESWA's scope of work—including Tonnelle Avenue, Property Acquisition, Professional Services, Palisades Tunnels, Amtrak Tower Relocation, and Kearny Yard Earthwork—similarly make clear that the Federal funding supporting those activities was "provided through the ESWA."[62] In other words, the amended ESWA demonstrates that all of the Federal funds—New Starts, ARRA, and CMAQ—supporting the activities within its scope of work are "provided through the ESWA."

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[60] *Id.* at Part 3.
[61] *Id.* (emphasis added).
[62] *Id.*

In sum, the ESWA and amended ESWA provided certain Federal funds to support a defined scope of work for the ARC Project. A portion of those funds was obligated to NJT through eight different grants—three New Starts,[63] one ARRA,[64] and four CMAQ[65] grants—that were either contained in the same document as the ESWA, as amended, or in separate grant agreements that were incorporated by reference into the ESWA, as amended. Each of these eight agreements support the specific scope of work set forth by the ESWA, as amended. According to FTA and NJT records, and discussed below, NJT expended $271,101,291 under the ESWA through these eight grants—a figure not challenged by NJT.[66]

E. New Jersey's Termination of the ARC Project

At the time the ESWA amendment was executed, FTA again expressed numerous concerns with NJT's ability to mitigate major risks associated with the Project.[67] FTA warned NJT, specifically, that "[t]he scheduled completion date for the project is extremely optimistic and has the potential to slip, with possible delays ranging from nine to 22 months."[68] Prior to any execution of an FFGA, FTA requested further assurances from NJT that NJT would vigorously mitigate and control project costs.

Following the execution of the ESWA amendment in April 2010, FTA and NJT worked towards entering into the next phase of the ARC Project and sought to execute by September

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[63] *See* Agency Doc. 9, New Starts Grant NJ-03-0138-02 (Mar. 8, 2007); Agency Doc. 2, ESWA, Grant Number NJ-03-0169-00 (Aug. 20, 2009); Agency Doc. 6, Amendment to the ESWA, Grant NJ-03-0169-01 at Part 2 (Apr. 14, 2010). While for ease of reference, FTA describes Grant NJ-03-0169-00 and Grant NJ-03-0169-01 as separate grants, Grant NJ-03-0169-01 is an amendment to Grant NJ-03-0169-00 and they are technically the same grant.
[64] *See* Agency Doc. 14, ARRA Grant NJ-96-X002-01 (Mar. 4, 2010) (original grant at Agency Doc. 38, ARRA Grant NJ-96-X002-00 (Aug. 18, 2009)).
[65] *See* Agency Doc. 10, CMAQ Grant NJ-95-X002-00 (Aug. 23, 2007); Agency Doc. 11, CMAQ Grant NJ-90-X086-00 (Jul. 30, 2008); Agency Doc. 12, CMAQ Grant NJ-95-X003-00 (Sept. 10, 2008); Agency Doc. 13, CMAQ Grant NJ-95-X008-00 (Sept. 4, 2009).
[66] *See* Agency Doc. 8, FTA Demand Letter to NJT at 1 (Nov. 24, 2010); Agency Doc. 19, NJT Quarterly Report (Sept. 30, 2010); Agency Doc. 7, ARC Expenditures as of 9/30/10.
[67] Agency Doc. 5, FTA Letter to NJT Approving an Amendment to the ESWA at 3-4.
[68] *Id.* at 3.

2010 an FFGA committing a total of $3 billion in Federal New Starts funds. To this end, FTA initiated the process of updating the risk assessment, consistent with FTA policy and pursuant to 49 U.S.C. § 5309, to ensure that NJT continued to have the financial capacity to carry out the Project. In addition, FTA and NJT needed to establish a revised baseline cost estimate for the Project which would take into account NJT's ongoing efforts to mitigate and control the Project's costs. Accordingly, FTA met with NJT staff on numerous occasions between May and August of 2010 to discuss different aspects of the cost estimate. FTA used information provided by NJT during those discussions to prepare a draft risk assessment, including an estimated risk range, for presentation to NJT.[69]

On August 16, 2010, representatives from FTA and NJT gathered for a meeting to discuss the initial working draft of the updated risk assessment with the understanding that FTA needed to review its assumptions and information with NJT in detail and engage in further discussion before it could reach a final risk assessment with a revised cost estimate for FFGA negotiations.[70] After FTA's Regional Administrator presented a summary of FTA's draft risk assessment, but before any discussion of those results, NJT representatives asked for and took a five minute recess.[71] When they returned, NJT Executive Director Weinstein informed the FTA representatives that NJT would not review in detail the draft results of FTA's updated risk assessment because NJT's representatives believed that none of their input over the last several months had been incorporated.[72] The NJT representatives then walked out of the room after indicating that they would provide their own risk assessment in a few days.[73] Notwithstanding

[69] Hynes-Cherin Decl., at ¶ 78.
[70] *Id.* at ¶ 79.
[71] *Id.* at ¶ 80.
[72] *Id.* at ¶ 81.
[73] *Id.* at ¶ 82.

NJT's walkout, FTA provided NJT with a copy of its draft 2010 Risk Assessment and the Regional Administrator's talking points.[74]

In the draft 2010 Risk Assessment, FTA preliminarily calculated that the Project's estimated cost range could be between $10.9 billion and $13.7 billion.[75] These figures increased from FTA's 2008 cost estimate of $8.4 billion to $12 billion due, in part, to NJT's failure to aggressively mitigate risks and control project costs.[76] NJT failed to do so despite FTA's repeated cautionary guidance on this point during: (1) the negotiation and execution of the original ESWA; (2) the negotiation and execution of the ESWA amendment; and (3) the entirety of the Final Design process. Indeed, NJT already had expended $775 million of its $1.8 billion contingency before it even began major construction on the Project.[77] Following the August 16, 2010 meeting, NJT provided FTA with its own projected cost range of $8.7 billion to $10 billion for the Project.[78] At this point, both NJT and FTA had increased their respective cost estimates from the original 2008 Risk Assessment. NJT and FTA met again in late September and early October and continued their discussions regarding the revised risk assessment.[79] Upon consideration of NJT's estimate, as well as additional information and input provided by NJT, FTA subsequently reduced its estimated cost range by $1.1 billion on the low end and $1.3 billion on the high end, to a range of $9.8 billion to $12.4 billion.[80]

On October 7, 2010, while FTA continued to evaluate the Project's progress and its risks in an effort to further reduce the estimated cost range based on NJT's input, *and more than two*

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[74] *Id.* at ¶ 83. *See also* NJT Silber Ex. 4, FTA ARC Risk Assessment Meeting Notes (Aug. 16, 2010).
[75] Hynes-Cherin Decl. at ¶ 84. *See also* NJT Weinstein Ex. 2, ARC Steering Committee Memorandum at 5 (Oct. 26, 2010).
[76] Hynes-Cherin Decl. at ¶ 85. *See also* NJT Silber Ex. 4, FTA ARC Risk Assessment Meeting Notes (Aug. 16, 2010).
[77] Hynes-Cherin Decl. at ¶ 86.
[78] Hynes-Cherin Decl. at ¶ 87. *See also* Agency Doc. 31, NJT ARC Executive Steering Committee Memorandum Recommending ARC Project Termination at 2 (Oct. 7, 2010).
[79] Hynes-Cherin Decl. at ¶¶ 91-93.
[80] Hynes-Cherin Decl. at ¶ 94.

years after FTA notified NJT that it estimated ARC costs could run as high as $12 billion, NJT's ARC Executive Steering Committee unanimously recommended to the Governor that "the ARC Project be terminated and that staff immediately begin an expeditious and orderly shutdown of the project" because the State of New Jersey could not afford to continue it.[81] The very next day, a contingent of DOT and FTA representatives traveled to New Jersey and met with Governor Christie in an effort to save the Project. DOT provided the Governor with the updated risk range of $9.8 billion to $12.4 billion, and proposed that FTA and NJT use the lower end $9.8 billion figure as the baseline cost estimate for an FFGA in light of NJT's estimated cost range.[82] Moreover, DOT pledged additional Federal New Starts funds in the amount of $358 million if the Port Authority and the State would help fund the difference between the $9.8 billion cost estimate and the Project's original $8.7 billion baseline cost estimate.[83]

In addition to DOT's extra grant support, DOT proposed four options that NJT and the State of New Jersey might utilize to fund the remaining project costs.[84] First, DOT offered to provide the State of New Jersey with a low interest Federal Railroad Rehabilitation and Improvement Financing ("RRIF") loan through the Federal Railroad Administration, which would have had a repayment period of up to thirty-five years with repayment obligations not to begin until six years after the first drawdown of the loan. Notably, DOT offered this loan as a "safety net" that NJT would use *only if the actual project costs exceeded the original baseline cost estimate plus the additional pledge of funds provided by FTA and the Port Authority*. If NJT had mitigated costs as it asserted it would, then NJT never would have had to use the line of

[81] Agency Doc. 31, NJT ARC Executive Steering Committee Memorandum to Governor Chris Christie Recommending ARC Project Termination at 1, 3 (Oct. 26, 2010).
[82] FTA normally would require NJT to identify a source of funding to meet the projected mid-range cost estimate, but in this case, FTA was prepared to allow NJT to use the lower end of the range because NJT continued to assert that it could complete the Project for a lower cost.
[83] *See* DOT's "Options Charts" that DOT provided to Governor Christie on October 8, 2010, Agency Doc. 36, Options to Cover ARC Project Costs (Oct. 8, 2010); Agency Doc. 37, The Funding Challenge (Oct. 8, 2010).
[84] *Id.*

credit provided through the loan. Second, DOT suggested that NJT might avail itself of a RRIF loan and, additionally, reduce the project scope to reduce costs. Third, DOT suggested that NJT might enter into a public-private partnership to secure additional funding from private sources for the Project. Finally, DOT suggested a hybrid approach whereby DOT offered a RRIF loan for the Portal Bridge,[85] and suggested that NJT enter into a public-private partnership to secure additional funding for the ARC Project.

Despite the numerous options presented by DOT that would have enabled the Project to continue, on October 26, 2010, NJT Executive Director Weinstein recommended to Governor Christie that he proceed with the Project's termination.[86] The next day, the Governor terminated the ARC Project.[87] After publicly dismissing each of DOT's four suggested options for funding the additional estimated project costs, and emphasizing his unwillingness to fund those costs from other sources, Governor Christie stated: "I have instructed Mr. Weinstein to continue the orderly wind down and closing of this project. This decision is final. There is no opportunity for reconsideration of this decision on my part. I am done. We are moving on."[88]

F. FTA's Debt Collection Action

At the time NJT terminated the ARC Project, FTA had obligated more than $350 million in Federal funds through grant agreements under the ESWA, and NJT had received $271,101,291 in Federal payments under it; the balance of the obligated funds had not yet been

[85] Although NJT deemed the absence of funding for the Portal Bridge to be "critical," Agency Doc. 31, NJT ARC Executive Steering Committee Memorandum Recommending ARC Project Termination at 2 (Oct. 7, 2010), the Portal Bridge was never a part of the Project and is irrelevant to this debt collection action.
[86] Agency Doc. 31, NJT ARC Executive Steering Committee Memorandum Recommending ARC Project Termination at 2 (Oct. 7, 2010).
[87] Agency Doc. 34, Transcript of Governor Chris Christie's Public Comments Terminating the ARC Project at 4 (Oct. 27, 2010).
[88] *Id.*

expended.[89] Specifically, NJT drew down a total of $271,101,291 against the eight grant agreements that obligated funds provided under the ESWA. A November 5, 2010 chart that NJT submitted to FTA provides a grant-by-grant breakdown of ARC expenditures and calculates $271,101,291 to be the total amount of Federal funds expended.[90] These grants—listed by grant number—are the same eight grants incorporated into the ESWA, as amended, and used to obligate the funds under it.[91]

On November 8, 2010, FTA's Regional Administrator for Region 2 sent NJT a letter and notified NJT that, based on the Governor's termination of the ARC Project, FTA intended to de-obligate all unexpended funds and collect all Federal funds expended on the Project.[92] A few weeks later, on November 24, 2010, FTA sent NJT a formal "Demand Letter" pursuant to the Federal Claims Collection Act of 1966, as amended, and initiated an administrative debt collection action.[93] In that Demand Letter, FTA notified NJT that, due to the Governor's termination of the ARC Project, NJT owed a debt to the United States in the amount of $271,101,291, the total amount of Federal funds expended on the Project under the ESWA.[94] FTA informed NJT that, within thirty calendar days from the date of receipt of the Demand Letter, NJT had the following rights: (1) to pay the amount in full; (2) to request FTA to review the validity or the amount of FTA's debt claim, stating the legal basis for the dispute; and (3) to inspect and copy FTA records related to the debt.[95] In its Demand letter, FTA notified NJT that

[89] Hynes-Cherin Decl. at ¶¶ 97-98.
[90] Agency Doc. 7, ARC Expenditures as of 9/30/10.
[91] *Id.* The chart lists seven grants, instead of eight, because it treats the ESWA (NJ-03-0169-00) and ESWA amendment (NJ-03-0169-01) as one grant.
[92] Agency Doc. 35, FTA Letter to NJT Regarding Repayment of Federal Funding (Nov. 8, 2010).
[93] Agency Doc. 8, FTA Demand Letter to NJT at 1 (Nov. 24, 2010). *See* 31 U.S.C. Chapter 37 (2006).
[94] Agency Doc. 8, FTA Demand Letter to NJT at 1 (Nov. 24, 2010). *See* Agency Doc. 19, NJT Quarterly Report (Sept. 30, 2010); Agency Doc. 7, ARC Expenditures as of 9/30/10.
[95] Agency Doc. 8, FTA Demand Letter at 2.

if NJT did not exercise its right to repay the debt that it owes to the United States, then FTA would exercise its rights to collect the debt, including administrative offset.[96]

By letter of December 10, 2010, representatives of Patton Boggs LLP notified FTA that they had been engaged as counsel to represent NJT in FTA's debt collection action.[97] On December 13, 2010, and December 14, 2010, NJT had telephone conversations with FTA's Deputy Chief Counsel and requested "a standstill of the administrative process," or alternatively, a thirty day extension of time to respond to FTA's Demand Letter pursuant to FTA's Debt Collection Order.[98] By letter of December 15, 2010, NJT followed up with a written request for a thirty day extension of time.[99] By letter of December 20, 2010, FTA granted NJT its first extension of time to respond to FTA's Demand Letter and set a deadline of January 10, 2011.[100]

By letter of December 23, 2010, NJT asked FTA to grant it an additional extension of time to respond to FTA's Demand Letter.[101] After several subsequent discussions, FTA granted NJT a second extension of time to respond to FTA's Demand Letter and set a deadline of January 18, 2011.[102]

On January 11, 2011, representatives from FTA and NJT met to discuss FTA's debt collection action. In that meeting, NJT requested a third extension of time to respond to FTA's Demand Letter, which FTA granted, allowing NJT to respond on or before January 25, 2011.[103] In sum, pursuant to FTA's Debt Collection Order, FTA granted NJT the maximum amount of

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[96] *Id.*
[97] NJT Letter to FTA (Dec. 10, 2010).
[98] *See* Federal Transit Administration (FTA) Order 2060.1A, Internal Procedures for Debt Collection (July 2, 2008).
[99] NJT Letter to FTA at 1-3 (Dec. 15, 2010).
[100] FTA Letter to NJT at 1 (Dec. 20, 2010).
[101] NJT Letter to FTA at 2 (Dec. 23, 2010).
[102] FTA Letter to NJT (Jan. 7, 2011).
[103] FTA Letter to NJT (Jan. 14, 2011); FTA Letter to NJT (Jan. 13, 2011).

time allowable—sixty calendar days from the date of receipt of FTA's Demand Letter—to submit a formal response.[104]

Although the Federal Claims Collection Act of 1966, as amended, and the joint United States Department of Justice ("DOJ") and United States Department of Treasury ("Treasury") Debt Collection Regulations instruct Federal agencies to provide debtors with the opportunity to inspect and copy agency records related to the debtor's *debt*, NJT submitted to FTA several broad and sweeping requests throughout this administrative debt collection process for the opportunity to inspect and copy thousands of unrelated agency records corresponding to the *Project*.[105]

In response to NJT's requests, on December 15, 2010, and January 11, 2011, FTA provided NJT with substantial volumes of documents related to NJT's debt, including relevant grant agreements, FTA Master Agreements, NJT Quarterly Progress Reports, internal FTA memoranda, and various correspondence between NJT and FTA.

On January 25, 2011, citing these and other documents, NJT sent to FTA by electronic mail NJT's response to FTA's Demand Letter (hereinafter "NJT's Response" or "NJT's Opposition to Demand"), which included over 3,000 pages of documents that NJT asserts are related to the debt. On January 27, 2011, NJT sent to FTA a hard copy of NJT's response.[106] This Final Decision of the FTA follows.[107]

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[104] FTA Letter to NJT (Jan. 14, 2011).

[105] NJT Letter to FTA at 5-8 (Dec. 15, 2010); NJT Letter to FTA at 1 (Dec. 23, 2010). FTA notes that NJT submitted two letters to FTA on December 23, 2010, requesting the opportunity to inspect and copy all agency records related to the Project.

[106] For consistency, throughout this Final Decision, FTA will cite to the hard copy version of NJT's Response, which is an amended version of the electronic Response that NJT submitted to FTA on January 25, 2011. FTA notes that NJT submitted its hard copy Response two days after the deadline.

[107] FTA attaches and cites to three additional documents and the Declaration of Ms. Brigid Hynes-Cherin in support of this Final Decision. The Declaration includes twenty-seven Exhibits; ten of which FTA is adding to the record of this debt collection proceeding. Although FTA did not provide these documents to NJT throughout the course of the administrative debt collection proceeding because they are related to the Project and not related to the debt, the

IV. LEGAL FRAMEWORK

FTA has authority to collect all Federal funds expended on the ARC Project. FTA's legal authority to collect all Federal New Starts, CMAQ, and ARRA funds expended on the Project under the ESWA is derived from: (1) the ESWA provisions of FTA's authorizing statute; (2) the ARC Project's Master Agreements; (3) the "Common Grant Rule"; (4) the Federal Claims Collection Act of 1966, as amended;[108] (5) the joint DOJ and Treasury Debt Collection Regulations; (6) DOT's Debt Collection Regulations; and (7) FTA's Debt Collection Order.

Under 49 U.S.C. § 5309(g)(3)(B)(iv) (the "Repayment Provision"), "If an [ESWA] 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."[109]

As discussed in more detail below, Governor Christie and NJT terminated the ARC Project for reasons within their control, and therefore, *New Jersey must repay all Federal payments made under the ESWA.*

Moreover, pursuant to each of the Master Agreements that NJT voluntarily entered into with FTA to receive Federal funds for the ARC Project, NJT was subject to the following terms and conditions:

> If . . . the Federal Government determines that the Recipient has willfully misused Federal assistance by failing to make adequate progress, by failing to make reasonable and appropriate use of Project property, or by failing to comply with the terms of the Grant Agreement or Cooperative Agreement for the Project

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transmittal of the documents with this Final Decision has not prejudiced NJT's ability to respond to FTA's claim because each of the documents was in NJT's possession prior to the initiation of this debt collection proceeding. Moreover, FTA includes these documents with its Final Decision because they are necessary to respond to NJT's arguments.

[108] The Federal Claims Collection Act of 1966 is codified at 31 U.S.C. Chapter 37, and it has been amended by the Debt Collection Improvement Act of 1982, the Debt Collection Amendments of 1986, and the Debt Collection Improvement Act of 1996.

[109] 49 U.S.C. § 5309(g)(3)(B)(iv) (emphasis added).

> including this Master Agreement, the Federal Government reserves the right to require the Recipient to refund the entire amount of Federal assistance provided for the Project or any lesser amount as the Federal Government may determine.[110]

Additionally, the Master Agreements provide: "Unless prohibited by Federal law or regulation, the Federal Government may recover any Federal assistance as necessary to satisfy any outstanding monetary claims that the Federal Government may have against the Recipient."[111]

By terminating the ARC Project, the State of New Jersey willfully failed to make any further progress on the Project. As such, in addition to the above-referenced mandatory statutory repayment obligation, FTA has authority under the Master Agreements corresponding to each of the ARC Project's New Starts, CMAQ, and ARRA grants to collect all of the Federal funds expended under those agreements.

FTA has additional authority under the plain terms of the Common Grant Rule at 49 C.F.R. Part 18 to collect Federal funds that it expends on a project if a grantee fails to carry out a project. Pursuant to the Common Grant Rule:

> If a grantee or subgrantee materially fails to comply with any term of an award, whether stated in a Federal statute or regulation, an assurance, in a State plan or application, a notice of award, or elsewhere, the awarding agency may . . . take . . . remedies that may be legally available.[112]

Again, in the instant case, Governor Christie and NJT terminated the ARC Project and failed to carry it out under the terms and conditions of each of the Master Agreements corresponding to

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[110] Agency Doc. 24, FTA Master Agreement for Fiscal Year 2011 at § 11 (Oct. 1, 2010). *See* Agency Doc. 23, FTA Master Agreement for Fiscal Year 2010 at § 11 (Oct. 1, 2009); Agency Doc. 22, FTA Master Agreement for Fiscal Year 2009 at § 11 (Oct. 1, 2008); Agency Doc. 21, FTA Master Agreement for Fiscal Year 2008 at § 11 (Oct. 1, 2007); Agency Doc. 20, FTA Master Agreement for Fiscal Year 2007 at § 11 (Oct. 1, 2006). *See also* 49 U.S.C. § 5309(c)(3) ("The Secretary shall require that any grant awarded under this section to a recipient be subject to all terms, conditions, requirements, and provisions that the Secretary determines to be necessary or appropriate for the purposes of this section.").

[111] Agency Doc. 24, FTA Master Agreement for Fiscal Year 2011 at § 9(e)(2) (Oct. 1, 2010). *See* Agency Doc. 23, FTA Master Agreement for Fiscal Year 2010 at § 9(e)(2) (Oct. 1, 2009); Agency Doc. 22, FTA Master Agreement for Fiscal Year 2009 at § 9(e)(2) (Oct. 1, 2008); Agency Doc. 21, FTA Master Agreement for Fiscal Year 2008 at § 9(e)(2) (Oct. 1, 2007); Agency Doc. 20, FTA Master Agreement for Fiscal Year 2007 at § 9(e)(2) (Oct. 1, 2006).

[112] 49 C.F.R. § 18.43(a)(5) (2010).

the New Starts, CMAQ, and ARRA grants for the Project. Therefore, the Common Grant Rule authorizes FTA to take any remedy that may be legally available, including collection of all Federal funds expended on the Project.

FTA also has authority under the Federal Claims Collection Act of 1966 and its amendments—most significantly, the Debt Collection Improvement Act of 1996—to collect funds owed to the Federal Government arising out of FTA activities. Pursuant to those statutes, "The head of an executive, judicial, or legislative agency . . . shall try to collect a claim of the United States Government for money or property arising out of the activities of, or referred to, the agency."[113]

As used in the statutes, the terms "claim" and "debt" are synonymous and interchangeable, and mean "any amount of funds or property that has been determined by an appropriate official of the Federal Government to be owed to the United States by a person, organization, or entity other than another Federal agency."[114] The expansively defined term "claim" includes, without limitation, "any amount the United States is authorized by statute to collect for the benefit of any person," "the unpaid share of any non-Federal partner in a program involving a Federal payment and a matching, or cost-sharing, payment by the non-Federal partner," and "other amounts of money owed to the Government."[115]

DOJ and Treasury jointly promulgated regulations that implement these statutory provisions. Pursuant to the joint DOJ and Treasury Debt Collection Regulations, "Federal

[113] 31 U.S.C. § 3711(a)(1).
[114] 31 U.S.C. § 3701(b)(1).
[115] *Id.*

agencies shall aggressively collect all debts arising out of activities of, or referred or transferred for collection services to, that agency."[116]

DOT promulgated its own Debt Collection Regulations at 49 C.F.R. Part 89 and FTA promulgated its own guidance—FTA's Debt Collection Order—that implement the Federal Claims Collection Act of 1966, as amended.[117] The regulations and FTA's internal order require FTA to aggressively collect debt.

In sum, under the ESWA statutory provision, the terms and conditions of the Master Agreements, the Common Grant Rule, and all of the applicable debt collection statutory, regulatory, and administrative provisions, FTA has a mandate to collect all New Starts, CMAQ, and ARRA funds expended on the ARC Project under the ESWA.

V. ANALYSIS

In support of its opposition to FTA's request for repayment, NJT makes a series of arguments. *First*, NJT contends that the ARC Project failed to proceed for reasons outside of NJT's control—specifically, where a cost estimate of the Project indicated that the cost likely would increase and where a fiscal crisis was impacting the State of New Jersey—and therefore, NJT has no obligation to repay $271,101,291 to the United States. *Second*, NJT argues that the ESWA included funds only from FTA's New Starts program, and therefore, FTA cannot recover CMAQ and ARRA payments made to NJT. *Third*, according to NJT, equitable and policy considerations mandate that no repayment obligation should be imposed on NJT. After careful consideration, based on the facts in the record and applicable legal authority, FTA finds these

[116] 31 C.F.R. § 901.1(a). Similar to the statutory definitions, DOJ and Treasury define the terms "debt" and "claim" synonymously and interchangeably. They refer to "an amount of money, funds, or property that has been determined by an agency official to be due the United States from any person, organization, or entity, except another Federal agency." 31 C.F.R. § 900.2(a).

[117] *See* 49 C.F.R. Part 89; FTA Order 2060.1A, Internal Procedures for Debt Collection (July 2, 2008).

arguments to be without merit and that NJT is required to repay the funds in question under the Repayment Provision and Master Agreements.

A. The State of New Jersey's Decision to Terminate the ARC Project Was a Discretionary Decision Within Its Control.

Pursuant to the statutory Repayment Provision, "If 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."[118] In this case, FTA provided NJT with $271,101,291 in Federal funds under the ESWA for the ARC Project and NJT and Governor Christie subsequently terminated the Project for reasons manifestly within their control. Their termination of the Project also constituted a willful failure to make adequate progress on the Project. Accordingly, pursuant to the Repayment Provision, and the terms and conditions of the Master Agreements, NJT has an affirmative obligation to pay back $271,101,291 to the Federal Government.

In its Response to FTA's Demand Letter, NJT argues that the ARC Project failed to proceed for reasons outside of NJT's control, and therefore, NJT has no obligation to repay any Federal funds expended on the project.[119] NJT identifies these reasons as the allegedly drastic and unexpected increases in FTA's cost estimates for the Project and NJT's alleged lack of control over FTA's cost estimate methodology. For the reasons discussed below, FTA finds that these arguments are unsupported by the administrative record and are otherwise without merit; to the contrary, the record shows that the cost estimate increases were neither drastic nor

[118] 49 U.S.C. § 5309(g)(3)(B)(iv) (emphasis added).
[119] NJT Opposition to Demand at 17-44 (Jan. 25, 2011).

unforeseeable and that NJT had significant input into and control over FTA's cost estimate calculations. Thus, NJT terminated the Project for reasons manifestly within its control.

1. NJT's fears of escalating cost estimates and New Jersey's own financial difficulties do not constitute reasons for the State to terminate the Project that are outside of its control.

In its Response, NJT contends that FTA unilaterally, "drastically," and "unexpectedly" increased the cost estimate for the ARC Project in June 2010 to an amount greater than $8.7 billion.[120] The administrative record contradicts NJT's contention. As early as August 2008, in collaboration with NJT, FTA estimated the cost of the Project to range from $8.4 billion to $12 billion, and FTA provided this estimate to NJT as part of the collaborative process of determining the Project's estimated cost. When the Project neared the potential execution of an FFGA, FTA initiated the process of updating a Risk Assessment, and in August 2010, based on risk assumptions that were the subject of ongoing negotiations between FTA and NJT, FTA preliminarily estimated the updated cost of the Project to range from $10.9 billion to $13.7 billion. After receiving input from NJT and reassessing certain assumptions regarding costs, in October 2010, FTA provided NJT with a lower revised cost estimate with $9.8 billion as the low end estimate, $10.9 billion as the mid range estimate, and $12.4 billion as the high end estimate. The record thus demonstrates that, contrary to NJT's characterization, the increase in the range was neither "drastic" nor "unexpected," but was in fact well within NJT's contemplation, particularly given its ability to influence the risk assessments and control its own cost mitigation measures. Moreover, the increase in the cost estimate range was not unusual for a New Starts project.[121]

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[120] *Id.* at 17-18.
[121] Hynes-Cherin Decl. at ¶ 85.

NJT's objection to these cost estimates derives from the requirement that a grantee bear all additional costs on a project after FTA approves a project into Final Design.[122] NJT argues that, in light of the revised cost estimates in 2010, NJT could not commit additional funds to the Project because a fiscal and economic crisis was impacting the State of New Jersey.[123] According to NJT, "To continue performance of the ARC Project, given FTA's dramatic cost increases, would have been fiscally and financially irresponsible for the State and NJT."[124]

With respect to DOT's alternative proposals to save the Project, NJT asserts that the Governor had no choice but to reject DOT's offer to provide NJT with a loan because the loan would place the State of New Jersey into deeper debt.[125] In addressing DOT's suggestion that NJT enter into a public-private partnership as an option to secure funding for NJT's additional share, NJT argues, based partly on remarks made in the press by the former governor of a different state who had no involvement in the ARC Project, that it might have had to spend a significant amount of time entering into a partnership with no guarantee that the partnership would be at an acceptable price or on terms acceptable to the State of New Jersey.[126]

In sum, NJT argues, based on (1) FTA's 2010 cost estimates, (2) the requirement that NJT bear any costs exceeding the original baseline cost estimate, and (3) the fiscal and economic crisis impacting the State of New Jersey, that the Governor and NJT had no choice but to terminate the Project for reasons beyond their control.[127] NJT's fears of escalating cost estimates and the State of New Jersey's own financial difficulties do not, however, excuse NJT's non-

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[122] Pursuant to FTA's 2006 Guidance on New Starts Policies and Procedures, "Once [a] 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." FTA 2006 Guidance on New Starts Policies and Procedures at 9, available at http://www.fta.dot.gov/planning/newstarts/planning_environment_5203.html (May 16, 2006).
[123] NJT Opposition to Demand at 18-33.
[124] *Id.* at 27.
[125] *Id.* at 30-31.
[126] *Id.* at 31.
[127] NJT Opposition to Demand at 17-44.

compliance with the ESWA and the Repayment Provision or its obligation under the Master Agreements.

First, even assuming the accuracy of NJT's claims regarding its difficulties of funding the Project in light of its budget issues, the State of New Jersey's *own* budget issues are, by definition, circumstances within the State of New Jersey's control. Indeed, NJT's Response repeatedly acknowledges the State of New Jersey's control over its own budget. For instance, NJT recognized in its Response that (1) New Jersey "defer[red] its $3 billion pension contributions and . . . reduce[d] school aid by $1.7 billion, municipal aid by $334 million, and higher education assistance by $178 million" to meet a balanced budget; (2) New Jersey can assess taxes to raise additional revenue; and (3) New Jersey has control over disbursements from the New Jersey Transportation Trust Fund.[128]

As NJT concedes in its Response, the State of New Jersey has a $30 billion annual budget, and in managing that budget, the Governor makes discretionary decisions on a regular basis regarding the programs and projects that the State should fund, the programs and projects that the State should not fund, and whether the State should raise additional revenue to increase its operating budget. From the inception of the Project, the State decided to allocate resources from its budget to fund the Project, until it decided in October 2010 to allocate those resources elsewhere. Once NJT requested and entered into an ESWA—and subsequently amended the ESWA after Governor Christie took office and affirmed the State's support for the Project—it knowingly accepted a Federal financial commitment with clearly stated statutory and contractual repayment obligations should New Jersey fail to comply with the requirements of that commitment. Governor Christie's wholly discretionary budget decisions with respect to its revenue pool and the allocation of its operating budget do not obviate or supersede those

[128] *Id.* at 25, 29.

statutory and contractual obligations.[129] If they did, then any ESWA recipient would simply be able to walk away from a project anytime it decided that it would be in its best interest to direct its resources elsewhere, rendering the Repayment Provision meaningless.

Second, the fact that NJT rebuffed DOT's final efforts to save the Project demonstrates that it was NJT—not FTA—that controlled the termination of the Project. As acknowledged in NJT's Response, NJT and Governor Christie rejected four different proposals offered by DOT to save the Project, including (1) a RRIF loan through the Federal Railroad Administration, (2) a RRIF loan combined with a reduction in the Project's scope, (3) a public-private partnership which would have infused financing from outside sources, and (4) a RRIF loan to fund the Portal Bridge, combined with a public-private partnership. And while NJT dismissed the loan proposals by arguing that New Jersey could not increase its debt load, the Governor subsequently made a discretionary decision to fund future transportation projects by taking on additional and substantial debt.[130] Governor Christie's unilateral termination of the project, and his rejection of feasible alternatives presented by DOT, demonstrates that the termination of the Project was willful and based on reasons squarely within New Jersey's control.

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[129] Indeed, if a grantee's own budgetary pressures provide a legally recognized carve-out from the repayment obligations of an ESWA, then it would create an enormous exception that swallows the rule. Any grantee debtor always could point to budgetary pressures as a reason to terminate a project and escape the ESWA's repayment obligations.

[130] Patrick McGeehan, *Christie Outlines a Plan to Pay for Transit Work*, N.Y. TIMES, available at http://www.nytimes.com/2011/01/07/nyregion/07christie.html?_r=1, Jan. 6, 2011 ("Gov. Christie of New Jersey laid out a plan on Thursday to pay for five years of work on the state's roads, rails and bridges by borrowing $4.4 billion."); NORTHJERSEY.COM, The Record: Another Band-Aid, available at http://www.northjersey.com/news/opinions/113186934_Another_Band-Aid.html, Jan. 10, 2011 ("Governor Christie unveiled his grand plan for the [Transportation Trust Fund] on Thursday: Borrow more money.").

2. NJT controlled the actual costs incurred on the ARC Project and its assertion that the increasing cost estimate was beyond its control is without merit.

NJT argues that the processes, methods, and assumptions that FTA used when conducting its 2010 Risk Assessment were beyond NJT's control, and therefore, justified the Project's termination.[131] This argument is similarly without merit. Setting aside the fact that NJT had ample input into the Risk Assessment and the baseline cost estimate, NJT's argument based on an increasing *estimate* is misplaced given that NJT had, at all times, firm control over the actual costs incurred on the Project, which drive the estimates on an ongoing and continuous basis. Because NJT had undisputed control over the costs incurred on the Project, FTA finds that any change in the cost *estimate* does not constitute a reason to terminate the Project that was beyond NJT's control.

Specifically, NJT alleges that FTA conducted its 2010 Risk Assessment without any input from NJT.[132] NJT states it strongly disagreed with FTA's re-estimate, and during the summer of 2010, NJT asserts that it attempted to demonstrate that it could deliver the Project at or near $8.7 billion.[133] NJT attempted to demonstrate how it had mitigated several major risk areas.[134] In an effort to account for FTA's concerns, NJT even presented its own revised cost estimate with $9.5 billion as the most likely cost of the Project.[135]

NJT further argues that FTA considered improper factors when revising the risk assessment, even though there were no material changes in the Project itself.[136] However, the arrival at various estimates involved a collaborative effort between NJT and FTA. The initial

[131] NJT Opposition to Demand at 32-40.
[132] *Id.* at 38.
[133] *Id.* at 40.
[134] *Id.* at 40.
[135] *Id.* at 38. Notably, with NJT presenting $9.5 billion as the most likely cost, and FTA's low end estimate of $9.775 billion, the parties were less than $300 million apart at the time the Project was terminated.
[136] *Id.* at 41-44.

August 2008 baseline cost estimate was reached only after rounds of discussions between NJT and FTA regarding the Project's scope and its various inputs. As detailed above, NJT understood at all times that the estimates were subject to ongoing negotiations between NJT and FTA and further subject to actual Project progress and cost mitigation by NJT. In arriving at the revised October 2010 baseline cost estimate, FTA first presented a draft risk assessment to NJT, and then subsequently revised and adjusted the risk assessment after reviewing and considering multiple submissions from NJT, including NJT's own draft cost estimate. In other words, a baseline cost estimate could only be reached after receiving data and other informational input from NJT, including the actual costs incurred by NJT to date.

To be clear, there is a distinction between the act of *estimating* costs and the act of *controlling* costs. Both parties—FTA and NJT—had the ability to estimate costs, but only NJT had the ability to control costs. FTA's role with respect to costs throughout the Project, as with all New Starts projects, was to re-estimate costs in collaboration with NJT at each decision point before it committed additional Federal investments, taking into account NJT's actual costs to date. NJT's role was to manage the Project and to enter into contracts to deliver the Project, and at all times, NJT had the ability to control the actual costs of these contracts. FTA was never a party to these contracts and had no ability to intervene and control the actual Project's costs. NJT's efforts, notwithstanding any FTA estimate to the contrary, demonstrate that NJT controlled and believed that it controlled the ability to complete the Project at or near the originally projected cost of $8.7 billion. It is apparent in NJT's argument that NJT was in firm control of the actual costs expended on the Project, the management of the Project, and the use of Federal funds for the Project under the ESWA. Again, even assuming for the sake of argument that NJT had limited control over the Project's cost estimate, NJT cannot cite to a rising cost

estimate as a reason justifying the termination of the Project when it had firm control of the *actual costs* expended.

In short, NJT's argument fails because it is based on an estimate—the mere *potential* that NJT would have to pay *actual excess costs* beyond an estimated figure. As the party negotiating the underlying construction contracts and managing the Project, NJT always was in control of the *actual costs* that it incurred on the Project. FTA awarded substantial amounts of Federal funds for the ARC Project due to NJT's commitment and responsibility under the ESWA and the Master Agreements to manage and deliver the Project within the agreed upon $8.7 billion budget. FTA obligated funds under the ESWA to reimburse NJT as NJT—not FTA—incurred costs for the Project. Consequently, because NJT's ability to support the Project was based on its ability to pay *actual costs*, not *estimated costs*, its argument based on the cost estimate fails.

In summary, the increase in the cost estimate range was not drastic and was well within a foreseeable range for the ARC Project. New Jersey's fiscal difficulties do not change these facts. FTA and NJT jointly and collaboratively calculated the cost estimates, which were based on actual costs that were, at all times, within NJT's control. Accordingly, FTA finds that the Governor and NJT terminated the Project for reasons entirely within their control.

B. The Early System Work Agreement Included New Starts Funds, CMAQ Funds, and ARRA Funds—All of Which Must Now be Repaid.

In its Response to FTA's Demand Letter, NJT argues that the ESWA included only New Starts funds.[137] In particular, NJT argues that as a matter of law, only New Starts funds may be included in an ESWA and are subject to the Repayment Provision. Furthermore, NJT contends that as a matter of fact, the ESWA, as amended, only obligated New Starts funds. As addressed

[137] *Id.* at 4-16.

in more detail below, FTA disagrees with NJT's interpretation of the law and facts, and finds that the ESWA can, and did, include New Starts and non-New Starts funds.

1. An ESWA may include more than New Starts funds.

In its Response, NJT argues that "the ESWA statute applies only to New Starts funds."[138] NJT's assertion is incorrect as 49 U.S.C. § 5309 does not limit the scope of an ESWA to New Starts funds. There is no language in title 49 of the United States Code that provides such a limitation. To the contrary, pursuant to 49 U.S.C. § 5309(g)(3)(B)(i), an ESWA "obligates an amount of available budget authority specified in law."[139]

GAO defines budget authority as "[a]uthority provided by federal law to enter into financial obligations that will result in immediate or future outlays involving federal government funds."[140] Thus, "available budget authority" includes not only New Starts funds but *all* Federal financial assistance provided to the ARC Project under the ESWA. The plain meaning of 49 U.S.C. § 5309(g)(3)(B)(i) does not limit the scope of an ESWA to New Starts funds; rather, the plain meaning allows an ESWA to include within its scope any source or type of Federal funding.

NJT also cites 49 U.S.C. § 5309(g)(4) in support of its argument that ESWAs may include only New Starts funds, but this reliance is misplaced. This paragraph describes contingent commitment authority, which applies to "future obligations of the Government and contingent commitments to incur obligations."[141] This paragraph, by its terms, does not apply to

[138] NJT Opposition to Demand at 5.
[139] 49 U.S.C. § 5309(g)(3)(B)(i).
[140] UNITED STATES GOVERNMENT ACCOUNTABILITY OFFICE, GLOSSARY OF TERMS USED IN THE FEDERAL BUDGET PROCESS at 20 (2005).
[141] 49 U.S.C. § 5309(g)(4)(A).

current year or previously obligated funds at issue in this debt collection action, and does not alter the plain meaning of 49 U.S.C. § 5309(g)(3)(B)(i).

2. NJT and FTA expressly included ARRA, CMAQ, and previously expended funds in the ESWA, and FTA's payment of these funds to NJT constituted payments under the ESWA.

NJT argues that the ESWA, as amended, obligates only certain New Starts funds and expressly excludes all CMAQ, ARRA, and previously awarded New Starts funds.[142] In particular, NJT argues that the only payments made under the ESWA are the New Starts funds that were obligated in the same documents wherein the parties executed the ESWA and its amendment.[143]

NJT's argument fundamentally confuses the grant documents that obligate New Starts funds included in the ESWA with the ESWA itself. While the ESWA and ESWA amendment were executed in documents that also obligated certain New Starts funds, the ESWA is not limited to those obligations. Instead, as described above, the ESWA and ESWA amendment set forth a defined scope of work for the ARC Project and provided certain funds in support of that work. Because of legal requirements, accounting rules, limitations of FTA's financial management system, and timing constraints, FTA obligated the ESWA funds in separate grant agreements. The fact that different program funds included in the ESWA were obligated through different grants, as FTA systems require, does not convert the funds NJT drew down from those grants into payments outside the ESWA.

The Repayment Provision is not limited to funds that were obligated in the same document wherein the parties executed the ESWA. Rather, it requires repayment of *all* Federal

[142] NJT Opposition to Demand at 10.
[143] Agency Doc. 2, ESWA, Grant NJ-03-0169-00 (Aug. 14, 2009) (obligating $14,700,000 in New Starts funds); Agency Doc. 6, ESWA Amendment, Grant NJ-03-0169-01 (Apr. 14, 2010) (obligating $47,520,000 in New Starts funds).

"payments made under the work agreement." This provision encompasses all Federal payments made under the ESWA, whether they were obligated through the ESWA-executing document or in a separate document and whether they are New Starts funds or from some other available budget authority. NJT's argument that funds are not "under the work agreement" unless they were obligated in the same document as the ESWA elevates form over substance and undermines the statutory purpose of the ESWA, which is, to "promote ultimate completion of the project more rapidly and at less cost."[144]

NJT's argument that ARRA, CMAQ, and previously-obligated New Starts funds were not included in the ESWA is undermined by the parties' clear understanding, evidenced in the grant documents and the administrative record. For instance, the Line Item Extended Budget Descriptions in the amended ESWA (NJ-03-0169-01) include the ARRA and CMAQ grants as sources of funds.[145] For example, the Line Item "Professional Services" in the amended ESWA is described as follows:

> The 'Total Eligible Cost' of this line item is $250,407,968. New Starts funding in this amendment funds $44,520,000. Future New Start grant amendments to this grant will fund $87,101,077. Port Authority funding funds $43,943,000. TTF funding funds $74,843,891. In addition to funding provided through this grant, as amended, there are other grants that also support costs associated with this line item. Specifically, the FY09 ARRA 5307 grant (NJ-96-SX002) funds $112,117,000. Prior New Starts Grant NJ-03-138 provided $6,069,932. Prior CMAQ grants NJ-90-X086, NJ-95-X002, and NJ-95-X003 will fund $100,000,000 of the cost. The FY09 CMAQ grant (NJ-95-X008) funds $5,000,000. Future CMAQ grants will fund $52,000,000. *The total amount of funding provided through this ESWA, as amended, for Professional Services is $525,644,000.*[146]

[144] 49 U.S.C. § 5309(g)(3)(A)(ii).
[145] Agency Doc. 6, ESWA Amendment, Grant NJ-03-0169-01 at Part 3, Line Items 14.01.10, 14.06.60, 14.08.80, and 14.04.40 (Apr. 14, 2010).
[146] Grant NJ-03-0169-01 at Part 3, Line Item 14.08.80 (emphasis added).

In six other budget categories in Grant NJ-03-0169-01, NJT repeated this description of the line item budget amount as encompassing New Starts, ARRA, and/or CMAQ funds, and indicated that these funds are *provided through the ESWA*. The language in these grants clearly conveys both parties' understanding and NJT's agreement by its signature on the grant that the ESWA and its amendment included more than the New Starts grants and more than New Starts funds.

Moreover, NJT's correspondence to FTA regarding the proper scope of the ESWA during its negotiation confirms that NJT specifically requested, indeed demanded, that previously spent CMAQ and New Starts funds be included in the ESWA:

> If the $6 M prior New Starts grant were removed from the ESWA, then an amount of "Non-section 5309 New Starts funding" would need to be removed from the ESWA scope consistent with the approximate two thirds/one third New Starts match. If that were done, the total ESWA scope would fall by approximately $18 million from $1.352 billion and the New Starts amount would fall by approximately $6 M from $400 M. ($12 M non-New Starts and $6 M New Starts)
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> Similarly, if the over $100 M of non-New Starts funds [CMAQ] expended on PE [Preliminary Engineering] were removed from the ESWA, then New Starts funds would need to be removed from the ESWA as well—consistent with the New Start/Non New Start ratio of about one third to two thirds. So over $100 M of non-New Starts and $50 M of New Starts would need to be removed from the scope of the ESWA, lowering the total ESWA and the New Starts amount. Neither of these outcomes is desirable.[147]

As this correspondence demonstrates, NJT requested that the previously expended grants be included in the ESWA to make additional Federal funds available to NJT, sourced from New Starts and non-New Starts programs, and to demonstrate a robust Federal commitment to the Project.[148] By doing so, and obtaining the benefit of additional Federal funding in the ESWA

[147] Agency Doc. 25, NJT E-mail to FTA Regarding the ESWA (June 5, 2009). Ultimately, the $6,069,932 in prior New Starts funds were not included in the original ESWA, but they were included in the amended ESWA. *See* Agency Doc. 6, Amendment to the ESWA, Grant NJ-03-0169-01 at Part 2 (Apr. 14, 2010) ("This includes . . . $6,069,932 of prior New Starts funding used for Preliminary Engineering from a grant that has since closed.").
[148] *See id.*

and its associated obligations, NJT is estopped from denying that payments under the ESWA, including payments made prior to the execution of the ESWA and payments of non-New Starts funds, constitute "payments made under the work agreement" under the Repayment Provision. Inclusion of these funds allowed NJT to increase the scope of the ESWA. By insisting on, and subsequently receiving, the direct benefits attendant to the inclusion of the other grants in the ESWA, NJT cannot now attempt to shirk the obligations of the Repayment Provision.[149]

NJT argues that even if the ARRA and CMAQ funds were payments under the work agreement, repayment is not necessary because they were "subtracted out of the ESWA cost." NJT bases this argument on a misreading of a statement in the ESWA that describes the total eligible cost under the New Starts grant. In particular, under the heading "Grant in Team," the ESWA describes how the total eligible cost for the New Starts grant was calculated:

> This grant outlines future New Starts funds that will be allocated to the ESWA. All future New Starts funds, including state match are shown in the column labeled Total Eligible Cost, ($1,097,000,000) . . . . The ARRA funds and the flex 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.[150]

In other words, to calculate the total eligible cost for the New Starts grant and state matching funds, it was necessary to subtract out the remaining costs allocated to the ESWA—the ARRA and CMAQ funds. That these ARRA and CMAQ funds were not included in the total eligible cost calculation for that particular grant in no way demonstrates that they were not part of the ESWA, and in fact, the language above demonstrates that these funds were included in the ESWA.

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[149] *See Hughes Masonry Co. v. Greater Clark County School Bldg. Corp.*, 659 F.2d 836, 839 (7th Cir. 1981) (holding that a party "cannot have it both ways. It cannot rely on the contract when it works to its advantage, and repudiate it when it works to its disadvantage"); *Comer v. Micor, Inc.*, 436 F.3d 1098, 1101 (9th Cir. 2006) ("Equitable estoppel precludes a party from claiming the benefits of a contract while simultaneously attempting to avoid the burdens that contract imposes.").

[150] Agency Doc. 2, ESWA, Grant NJ-03-0169-00 (Aug. 14, 2009) (emphasis added).

NJT further argues that it should not have to repay the ARRA and CMAQ funds because they were not incorporated into an "umbrella" agreement that encompasses all of the grants within the ESWA with common terms and conditions.[151] NJT's argument is misplaced. The terms and conditions applicable to the various grants under the ESWA are clear. Each of the grants—whether rooted in 49 U.S.C. § 5309, ARRA, or CMAQ—contain certain terms in the grant itself and incorporate the then-applicable FTA Master Agreement. The ESWA, then, incorporates the grants supporting the scope of work defined by and obligating the funds provided under the ESWA. The ESWA statutory obligations, including the Repayment Provision, apply to the funds paid through grants under the ESWA.

Although NJT acknowledges that the ESWA and amended ESWA obligated certain New Starts funds—particularly, $62 million was obligated in grant agreements contained in the same document as the ESWA and ESWA amendment—NJT argues that even those funds should not be subject to the Repayment Provision. Specifically, NJT contends that the "underlying purpose" of the Repayment Provision is to "recoup funds that were *advanced*" under an ESWA and the ESWA did not "advance" New Starts funds, as the New Starts funds included in the ESWA were earmarked for the Project by Congress prior to execution of the ESWA.[152]

This argument is unsupported by the law. FTA does not "advance" funds to grantees, but rather, FTA pays funds to grantees on a reimbursement basis as grantees incur construction and other costs throughout the development of a project. Moreover, the statute does not make any distinction based on whether a payment under the ESWA is an "advance." The ESWA by its terms included past, current, and future funds, and the statute provides that "all Government payments made under the work agreement" shall be repaid.

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[151] *Id.* at 14-15.
[152] NJT Opposition to Demand at 18 (emphasis in original).

Lastly, NJT argues that it should be relieved from repaying the funds in question because it would have been entitled to and received them regardless of whether the ESWA was executed.[153] This argument ignores the plain fact that NJT sought, negotiated, formally requested, and accepted an ESWA, and that ESWA includes New Starts, ARRA, and CMAQ funds. NJT's repayment obligation is based on the requirements of the actual funding vehicle for the abandoned Project, not on an after-the-fact hypothetical.

As demonstrated above, the ESWA defined a particular scope of work under the ARC Project and provided Federal funds from different sources to support that scope. These funds were obligated to New Jersey through eight grants that were either contained in the same document as the ESWA, as amended, or in separate grant agreements that were incorporated by reference into the ESWA, as amended. Under these specific grants, NJT expended $271,101,291. Those funds constitute "all Government payments made under the work agreement" and NJT must repay these funds to the United States.

3. The Repayment Provision requires the repayment of all Federal payments made under the ESWA, not just New Starts funds.

NJT argues that the Repayment Provision does not apply to the ARRA or CMAQ funds. NJT's argument defies the language of the statute, which provides that "*all* Government payments made under the work agreement" shall be repaid in the event a project is terminated.[154]

Statutory construction begins with the language of the statute.[155] Where the statutory language is clear, the inquiry ends there.[156] Here, the language of the statute is clear: the Repayment Provision contains no limitation on the type of payments that FTA may recover, and

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[153] *Id.* at 4.
[154] 49 U.S.C. § 5309(g)(3)(B)(iv) (emphasis added).
[155] *Richardson v. United States*, 526 U.S. 813, 818 (1999) (stating "when interpreting a statute, we look first to the language").
[156] *Hughes Aircraft Co. v. Jacobson*, 525 U.S. 432, 438 (1999).

instead uses the all-encompassing phrase "*all* Government payments made under the work agreement."[157] "All" does not mean one type or source of Federal funds but not another. The statute means exactly what it says: all Government payments.

The legislative history confirms that repayment is not limited to New Starts funds, but rather, that Congress intended repayment to be based on the scope of work under the agreement and the project, not to the precise source of funds used. Indeed, the Senate Committee Report summarizing the bill containing the Repayment Provision as originally enacted states, in pertinent part, "If an applicant failed to implement the project for reasons within the applicant's control, *the applicant would be required to repay all federal payments made under the early systems work agreement* plus reasonable interest and penalty charges as specified in the agreement."[158] The Report notes that this requirement is to ensure that ESWAs "are used only in projects that can reasonably be expected to proceed."[159] Thus, the Repayment Provision requires the grantee to consider the consequences of requesting an ESWA, availing itself of substantial Federal funding, and subsequently abandoning a project: the grantee will be made to repay all Federal payments under the ESWA regardless of the source. Where, as here, NJT sought and obtained an ESWA, it must bear the consequences of terminating the Project.

Further, if Congress had intended to limit the scope of repayment to only New Starts funds under 49 U.S.C. § 5309, then Congress could have easily done so by adding "provided under this subsection" or "provided under this section" after the word "payments" in the

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[157] 49 U.S.C. § 5309(g)(3)(B)(iv) (emphasis added). Webster's Third New International Dictionary defines the word "all" as that which "is the whole amount, quantity, or extent of" the matter at hand.

[158] S. Rep. No. 102-79 at 52 (1991) (emphasis added). The Supreme Court has observed that the "authoritative source for finding the Legislature's intent lies in the Committee Reports on the bill, which represent the considered and collective understanding of those members of Congress involved in drafting and studying proposed legislation." *Eldred v. Ashcroft*, 537 U.S. 186, 210 n.16 (2003) (citations and quotation marks omitted). FTA therefore rejects NJT's reliance on language in a staff discussion draft of a proposal to be considered by the Committee prior to issuing the final Committee Report discussed herein. NJT's Opposition to Demand at 15. The language of the Repayment Provision contains no carve-out for engineering or design costs.

[159] *Id.*

Repayment Provision. It did not. Because Congress has demonstrated its ability to limit the scope of repayment in other instances and did not do so here, its omission of any limitation indicates that it meant no limitation.[160] Here, unlike other repayment provisions, Congress did not, in any way, limit the scope of recovery under the Repayment Provision.[161]

4. Formula Program funds administered under 49 U.S.C. § 5307 are subject to repayment.

Notwithstanding the clarity of the Repayment Provision, NJT also argues that 49 U.S.C. § 5307(k) precludes FTA from subjecting ARRA and CMAQ formula funds to the Repayment Provision. FTA interprets 49 U.S.C. § 5307(k) and the Repayment Provision to require repayment of ARRA and CMAQ funds administered under 49 U.S.C. § 5307 but obligated and paid under an ESWA for a New Starts project.

CMAQ funds are "flexed" to FTA from the Federal Highway Administration, and FTA then administers those funds under its Urbanized Area Formula Program ("Formula Program") at 49 U.S.C. § 5307. Likewise, the ARRA funds at issue were subject to the requirements applicable to the Formula Program.[162] Pursuant to 49 U.S.C. § 5307(k)(1), there are 17 particular sections and subsections of 49 U.S.C. Chapter 53 applicable to grants of 49 U.S.C. § 5307 funds, and under 49 U.S.C. § 5307(k)(2), all other provisions of 49 U.S.C. Chapter 53 are, by omission, inapplicable to Formula Program grants.

As explained above, however, the language of the Repayment Provision requires repayment of "all" funds paid under the ESWA, including, in this case, New Starts funds and

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[160] *See Whitfield v. United States*, 543 U.S. 209, 216 (2005).

[161] *See, e.g.*, 42 U.S.C. § 1395bbb(e)(4) (conditioning payments to a home health agency on its agreeing to "repay to the Federal Government payments received under this subparagraph if the corrective action is not taken") (emphasis added); 7 U.S.C. § 1446(d)(3)(A)(iv)(III) (requiring the producer "repay to the Secretary the entire payment received under the contract") (emphasis added).

[162] *See* Pub. L. 111-5, 123 Stat. 115, 209-10 (2009).

non-New Starts funds.[163] Particularly given FTA's duty to read potentially conflicting statutory provisions harmoniously when possible,[164] FTA finds no conflict between 49 U.S.C. § 5307(k) and 49 U.S.C. § 5309(g)(3)(B)(iv). Section 5307(k) applies program requirements to a grant only to the extent that a project funded with a grant under 49 U.S.C. § 5307 is being implemented. Once the Project was terminated, 49 U.S.C. § 5307 program requirements ceased to apply, and the Repayment Provision automatically became applicable.

In statutory construction, "the specific governs the general."[165] In this instance, the Repayment Provision is the more specific statute as it requires repayment of all funds paid under a precise type of agreement—an ESWA. There are very few ESWAs even in the relatively small universe of New Starts projects. Indeed, the ARC Project is only the fifth project to enter into an ESWA since the enactment of the ESWA statute in 1991.[166] Conversely, 49 U.S.C. § 5307(k)(2) is a "general" provision that excludes by omission the applicability of sections of the Federal transit code to Formula Program grants. As such, 49 U.S.C. § 5307(k) applies to literally hundreds of grantees and thousands of grants, each and every fiscal year. Here, where it is undisputed that the ARRA and CMAQ funds were used for the ARC Project as described in the ESWA, the more specific Repayment Provision pertaining specifically to the ESWA controls.

In short, the Repayment Provision, created simultaneously with the ESWA, imposes an obligation on the grantee, and is an integral part of every ESWA entered into by FTA and its

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[163] Furthermore, pursuant to FTA guidance, "Where the urban formula funds will be used in conjunction with Capital Program new start funds (authorized by 49 U.S.C. § 5309), Capital Program requirements apply as well." FTA Circular 9030.1C, Urbanized Area Formula Program: Grant Application Instructions, Appendix C (Oct. 1 1998) (applicable from effective date to May 1, 2010).

[164] "It is a fundamental canon of statutory construction that the words of a statute must be read in their context and with a view to their place in the overall statutory scheme. A court must therefore interpret the statute as a symmetrical and coherent regulatory scheme, and fit, if possible, all parts into an harmonious whole." *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 133 (2000) (citations and internal quotation marks omitted).

[165] *See Fourco Glass Co. v. Transmirra Products Corp.*, 353 U.S. 222, 228 (1957) ("However inclusive may be the general language of a statute, it 'will not be held to apply to a matter specifically dealt with in another part of the same enactment. . . . Specific terms prevail over the general in the same or another statute which otherwise might be controlling.'") (internal citations omitted).

[166] *See* Hynes-Cherin Decl. at ¶ 43.

grantees. By including the various grants in the ESWA, including the CMAQ, ARRA, and previously-awarded New Starts grants, NJT must accept the conditions attached to these grants when they were made a part of the ESWA, including the Repayment Provision.[167]

C. The Master Agreements Independently Authorize FTA to Seek Repayment of All the Federal Funds Expended on the Project.

Even absent the ESWA's Repayment Provision, FTA has authority to collect all of the Federal funds expended under its New Starts, CMAQ, and ARRA grants under the terms and conditions of FTA's Master Agreement, which provides:

> If . . . the Federal Government determines that the Recipient has willfully misused Federal assistance by failing to make adequate progress, by failing to make reasonable and appropriate use of Project property, or by failing to comply with the terms of the Grant Agreement or Cooperative Agreement for the Project including this Master Agreement, the Federal Government reserves the right to require the Recipient to refund the entire amount of Federal assistance provided for the Project or any lesser amount as the Federal Government may determine.[168]

FTA's Master Agreement is incorporated by reference into each of its grant agreements. In this case, FTA's Master Agreement was incorporated into each New Starts, CMAQ, and ARRA grant agreement, and therefore, NJT at all times was subject to the above-referenced terms and conditions.

By terminating the ARC Project, the Governor and NJT "fail[ed] to make adequate progress" on the Project. Clearly, the termination of the Project constituted a failure to make

[167] *See County Sch. Bd. v. RT*, 433 F.Supp.2d 692 (E.D. Va. 2006) (noting that "it would offend every principle of equity and good morals to permit a party to a transaction to enjoy its benefits and at the same time deny its terms and qualifications" and holding that party is therefore estopped from challenging the statutory scheme under which it received federal funding).

[168] Agency Doc. 24, FTA Master Agreement for Fiscal Year 2011 at § 11 (Oct. 1, 2010). *See* Agency Doc. 23, FTA Master Agreement for Fiscal Year 2010 at § 11 (Oct. 1, 2009); Agency Doc. 22, FTA Master Agreement for Fiscal Year 2009 at § 11 (Oct. 1, 2008); Agency Doc. 21, FTA Master Agreement for Fiscal Year 2008 at § 11 (Oct. 1, 2007); Agency Doc. 20, FTA Master Agreement for Fiscal Year 2007 at § 11 (Oct. 1, 2006). *See also* 49 U.S.C. § 5309(c)(3) ("The Secretary shall require that any grant awarded under this section to a recipient be subject to all terms, conditions, requirements, and provisions that the Secretary determines to be necessary or appropriate for the purposes of this section.").

"adequate progress." Moreover, as demonstrated above, the termination of the Project was entirely within the control of the Governor and NJT. The record shows that the cost estimate increases that NJT alleges were unexpected and beyond its control, and that NJT asserts compelled the Project's termination, were in fact within NJT's control and were completely foreseeable. Accordingly, the decision to terminate was a willful exercise of the Governor's and NJT's discretion.

Thus, in addition to the above-referenced affirmative statutory obligations placed on FTA by the Repayment Provision, FTA has independent contractual authority under the Master Agreements corresponding to each of the ARC Project's New Starts, CMAQ, and ARRA grants to collect all of the Federal funds expended under those agreements. Consequently, NJT is required to repay all of the Federal funds expended under those agreements because it failed to make adequate progress on the ARC Project.

D. Principles of Equity and Fairness Favor Enforcing the Statute and Master Agreements Voluntarily Entered Into by NJT and Requiring New Jersey to Repay the Debt That it Owes to the United States Government.

In its Response, NJT makes a political and policy argument that "principles of equity," or "fairness," should persuade FTA to forgive the debt that it owes to the United States. Specifically, NJT argues that it would be unfair for New Jersey to (1) repay funds expended before the ESWA was executed, (2) repay funds expended on preliminary engineering and design when it could have expended those funds absent the ESWA, (3) repay funds when the ESWA did not actually provide funds, and (4) repay funds when the Project could not proceed for reasons beyond NJT's control.[169] NJT also argues that it would be unfair for FTA "to compel NJ Transit to repay funds when NJ Transit and its local funding partners were being asked to

[169] NJT Opposition to Demand at 44-45.

take on virtually all of the extraordinary cost increases" for a project of regional significance.[170] Finally, NJT argues that it would be unfair for FTA to compel New Jersey to repay funds that it owes to the United States when the work completed thus far on the ARC Project has enduring value to other projects in the same corridor and when, to repay the debt to the United States, NJT would have to cancel over $271 million in projects that would relieve congestion and maintain the state of good repair in the corridor.[171]

NJT's appeal to equity runs afoul of the venerable principle that "equity follows the law."[172] In this case, clear statutory language of the Repayment Provision *requires FTA* to collect the $271,101,291 that it expended on the ARC Project, and consequently, no appeal to equity is available to NJT. The language of the Repayment Provision leaves no room for consideration of equity, but instead mandates that a grantee subject to an ESWA "*shall* . . . repay *all* Government payments."[173] NJT does not, and cannot, identify any statutory or judicial authority for any injection of equity in the circumstances of this case. Therefore, FTA rejects NJT's appeal to equity.

Indeed, to the extent that principles of equity and fairness apply in this case, they would weigh in favor of requiring repayment. While it is true that it has not been the practice of FTA to seek repayment of New Starts funds or other sources of Federal funding expended for environmental analysis, engineering, and design of New Starts projects that did not proceed to construction, in this case, NJT insisted the funds expended on the ARC Project—including New Starts, CMAQ, and ARRA funds—be included in an ESWA. NJT decided to request an ESWA, to include the grants at issue in the ESWA, and subsequently agreed to abide by all conditions

[170] *Id.* at 45.
[171] *Id.* at 45-48.
[172] *Hedges v. Dixon County*, 150 U.S. 182, 192 (1893).
[173] *Lexecon Inc. v. Milberg Weis Bershad Hynes & Lerach*, 523 U.S. 26, 35 (1998) (finding that the term "shall" creates "an obligation impervious to judicial discretion").

associated with the ESWA, in exchange for which NJT received not only the funding, but also the unique and substantial benefits that an ESWA provides to a grantee. NJT requested and accepted the largest ESWA grant investment ever provided in the history of FTA for the ARC Project. In doing so, NJT voluntarily and knowingly bound itself to the conditions that accompanied the ESWA, including the Repayment Provision. Similarly, FTA relied on NJT completing the Project when FTA, by executing the ESWA, committed itself to the largest ESWA investment in the agency's history. Because the New Starts program is oversubscribed, FTA had to divert funding from other qualified New Starts projects to make funds available to NJT, with the understanding that NJT was committed to completing the Project.[174] To the extent funds are recovered from NJT following the termination of the Project, those funds could be made available to other worthy New Starts projects. As such, equity weighs in favor of enforcing the conditions accompanying the ESWA.

Likewise, NJT's assertion that the work completed on the ARC Project has enduring value to other projects in the same corridor is irrelevant and speculative, at best. First, neither the Repayment Provision nor any other ESWA statutory rule or regulation leaves any room for the consideration of any benefit left by an abandoned project. Second, any supposed benefit is speculative and would, in any event, ultimately inure to New Jersey's benefit. Any applicant seeking Federal funds for a project along the ARC corridor would have to fully comply with the National Environmental Policy Act and prepare a new Environmental Impact Statement after completing a new engineering and design process. And should such applicant use any data generated by the Project and follow through with a transit project, the beneficiary of any such drastically attenuated value from the Project would still be New Jersey.

[174] Hynes-Cherin Decl. at ¶ 14.

Nor is NJT's assertion that it would have to cancel over $271 million in transit projects to repay its debt to the United States supported by the record. The $271,101,291 debt that the State of New Jersey owes the United States constitutes less than one percent of the State's annual operating budget of over $30 billion.[175] Furthermore, New Jersey, of which NJT is merely one instrumentality, may use additional sources of revenue to repay its debt to the United States.

NJT made assurances to FTA under the terms and conditions of the ESWA and the Master Agreements that it would complete the ARC Project, and FTA provided NJT with $271,101,291 in Federal funds under an ESWA for the Project. NJT and Governor Christie terminated the Project for reasons manifestly within their control. Under the terms and conditions of the ESWA and the Master Agreements, NJT has an affirmative obligation and responsibility to pay back the $271,101,291 to the Federal Government. The law requires FTA to recover the debt. To the extent that principles of equity and fairness apply to this case, they favor the law and require New Jersey to repay the debt that it owes to the United States.

[175] *See* State of New Jersey, Office of Management and Budget, Fiscal 2011 Budget in Brief at 8, available at http://www.state.nj.us/treasury/omb, (Mar. 16, 2010). FTA notes that NJT's annual operating budget is approximately $2 billion. *See* National Transit Database, New Jersey Transit Corporation Profile, available at http://www.ntdprogram.gov/ntdprogram/pubs/profiles/2009/agency_profiles/2080.pdf (Sept. 14, 2010).

VI. FINAL DECISION

After carefully considering the administrative record as a whole, and for the reasons set forth above, the Federal Transit Administration has determined that New Jersey owes a debt to the United States Government in the amount of $271,101,291 for Government payments made under the ESWA for the ARC Project. NJT should contact FTA to make arrangements to pay the amount due. This Decision is administratively final.

Robert J. Tuccillo
Associate Administrator/Chief Financial Officer
Office of Budget and Policy

April 29, 2011
Date