

TEXAS TRANSPORTATION COMMISSION

ALL Counties

MINUTE ORDER

Page 1 of 1

ALL Districts

The Texas Transportation Commission (commission) finds it necessary to propose amendments to §31.36, Section 5311 Grant Program, relating to federal programs to be codified under Title 43, Texas Administrative Code, Part 1.

The preamble and the proposed amendments, attached to this minute order as Exhibits A and B, are incorporated by reference as though set forth verbatim in this minute order, except that they are subject to technical corrections and revisions, approved by the General Counsel, necessary for compliance with state or federal law or for acceptance by the Secretary of State for filing and publication in the *Texas Register*.

IT IS THEREFORE ORDERED by the commission that the amendments to §31.36 are proposed for adoption and are authorized for publication in the *Texas Register* for the purpose of receiving public comments.

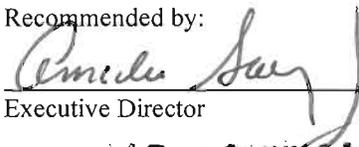
The executive director is directed to take the necessary steps to implement the actions as ordered in this minute order, pursuant to the requirements of the Administrative Procedure Act, Government Code, Chapter 2001.

Submitted and reviewed by:



Director, Public Transportation Division

Recommended by:



Executive Director

112304 JUN 24 10

Minute
Number

Date
Passed

1 Proposed Preamble

2 The Texas Department of Transportation (department) proposes
3 amendments to §31.36, Section 5311 Grant Program.

4

5 EXPLANATION OF PROPOSED AMENDMENTS

6 Transportation Code, §456.022 requires the Texas Transportation
7 Commission (commission) to adopt rules to establish a formula
8 allocating state and federal funds among individual eligible
9 public transportation providers. The statute states that the
10 formula may take into account a transportation provider's
11 performance, the number of its riders, the need of residents in
12 its service area for public transportation, population,
13 population density, land area, and other factors established by
14 the commission. Transportation Code, §456.008 states that the
15 commission may establish different performance measures for
16 different sectors of the transit industry and also states that
17 the performance measures shall assess the efficiency,
18 effectiveness, and safety of the public transportation
19 providers.

20

21 On June 29, 2006, the commission amended §31.36 regarding
22 formulas for the distribution of state and federal funds. The
23 commission now desires to further amend the formulas to better
24 allocate funding resources.

25

1 The amendments to §31.36, Section 5311 Grant Program, clarify
2 the current formula for federal funds and limit the
3 discretionary portion to no more than 10 percent of the annual
4 funds for intercity bus allocation and state administrative
5 expenses. In addition, the percentage figures in §31.36 are
6 adjusted for style to spell out "percent" rather than using the
7 symbol "%".

8
9 Amendments to §31.36(g) clarify that state administrative
10 expenses are subtracted prior to the allocation of funds to
11 subrecipients.

12
13 Amendments to §31.36(g)(1) change the paragraph name to
14 "Intercity bus allocation" to better describe the purpose of the
15 paragraph. Changes mirror the language in the federal statute
16 and federal circular regarding the certification process and
17 level of authority that may certify. Lastly, the words
18 "allocate" and "annual" are added to provide clarity.

19
20 Amendments to §31.36(g)(2) change the paragraph name from
21 "Remaining balance allocation" to "Need and performance
22 allocation" to better describe the purpose of the paragraph.
23 The amendments delete obsolete and outdated language referring
24 to state funds. State funds language was added as a result of a
25 special state appropriation rider passed by the 73rd Legislature,

1 1993. The department has not received funding of the same
2 nature since that biennium and therefore the language is being
3 deleted. Amendments to §31.36(g)(2) also move the reference to
4 the maximum amount of Section 5311 federal apportionments,
5 \$20,104,352, from §31.36(g)(2) subparagraph (C) to paragraph (2)
6 to clarify that the entire paragraph is subject to the maximum
7 amount and not just the subparagraph. In addition
8 §31.36(g)(2)(A) and (B) delete outdated references to fiscal
9 years 2008 and 2009.

10

11 Amendments to §31.36(g)(3) create §31.36(g)(2)(C) and delete the
12 reference to the maximum amount of Section 5311 federal
13 apportionments subject to this paragraph and verbiage describing
14 the discretionary award. The maximum amount is moved to
15 §31.36(g)(2) and the discretionary allocation is now covered by
16 new §31.36(g)(3).

17

18 Language from current §31.36(g)(2)(C) is added to §31.36(g) new
19 paragraph (3) to describe the discretionary allocation. A new
20 provision is added limiting the discretionary portion to no more
21 than 10 percent of the annual apportionment after subtracting
22 funds for intercity bus allocation and state administrative
23 expenses. Limiting the discretionary allocations to no more
24 than 10 percent provides a more reasonable level of funds set
25 aside for discretionary award as compared to the overall funding

1 in the program.

2

3 New paragraph (4) is added to §31.36(g) to describe the vehicle
4 revenue mile allocation. This new paragraph outlines the
5 procedures for allocating funds not allocated by the previous
6 paragraphs. Funds allocated under this new section will be
7 calculated on a pro rata basis using individual system revenue
8 miles as compared to the sum of all systems. This new
9 allocation will provide the recipients of funds from this
10 program a more predictable distribution of funds in future
11 years. The amendments codify the funding allocation process
12 that has been used for the past two years under the
13 discretionary allocation, making it a stand alone allocation.

14

15 Subsequent paragraphs in §31.36(g) are renumbered and cross
16 references are updated as a result of the above changes.

17

18 The statutory duties of the Public Transportation Advisory
19 Committee's (PTAC) include advising the commission on the needs
20 and problems of the state's public transportation providers,
21 including recommending methods for allocating public
22 transportation funds, and providing feedback on proposed rule
23 changes involving public transportation matters during
24 development and prior to final adoption.

25

1 PTAC met on June 17, 2010, and by motion recommended to the
2 commission all of the above amendments in the allocation funding
3 formula.

4

5 FISCAL NOTE

6 James Bass, Chief Financial Officer, has determined that for
7 each of the first five years the amendments as proposed are in
8 effect, there will be no fiscal implications for state or local
9 governments as a result of enforcing or administering the
10 amendments.

11

12 Eric Gleason, Director, Public Transportation Division, has
13 certified that there will be no significant impact on local
14 economies or overall employment as a result of enforcing or
15 administering the amendments.

16

17 PUBLIC BENEFIT AND COST

18 Mr. Gleason has also determined that for each year of the first
19 five years the sections are in effect, the public benefit
20 anticipated as a result of enforcing or administering the
21 amendments will be a more fair and equitable allocation of
22 public transportation funding as administered by the subchapter,
23 as well as more fully implementing current state and federal law
24 to improve the efficiency, effectiveness, and safety of public
25 transportation providers and to increase the availability of

1 transportation services to the public. There are no anticipated
2 economic costs for persons required to comply with the sections
3 as proposed. There will be no adverse economic effect on small
4 businesses.

5

6 PUBLIC HEARING

7 Pursuant to the Administrative Procedure Act, Government Code,
8 Chapter 2001, the Texas Department of Transportation will
9 conduct a public hearing to receive comments concerning the
10 proposed rules. The public hearing will be held at 9:00 a.m. on
11 August 6, 2010 in the Ric Williamson Hearing Room, Dewitt C.
12 Greer State Highway Building, 125 East 11th Street, Austin,
13 Texas and will be conducted in accordance with the procedures
14 specified in 43 TAC §1.5. Those desiring to make comments or
15 presentations may register starting at 8:30 a.m. Any interested
16 persons may appear and offer comments, either orally or in
17 writing; however, questioning of those making presentations will
18 be reserved exclusively to the presiding officer as may be
19 necessary to ensure a complete record. While any person with
20 pertinent comments will be granted an opportunity to present
21 them during the course of the hearing, the presiding officer
22 reserves the right to restrict testimony in terms of time and
23 repetitive content. Organizations, associations, or groups are
24 encouraged to present their commonly held views and identical or
25 similar comments through a representative member when possible.

1 Comments on the proposed text should include appropriate
2 citations to sections, subsections, paragraphs, etc. for proper
3 reference. Any suggestions or requests for alternative language
4 or other revisions to the proposed text should be submitted in
5 written form. Presentations must remain pertinent to the issues
6 being discussed. A person may not assign a portion of his or
7 her time to another speaker. Persons with disabilities who plan
8 to attend this meeting and who may need auxiliary aids or
9 services such as interpreters for persons who are deaf or
10 hearing impaired, readers, large print or Braille, are requested
11 to contact Government and Public Affairs Division, 125 East 11th
12 Street, Austin, Texas 78701-2483, (512) 305-9137 at least two
13 working days prior to the hearing so that appropriate services
14 can be provided.

15

16 SUBMITTAL OF COMMENTS

17 Written comments on the proposed amendments to §31.36 may be
18 submitted to Eric Gleason, Director, Public Transportation
19 Division, Texas Department of Transportation, 125 East 11th
20 Street, Austin, Texas 78701-2483. The deadline for receipt of
21 comments is 5:00 p.m. on August 9, 2010.

22

23 STATUTORY AUTHORITY

24 The amendments are proposed under Transportation Code, §201.101,
25 which provides the commission with the authority to establish

1 rules for the conduct of the work of the department, and more
2 specifically, Transportation Code, §456.022, which requires the
3 commission to adopt rules establishing a formula allocating
4 funds among eligible public transportation providers.

5

6 CROSS REFERENCE TO STATUTE

7 Transportation Code, Chapter 456.

1 SUBCHAPTER C. FEDERAL PROGRAMS

2 §31.36. Section 5311 Grant Program.

3 (a) Purpose. Section 5311, Federal Transit Act, (49 USC
4 §5311), authorizes the Secretary of the U.S. DOT to make grants
5 for public transportation projects in nonurbanized areas. The
6 department has been designated by the governor to administer the
7 Section 5311 program.

8 (b) Goal and objectives. The Department's goal in
9 administering the Section 5311 program is to promote the
10 availability of professional, cost-effective, efficient, and
11 coordinated passenger transportation services to the general
12 public in nonurbanized areas using the most efficient
13 combination of financial and other resources. To achieve this
14 goal, the objectives of the department are to:

15 (1) promote the development and maintenance of a network
16 of general public transportation services in nonurbanized areas
17 throughout the state, in partnership with local officials;

18 (2) fully integrate the Section 5311 program with other
19 federal, state, and local resources that are designed to serve
20 nonurbanized populations;

21 (3) improve the efficiency, effectiveness, and safety of
22 Section 5311 systems through the provision of technical
23 assistance; and

1 (4) include private sector operators in the overall plan
2 to provide public transportation services.

3 (c) Department role. The department acts as the designated
4 recipient for all Section 5311 funds appropriated to the state
5 and has an oversight responsibility for all nonurbanized transit
6 services within the state. The department, however, recognizes
7 the subrecipients as partners who shall retain control of daily
8 operations. As the administering agency, the department will:

9 (1) develop application materials and disseminate
10 information to prospective applicants and other interested
11 parties;

12 (2) allocate the available program funds in a fair and
13 equitable manner as described in subsection (g) of this section
14 (the department will not provide Section 5311 funds to more than
15 one transit system in a geographical area);

16 (3) develop evaluation criteria and select projects for
17 funding;

18 (4) prepare the state's annual program of projects and
19 funding application and submit that material to the FTA for
20 approval;

21 (5) negotiate and execute contracts with local Section
22 5311 subrecipients;

23 (6) prepare requests for federal reimbursement, and

1 process payment requests from Section 5311 subrecipients;

2 (7) monitor and evaluate the progress of ongoing
3 transportation operations, including compliance with federal
4 regulations; and

5 (8) provide technical assistance to Section 5311
6 subrecipients to aid them in improving transit services.

7 (d) Eligible subrecipients. State agencies, local public
8 bodies, private nonprofit organizations, Native American tribes
9 and organizations, and operators of public transportation
10 services are eligible to receive Section 5311 funds through the
11 department. Private for-profit operators of public
12 transportation services may participate in the program through
13 contracts with eligible subrecipients. An entity must be a
14 rural transit district to receive Section 5311 funds except that
15 private for-profit operators of public transportation services
16 and entities that are not rural transit districts are eligible
17 to receive Section 5311 funds through the department under the
18 intercity bus program, as set forth in subsections (g)(1) and
19 (i) of this section.

20 (e) Eligible assistance categories. The following
21 categories of expenses are eligible for federal reimbursement
22 under the Section 5311 program.

23 (1) State administrative expenses. The department may

1 use up to 15 percent [~~15%~~] of the annual federal apportionment
2 to defray its expenses incurred for the administration of
3 Section 5311 program. These funds may also be used to provide
4 technical assistance to subrecipients. Technical assistance may
5 include project planning, program development, management
6 development, coordination of public transportation projects, and
7 related research. Projects are solicited from subrecipients and
8 other interested parties. State administrative and technical
9 assistance expenses do not require a non-federal match.

10 (2) Capital expenses.

11 (A) Eligible items include, but are not limited to:

12 (i) buses;

13 (ii) vans or other paratransit vehicles;

14 (iii) radios and communications equipment;

15 (iv) passenger shelters, bus stop signs, and similar
16 passenger amenities;

17 (v) wheelchair lifts and restraints;

18 (vi) vehicle rehabilitation, remanufacture, or
19 overhaul;

20 (vii) preventive maintenance, including all
21 maintenance costs;

22 (viii) extended warranties that do not exceed the
23 industry standard;

1 (ix) the mass transit portion of ferry boats and
2 terminals;

3 (x) operational support such as computer hardware or
4 software;

5 (xi) installation costs and vehicle procurement,
6 testing, inspection, and acceptance costs;

7 (xii) construction or rehabilitation of transit
8 facilities, including design, engineering, and land acquisition;

9 (xiii) facilities to provide access for bicycles to
10 mass transit facilities and equipment for transporting bicycles
11 on mass transit vehicles;

12 (xiv) the lease of equipment or facilities, provided
13 that the local subrecipient, with the concurrence of the
14 department, determines that a lease is more cost effective than
15 the purchase of equipment or facilities after considering
16 management efficiency, availability of equipment, staffing
17 capabilities and guidelines on capital leases as contained in 49
18 CFR Part 639;

19 (xv) the capital portions of costs for service under
20 contract;

21 (xvi) joint development projects (FTA Circular
22 9300.1A, or its latest version, provides guidelines for joint
23 development projects);

1 (xvii) the introduction of new technology, through
2 innovative and improved products, into mass transportation;

3 (xviii) transit-related intelligent transportation
4 systems;

5 (xix) the provision of ADA paratransit service, which
6 shall not exceed 10 percent [~~10%~~] of the state's annual
7 apportionment of Section 5311 funds and shall be used only by
8 subrecipients that are in compliance with ADA requirements for
9 both fixed route and demand responsive service;

10 (xx) mobility management consisting of short-range
11 planning, management activities and projects for improving
12 coordination among public transportation, and other
13 transportation service providers carried out through an
14 agreement entered into with a person, including a governmental
15 authority, but excluding operating expenses; and

16 (xxi) crime prevention and security.

17 (B) The capital cost of contracting includes
18 depreciation, interest on facilities and equipment, and those
19 allowable capital costs that would otherwise be incurred
20 directly, including maintenance. No capital assets (vehicle,
21 equipment, or facility) that have any remaining federal interest
22 in them and no items purchased with state or local government
23 funds may be capitalized under the grant agreement.

1 (C) Based on funding availability, federal funds may be
2 used to reimburse up to 80 percent [~~80%~~] of eligible capital
3 expenditures. The federal share may increase to up to 90
4 percent [~~90%~~] for bicycle facilities projects or for incremental
5 costs related to compliance with the Clean Air Act or with the
6 Americans with Disabilities Act of 1990. The federal share may
7 also increase in accordance with 23 U.S.C. 120(b)(2) as
8 determined by FTA regarding the area of nontaxable Indian lands,
9 individual and tribal [~~land~~], public domain lands (reserved and
10 unreserved), national forest, and national parks and monuments.
11 Eligibility standards for the higher federal share are defined
12 in FTA Circular 9040.1F, or its latest version.

13 (3) Project administrative expenses. Costs not directly
14 tied, but essential, to the operations of passenger
15 transportation systems may be reimbursed at up to 80 percent
16 [~~80%~~] with federal funds. The federal share may also increase
17 in accordance with 23 U.S.C. 120(b)(2) as determined by FTA
18 regarding the area of nontaxable Indian lands, individual and
19 tribal [~~land~~], public domain lands (reserved and unreserved),
20 national forest, and national parks and monuments. Eligibility
21 standards for the higher federal share are defined in FTA
22 Circular 9040.1F, or its latest version.

23 (4) Operating expenses. Those costs directly tied to

1 systems operations, such as fuel, oil, drivers', mechanics', and
2 dispatchers' salaries, and replacement parts may be reimbursed
3 at 50 percent [~~50%~~] of net operating costs. The federal share
4 may also increase in accordance with 23 U.S.C. 120(b)(2) as
5 determined by FTA regarding the area of nontaxable Indian lands,
6 individual and tribal [~~land~~], public domain lands (reserved and
7 unreserved), national forest, and national parks and monuments.
8 Eligibility standards for the higher federal share are defined
9 in FTA Circular 9040.1F, or its latest version. The local
10 subrecipient must provide a match, either in cash or with in-
11 kind donations.

12 (f) Local share requirements. FTA program funds cannot be
13 used as the local share required for Section 5311 grants.
14 Eligible match sources include local or state programs, or
15 unrestricted federal funds. At least half of the local share
16 for both net operating and non-operating expenses must be cash
17 or cash equivalent. In-kind contributions, volunteer services,
18 and donations are eligible as local share if the value is
19 documented.

20 (g) Allocation of funds. As part of its administration of
21 the Section 5311 program, the department is charged with
22 ensuring that there is a fair and equitable distribution of
23 program funds within the state (FTA Circular 9040.1F, or its

1 latest version). After subtracting funds for state
2 administrative expenses in accordance with subsection (e)(1) of
3 this section, the [The] department will allocate Section 5311
4 funds to local subrecipients in the following manner and order.

5 (1) Intercity bus allocation [Reserve]. Unless the chief
6 executive officer of the state or the executive officer's
7 authorized designee [governor] certifies to the Secretary of the
8 U.S. DOT that the intercity bus service needs of the state are
9 being adequately met, the department will allocate [reserve] not
10 less than 15 percent [15%] of the annual Section 5311 federal
11 apportionment for the development and support of intercity bus
12 transportation [~~to be allocated under subsection (i) of this~~
13 ~~section~~]. If it is determined that all or a portion of the set-
14 aside monies is not required for intercity bus service, those
15 funds will be applied to the formula apportionment process
16 described in paragraph (2) of this subsection. Procedures for
17 determining if a certification of adequacy is warranted are as
18 follows.

19 (A) The department will review all data on intercity
20 bus service availability, including outstanding requests from
21 intercity operators, and levels of service.

22 (B) The department will consult with affected intercity
23 bus service providers.

1 (C) The department will consult with other state
2 agencies that have jurisdiction with respect to intercity bus
3 regulation and seek their recommendations as to the adequacy of
4 current service.

5 (D) Based on the findings of subparagraphs (A), (B),
6 and (C) of this paragraph, the commission, the chief executive
7 officer of the state or the executive officer's authorized
8 designee may certify [~~or recommend that the governor certify~~] to
9 the adequacy of intercity bus service.

10 (2) Need and performance [~~Remaining balance~~] allocation.
11 Excluding the amounts allocated under [~~Except as provided in~~]
12 paragraph (1) of this subsection, the balance of the annual
13 Section 5311 federal apportionment, plus the remaining balance
14 of previous Section 5311 federal apportionments, [~~and any state~~
15 ~~funds appropriated specifically for the purpose of funding~~
16 ~~nonurbanized public transportation services~~] not to exceed
17 \$20,104,352, will be allocated to transit providers as described
18 in subparagraphs (A) and (B) of this paragraph.

19 (A) The need based allocation is 65 percent [~~determined~~
20 ~~as follows: 80% will be awarded for fiscal year 2008, and 65%~~
21 ~~for each fiscal year thereafter~~] giving consideration to
22 population weighted at 75 percent [~~75%~~] and on land area
23 weighted at 25 percent [~~25%~~] by using the latest census data

1 available from, and as defined by, the U.S. Census Bureau for
2 each nonurbanized area relative to the sum of all nonurbanized
3 areas.

4 (B) The performance based allocation is 35 percent
5 [~~will be 20% for fiscal year 2008, and 35% for each fiscal year~~
6 ~~thereafter~~]. The subrecipient is eligible for funding under
7 this subparagraph if it is in good standing with the department
8 and has no deficiencies and no findings of noncompliance. The
9 commission will award the funding by giving equal consideration
10 to local funds per operating expense, ridership per vehicle
11 revenue mile, and vehicle revenue miles per operating expense.
12 These criteria may be calculated using the subrecipient's annual
13 audit for the previously completed fiscal year, data from other
14 sources, or from the department's records.

15 (C) [~~3~~] Funding stability. Subject to available
16 appropriation, no award to a transit district under this
17 paragraph will be less than 90 percent [~~90%~~] of the award to
18 that transit district for the previous fiscal year. All
19 allocations under subparagraphs (A) and (B) of this paragraph
20 are subject to revision to comply with this standard. [~~If~~
21 ~~available funding exceeds \$20,104,352, additional funding will~~
22 ~~be awarded by the commission on a pro rata basis, competitively,~~
23 ~~or a combination of both. Consideration for the award of these~~

1 ~~additional funds may include, but is not limited to,~~
2 ~~coordination and technical support activities, compensation for~~
3 ~~unforeseen funding anomalies, assistance with eliminating waste~~
4 ~~and ensuring efficiency, maximum coverage in the provision of~~
5 ~~public transportation services, adjustment for reductions in~~
6 ~~purchasing power, and reductions in air pollution. These~~
7 ~~additional awards are not subject to the funding stability~~
8 ~~allocation process in succeeding fiscal years.]~~

9 (3) Discretionary allocation. If the amount of the
10 Section 5311 federal apportionments exceeds the maximum amount
11 that may be allocated under paragraph (2) of this subsection, a
12 part of that excess, not to exceed 10 percent of the amount
13 computed by subtracting, from the annual Section 5311 federal
14 apportionment, the funds for state administrative expenses under
15 subsection (e)(1) of this section and funds allocated for
16 intercity bus transportation under paragraph (1) of this
17 subsection, will be available to the commission for award at any
18 time during the fiscal year on a pro rata basis, competitively,
19 or a combination of both. Consideration for the award of these
20 additional funds may include, but is not limited to,
21 coordination and technical support activities, compensation for
22 unforeseen funding anomalies, assistance with eliminating waste
23 and ensuring efficiency, maximum coverage in the provision of

1 public transportation services, adjustment for reductions in
2 purchasing power, and reductions in air pollution. An award
3 under this subparagraph will not be considered for the purpose
4 of applying the funding stability allocation process under
5 paragraph (2)(C) of this subsection in succeeding fiscal years.

6 (4) Vehicle revenue mile allocation. Any amount of the
7 annual Section 5311 federal apportionment that is not otherwise
8 allocated under this subsection will be allocated to
9 nonurbanized areas, with the amount allocated to a nonurbanized
10 area based on the proportion of vehicle revenue miles for that
11 nonurbanized area to the total of vehicle revenue miles for all
12 nonurbanized areas.

13 (5) [~~4~~] Adjustments to allocation.

14 (A) If part of a transit district's service area is
15 changed due to declaration by the United States Census Bureau or
16 the service area is otherwise altered, the department and that
17 subrecipient shall negotiate an appropriate adjustment in the
18 funding year or any subsequent year, as appropriate. This
19 negotiated adjustment is not subject to the minimum and maximum
20 standards set forth in paragraph (2)(C) [~~paragraph (3)~~] of this
21 subsection.

22 (B) If a previously designated urbanized area is
23 declared nonurbanized by the United States Census Bureau, a

1 public transportation subrecipient serving that area must apply
2 for funds in accordance with paragraph (6) [~~(5)~~] of this
3 subsection.

4 (6) [~~(5)~~] Application and contract. Prior to receiving
5 funds a subrecipient must complete and comply with all
6 application requirements, rules, and regulations applicable to
7 the Section 5311 program. A completed application must be
8 submitted, in a form prescribed by the department, to the
9 appropriate district office, and document the need and demand
10 for general public passenger transportation services. A
11 contract shall be for no less than 12 months unless authorized
12 by the department.

13 (h) Program of projects. All projects for a fiscal year
14 will be identified in accordance with the allocation rules
15 included in subsection (g) of this section. After commission
16 approval of the allocation, these projects will be submitted to
17 the FTA as the annual program of projects for the fiscal year.

18 (i) Intercity bus. For funding from allocations made under
19 subsection (g)(1) of this section, an [~~If the governor does not~~
20 ~~certify to the adequacy of intercity bus transportation within~~
21 ~~the state, funds will be made available in accordance with~~
22 ~~subsection (g)(1) of this section. An~~] annual request for
23 proposals will be issued for projects complying with FTA

1 definitions of intercity bus transportation.