

**BEFORE THE UNITED STATES DEPARTMENT OF TRANSPORTATION**

**FEDERAL TRANSIT ADMINISTRATION**

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<b>THE CONSERVATION LAW</b>	)	<b>COMPLAINT UNDER TITLE VI OF</b>
<b>FOUNDATION, ALTERNATIVES FOR</b>	)	<b>THE CIVIL RIGHTS ACT OF 1964,</b>
<b>COMMUNITY AND ENVIRONMENT and</b>	)	<b>EXECUTIVE ORDER 12898,</b>
<b>GREATER FOUR CORNERS ACTION</b>	)	<b>EXECUTIVE ORDER 5610.2(a), AND</b>
<b>COALITION</b>	)	<b>FEDERAL TRANSIT CIRCULAR</b>
	)	<b>4702.1A</b>
<b>Complainants,</b>	)	
	)	
<b>v.</b>	)	
	)	
<b>MASSACHUSETTS BAY</b>	)	
<b>TRANSPORTATION AUTHORITY</b>	)	
	)	
<b>Respondent.</b>	)	

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## **I. INTRODUCTION**

This Complaint is filed on behalf of the Conservation Law Foundation, Alternatives for Community and Environment, and Greater Four Corners Action Coalition. The Massachusetts Bay Transportation Authority's (MBTA) cancellation of late-night weekend service on the rapid transit system and select bus routes (Late-Night Service) violates: 1) Title VI of the Civil Rights Act of 1964 (49 C.F.R. § 21) and 2) the United States Department of Transportation (USDOT) Order to Address Environmental Justice in Minority Population and Low-Income Populations (Order 5610.2(a)).

Specifically, the MBTA violated the Title VI prohibition on discrimination and USDOT's Environmental Justice Order by cancelling Late-Night Service without analyzing and, if available, implementing less discriminatory alternatives. As the cancellation of Late-Night Service is considered a major service change, the MBTA was required to conduct an equity analysis to determine if the change would have a discriminatory impact based on race, color, or national origin and whether low-income populations would bear a disproportionate burden because of the changes. The MBTA attempted to cancel Late-Night Service without conducting this equity analysis and in fact only conducted the analysis after the Federal Transit Administration (FTA) ordered them to do so on March 3, 2016. Exhibit A: FTA Letter to MBTA, March 3, 2016.

The MBTA's subsequent equity analysis, however, was conducted incorrectly and inconsistently with the requirements of FTA Circular C 4702.1B. The equity analysis erroneously assumed that the entire population of the municipality around each individual Late-Night Service station constitute the population with access, rather than those within one-quarter mile area around each bus stop and half a mile from each subway station. This gross

overestimation violates the FTA's equity analysis guidance and conflicts with best practices. By relying on this overly coarse dataset, the MBTA concluded that the discontinuance of Late-Night Service would not result in a disparate burden on minority populations and would not result in a disproportionate burden on low-income populations. However, when the equity analysis is conducted correctly, using appropriate data and methodology, the cancellation of Late-Night Service is shown to have a disparate and disproportionate burden on racial minorities and low-income populations. See Exhibit B: Analysis of Equity Impacts of Cancellation of MBTA Late-Night Service by Professor Marcos Luna of Salem State University.

Only after the Fiscal and Management Control Board of the MBTA voted to discontinue Late-Night Service, did the MBTA analyze an alternative to cancellation of the existing Late-Night Service. The MBTA later considered, but did not analyze, a second. Although the transit agency identified the alternative it analyzed as less discriminatory, it did not implement it and provided no meaningful opportunity for public comment for either alternative.

For the reasons stated below, we request that FTA take all necessary steps to ensure that the MBTA come into compliance by investigating and requiring the transit agency to implement sufficient mitigation measures.

## **II. COMPLAINANTS**

The Conservation Law Foundation (CLF) is a nonprofit, member-supported organization incorporated under the laws of Massachusetts with a principal place of business at 62 Summer Street, Boston, MA 02110. CLF is a regional organization dedicated to conserving natural resources, protecting public health, and promoting thriving communities for all in New England. CLF has a long history of working on behalf of its members to address transportation issues and environmental justice concerns.

Alternatives for Community & Environment (ACE) is a nonprofit environmental justice organization with a principal place of business at 2201 Washington Street, #302, Boston, MA 02119. For over twenty years ACE has worked to empower communities of color and low-income communities throughout Massachusetts to create healthy and sustainable communities while eradicating environmental racism and classism.

Greater Four Corner Action Coalition (GFCAC) is a nonprofit organization with a principal place of business at 367 Washington Street, Dorchester, MA 02124. GFCAC works to promote neighborhood stabilization in the Four Corners Community of Dorchester while addressing transportation, environmental, and economic justice issues. GFCAC works to improve transportation services to the Four Corners community.

### **III. MASSACHUSETTS BAY TRANSPORTATION AUTHORITY**

MBTA operates the bus, subway, commuter rail, and ferry systems in the Boston metropolitan area. The MBTA is a past and current recipient of federal funding. As such, the MBTA is a “program or activity” that is subject to the requirements of Title VI. 42 U.S.C. § 2000d-4a(1)(A)-(B); 49 C.F.R. § 21.23(e)(1). The MBTA’s cancellation of Late-Night Service without an analysis of less discriminatory alternatives and, if available, implementation violates its duty to administer all programs and activities in a non-discriminatory manner.

### **IV. HISTORICAL BACKGROUND OF LATE-NIGHT SERVICE**

Between March 28, 2014 and June 26, 2015 the MBTA offered extended hours of service on its 15 most heavily used bus routes<sup>1</sup> and its subway system<sup>2</sup> on Saturday and Sunday

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<sup>1</sup> Routes 1, 15, 22, 23, 28, 32, 39, 57, 66, 71, 73, 111, and 116/117.

<sup>2</sup> Red, Orange, Green, Blue, Mattapan, and Silver Line, except for SL2.

mornings. This Late-Night Service extended the MBTA's hours by 90 minutes from 1:00 AM to about 2:30 AM. Late-Night Service operated approximately every 15 to 20 minutes, and, in most cases, it served the same stations and stops and charged the same fares as regular daytime service. In June of 2015, the MBTA revised its Late-Night Service to end half an hour earlier, at around 2:00 AM, and discontinued Late-Night Service on five of the 15 key bus routes.<sup>3</sup> On March 18, 2016, the MBTA terminated its Late-Night Service altogether, returning to its original service hours of 5:30 AM to 1:00 AM.

In addition to offering extending hours of service on select bus routes and its subway system, the MBTA also extended service on its paratransit service THE RIDE, as required by the Americans with Disabilities Act. See 49 C.F.R. § 37.131. As a complement to the extended service hours described above, this paratransit service was first extended to 2:30 AM<sup>4</sup> and later reduced to 2:00 AM.<sup>5</sup> When the MBTA terminated Late-Night Service for bus routes and subway system, it also terminated THE RIDE service for those hours.

## **V. TITLE VI VIOLATIONS AND ENVIRONMENTAL JUSTICE VIOLATIONS**

### **A. OVERVIEW**

The MBTA's cancellation of Late-Night Service on the rapid transit system and select bus routes violates Title VI and Environmental Justice requirements by having a disparate impact on racial and ethnic minorities and by having a disproportionate impact on low-income

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<sup>3</sup> Routes 15, 22, 71, 73, and 77

<sup>4</sup> An Interim Review of the MBTA Late-Night Service Pilot Program, MBTA, February 11, 2015, fn 1 *available at* [http://www.mbta.com/uploadedfiles/Smart\\_Forms/News,\\_Events\\_and\\_Press\\_Releases/LateNightReview\\_021115.pdf](http://www.mbta.com/uploadedfiles/Smart_Forms/News,_Events_and_Press_Releases/LateNightReview_021115.pdf).

<sup>5</sup> Riding the T, MBTA *available at* [http://www.mbta.com/riding\\_the\\_t/default.asp?id=6442451913](http://www.mbta.com/riding_the_t/default.asp?id=6442451913).

populations. The FTA-required equity analysis conducted by the Central Transportation Planning Staff (CTPS) on behalf of the MBTA was flawed. The CTPS's own equity analysis using ridership data demonstrated both a disparate and disproportionate burden in three out of four cases. Despite these results, the MBTA ultimately concluded that there is no disparate or disproportionate burden because they relied on a second analysis using population data. CTPS, however, did not follow FTA equity analysis guidelines and instead used an overly broad data set. The equity analysis therefore erroneously concluded that the discontinuance of Late-Night Service would not result in a disparate burden on minority populations and would not result in a disproportionate burden on low-income populations.

Despite the erroneous conclusion, on two separate occasions, April 11, 2016 and May 2, 2016, the Fiscal and Management Control Board of the MBTA considered staff-recommended mitigation for the termination of the Late-Night Service. The MBTA staff presented the mitigation as voluntary. See Exhibit C: Late Night- Proposed Voluntary Mitigation Options. As such, at best, the MBTA only analyzed one alternative to cancellation of the existing Late-Night Service. Although the transit agency identified this alternative as less discriminatory, it did not implement it and provided no meaningful opportunity for public comment, nor did it consider any other alternatives. Since the equity analysis of the cancellation of Late-Night Service performed according to FTA guidelines demonstrates a disparate and disproportionate burden, and at least one less-discriminatory alternative exists, implementation of a less-discriminatory alternative consistent with Title VI requirements is mandatory.

## **B. MBTA'S FLAWED EQUITY ANALYSIS**

FTA Circular 4702.1B Title VI Requirements and Guidelines for Federal Transit Administration Recipients contains explicit guidance as to what geographic area should be

included when conducting equity analysis using population data. This guidance states that when a transit provider conducts an equity analysis for minority populations or low-income populations using population data instead of ridership data:

the choice of dataset should be the smallest geographic area that reasonably has access to the bus or rail stop or station...passengers will generally walk up to one-quarter mile to a bus stop or one-half mile to a light or heavy rail station, or drive up to three miles to a commuter rail station. The demographics of the neighborhoods within those distances should be the datasets used. Transit providers may use the data from an entire Census block or block group when a portion of the area is within the walking or driving distance described above.

FTA C. 4702.1B, Chap. IV-14(e), Chap. IV-17(f).

CTPS did not follow these prescribed guidelines in their equity analysis and as such their conclusions are invalid. Instead of appropriately limiting the population data to the geographic area of one-quarter mile around the bus stops and one-half mile around rapid transit stations, CTPS utilized population data from the entire municipalities served, resulting in a gross overestimation of the actual population with access. Specifically, CTPS used the population of each municipality, weighted by its share of systemwide service hours, divided by its share of systemwide population to determine the proportion of minority and low-income populations with access to Late-Night Service. See Exhibit D: Service Equity Analysis of the Proposed Discontinuation of MBTA Late-Night Service at 11. Thus, even though a Late-Night Service bus route services the Roxbury neighborhood of Boston, with 36.2 percent of residents living in poverty, CTPS included population data from all of Boston, including the affluent and white neighborhoods, such as Beacon Hill, with only 9.8 percent of residents living in poverty.<sup>6</sup> In effect, CTPS assumed that same, entire population municipality has access to each specific bus

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<sup>6</sup> Poverty in Boston, Boston Redevelopment Authority Research Division, March 2014, Appendix 1, *available at* <http://www.bostonredevelopmentauthority.org/getattachment/01cef762-956d-4343-a49a-b41c280168ae/>.

stop or subway station, regardless of distance. In other words, the same population was considered for a bus stop in Dorchester and Back Bay Station, neighborhoods with 77.8 percent minority and 21.8 percent minority population, respectively.<sup>7</sup> This use of overly broad population data allowed the MBTA to conclude that the cancellation of Late-Night Service would have no disparate or disproportionate impact. CTPS's own ridership survey data, on the other hand, demonstrates that minorities utilized Late-Night Service almost twice (1.8) and individuals with low-income nearly 2.5 times (2.45) as much as the overall MBTA service. Exhibit D: Service Equity Analysis at 7-8. When the equity analysis is performed correctly using the FTA's methodology, there is both a disparate burden on racial minorities and a disproportionate burden on low-income populations. See Exhibit B: Analysis of Equity Impacts by Professor Marcos Luna of Salem State University.

### **C. CORRECT EQUITY ANALYSIS USING FTA'S GUIDELINES**

The equity analysis performed using appropriate geographic scale, as required by the FTA guidelines, shows that disparate and disproportionate burdens are evident. See Exhibit B: Analysis of Equity Impacts by Professor Marcos Luna of Salem State University. The equity analysis found a disparate burden for minority populations for the discontinuance of late-night bus service and combined late-night bus and rapid transit services.

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<sup>7</sup> Boston in Context: Neighborhoods, Boston Redevelopment Authority, August 2015, *available at* <http://www.bostonredevelopmentauthority.org/getattachment/290cae05-72b0-47ba-a214-4a6645d43b01>.

Table 1. Assessment of Disparate Burdens on Minority Population Due to Discontinuance of Late-Night Service Using ACS 2014-2010 Block Group Data

	Ratio to all MBTA bus minority population	Ratio to systemwide minority population	Disparate burden threshold	Result of disparate burden analysis
Bus	1.49	1.80	>1.20	DISPARATE BURDEN
Bus and Rapid Transit	1.33	1.60	>1.20	DISPARATE BURDEN

The equity analysis also found a disproportionate burden for low-income populations for the discontinuance of late-night bus service. While the analysis did not show a disproportionate burden for the combined late-night bus and rapid transit services, the disproportionate burden threshold was missed by .02 or 2 percent. As the MBTA’s own rider survey analysis did find a disproportionate burden for this group, the difference found in this analysis is likely insignificant.

Table 2. Assessment of Disproportionate Burdens on Low-Income Population Due to Discontinuance of Late-Night Service Using ACS 2014-2010 Block Group Data

	Ratio to all MBTA bus low income households	Ratio to systemwide low income household	Disproportionate burden threshold	Result of disproportionate burden analysis
Bus	1.23	1.28	>1.20	DISPROPORTIONATE BURDEN
Bus and Rapid Transit	1.13	1.18	>1.20	NO DISPROPORTIONATE BURDEN

As such, the MBTA’s cancellation of Late-Night Service without mitigation violates the Title VI prohibition on discrimination and USDOT’s Environmental Justice Order.

**D. ALTERNATIVES/MITIGATION MEASURES CONSIDERED**

On April 11, 2016 and May 2, 2016 MBTA staff recommended less discriminatory/mitigation measures for the cancellation of Late-Night Service to the MBTA Fiscal and Management Control Board, but presented them as voluntary. On both dates, the MBTA Fiscal and Management Control Board reviewed the MBTA staff recommendation, which proposed to add additional trips or extra run time to seven bus routes, but did not implement the measure, or any subset. See Exhibit C: Late Night- Proposed Voluntary Mitigation Options. While the MBTA did provide a comment period for the MBTA staff recommendation for mitigation, this public comment period was not meaningful. Notice of the public comment period was only posted online and was not advertised well, and the comment period was merely open for one week.<sup>8</sup> As a result, the MBTA received only 76 responses.<sup>9</sup> Further, public comment announcement made no mention of Title VI, so the public was unaware of the context of the proposed mitigation. The MBTA Fiscal and Management Control Board also reviewed an alternative to the Late-Night Service proposed by transportation advocates, which includes eight bus routes and daily operation. See Exhibit E: Advocates' Proposal for Overnight Service. The MBTA Fiscal and Management Control Board has also taken no action to implement this proposal. The equity impact of this proposal has not been analyzed. MBTA did not provide a meaningful opportunity for public comment on any of these mitigation measures or alternatives, as required by the FTA. See FTA C 4702.1B, Chapter IV-16(f)(vii).

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<sup>8</sup> MBTA Seeks Public Comment on Mitigation Options Critical Bus Routes Targeted, MBTA, March 28, 2016 *available at* [http://www.mbta.com/about\\_the\\_mbta/news\\_events/?id=6442456036&month=3&year=16](http://www.mbta.com/about_the_mbta/news_events/?id=6442456036&month=3&year=16).

<sup>9</sup> Late Night- Proposed Voluntary Mitigation Options at 7, *available at* [http://www.mbta.com/uploadedfiles/About\\_the\\_T/Board\\_Meetings/FINAL\\_Sec\\_BK\\_Voluntary%20Equity%20Mitigation%20LNS%20\(2\).pdf](http://www.mbta.com/uploadedfiles/About_the_T/Board_Meetings/FINAL_Sec_BK_Voluntary%20Equity%20Mitigation%20LNS%20(2).pdf).

**E. ENVIRONMENTAL JUSTICE VIOLATIONS**

The MBTA also violated USDOT's Environmental Justice Order which requires the full consideration of environmental justice principles throughout planning and decision-making processes in the development of programs, policies, and activities. USDOT Order 5610.2(a), section 1.b. While Title VI imposes statutory and regulatory requirements that are broader in scope than environmental justice, a Title VI analysis would not necessarily satisfy environmental justice requirements, as Title VI does not include low-income populations. USDOT Order 5610.2(a), section 7.a. USDOT requires that activities with the potential to have a disproportionately high and adverse effect on human health or the environment include explicit consideration of the effects on minority populations and low-income populations. USDOT Order 5610.2(a), section 5.b(1). The Order requires meaningful opportunities for public involvement by members of minority populations and low-income populations during the planning and development of programs, policies, and activities, including the identification of potential effects, alternatives, and mitigation measures. USDOT Order 5610.2(a), section 5.b(1). Statutes governing USDOT regulations must be administered so as to determine whether programs, policies, or activities will have an adverse effect on minority and low-income populations and whether that adverse effect will be disproportionately high. USDOT Order 5610.2(a), section 8.a. While mitigation and enhancement measures may be taken into account when determining if there is a disproportionately high and adverse effect on minority and low income populations, program administrators must avoid discrimination and avoid disproportionately high and adverse effects on minority populations and low-income populations by ensuring that any activity that will have a disproportionately high and adverse effect will only be carried out if further mitigation measures or alternatives that would avoid or reduce the

disproportionately high and adverse effect are not practicable. USDOT Order 5610.2(a), section 8.b-8.c.

The MBTA violated USDOT Order 5610.2(a) by failing to determine whether the cancellation of Late-Night Service would have a disproportionately high adverse effect on minority and low-income populations before the cancellation of service. When the MBTA finally did conduct their equity analysis, after being ordered to do so by the FTA, they erroneously concluded that there was no disproportionately high and adverse effect on minority or low-income populations because they used an overly broad dataset. As the MBTA erroneously concluded there was no disparate or disproportionate burden, they never investigated mitigation measures or alternatives that would avoid or reduce the disproportionately adverse effect of cancellation of Late-Night Service on low-income populations, nor provided a meaningful opportunity for public involvement, as required by USDOT Order 5610.2(a).

## **VI. REQUESTED REMEDIES**

For the reasons set forth above, the MBTA is not in compliance with Title VI of the Civil Rights Act of 1964, Executive Order 12898, and USDOT's Environmental Justice Order. Accordingly, the FTA should take all necessary steps to ensure that the MBTA come into compliance. Such steps must include implementation of a less discriminatory alternative to cancellation of the Late-Night Service, after an equity analysis, and meaningful public comment.

FTA guidance requires that when there is a finding of disparate impact, the transit provider shall analyze alternatives that would have a less disparate impact on minority riders. FTA Circular 4702.1B, Chap. IV-16(f)(vii). If a transit provider chooses not to alter the proposed service changes despite the potential disparate impact on minority populations, it may implement the service change only if it has a substantial justification and can show that there are

no alternatives that would have a less disparate impact on minority riders but would still accomplish the transit provider's legitimate program goals. FTA Circular 4702.1B, Chap. IV-16(f)(vi). The MBTA analyzed an alternative, found it to be less-discriminatory, but did not implement it. It also did not provide an opportunity for meaningful public comment.

FTA guidance also requires that when there is a finding of a disproportionate burden on low-income riders, the transit provider should take steps to avoid, minimize, or mitigate impacts where practicable, as well as describe alternatives available to low-income passengers affected by the service changes. FTA Circular 4702.1B, Chap. IV-18 (g)(iv). A plan that would create a disproportionate burden on low-income populations should only be carried out under EO 12898 and USDOT's Environmental Justice Order if further mitigation measures or alternatives that would reduce the disproportionately high and adverse effects are not practicable. DOT Order 5610.2(a), section 8.c. Since at least one practicable alternative is available, the MBTA is required to implement it and/or another less-discriminatory alternative.

Complainants request, at minimum, the following remedies:

- a complete analysis of alternatives to cancellation of Late-Night Service including, but not limited to, the proposal for alternative Late-Night Service currently under investigation by the MBTA, see Exhibit E, and the complete MBTA staff recommendation for mitigation of the termination of Late-Night Service, see Exhibit C;
- a meaningful public comment period;
- implementation of a less-discriminatory alternative, including complementary THE RIDE service; and
- temporary implementation of a mitigation measure, including paratransit service, until a permanent alternative is in place, since the Late-Night Service has already been terminated.

Respectfully submitted,

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