PUBLIC-PRIVATE PARTNERSHIPS: STATE AND USER PERSPECTIVES

(110–46)

HEARING

BEFORE THE

SUBCOMMITTEE ON
HIGHWAYS AND TRANSIT

OF THE

COMMITTEE ON
TRANSPORTATION AND
INFRASTRUCTURE
HOUSE OF REPRESENTATIVES

ONE HUNDRED TENTH CONGRESS

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U.S. House of Representatives

Committee on Transportation and Infrastructure

Washington, DC 20515

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May 23, 2007

SUMMARY OF SUBJECT MATTER

TO: Members of the Subcommittee on Highways and Transit

FROM: Subcommittee on Highways and Transit Staff

SUBJECT: Hearing on Public-Private Partnerships: State and User Perspectives

PURPOSE OF HEARING

The Subcommittee on Highways and Transit is scheduled to meet on Thursday, May 24, 2007, at 10:00 a.m., to receive testimony on the views of state and local officials and the users on transportation project delivery and financing under public-private partnership ("PPP") arrangements. The Subcommittee will hear from state and local officials, and representatives of the trucking industry, highway user, and environmental communities.

BACKGROUND

Nature of Public-Private Partnerships

The Government Accountability Office defines public-private partnership, in part, as "a contractual agreement formed between public and private sector partners, which allows more private sector participation than is traditional. The agreements usually involve a government agency contracting with a private company to design, renovate, construct, operate, maintain, and/or manage a facility or system. While the public sector usually retains ownership in the facility or system, the private party will be given additional decision rights in determining how the project or task will be completed." The U.S. Department of Transportation has adopted this definition for its programs. The goal of PPPs is to allocate responsibilities in the development, construction, management, and financing of a transportation project to the public and private partners in a way that will produce the best result and to share equitably the risks and rewards among the partners.

Conventional Contracting Approach

Traditionally, delivery of highway and transit projects follows the design-bid-build sequence. The typical pattern that began in the mid-20th Century is for public transportation agencies (departments of transportation and transit authorities) to design a transportation project using in-house engineering staff until it is 100 percent complete. The project is then let out for construction bids in a competitive process. Generally, the private construction firm that offers the lowest-price bid is awarded the contract to build the project. The project is financed with public (federal, state, or local) funds on a pay-as-you-go basis. At completion, the public transportation agency inspects the project to ensure that it is built according to plan and meets various design and construction standards. The agency then operates and maintains the project during the useful life of the project. The advantages of conventional contracting for the agency are (1) complete control over project design, (2) a competitive bid price for project construction, and (3) a high degree of transparency. The disadvantages are (1) financial exposure to change orders, (2) no guarantee of the lowest final project price, and (3) a need for complete public funding.

Use of Public Private Partnerships and Federal Tools

For a variety of reasons, both state departments of transportation and transit agencies in the mid-1980s began outsourcing to private contractors a number of the activities associated with planning and development of transportation projects. Over time, the list of such outsourced activities lengthened.

As the number of transportation PPPs grew, they were presented as a win-win proposition for governments and the private sector. For the government, it offered the opportunity to encourage entrepreneurial development and operation of transportation projects, take advantage of private-sector management skills and capital, speed up application of advanced technology, and reduce the size of public payrolls. For the private sector, it offered opportunities to participate in infrastructure investment, to expand their customer base, and to diversify their business model.

Early PPPs in the United States were mostly of the innovative procurement type. A number of models evolved, encompassing varying activities for which the private-sector partner was responsible. They ranged from design-build to design-build-operate, design-build-maintain, and design-build-operate-maintain. As more responsibilities were assumed by the private-sector partner, more of the risks relating to project costs and delays were shifted to the private-sector partner.

In 1998, Congress provided federal assistance in the Transportation Equity Act for the 21st Century to encourage greater private-sector participation. The Transportation Infrastructure Finance and Innovation Act ("TIFIA") was enacted, and state infrastructure banks ("SIBs") were established, as part of this legislation. These programs were designed to leverage federal transportation resources to attract non-federal or private investment in transportation projects.

The Safe, Accountable, Flexible, Efficient Transportation Equity Act: A Legacy for Users of 2005 ("SAFETEA-LU") expanded tools to attract private capital investment to transportation improvement projects. The bill made improvements to the TIFIA programs to increase its utilization, and expanded SIBs to all 50 states.

The legislation also included federal income tax exemption to $15 billion in private activity bonds ("PAB") that would be used for highway and freight transfer facilities. Texas recently became the first state to receive an allocation under this new program to use PAB to help finance a highway project near Austin developed under a PPP. Using PAB and other types of bonding – including GARVEE bonds and municipal bonds – to finance transportation projects fundamentally changes the traditional pay-as-you-go approach (financing projects out of currently available funding) to one of debt financing (spreading project payments into the future). In addition to requiring future generations to pay part of the costs of the projects, repayment of debts often – but not always – involves tolls.

SAFETEA-LU also provided public-private partnerships opportunities for public transportation projects through the Federal Transit Administration ("FTA") Public-Private Partnership Pilot Program, known as Penta-P, for certain new fixed guideway capital projects. The pilot program was created to demonstrate the advantages and disadvantages of public-private partnerships for transit. In its May 1, 2007 notice of agency response to comments, FTA announced its intention to consider projects including innovative procurement contracting mechanisms and financing in addition to projects involving long-term private operations or concession contracts for inclusion into the pilot program. FTA also stated that project sponsors should utilize a wide range of financing tools, including PAB, to support PPPs if the project is eligible to use such financing tools. On May 16, 2007, FTA announced that the proposed Oakland Airport Connector has been selected as the first project to take part in the transit PPP pilot program. The proposed three-mile-long connector, which features fully automated trains that operate on an exclusive right-of-way, will provide improved access to the Oakland International Airport by connecting it to the existing Coliseum Bay Area Rapid Transit station.

State and Local Government Perspective

States and localities use PPPs to help develop or finance transportation projects based on the premise that private sector involvement will deliver the projects faster and more efficiently or provide financial participation to make project development possible. The goal of state and local governments under this approach is to provide better value to the public for the projects, in comparison to the traditional procurement approach of design-bid-build. Such value can be in the form of timely or early project completion, using innovative construction materials or techniques, improved project management, shifting risks to private-sector partners, or avoiding or lessening the use of public funding.

However, there is a concern that when state and local governments are considering PPPs, they do not compare the total project life-cycle costs of using a traditional procurement approach versus a PPP. This type cost comparison is typical in Europe.

PPPs may also provide access to private sector capital for state and local governments. For highway projects that add new capacity, the private sector may be willing to fund the construction and operation of the new capacity and in return receive toll revenues from the facility over a number of years. Under another approach – called availability payments – the public authority guarantees defined payments over a period of time to the private entity in exchange for the private entity paying for the construction and operation costs. Under both of these approaches the private sector pays for the construction and operation of the facility, providing capital assistance to state and local governments in exchange for a future revenue stream dedicated to the private entity.

Recently state and local governments have looked at leasing existing facilities to private entities. These long-term concession agreements provide state and local governments with a substantial up-front payment in exchange for the authority to operate and maintain the facility and to collect toll revenue associated with the facility. In many cases the state and local governments use these up-front payments to finance infrastructure projects that the governments may not otherwise be able to afford, although Chicago used the proceeds it received from the Skyway concession agreement for non-transportation expenditures. Indiana used the proceeds from the long-term lease of the Indiana Toll Road to fund transportation projects, but most of them are outside of the corridor of the privately leased toll road.

There are also many concerns associated with long-term concession agreements. Some financial analyses have demonstrated that many of these long-term leases do not provide the best value to the public. Moreover, there is the more fundamental question of management and political control. Long-term concessions that last for 50 to 99 years cede control to the private partners for 2 to 4 generations. This may severely limit the ability of future governments to make decisions relating to transportation improvements and economic development. Similarly, non-compete clauses – or the more recent variations of such clauses – will hamper state and local governments' ability to meet their responsibility to address current and future mobility and safety needs.

Some states and local governments have legislation that allows for "unsolicited proposals" for transportation projects. Under this authority, private entities may submit ideas for projects that have not been put out to bid by the state or local government. If the unsolicited proposal is found to be feasible, the state or local government then will have to open the proposed project up to bids from other private entities in order to ensure a competitive process. Unsolicited proposals provide an avenue for state and local governments to tap into the innovation, efficiencies, and sources of capital that the private sector brings to the table.

Critics of unsolicited PPP proposals state that they have the real potential to undermine the statewide and metropolitan planning processes set forth in federal highway law. Communities that have waited many years to have their projects included in fiscally constrained transportation improvement programs (TIPs and STIPs) and long-range transportation plans may discover that they have to wait longer because a PPP project originated from an unsolicited proposal has cut into the front of the line and, as a result, state and local transportation authorities have to revise their financial commitments to projects already on the TIP, STIP, and plan to provide financial support for the PPP project. This could do significant damage to the public support for transportation planning efforts.

Finally, decisions to use PPPs to construct, operate, maintain, or finance transportation projects as well as the final agreements should be arrived at in an open and transparent process. Timely dissemination of relevant information is critical for the public to understand what is being considered or negotiated. Without that information, stakeholders cannot participate fully in the decision-making that, in turn, can undermine the public confidence in, and erode the public support for, the projects.

Users' Perspective

Future toll rates are one of the most important issues from the users' perspective. While users may have the opportunity to express their views on toll increases when the partnership agreement is negotiated, the agreement specifies future increases in the toll rate and the public does not have the opportunity to affect the scheduled toll increases once the agreement is put in place. Some people argue that tolls are regressive in nature, and have a disproportionate impact upon lower income individuals.

How the proceeds and revenues generated from PPPs are used has been the focus of much debate. Transportation projects are most often financed by user fees. Understandably, users want the proceeds paid by the concessionaires and toll revenues paid by those who use the facilities to be used for transportation purposes, including providing expanded or improved transit services. Examples to the contrary include the City of Chicago using the proceeds from the Chicago Skyway concession for non-transportation purposes. In addition, some proponents of PPPs have suggested using the proceeds from proposed long-term leases of certain existing toll roads in New Jersey for property tax relief, among other non-transportation uses.

Timely access to relevant information when public–private partnership agreements are being negotiated is important to the users. As explained previously, the public will be able to participate meaningfully in decision-making only if they have relevant information about the projects or the agreements governing the PPPs. Users have expressed concerns about legislation that keeps such information secret until the PPP agreements have been finalized, when it will be too late for them to influence the decision.

PREVIOUS SUBCOMMITTEE ACTION

The Subcommittee on Highways and Transit has held three hearings on PPPs. The first hearing in May 2006 focused on long-term leases of existing highways in the United States. In February 2007, the Subcommittee held a second hearing in response to a growing interest in PPPs among the States and a strong push by the Federal Highway Administration for PPP adoption by the States. It explored the public interests at stake and how those public interests could be protected in PPP arrangements. Most recently in April, the Subcommittee held a third hearing on PPPs that examined innovative procurement practices.

WITNESS LIST

PANEL I

Hon. Edward G. Rendell
Governor of Pennsylvania
Harrisburg, PA

PANEL II

Hon. Alan Lowenthal
Chair, California Senate Transportation and Housing Committee
Sacramento, CA

Hon. Terri J. Austin
Chair, Indiana House Roads and Transportation Committee
Indianapolis, IN

PANEL III

Mr. Bill Graves
President and CEO, American Trucking Association
Alexandria, VA

Mr. Todd Spencer
Owner-Operator Independent Drivers Association
Grain Valley, MO

Mr. Greg Cohen
President, American Highway Users Alliance
Washington, DC

Mr. Michael Replogle
Environmental Defense
Washington, DC

HEARING ON PUBLIC-PRIVATE PARTNERSHIPS: STATE AND USER PERSPECTIVES

Thursday, May 24, 2007

HOUSE OF REPRESENTATIVES,
COMMITTEE ON TRANSPORTATION AND INFRASTRUCTURE,
SUBCOMMITTEE ON HIGHWAYS AND TRANSIT,
Washington, DC.

The Subcommittee met, pursuant to call, at 10:05 a.m., in Room 2167, Rayburn House Office Building, the Honorable Peter DeFazio [Chairman of the Subcommittee] presiding.

Mr. DEFAZIO. Good morning. Thanks for being here.

We are going to change the order a bit. Governor Rendell, being a multimodal guy, is on the train and the train is a bit delayed. So we are going to have the second panel first.

This is, I believe, the third or fourth hearing this year we have held on private-public partnerships. I am not going to repeat the concerns expressed. We are continuing to investigate both the benefits and potential pitfalls of public-private partnerships.

The Chairman and I sent out an advisory letter to State legislators and governors and DOTs a couple of weeks ago expressing some of the concerns we have. We are concerned about some one-sided presentations that have been made. And we are still looking forward to—it has not yet happened—the Administration posting a more balanced discussion of the issues on their web site as opposed to the so-called model legislation. The Chairman and I are in the final moments of drafting up our own sort of advisory on these issues that will go into our concerns in more depth, and we hope to be providing that before the Memorial Day break.

With that, I would turn to whichever of my Republican colleagues has decided to go first.

Mr. DUNCAN. Thank you, Mr. Chairman. I have this down as the third hearing, but I think we also had a briefing by the GAO which was sort of like a hearing. So this is the third and a half, I guess. In February, we held what could be called an overview hearing on public-private partnerships. In April, we held a hearing on innovative contracting techniques. Today we will hear testimony from Governor Rendell of Pennsylvania and two State legislators on the States' perspective on public-private partnerships. We will also hear from four witnesses representing users of our Nation's highway system, to get their opinions on these partnerships.

In my home State of Tennessee, our philosophy for funding transportation projects has been pay-as-you-go. We will spend no more than we take into the State Transportation Fund. Toll roads have not been a part of the funding mechanism for roads in Tennessee. But this does not mean that toll roads and other public-private partnerships do not have their place in the national toolbox of financing alternatives.

It is also important to remember that these partnerships are much more than just toll roads. PPPs are contractual agreements between public and private sector partners that allow more private sector participation than has been traditional. We held an entire hearing in April on innovative contracting techniques. None of the technologies presented involved tolls. Some States are also exploring concepts such as availability payments and shadow tolls as ways to incorporate private sector financing into public infrastructure projects. Under these approaches the private sector will provide the up-front financing for the project in return for a guaranteed stream of payments over a number of years from the public entity sponsoring the project.

While I am open to exploring additional private sector participation in transportation projects, I am concerned about possible "sweetheart" deals for private companies. In particular, it is very important to make sure that decisions made by State and local governments regarding long-term lease agreements are made with the public good firmly at the forefront. We need to make sure that not all the money is paid up front so that governors and taxpayers many years down the road are left holding the bag.

I am particularly interested in hearing from Governor Rendell about how his proposal to lease the Pennsylvania Turnpike will ensure that the public interest is protected with these concerns in mind.

Mr. Chairman, that concludes my statement. I ask unanimous consent that the Record be held open for 30 days for the submission of written statements or follow-up questions to the witnesses. Thank you.

Mr. DEFAZIO. I thank the Ranking Member. I now turn to the Full Committee Ranking Member, Mr. Mica.

Mr. MICA. Thank you. I appreciate Mr. DeFazio and Mr. Duncan holding this important hearing in a series of hearings. I try not to interfere in the work of the Subcommittees in my position as the Ranking Republican. But I think this is a very important hearing to participate in as you begin your panels and discussions today.

I think Mr. Oberstar would be here, too. I know his keen interest in this issue. I was saddened to learn, I think he lost one of his uncles and had to depart Washington for the funeral. So our thoughts are with him. But I know he would be here, too, because he also believes this is a very important topic.

The whole question of public-private partnerships has been a hotly debated issue during the past couple of years. In my home State, we have used a host of innovative financing techniques to fund transportation projects. I come from central Florida. Just in the area around Orlando we have over 170 miles of toll roads, and we also have a State turnpike which has been running through the heart of central Florida for many years.

I had hoped that our new Secretary of Transportation Stephanie Kopelousos could be here and testify today. Unfortunately, she had some critical issues in Tallahassee and will not be with us. Maybe we can make a statement from her or from the Florida Department of Transportation a part of the record at a later date.

I believe that public-private partnerships, specifically private sector financing, will be an absolute key component and must play a role in solving our impending transportation funding crisis. However, by the same token, I do not think that should be the only solution that we pursue. I think, first of all, the Federal Government does not really know what we want our national infrastructure to look like, starting with highways. We passed our interstate-initiating legislation back in the 1950s, we have passed some intermodal requirements along the way, but no one can tell you what the Interstate is going to look like 20 to 50 years from now and who will be responsible for what.

With a lack of Federal policy and the creation of this vacuum, States are beginning to initiate actions dealing with trying to meet the congestion and transportation requirements of each of their entities. Last night I read Governor Rendell's statement. Read and hear Governor Rendell's statement, and what Pennsylvania faces the other 49 States also face—a crisis not only in construction of new highways, roads, but the statement on bridges is just like a statement across the Nation.

So, first of all, we lack a Federal policy as to what we want our infrastructure to look like. Secondly, we do not know what the Federal Government's responsibility is going to be, and we do not know how we are going to finance that. We have created a vacuum and States will be moving forward to take some action if we do not take some action.

However, I do want to say that I have to express some concern about the letter that was sent by Chairman Oberstar and Subcommittee Chair DeFazio to the Governors, the State DOTs, some of the State legislators on May 10th. They wrote to strongly discourage States from entering into public-private partnership agreements that are not in the long-term interest of our national transportation plan.

Well, somebody tell me what our long-term national transportation plan is. Again, I think they are trying to fill that void. I will give my colleagues on the other side of the aisle the benefit of the doubt that we do not want anyone to enter into any agreements that are not in the public interest. But, again, they are filling a void caused by a lack of Federal policy. These hearings I know are being conducted to develop that policy.

I believe that in the future we in the United States absolutely will have to rely on leveraging with the private sector dollars for funding transportation projects. Europeans and Australians have been doing this for over 40 years. I think we can look at other models and create our own that fits our unique requirements in the United States and optimize the dollars and financing that is available to move these important infrastructure projects to the benefit of the public.

There is one particular sentence in the Oberstar and DeFazio letter that I do disagree with, and this caused quite an uproar in the Transportation Committee. The letter states that the Committee "will work to undo any agreements that do not fully protect the public interest and the integrity of the national system." Now, again, if they do not protect the public interest, I do have concerns and would concur with that statement.

But the States are operating in a void of public policy and I defy anyone to tell us what our national system is today and what it will look like in 20 or 50 years from now. And I also sympathize with the governors and other State legislators and officials trying to deal with what has turned into a national parking lot as far as highway transportation is concerned.

I look forward to working with Members of the Committee as we hopefully resolve some of these issues and learn from these witnesses and others how we can best move forward. Sorry to take a little bit extra time, but I do feel this is important. I think Mr. Oberstar would do the same if he were able to be here. Thank you. I yield back.

Mr. DEFAZIO. I thank the Ranking Republican Member.

The Committee is attempting, we are doing it on two tracks here. One is to look at potential funding resources to deal with national infrastructure needs. The other is to develop a vision and fully assess the national infrastructure needs. We are only in the fourth or fifth month of assessing that.

I would agree with the gentleman in terms of we need a new vision. We have been living off of past capital for basically a half a century that was provided by Dwight David Eisenhower as President and the National Interstate System and we have just only incrementally changed that. We need to look at a transportation policy for the 21st century.

But I would also state that the existing system is the Interstate system and we have concerns about fragmentation and/or segmentation where critical parts of the designated Interstate system charge extortionate rents or tolls because of poorly drafted and entered into private-public partnerships. That is what we are referring to in that letter.

With that, unless there are other Members who urgently have an opening statement, I want to turn to the witnesses and move ahead. Thank you.

The order on the agenda would be the Honorable Alan Lowenthal, Chair of the California State Senate Transportation and Housing Committee. Senator Lowenthal.

TESTIMONY OF THE HONORABLE ALAN LOWENTHAL, CHAIR, CALIFORNIA SENATE TRANSPORTATION AND HOUSING COMMITTEE, SACRAMENTO, CALIFORNIA; THE HONORABLE TERRI J. AUSTIN, CHAIR, INDIANA HOUSE ROADS AND TRANSPORTATION COMMITTEE, INDIANAPOLIS, INDIANA

Mr. LOWENTHAL. Thank you Mr. Chair and Members. Thank you for inviting me here today to discuss California's experience with public-private partnerships and to share my thoughts concerning an appropriate State policy on public-private partnerships given our current understanding of the opportunities and challenges of this financing tool.

When it comes to transportation funding, California is in the midst of the same struggle as is the Federal Government. California has not raised its gas tax since 1994, and the value of the tax has eroded substantially due to inflation and rising construction costs. At the same time, the State expects tremendous population growth, with the number of vehicle miles traveled growing at an even faster rate. As a result, the State has been in the uncomfortable position of under-investing in its transportation infrastructure. And today we have some of the worst congestion in the Nation.

Public-private partnerships have been increasingly presented to policymakers as a tool to finance much-needed transportation facilities. In California, the debate has focused solely on using public-private partnerships for the design, build, finance, and operation of a new transportation facility. As a State, we are not considering the lease of any existing infrastructure, as has been done in the City of Chicago or the State of Indiana.

Public-private partnerships are not new to California. I have submitted to the Committee a report that details California's experience with public-private partnerships. To summarize, in 1989 the legislature passed legislation allowing for the construction of four public-private partnerships. Two projects were initiated before legislation was passed in 2002 limiting the number of public-private partnerships to two.

The first project included a "non-compete clause" which prevented the State from making needed improvements to the facility. Due to the limitations imposed by the non-compete clause, a public agency purchased the concession rights to the toll lane in 2002, making California's first operational private toll project a public facility.

California's second and only other public-private partnership, which is financed by Macquarie Infrastructure Group, has experienced significant cost overruns and project delays. Who bears responsibility for these increased costs—the public or the private partner—is subject to dispute between the two parties. This facility is not yet in service and already the legislature has extended the length of time that tolls may be charged in order to facilitate the resolution of this dispute.

California's experience with public-private partnerships lends support to the following concerns about these arrangements:

One, concession agreements may limit the ability of a public agency to adapt to the changing transportation needs of a region; and two, working with a private entity may be a contentious and litigious endeavor for public agencies because private companies may work to protect their investment over the public interest.

While public-private partnerships have had a troubled history in California, the State nonetheless recognizes that development concessions may offer certain opportunities a way forward.

One arena in transportation that I believe is ripe for public-private partnerships is in goods movement. Last year, the California Legislature passed legislation to authorize four public-private partnerships to facilitate the development of infrastructure that is primarily designed to support the movement of freight. Forty-five percent of the Nation's seaborne cargo enters the State by the Ports of Los Angeles and Long Beach, the majority of which is simply passing through our State to other parts of the country. The trade activity is expected to double by 2020. Southern California is experiencing a public health crisis due to air quality that has been degraded by emissions from goods movement activity. The State's infrastructure can barely handle existing trade, let alone accommodate this overwhelming coming growth.

Under the current system of transportation funding, retailers and manufacturers who ship goods to the United States are profiting from the use of California's transportation infrastructure. At the same time, communities near our seaports and along our trade corridors are subsidizing the cost of consumer goods with poor health and a diminished quality of life.

Public-private partnerships have the potential to provide needed goods movement-related facilities. Concession agreements could and should include specified performance standards regarding the mobility of goods and the environmental and community impacts of transportation facilities. In this way, public-private partnerships may help to improve not only the transportation infrastructure, but also community health and well-being. Perhaps more importantly, public-private partnerships in the realm of goods movement may foster the development and demonstration of new technologies to support the movement of freight in a manner that produces zero emissions.

The primary users and beneficiaries of goods movement facilities would be private entities such as retailers and manufacturers as well as the trucking and railroad companies employed to move their cargo. Focusing public-private partnerships on goods movement, where a private company charges other private companies, such as retailers, manufacturers, trucking companies, for the use of that facility, evens the playing field, so to speak, between those who control the facility and those who pay to use it. Cargo owners have a greater ability to pay for their use of the facility and/or pass on their costs and they have a greater ability to choose different facilities, such as other ports, if the price of doing business using that facility becomes too high.

As I close, I would like to suggest a series of intermediate steps that States may take to address infrastructure dilemmas and take advantage of private sector efficiency and innovation. First, States could develop more publicly operated toll facilities, which also invite private capital into infrastructure development through the sale of tax-exempt bonds. States could also allow a greater role for the private sector in the operation of facilities. Finally, regardless of whether a facility is public or private, Federal and State Government should do more to encourage demand management strategies in order to achieve higher performance from our existing facilities.

Thank you. I welcome any questions by the Subcommittee.

Mr. DEFAZIO. Thank you, Senator.

With that, I now turn to the Honorable Terri J. Austin, Chair of the Indiana House Roads and Transportation Committee. Welcome.

Ms. AUSTIN. Thank you, Mr. Chairman and Members of the Committee, for the opportunity to testify here today about Indiana's experiences.

In March 2006, the Indiana General Assembly enacted legislation for the first time that gives our State's executive branch the authority to enter into public-private partnership agreements for the financing and development of limited access facilities, tollways, roads and bridges, and other infrastructure assets. And I might add that this past session we added passenger and freight rail to the definition of P3 agreements.

This same legislation, which is also known as House Bill 1008, also allowed a quasi-state agency called the Indiana Finance Authority to enter into an agreement with a private consortium to lease the Indiana Toll Road. And as you may know, the Indiana Toll Road is about 157 mile stretch that hits the Ohio Turnpike on our eastern border and the Chicago Skyway on our western border and also includes Federal Interstates I-80 and I-90. The lease agreement, which was finalized with the multinational firm Macquarie-Cintra, was a concessions model that gave up tolling revenue and rights to the road for a period of 75 years in exchange for a one time up-front payment of $3.8 billion.

The Indiana Toll Road Concession and Lease Agreement gave the exclusive franchise and license to not only operate, manage, maintain, rehabilitate and toll this thoroughfare, but it also included the rights to all revenues that are generated by the agreements with vendors and concessionaire that provide goods and services along the toll road.

What I would like to do today with my testimony is to offer what I think are four principles that any legislative body, and I especially hope this particular body will consider as you look at the possibility of public-private partnerships, and this also goes for State legislators, as we wrestle with what are the appropriate tools for our infrastructure development toolbox, and how do we protect and safeguard the public interest.

First and foremost, I would suggest that adequate public debate regarding P3s should be one of the priorities. Elected officials should debate whether or not public-private partnerships based upon agreements that last two, three, and four generations really represent good public policy and good transportation policy.

For this to happen, and for the public and their duly elected representatives to be able to adequately examine these types of agreements, we need more than a few short weeks to build a working knowledge about P3s, examine prospectus agreements and reports, and understand the unprecedented amounts of information that accompany projects of this nature. This also includes an opportunity to examine various P3 models and to weigh the pros and cons of such agreements so that legislators and the public can participate in meaningful discussions.

Indiana, as you know, has a part-time legislature. The eight weeks of the 2006 legislative session did not afford enough time to consider such a complex and far-reaching proposal before we were asked to cast a vote that would effectively tie the hands of both the executive branch and the legislative branch for decades to come.

Ultimately, the public should have some level of discomfort with elected officials who serve two, four, and six year terms when they propose to enter into 75 or 99 year contractual obligations. As legislators, we know that laws can be amended and even repealed. However, there are simply very good reasons that long-term leases of public assets deserve extra time and extra scrutiny.

Citizens deserve the right to change their mind about public policy and the course that their leaders have charted. Even if it reduces the windfall from a long-term P3 agreement, government needs to make certain that the agreements are not too difficult to extract themselves from.

Additionally, we need to make sure that we are not pursing P3 agreements solely to avoid other policy options that may be even more complex or perhaps more politically difficult. There are difficult questions that should be pursued at the same time we examine P3 agreements. But most importantly, there should be a diverse strategy for keeping our Nation's infrastructure strong. We should not put all of our eggs in one basket simply because private equity firms are flush with cash and they are looking for roads to lease.

Secondly, I would suggest that there has to be a verified project need and support for the project. Projects that are being promoted for P3 financing should be part of an established comprehensive, long-range plan for transportation infrastructure. The decision to undertake any new project should not be about following the money or taking advantage of a newly found "cash cow." There should be an identified need for the project that is substantiated by feasibility studies and verifiable data.

When vetting a project and an agreement, there should be strong support from local elected officials and residents, and a thorough examination and understanding of both the consequences and implementation of such an agreement. I believe it would be desirable to have local involvement and support throughout the entire scope of the project, including both the conceptualization, design, implementation, and evaluation of the proposal. Especially for projects that involve Federal transportation assets, there should also be substantial involvement and partnership communication between Federal officials, transportation officials, and elected officials, and locals, and at the state level.

The third principle I would suggest is transparency, due diligence, and independent monitoring. In the case of Indiana's P3 agreement for the lease of the toll road, it was essentially a fait accompli. An RFP for the project had already been developed, disseminated, and responses were received prior to any legislative knowledge or involvement. Although requests for information were submitted by both legislators and the public, sometimes there was a reluctance to bring forward the details and information regarding the agreement and anything that had any of the financials that it had been based upon. But there were virtual, I would say, "bedrooms" created that allowed prospective bidders to go in and take a look at all this data. And it was difficult for legislators to actually have access to some of that same information.

I would say that the reluctance on the part of any administration or anybody to disclose that type of information does little to foster public confidence that these long-term agreements are actually in the best interest of the public.

Fourth, I would simply suggest that asset realization and distribution should follow the appropriate legislatively bodies and authorities. Cash-strapped States and local governments seem to be choosing to receive the funds up front. I know that is what Representative Duncan expressed some concern about. When this occurs, I believe that the legislative branch is the appropriate authority to take a look at how those funds should be distributed. I will simply say that in Indiana's case, we still have over $2 billion in local road, street, and bridge projects that have not been addressed by the General Assembly and we need to take a look at how we distribute the proceeds from any type of agreement where we get such an up-front windfall.

I would simply add, and this is not in my written testimony, however, that the funds for the Indiana Toll Road, which is also known as Major Moves, is being reinvested in transportation infrastructure. However, it is scheduled to run out after 15 years. And what do we do when a lease is 75 years, we have given away the rights to our revenue, especially even the development revenue along the toll road and the rights to future development, to a private entity.

In summary, I want to be perfectly clear that I do not think that all public-private partnership agreements are bad, nor should they be rejected out of hand. However, based upon what I have witnessed in Indiana and as reported in other States, the asset monetization and the long-term lease of transportation infrastructure deserves far more public discussion and debate than it has received.

We are all aware of the challenges that you face in terms of the Highway Trust Fund and how it is going to impact revenues that are available to State and local governments. I would simply say that our own reluctance as a General Assembly to raise the fees for the last 20 years, the Indiana Toll Road fees, and your reluctance to raise the Federal gas tax have contributed to our current dilemma. I am not convinced that more taxes are the answer, nor do I believe that we can build our way out of congestion. I believe and hope that public mass transit deserves to be a part of State and Federal discussions and funding considerations.

I look forward to working in partnership with my Federal officials to make this happen.

Mr. DEFAZIO. Thank you for your excellent testimony.

With that, we will proceed to a round of questions.

Senator Lowenthal, I just wanted to follow up. We have had varying opinions on the efficacy or efficiencies that are absolutely inherent in public-private partnerships in terms of private construction of the roads. I guess I would ask, State Route 125, as I understand it, is being built by the Macquarie Infrastructure Group. Is that correct?

Mr. LOWENTHAL. Yes, it is.

Mr. DEFAZIO. That is the same company involved in the Indiana and the Chicago Skyway. Now you said, "It has experienced significant cost overruns and project delays." Could you give us a little insight into why, since we have told that this is the panacea to publicly constructed projects?

Mr. LOWENTHAL. I think part of it is who is going to assume the risk for permitting and delays that have taken place in the construction of, or in the planning and permitting for State Route 125, which is, incidentally, just a short, I think, nine and a half mile route that we are talking about tolling. There have been considerable difficulties over the environmental permitting, some of the issues around easements, and land acquisition.

And the question has come up as to who is responsible for all of those. Is it the private sector, or is it the public sector. So those are the kinds of issues that really have to be clearly delineated, were not as clearly delineated, and therefore have led to tremendous disagreements between the public agencies, and that is in San Diego County, and Macquarie Bank in terms of who is responsible for these cost overruns.

The legislature stepped into that by permitting the addition of 10 more years of tolling, I believe from 35 to 45 years, for that lease to meet the costs if the private sector would pick up those costs to try to resolve this dispute, which still has not been totally resolved between the two. So a lot of it, as we have learned, has to do with the details in terms of the risk that is taken. If the private sector receives benefits, do they also have to take on some of the risks for the environmental permitting and others. And in this case, that was not real clear and we are kind of caught in that dispute.

Mr. DEFAZIO. As I understood it, perhaps you can correct me, the environmental review was completed way back in 2001 and Macquarie began the financing in 2003. Were there construction delays, or was it just all back to the environmental review issue?

Mr. LOWENTHAL. Well, there were alignment issues. Originally, the alignment went over granite and it was too difficult to build and too hard to realign.

Mr. DEFAZIO. So it had to do with actually unanticipated——

Mr. LOWENTHAL. Right. Things came up. And the private company negotiated community benefits that were more expensive than anticipated, also. So there was realignment, and even though the environmental permitting was completed, when they actually began the construction they found they had to realign the project.

Mr. DEFAZIO. And in this agreement, Macquarie feels that, even though one of the great benefits we hear of public-private partnerships is that in "greenfields" the private entity assumes the risk, in this case they are saying, no, they should not have to.

Mr. LOWENTHAL. That is right. With having found this out that they had to realign, that there were these issues, and there was disagreement between the public agency then and the private agency, the State legislature stepped in to try to resolve that, but realizing this was not what we had intended when we started.

Mr. DEFAZIO. Right. And what is the value of ten additional years of tolling? Do you have a number?

Mr. LOWENTHAL. That I do not know. That I do not know. But we can get that information. It is significant. Quite significant.

Mr. DEFAZIO. Yes. Okay.

Mr. LOWENTHAL. That is almost one-quarter of the amount of time they have. We have increased it by approximately 25 percent.

Mr. DEFAZIO. Right. And just the goods movement, I am very intrigued by the focus on a public-private where you have a commercial entity using the public-private road. How far along are you with that concept?

Mr. LOWENTHAL. Well, we have not had any projects come forward. But we have begun to identify a number of possible projects. What we are finding, and this is not just true for California ports but for the Nation's goods movement, is that we tend to have our ports of entry in urban areas. And so now with the tremendous change in goods movement with the tremendous importation of goods, and with the large retailers in this Nation wanting to send these goods to distribution centers, deconsolidate the goods, and then reconsolidate them and send them on to the rest of the Nation, we have trade corridors now of 100 to 125 miles from the ports to these large distribution centers that are going through some of the most congested areas.

So whether we are talking about truck toll lanes, whether we are talking about new kinds of rail infrastructure, because we also have issues of pollution that take place, we are going to be looking at magnetic levitation projects potentially, we are going to be looking at all sorts of technologies that not only move goods through urban areas for periods and connect to our rail lines and truck lines, but also those that produce limited, if not zero, pollution. Those are the ones that we are going to have to engage the private sector. And that is really what we are looking at now.

Mr. DEFAZIO. I would be very interested as you move forward with that.

Mr. LOWENTHAL. Those are going to be the most fascinating projects we believe. And those are projects that the State would not be able to undertake without some kind of private investment.

Mr. DEFAZIO. Excellent.

Representative Austin, I do not know, have you seen the model legislation, so-called, provided by the Administration on PPPs?

Ms. AUSTIN. I have, and I attended the February 9th briefing.

Mr. DEFAZIO. So I would assume then from your testimony where you talk about the amount of time and sort of the compartmentalization of the information that the legislature felt they needed to make a decision, you would probably disagree with some of their points about the proprietary nature, the exemption from public disclosure. Do you think those are areas where—I think you are saying we need a lot more transparency in these agreements. Is that right?

Ms. AUSTIN. I do believe that we need more transparency. These are public assets. And in the case of the toll road, it was built with both Federal and State taxpayer dollars. To basically lease away—and in the terms of our agreement, there was conflicting language because at one point it is referred to as a sale for tax purposes, and then in the rest of the agreement it is referred to as a lease. So our concern is that years down the road if there is a lawsuit that arises regarding anything in the developmental, the environmental, how is the court going to interpret that. So I really believe not only transparency, but the clarity in the language of the agreement itself is also crucial.

This is a new concept here in the United States. And although it has taken place in limited projects for the last 20 years, I think that you really need to give legislators an opportunity to build what I would say is a working knowledge base about what these agreements are before you ask them to vote on something that is going to effectively sign away an asset or take someone's land for two, three, and four generations.

I do not know if you followed the Indiana General Assembly this past session, I am sure you were busy with your own things here, but there were two other proposals that were put forward by the administration—the Illiana Expressway, which would have been a new route up in the northern part of Indiana, would have run somewhat parallel to the toll road that we leased away; and also the Indiana Commerce Connector, which would have gone through five counties in central Indiana, which basically would have been a beltway outside of Interstate 465 connecting Interstate 70 and Interstate 69. One of the things that we did—this was a new project, it was not on the books, it was not anything that there had been any real feasibility studies done to support—we took field hearings out to people in those counties. And the overwhelming public sentiment was that they appreciated the opportunity to speak out about this project and ask questions, because they really felt as if they had not been given that opportunity in previous instances.

Mr. DEFAZIO. That is excellent. I think it also underlines a point you made earlier; which is, if these projects are outside the State Transportation Improvement Plan, it makes them even more problematic and the need greater for, as you did, which I congratulate you on, going out to the public and saying, well, we have never discussed this before, is there a need, do you support it. Excellent. Thank you very much.

I now turn to the Ranking Member, Mr. Duncan.

Mr. DUNCAN. Thank you very much, Mr. Chairman. And thank you Senator Lowenthal and Representative Austin for being with us.

Between 1995 and 2001, I had the privilege of chairing the Aviation Subcommittee. I always remember the hearing in which we had the head of the Atlanta Airport who told us that the main newest runway at the Atlanta Airport took 14 years from conception to completion, but it took only 99 days of construction, and they did those in 33 days. But they were so relieved to finally get approval that they did 24-hour construction days. Almost all of the delays were environmental rules and regulations and red tape.

So I read with interest, Senator Lowenthal, about this project on State Route 125. It says this project was begun in 1991, but the project approval process proved to be lengthy and environmental clearance was not finally granted until 2001. We hear and read about, and some of us have been there, some of these other countries, China and Japan and so forth, and they approve and complete these major highway and airport projects in two or three years, even in areas as populous as California.

I am just wondering, I do not know if you know what the original cost estimate was in 1991 compared to what it finally ended up being. But when we delay these projects all these years, the costs go way up, people end up getting killed when roads are not improved. We have got some environmental streamlining in the latest highway bill.

I guess I have a couple of questions. How much are you talking about when you say there have been cost overruns? I just wonder how much those were. And you say delays, what kind of delays are you talking about? It says in your testimony 12.5 mile project. You said a minute ago 9.5 miles.

Mr. LOWENTHAL. I meant 12.5 miles.

Mr. DUNCAN. Okay. That is not a lengthy road. I am wondering how much in cost overruns we are talking about, and how much of a delay we are talking about, and how much more of a delay is there expected to be at this point? And secondly, has the State considered trying to some way hopefully speed up the approval processes?

Mr. LOWENTHAL. All those questions. Let me clarify first the first part. SR-125 has two parts, they are connector roads really between freeways, there is the public part and the private part. The private part is the 9.5 mile part that is tolled, then there is a public part that is another additional 3 miles, and that is where we get to the 12.5 miles. So we are not talking about the public part now. We are talking just about the part that Macquarie has——

Mr. DUNCAN. The 9.5 mile private part.

Mr. LOWENTHAL. Right. And we have also, you know, it is a double-edged sword, California has the California Environmental Quality Act which we are very proud of. And on one had, it has provided for a tremendous amount of environmental protection; on the other hand, we also would like to see when needed some streamlining also. And so we are very appreciative when we can speed up the process. Earlier, some of the process, as I pointed out, slowed down because of the environmental permitting. There were protected species that were not early identified. That took some time to identify.

Macquarie was not in this process early on. It was not until later on in the process that Macquarie got involved into the process. And the real slowing down really did not occur, as I pointed out, because of the environmental process, but because they did not anticipate when they began this finding so much granite underneath and having to realign the road. So some of it was, as the Chair pointed out, an unintended consequence that would have occurred anyway. The question was, who is going to be responsible for that delay?

Mr. DUNCAN. How much of a cost overrun are you talking about?

Mr. LOWENTHAL. We are talking about between I think the original cost was $400 million which was allocated, then it grew to $682 million with the realignment and the slowing down.

Mr. DUNCAN. And in 1991 when this project was first approved, when was it supposed to have been completed? And when are you talking about completing it now?

Mr. LOWENTHAL. I think it is going to be completed this year. I think it was supposed to be completed around—I do not think we really had a time. It was not anticipated to be completed for a number of years. I am just not sure how much the environmental part—what the legislature was told when we got involved was that it was a two and a half years delay.

Mr. DUNCAN. But it is not completed now, though; is that correct?

Mr. LOWENTHAL. It is just about to be completed. It will be open this year. It is a two and a half year delay, and that had to do with the construction.

Mr. DUNCAN. It seems really sad to me that we would talk about a 12.5 mile project that we started in 1991 and in 2007 it is still not quite completed. That is just getting almost to the point of being ridiculous.

Mr. LOWENTHAL. It is.

Mr. DUNCAN. Let me ask you another question. The Department of Transportation recently came out with a report saying that we are spending roughly $75 billion a year from all sources, Federal, State, and local, on our highways each year and that we need to be spending, they estimate, $131.5 billion a year. So you are talking about a shortfall according to the DOT of $56.5 billion a year. In 10 years' time or 20 years' time, that would really mount up to some huge money. What I am wondering about, you talked about you have not had a gas tax increase since I think you said 1994; is that correct?

Mr. LOWENTHAL. Yes.

Mr. DUNCAN. As angry and upset as people are about gas prices all over the country today, we certainly could not come in with a gas tax increase I do not suppose. It would be very difficult at this point. But how do we make up this shortfall, or hopefully part of it, if we do not go more to public-private partnerships? What is the solution?

Mr. LOWENTHAL. Well, there are a number of solutions that can be done. One of the solutions is that the California voters this year passed a $40 billion bond package on infrastructure, of which $19.9 billion was for transportation related infrastructure, $4.5 billion for public transit, $4.5 billion to increase corridor mobility, $2 billion for goods movement infrastructure, trade corridors. So the first thing is that the public, the government, as representative of the people of California, decided themselves to give a down payment to invest in their infrastructure. I believe it is the largest infrastructure package that any State has ever proposed and the people have passed. So that is one way.

Another way is to look at what kinds of projects come forward. Right now, our priority in California, in terms of inviting the private sector to join with the public sector, is in the logistics and the movement of goods. We see that vital for both the Nation's and for the State's economy, and for the economic well-being of the State. So we are going to be serious about looking at goods movement projects, trade corridor projects for public-private partnerships. That is going to be our focus in the State.

Mr. DUNCAN. I will say this——

Mr. LOWENTHAL. And we are going to need also to look at public tolls. We do not believe that tolling has to necessarily be from the lease agreements. We have been doing tolling in California through public tolls for a number of years. We have our bridge authorities, the Golden Gate Bridge, the Bay Bridge. And we will continue to look at public tolling also. So we are going to look at all of those ventures. And as I say, we have already done two public-private partnerships on new ventures. What we are not going to be looking at as a State is existing assets.

Mr. DUNCAN. All right. Let me move to Representative Austin. You did mention, and I have expressed a concern, that if we go into these long-term leases by the States and these private companies, if we have governors who take all this money up front—and I understand that Indiana was paid $3 billion up front and nothing in future years.

Ms. AUSTIN. It was $3.8 billion. And I can tell you that the majority of that was allocated to a 10-year transportation plan of existing projects. Also, what I did not say but is in my written testimony, there was $150 million that was allocated to 85 of Indiana's 92 counties for, basically, here, we will give some dollars to locals to help them do some street projects. But more importantly, $360 million was allocated among 7 counties along the tollway. The concern that was expressed and one of the criticisms is that the funds were actually not distributed in a way that met local needs and in a fair and equitable manner, but based on already established priorities and population statistics.

Also, I would say that we took $500 million out—the legislation called for $500 million of that $3.8 billion to be put in what is called a Next Generation Trust Fund. The money actually is supposed to sit there and then they scoop the interest out every five years and put it into what is called the Major Moves Construction Fund, which is where the bulk of the revenue went. That is to help extend the life of the agreement. But, essentially, the funding mechanism does run out after 10 years. And the question is going to be what do we do then, because we have given away the cow, so to speak.

Mr. DUNCAN. I know from a public policy perspective, we have had widespread private investment in utilities and telecommunications networks and in other areas. We do need to look at this from a transportation standpoint. I also know that people for many years have been moving from the high tax states to the low tax states. So you have to take that into consideration as well.

But on some of these situations, if States are going to do some of these things, it seems to me they should make provision for payments to be made in some way for money to come into the States for the entire term of the lease, even with inflation factors to be included, so that more money is coming in with each year instead of taking everything on the front-end and leaving future governors and future taxpayers to hold the bag in later years. And I also wonder what provisions are made if one of these companies goes bankrupt. What happens then if, say, you have got a 75 year situation? That seems to be a potential problem there, too.

At any rate, thank you very much for your testimony.

Mr. DEFAZIO. Thank you, Mr. Duncan. I am going to turn to Mr. Nadler in just a moment, but just one quick question to Senator Lowenthal on this geological assessment. Back to the issue that private-public partnerships are good because the risk is shifted to the private sector. Would you not think that part of their determining they are going to do a project when they are given a specified route would be they would go out and do geological assessments before they bid and know what it was going to cost, and therefore that would be their problem?

Mr. LOWENTHAL. I agree.

Mr. DEFAZIO. Thanks. Okay, Mr. Nadler.

Mr. NADLER. Thank you. Let me first thank Congresswoman Hirono for agreeing to let me precede her, since I have to leave for an 11:00 meeting that I am already late for.

Let me ask both witnesses, some people say that the way public-private partnerships bring revenue into infrastructure projects is simply by enabling tolls to be raised faster or higher than the public process would permit, and/or enabling high priced unionized public employees to be replaced by cheaper people who are paid much less as toll booth attendants or whatever. My question is the following. Aside from that, how can private-public partnership bring more revenue into infrastructure projects than would be the case, for example, if the State to were monetize the net present value of future tolls by bonding against the revenue which came from future tolls? In other words, how does this entire mechanism work, aside from the two things that I mentioned, to bring more revenue into the whole situation? How does it bring more revenue, not more revenue, more resources for infrastructure maintenance or construction than would otherwise be available?

Ms. AUSTIN. I think in our case it was the fact that it created an up-front flush of cash. The $3.8 million was certainly very tempting to many legislators and——

Mr. NADLER. It brought it up front.

Ms. AUSTIN. Yes, $3.8 billion.

Mr. NADLER. But why could not the State, if it wanted to, have simply bonded against the future revenue stream tolls and gotten the same up-front money?

Ms. AUSTIN. That was an alternative that was proposed and defeated.

Mr. NADLER. Because?

Ms. AUSTIN. I can say it went down along party line vote. It was not part of the proposal.

Mr. NADLER. What were the arguments?

Ms. AUSTIN. Well, one of the criticisms of bonding is that then you have to pay all this interest for a number of years that you would not normally have to pay. However, in the case of bonding, a more limited or shortened agreement might not have brought quite so much cash, say we cut it down from 75 to 25 years and then created options to renew, might have cut it by a third, and then that money could then have been turned around and used for Garvey bonds and other such things.

Mr. NADLER. All right. Step away for a moment from getting the revenue up front. If you were faced with having to raise $5 billion for a major new project, how would private-public partnership bring some new source of revenue to help realize this?

Ms. AUSTIN. The investors are willing to take that risk to build a new project. The Commerce Connector was a perfect proposal of that.

Mr. NADLER. Say again?

Ms. AUSTIN. The Indiana Commerce Connector. It is a project that was newly presented, newly conceived, in many cases local communities had no idea that someone had even conceptualized it. The Administration came out with the proposal a few days after the election and folks immediately began to say where is the data for this project, where is the need. One of the rationales for the project was to help move freight traffic off of Indiana 465, which is a beltway, and also Indiana 70, which runs through Ohio and into Missouri.

Mr. NADLER. But regardless of the debate, let us assume it is a needed project, let us assume it is a needed, essential project, what you are saying in effect is that private investors bring in money.

Ms. AUSTIN. Well, yes.

Mr. NADLER. All right. Yes. And they bring in more money than the State could get. I assume they expect a return on their investment, and their return is going to be from charging tolls. Correct?

Ms. AUSTIN. Not only charging tolls, but what other revenue mechanisms are included in the agreement. And in the case of the Indiana Toll Road agreement, all of the concessionaires and vendors who pay a fee to position themselves along the toll road also are part of the revenue.

Mr. NADLER. Okay. So it is going to be concessionaires, vendors, and tolls. And is that a larger amount of money, or is it likely to be a larger amount of money, or possibly going to be a larger amount of money than the State could get by bonding out against the same things?

Ms. AUSTIN. Not necessarily.

Mr. NADLER. So what is the advantage? Or is there an advantage?

Ms. AUSTIN. I think the money that you would get through bonding actually goes out over a longer period of time, is spread out over a longer period of time, versus the one time, up-front $3.8 billion that we received. Money in the bank.

Mr. NADLER. Okay. Thank you.

Mr. DEFAZIO. We need to move along quickly with this round because Governor Rendell is waiting and he has to get a train back. So, Mr. Coble.

Mr. COBLE. Mr. Chairman, I will be brief. And I apologize, I have had two other meetings, so I have been playing jack-in-the-box. Good to have you all with us.

Let me put this question to either of you. There are a number of new technologies that exist which are purported to make public-private partnerships more efficient and effective for both the public and the administrators of the partnership. Speak to me, if you will, about the technologies and how they may affect commerce. For example, if a number of contiguous states or regional areas were to develop and implement public-private partnerships but used varying technology, what impact, if any, would this have on the movement of goods that depend upon our highway infrastructure? For example, if Virginia had a SmartCard pass, for example, and North Carolina conversely would not have the same card that would permit easy flow through the toll. Talk to me about that.

Mr. LOWENTHAL. I am not sure. We have not confronted that issue in California. But the question is, if you had a card that worked for registering in, let us say, Virginia but was different than the one in North Carolina, the question is would that impede the flow of goods through there.

Mr. COBLE. What impact, if any? It may have no impact.

Mr. LOWENTHAL. I do not think it would have any impact at all potentially. The issue, maybe I am missing the question, I think that you are right, in the sense that it would mean that one would have to have multiple kinds of abilities to go through multiple states, and that might be an inconvenience but I do not think it is something that could not be overcome.

Mr. COBLE. Ms. Austin, do you want to weigh in on this?

Ms. AUSTIN. I would. Thank you, Representative Coble. I can tell you that is becoming a problem in Indiana along the toll road. One of the provisions of the agreement, in order to gain legislative support for the legislation, was to freeze the tolls for 10 years and to subsidize back to the private consortium, I believe that amount comes to around $260 million, because citizens were in such an uproar about their tolls, the authority to raise the tolls being given to a private entity for a 75-year period of time.

So what the agreement called for was that if folks who lived and worked and resided in those areas would buy something called the Easy Pass transponder, they could go through the tolls between Illinois and Indiana and those are the ones who would have their tolls frozen, they would not have to pay the increased tolls, but those who could not afford to buy the transponder or chose not to buy it for their car had to pay the increased tolls. But more importantly, what we are finding as they have rolled this out just recently is the folks who travel into Illinois into the Illinois toll road that connects with ours, the transponders are not working. And so the technologies have got to be compatible.

Mr. COBLE. Well I am not searching for a problem, Mr. Chairman, but I can see that this would be a potential problem. I thank you, Mr. Chairman. I yield back.

Mr. DEFAZIO. Thank you. Ms. Hirono.

Ms. HIRONO. Thank you, Mr. Chairman. Senator Lowenthal, I can certainly understand why California and other States would want to look for different revenue sources. The long-term leases that you talked about fraught with peril and many questions. So I can see why charging user fees for the movement of goods through your ports would seem like a much simpler way to raise the needed revenues. However, I am sure you are aware that for a State like Hawaii, which is almost 100 percent dependent on ship goods, this kind of a user fee would have a tremendous, tremendous impact.

I note in your testimony as you talked about this approach, you say the Federal Government is nowhere in sight. So that says to me you believe that this should be a much more nationally oriented issue that speaks to a national solution.

Mr. LOWENTHAL. Right. Right.

Ms. HIRONO. So do you have any suggestions along those lines?

Mr. LOWENTHAL. I will just tell you, as I pointed out before, the State, in terms of just talking about goods movement, has put up both in terms of air quality money and infrastructure just for goods movement approximately $3 billion. We are confronting both an infrastructure crisis and a public health crisis. We now estimate that we have about 5,400 premature deaths a year due to goods movement in the State of California, and about $200 billion of costs over the next 15 years in terms of health care costs due to particulates related to the movement of goods through our State, primarily through our seaborne ports. We have the highest asthma rates in the country and the highest cancer rates around our ports due to diesel particulates.

The State can play a role in that, the private sector, but the public sector also. When we are moving 45 percent of the Nation's goods, we are actually, by our health and our infrastructure, subsidizing the rest of the Nation. So we have to look at all options to protect our citizens. We are in a crisis situation.

Ms. HIRONO. My question was, what can the Federal Government do? Because I agree with you that California citizens should——

Mr. LOWENTHAL. We can have a national policy on goods movement and understand that the States, the ability to move goods to the rest of the Nation, with the change and becoming part of an international global economy, that we are going to need national investment in our infrastructure, or else we are going to have to do it ourselves because we cannot afford any longer just to be basically the tailpipe of the Nation.

Ms. HIRONO. Thank you. I agree.

Mr. DEFAZIO. I thank the gentlelady.

With that, I would thank the panel for their testimony. It was very helpful and we look forward to an ongoing dialogue. Thank you. We appreciate it.

Mr. LOWENTHAL. Thank you.

Ms. AUSTIN. Thank you for having us.

Mr. DEFAZIO. Governor Rendell will be in momentarily and he would be the next witness.

With that, I call on Mr. Altmire for any statement he may wish to make.

Mr. ALTMIRE. Thank you, Mr. Chairman. I want to thank you, Governor Rendell, for testifying before us today on your efforts to generate additional revenue for the unmet transportation needs of the Commonwealth. You have always shown a willingness to offer innovative solutions to the serious challenges that confront our State. I commend you for your leadership on these issues.

Under Chairman DeFazio's leadership, this Committee has had the opportunity to examine how public-private partnerships are entered, as well as the impact of recent lease agreements for the operation and maintenance of the Chicago Skyway and Indiana Toll Road. Other examples include the Pocahontas Parkway in Virginia, the Southern Connector in South Carolina, SR-125 in California, and the Trans-Texas Corridor. Each of these agreements between States and the private sector provides us with guidance on how similar deals should or should not be structured in the future in order to ensure the public interest is protected.

As Governor Rendell is fully aware, substantial investment in Pennsylvania's highways, bridges, and public transit is required to meet our Commonwealth's future transportation needs. According to the 2006 report of the Transportation Funding and Reform Commission, one and three-quarter billion dollars in highway and transit funding will be needed per year for the foreseeable future. It is critical that we provide the necessary resources to meet our growing transportation needs, including repair of existing aged infrastructure and proper planning for the future.

While I do have some reservations about this issue, I look forward to learning more about Governor Rendell's proposal.

I want to thank the Chairman again for calling this hearing, and thank the Governor for appearing before us today. Thank you.

Mr. DEFAZIO. All right. With that, I thank the Governor for being here. Please proceed with your testimony, Governor.

TESTIMONY OF THE HONORABLE EDWARD G. RENDELL, GOVERNOR, COMMONWEALTH OF PENNSYLVANIA

Governor RENDELL. Mr. Chairman, good morning. I thank Congressman Altmire for those fine words. We were all proud of his stirring election victory and he has done a great job in the short time he has been here. Let me echo what Congressman Altmire said. I came to this issue with concerns as well. It is fair to say that I am not totally without concerns as we proceed down the road.

Let me begin by telling you, and I will try to be as brief as I can, the problem in Pennsylvania that has caused us to consider entering into a public-private partnership to lease the Pennsylvania Turnpike.

Pennsylvania, as Congressman Altmire knows but probably few others do, is a pass-through State. If you want to go from the Atlantic corridor to the midwest, you go through Pennsylvania. And most of the people who go through Pennsylvania go through on the Pennsylvania Turnpike.

But to give you an example of just how much of a pass-through State we are, the State maintains more miles of roads than the States of New York and New Jersey do combined, even though Pennsylvania's population is exactly half of what New York and New Jersey's population would be totalled together. And the state of our roads, highways, and bridges is not good, notwithstanding an unprecedented level of spending that has occurred during my first four years as Governor.

Take Pennsylvania's bridges. We have 25,000 State maintained bridges. That is the third highest number of any State in the Union. But we lead the Nation in number of bridges that are 75 years old or better. When I became Governor, in the previous year the State spent $259 million on bridge repair and maintenance. We have upped that, Mr. Chairman, to $558 million in the last year of my first term. Yet we still have 5,900 structurally deficient bridges. The highest number in the Nation. The cost estimate to repair those 5,900 bridges, to put them in safe working condition, is $8 billion alone—$8 billion dollars alone.

Pennsylvania has 8,500 miles of State maintained roads that have been designated as in poor condition. That is 20 percent of the over 40,000 roads we have and that we maintain. This is despite the fact that we have spent $8 billion in the last four years. The highest level of spending ever maintaining our highways and roads. And as the Committee is well aware, these problems are all exacerbated by the tremendous up-tick in road construction costs. In the last two years in Pennsylvania, and I think this is fairly consistent around the Nation, road construction costs have increased by 36 percent in the last two years.

So what are we going to do? Clearly, the welfare of the citizens of the Commonwealth of Pennsylvania is very much dependent on finding a way to significantly cut into that repair backlog. Right now, we are spending 19 percent of all dollars on just maintaining the roads and bridges we have, and we are not even getting close to doing that. And a lot of new needed construction—and I am looking at Congressman Altmire, you know about the MonFayette Expressway—we have no dollars to even begin going down the road to construct the remaining portions of the Monfayette Expressway.

So what are we going to do?

Well, like you, I studied what went on in Indiana under the leadership of a conservative Republican governor, and in Chicago under the leadership of a liberal progressive Democratic mayor, and I concluded that was an option that Pennsylvania had to look at. To help us down the road to this option, we hired Morgan Stanley as our financial advisor. And in December of last year, we put out requests for interest to find out who was interested in potentially leasing, and I stress leasing, not buying, the Pennsylvania Turnpike. We asked them to give us a rough estimate of how much they would be willing to bid for a 99-year lease. We came back with 48 responses. And of those 48 responses, the potential dollars went from $800 million to $30 billion, that was the potential range.

We have asked Morgan Stanley to do a lot more research since that time. And Morgan Stanley has come to the conclusion that we have three options. The first option is to enter into that type of lease. Morgan Stanley estimates we would get $12 to $18 billion up-front for that type of lease. What my intention would be is to annuitize that money and, let us take a middle figure, $15 billion, if we got $15 billion, that would produce about $1.4 billion a year in annuity. As you heard Congressman Altmire say, the Transportation Reform Commission says we need $1.7 billion of additional annual spending for roads, bridges, and highways, and, Mr. Chairman, for mass transit. The Transportation Reform Commission recommended $1 billion a year in additional spending for Pennsylvania's roads, bridges, and highways, and $700 million a year for mass transit, above and beyond what they are receiving today.

So assuming we got the middle of Morgan Stanley's estimate, that would be $15 billion, it would annuitize $1.4 billion and put us close to the goal of being able to meet the funding needs for roads and highways and for mass transit.

But Morgan Stanley gave us two other options. Option two would be to turn the Turnpike over to a new public corporation and refinance the road. It would not be private, it would be a public corporation. They believe the refinancing could net us somewhere between an annuity of $900 million to $1.4 billion a year. It is not quite as potentially lucrative as the private leasing because you do not get the private tax advantages that people do on the private side for investing in this type of deal. But it still could be extremely lucrative.

And lastly, the Pennsylvania Turnpike Commission itself, as Congressman Altmire knows, has advanced their own proposal that they would continue to control the turnpike, and by using a series of fees and new tolls and some refinancing, they could produce approximately $900 million a year.

Now, it is clear to me that we have to go down the road and look at all of these options. What I have asked the legislature to do is give us the ability to go out to auction on this lease. Without doing that, it is going to be impossible for us to make a judgement. When you put your house up for sale there is a certain figure you will sell your house at, but if the bids come in lower than that you are not going to sell your house. So, for example, if we go down this

PPP road and the bids come back let us say at $8 billion a year, that would give us an annuity of $720 million a year. That is insufficient. We will not enter into a lease for that. But the only way we are going to be able to find out is to test the market. If that is the case, then clearly turning it over to a new public corporation and refinancing which could produce more than $700 million a year is preferable. The Turnpike's proposal might be preferable if that is all we get.

But let us assume for the moment that the auction is taken and we come back with a $20 billion bid. Not out of the question. A $20 billion bid would produce about $1.9 billion in yearly annuity. That would take care of the transportation concerns of the people of Pennsylvania for the next 30 years.

I want to close, Mr. Chairman, after giving you those examples, by not pointing the finger at the Federal Government. The Federal Government has been very good to Pennsylvania in highway funding, certainly during the time of Congressman Bud Shuster, and you continue to help us in every way you can. But the Federal Government realistically, doing the things you do right now, can never give to Pennsylvania, or to any older State that has these types of built-up transportation needs, you will never come close to being able to give us the amount of money that we need to bridge this gap.

There is only one alternative, and I have recommended this for years since I was Mayor of the City of Philadelphia. I testified before President Clinton's Commission on a Federal Capital Budget which, as you may recall, was then chaired by John Corzine, head of Goldman-Sachs, and Kathleen Brown, then treasurer of the State of California. If you do not want us to go down these roads, my suggestion, and it is a sincere and legitimate one, one that I have been pushing for 10 years, is the Federal Government should join every other political subdivision in this country and adopt a capital budget. Every one of the G-7 nations has had trillion dollar-plus infrastructure repair programs in the last decade, but not America. And it is not just roads, bridges, and highways. It is water, sewer, ports, airports.

If we are really serious about doing something about the infrastructure of this country and we want to stay away from these types of deals, we should move as quickly as we can to adopt a Federal capital budget and go on a real serious infrastructure program. Not an infrastructure program with a lot of earmarks and a lot of pork, but with an infrastructure program saying this much for roads and highways, this much for mass transportation, this much for water and sewer. That can be the solution to this problem.

But absent Federal action to adopt a capital budget and go on a real infrastructure repair program, absent that, there is no way that the Federal Government out of its existing yearly operating budget is going to be able to help the Pennsylvanians, the Michigans, the Illinois, the States like that that have these types of old transportation infrastructure. There is no way that we are going to be able to go down that road and meet the public interest without looking at some of these options.

Mr. DEFAZIO. Thank you, Governor. I would agree on the capital budget part. I have long supported the idea of capital budgets and, in fact, two year budget cycles. But we run into something called the Appropriations Committee when we talk about reasonable things like that. But hopefully we will get there some day.

There is Morgan Stanley, there is sort of a disturbing shall we say consistency in these sorts of evaluations that are done for states. One that I find here in particular is they say "tolls allowed to rise at nominal GDP per capita inflation or 2 percent a year, whichever is greater." Governor Daniels and I had an exchange over that. Would you call that a floor or a ceiling?

Governor RENDELL. Neither. Because those are Morgan Stanley's recommendations.

Mr. DEFAZIO. Right. But they were adopted both by Chicago and by Indiana.

Governor RENDELL. Well I do not think you will find that Pennsylvania, either myself or the legislature, stands ready to just adopt——

Mr. DEFAZIO. Okay. But here is the problem with that. The assumption of these massive payments are predicated on that formula. Because every one of these deals, they do not make the money on volume. Macquarie is very up front about it: "We do not make money on efficiency. We do not make money on volume. We make money on toll increases."

So if you are not going to follow that model, and you would have to tell Morgan Stanley that, they would have to recompute all these values, and I think you would find much lower up-front payment if you are not going to allow a floor. And just again, I exchanged this with Mr. Daniels just to edify him, if that floor had been applied to the Holland Tunnel, the current per car one-way toll, given the Great Depression and everything else that has happened, it would be $185.13. Now the answer of Macquarie is well, my God, we would not do that because we would drive traffic away.

Do you envision non-compete agreements, because they also are what helps drive the value of these. You have a non-compete agreement. Indiana has a very stringent non-compete agreement.

Governor RENDELL. Well, first of all, all these problems, and you are right that there is a balance. Where you set the bar, how frequently, and at what degree tolls can be raised impacts the amount of money you are going to get. But it is our intention to set the bar at what we think is a reasonable figure to protect Pennsylvania drivers. And what harm is there under your scenario for us going to market? If we set the bar at a lower rate than Morgan Stanley recommends and we get a bid of $7 billion, we will not enter into an agreement. But if we set the bar——

Mr. DEFAZIO. Right. But the key is the assumptions that go into it and the protections to the public. We had previous testimony from the chair of the Indiana State Transportation Committee, Representative Austin, who does not agree with the deal they entered into. She said the greatest problem they had there, which is also mirrored in the model legislation of the Bush Administration, and it has been repeated in a number of these deals, is the public does not know what the deal is, nor does the legislature, until it is done. So are you talking about a totally transparent process? If you get bids, those bids will be available, no proprietary information, it will be out there to be compared by the legislature and the public and all the assumptions will be known. Is that the kind of legislation you are asking for?

Governor RENDELL. Absolutely. In fact, it is our goal to have the legislature agree to the toll schedule that we would put into the final auction. That is number one.

Number two, remember, you are addressing these problems, and, look, I give the Committee great credit for looking at this, this is the right time to look at it, but you are addressing these problems in a vacuum. You are not going to give me a Federal capital budget in the next couple of years, correct?

Mr. DEFAZIO. It is not a vacuum, Governor. The point is the Committee is in the midst of a number of hearings about how we are going to enhance Federal revenues and assess the need.

Governor RENDELL. Right. But it is unlikely that we are going to see a Federal capital budget in the next couple of years.

Mr. DEFAZIO. Well the question becomes, we had testimony from a fellow from Northwest Financial who said, in the case of Indiana, they could have bonded more money as a State entity, retained control of the Toll Road, not had non-competing agreements and everything else, and had more money up front for capital investment. We want to protect the public interest. And I admit, you have needs and you have got to address them. But the question becomes whether you do it through one of these privatized agreements, or the State itself, as in your option two, might do it. But what is key——

Governor RENDELL. And again, we know what we will get in option two. We roughly know what we will get in option two. We are going to take a look at option one, and we are going to go to market with the type of controls we think is necessary.

But let me go back. If we are not going to do any of these things, and you are not going to give us a Federal capital budget, and remember, mass transit is in the state it is today because all of you down here removed operating funding for mass transit back in the late 1990s, if you are not going to do anything to help, and I am not saying that you should, then the alternative——

Mr. DEFAZIO. I think your State probably does receive very substantial funds on an annual basis in the public transportation from the FTA.

Governor RENDELL. Absolutely. But we also have 30 cents a gallon in gasoline taxes—30 cents a gallon, which places us in the top 10. To come close to just the $1 billion that we need, according to the Transportation Reform Commission, we would have to raise our gas tax 12.5 cents a gallon. So I would ask you to get your calculator out. You talk about what tolls would go up under this scheme, get your calculator out and over the course of time figure out who would pay more, the citizens of Pennsylvania paying 12.5 cents additional on every gallon, or a sizeable toll increase. You cannot look at it in a vacuum. Something has to be done.

Mr. DEFAZIO. I am not going to choose your options for you. But the concern here, what I am expressing to you and you are telling us you will absolutely address, is it will be a totally transparent process, you are not going to allow non-compete agreements, you are not going to put a floor under toll increases, and all of this will be established by the legislature and then you will go out to bid with other conditions, and all of the bids will be available to the public and to the legislature so they can fully understand the bids. If you do it that way, it will be an interesting exercise.

And if you do not adopt the assumptions of Morgan Stanley, I expect you are going to find your option two is going to be a much more attractive way to finance your needs than option one, because the private sector, unless they can extract excessive rents in a monopoly situation, is not going to pay a bunch of money for it. That is what has happened in these other agreement—99 year lease for Chicago, floor under the toll increases, non-compete agreements; Indiana, non-compete agreements, floor under the toll increases.

And there are some bad examples of what happens with non-compete agreements. We had one in California, SR-91. They entered into an agreement for a toll road and there was a non-compete agreement. The State determined they were having a lot of accidents at one point, they had to change an intersection, and the company said, oh, no, you cannot have safety improvements because of the non-compete agreement. They got into litigation, they had to buy out the project for twice what it cost.

Governor RENDELL. Sure. There are a lot of pitfalls to this.

Mr. DEFAZIO. I am pleased to hear the approach you are going to take. It will be interesting to see the results.

Governor RENDELL. Absolutely. And there are a lot of pitfalls. Nobody says there are not pitfalls and nobody says there are not red flags that we should watch. But let me be clear. Where we are, and the Federal Government's refusal to adopt a capital budget has left us—we pay 30 cents tax on a gallon of gas. That is far more than Federal——

Mr. DEFAZIO. That is a tax assessed at the pump?

Governor RENDELL. Thirty cents a gallon.

Mr. DEFAZIO. Right. That is the consumer, or I think you also have a producer tax.

Governor RENDELL. Well that is putting them together because the producer tax is passed on to the consumer.

Mr. DEFAZIO. Well, could it not come out of the producer's profits?

Governor RENDELL. I have suggested doing that for mass transit, and my legislature tells me there is no way we could adequately——

Mr. DEFAZIO. Let me just ask, what does regular cost per gallon in Pennsylvania today?

Governor RENDELL. Today? About $3.12.

Mr. DEFAZIO. Okay. We are at $3.48 in Oregon and we have a lower gas tax than you. So something else might be going on other than the tax in terms of the pricing.

Governor RENDELL. Oh, there is no question. If you want suggestions from me, you are giving me suggestions, if you want suggestions from me, let us do what we ought to have done a long time ago. The profits that are being made by the oil companies are astounding. There is no rhyme or reason that gasoline has gone up a dollar in the last five or six months. We should do an excess profit tax and give the excess profit tax back to the States for transportation money. That would make a lot of sense.

I know there are some proposals here to give it back to the individual drivers. You give it back to the individual drivers and it is a small stipend and it does not do much. Give it back to the States and then I would not have to do any of these things. The taxes that our oil companies pay in Pennsylvania are pitiful, pitiful compared to the profits that they make.

Mr. DEFAZIO. Okay. We have substantial grounds for agreement there. I do have a windfall profits tax proposal, I do not dedicate it back to the States, but I will take a look at that. Thank you.

Mr. Duncan.

Mr. DUNCAN. Thank you, Mr. Chairman. And thank you, Governor. I do appreciate your testimony. I believe that there is an important place for public-private partnerships and they can be good things. We do them, as I pointed out to the last panel, in many other areas. Sometimes they have been very good. Sometimes they have not been. Particularly in the defense area, some have become rip-off sweetheart-type deals, and I am concerned about that. A former big city mayor once testified before another congressional committee that the problem with government is that it does not work. There is no incentive for people to work hard, so many do not. There is no incentive to save money, so much of it is squandered. That is the problem. So, generally, things are done more economically and more efficiently in the private sector.

But I am concerned, and I have expressed this earlier in both my opening statement and with the last panel, I have a concern about governors, mayors taking money on the front-end, seeing dollar signs, not providing for the future and leaving governors and taxpayers 25, 50, or 75 years down the road holding the bag. So I am pleased, if I understand it correctly, that what you are talking about doing is investing this money that you get.

Governor RENDELL. Taking annuitized payment.

Mr. DUNCAN. Right. And that is what I think should be done. Expenses and costs for States are going to grow in future years because of inflation and other facts and all of those things need to be taken into consideration. So really, in these agreements, it should be figured in that more money is going to be needed in future years.

Secondly, I am pleased that you had such interest in your request for proposals that you sent out. I think you said 48 responses.

Governor RENDELL. Yes, 48 responses. But that was request for expression of interest.

Mr. DUNCAN. Expressions of interest.

Governor RENDELL. We do not anticipate that many bidders if we go to auction.

Mr. DUNCAN. Right. Right. Well, so far, we have had the Macquarie Company out of Australia, and I met with them a few years ago on a codel to Australia led by Chairman Rodgers, and also we have this Spanish company Cintra. But I noticed one article that said the New Jersey Pension Fund has $190 million invested in those two companies. I am sure there are other American investors in those companies. But we have been sort of slow I think in getting a lot of interest by American companies and investors to invest in these types of things. So I am pleased that you are seeing that kind of interest.

Governor RENDELL. Let me say two things. Number one, the Macquarie bid here includes six union pension funds, including the major part of the Macquarie bid is the National Carpenters Union Pension Fund. And number two, the reason we are seeing such high level of interest, my guess, is the Pennsylvania Turnpike is close to being the granddaddy of all toll roads.

So it is different than a little stretch of Indiana or the Chicago Skyway. The Chairman said that volume is not of importance, and I agree it is not of paramount importance, but it is always volume times rate. My taxpayers, I always have to remind them that we have to spread the base and grow the base on taxes because it is tax rate times tax base. And volume does matter, because if volume falls, it does not matter what you charge. So that is why I think there is so much interest in our turnpike.

And I would agree with you, Congressman. When I was Mayor of the City of Philadelphia, I took over facing a $250 million deficit, about a 12 percent deficit based on our operating budget. One of the ways we removed that deficit was that over the course of time and with public employee unions allowed to bid, we privatized 25 functions and those 25 functions saved us about $70 million a year in operating costs. And in each and every one of those, there was no diminution of service. Well, I take that back, maybe one out of 25, and in the other 24 the service level stayed the same or actually improved.

So I think there is a place for the private sector in aiding government in reaching its mission. I absolutely accept that. It has to be one of the alternatives that we look at. Look, you know the anti-tax fever that affects Washington. It affects Harrisburg as well. We have to be as creative as we can to find ways to do the same or even better at less cost. That is why we went down this road. If we were not in this condition, we would not be here. We simply would not be here. I would not be a witness. We would not have gone down this road.

But those figures, the figures that Congressman Altmire cited, are staggering. By the way, the 12.5 cents gas tax, that only takes care of the $1 billion needed for bridges, roads, and highways. That would not provide, and under the Pennsylvania Constitution could not provide, one dime for our mass transit needs. So this is a huge problem. And the public interest demands that we deal with the problem. We are going to do exactly what the Chairman said. We are going to look at option one, hopefully go to market and see what the price is in the marketplace, and compare it to the other options.

Mr. DUNCAN. I appreciate your testimony. I agree with it. And all the things you mentioned earlier, the airports, the sewers, the highways, these are all things we deal with and talk about all the time in this Committee. And I appreciate you mentioning Chairman Shuster, because he led this Committee with great effectiveness, both for Pennsylvania and the Nation.

Governor RENDELL. No question.

Mr. DUNCAN. Do you think there is some way in these agreements, if we get more into them in the future, and I think we are going to have to, but if we do, do you think there is some way to limit these increases in these tolls so we avoid the situation that Chairman DeFazio mentioned, where you would have to pay $185 toll to get through the Holland Tunnel?

Governor RENDELL. Sure. The answer is the FA recommends what will produce the most money. The government officials, who in the end can maintain control, they have to decide what is an appropriate level of increase. It is easy to say, and the Chairman quoted that figure, but what would be the increase in the Pennsylvania Turnpike tolls, what would be the increase if we just increased our tolls over that same period? It may not be quite as much, but it gets up there too. So you have to strike the appropriate balance. That is why government should never lose control. Remember, we are not selling the house. If you sell your house, the new owner can paint it chartreuse and you might hate that. If you rent your house, they cannot paint it at all. And we are not selling this road. We are leasing it and we will maintain the ultimate control. That will be a judgement made by government officials. And if the Chairman is right, and I hope he is not, but if he is right and we will not net the type of money that we are looking for, then we will look at other avenues. I think it is just as plain and simple as that. It is a basic economic decision balanced against the interest of the public.

Mr. DUNCAN. Thank you very much. I have far exceeded my time. I do want to tell you that the big city mayor that I quoted earlier was Mayor Rendell of Philadelphia.

[Laughter.]

Governor RENDELL. There you go.

Mr. DUNCAN. I also remember when we had Mayor Wilson Good, one of your predecessors in Philadelphia, and when he testified, I remember it was a Tuesday, I said, "Mayor Good, I was in Philadelphia Sunday night." He said, "You were?" And I said, "Yes. Philadelphia, Tennessee, population 400, in my district."

[Laughter.]

Mr. DUNCAN. But congratulations on your big reelection victory. Thank you for being here with us.

Governor RENDELL. Thank you, Congressman.

Mr. DEFAZIO. I now turn to Mr. Altmire.

Mr. ALTMIRE. Governor, as you talked about, the Pennsylvania Turnpike runs from one end of the State to the other. It crosses the whole State.

Governor RENDELL. And north-south.

Mr. ALTMIRE. That is right. That is right. And in my district, as you know, I have six counties and the turnpike runs right through the heart of it, connects to the Ohio Turnpike along the Ohio line. This really is different than what any other State has done. We can certainly use them as examples, but this is much bigger in scope, as you pointed out, than what anyone else has ever done.

But aside from the money part, the financial benefit of being able to fix the roads and make up that deficit that you have talked about, what are the people who live in my district or the people who use the turnpike, the drivers, going to see from a positive and a negative perspective? What are the downsides that you are trying to avoid? But more importantly, what are the good things they are going to see take place if this happens?

Governor RENDELL. Well, number one, hopefully we will have a controllable toll structure. Now as you know, politicians are always reluctant to raise anything, tolls included. But you recall when I became Governor, we had not had a toll increase on the Pennsylvania Turnpike since 1988. I authorized the Turnpike Commission to seek an inflation increase. Tolls went up 42 percent. But because we pledged all that money back to repair, we got very few negative calls or letters about the increase in tolls.

Under this plan, the toll increases will be more regular. They will not be 16 years apart. They will be more regular but they will be lower obviously than 42 percent at a time. That is the first thing that they will see. Hopefully, if we do it right and we draw the balance the right way, the toll increases will be moderate.

Secondly, I think they will see as good or even enhanced maintenance. Because remember, and you know this better than anyone on the panel, there are a lot of non-toll options to get across Pennsylvania. A lot of truckers today take advantage of those non-toll options. So the people who run this—again, regardless of what the Chairman said, volume times rate is crucial—the people who run this are going to want volume. The only way they are going to get volume is to maintain a good road in good working order. And I think you will see that happen. I know in Indiana, the company put up-front money into maintenance far above and beyond what the State could have done. And I think you will see that because of the competition versus non-toll roads.

Mr. ALTMIRE. Do you have a concern, you obviously know what is happening with the public transit system in southwestern Pennsylvania, do you have a concern, with gas prices and everything else, that what you are proposing may impact disproportionately low-income people who are using the turnpike to get to work? And with the regular increase in tolls, is there some sort of stop——

Governor RENDELL. It will be infinitely less of an impact than a 12.5 cents a gallon gas tax hike.

Mr. ALTMIRE. Right. Last question. What other States have you looked at? You talked about Indiana and Chicago. Have you looked at some of the smaller States for upside?

Governor RENDELL. No. We have talked to Governor Perry in Texas a little bit, but basically I have had long discussions with Governor Daniels and with Mayor Daley. It is pretty instructive that one of the most progressive liberal Democrats in the country has also gone down this road. And he is a disciple. In fact, he has offered to come in and talk to the Pennsylvania legislature about this issue.

Mr. ALTMIRE. Thank you, Governor. Thank you, Mr. Chairman.

Mr. DEFAZIO. Well, I would caution the Governor, if he is going to use Mayor Daley as a model, he may be a progressive Democrat, but in fact the agreement there is definitely the model of about the worst possible agreement. The money is not even dedicated to transportation. It is a 99-year lease. It does not have recapture. It has automatic increases. But mostly, they are getting away with it because they are extorting a lot of money from people who do not live in his jurisdiction, so he is not going to have to be accountable at the polls.

Mr. Dent.

Mr. DENT. Thank you, Mr. Chairman. Good morning, Governor.

Governor RENDELL. Congressman.

Mr. DENT. I just wanted to say, first of all, it is a pleasure working with your Secretary Allen Biehler. A good professional and I have enjoyed working with him on a number of projects. I am glad to see that the PennDOT office has moved into downtown Allentown and appreciate your assistance in helping to facilitate that move of about a mile or so. It is very beneficial to the city. And I do appreciate all their help on various regional projects, transportation projects we have been working on together.

As you know, we are facing a lot of challenges in mass transit and on highways in Pennsylvania. I know you mentioned a little earlier, and I apologize for not getting here sooner, but you were talking about some of the challenges with roads and bridge funding. Could you comment a little bit on how the Federal highway allocation that Pennsylvania receives is being flexed. I know a couple of years ago in 2005 you used some of that money, a few hundred million, $300 million or so, to support the capital program of some of the mass transit systems, including Septa, Pat, and others.

Governor RENDELL. Right.

Mr. DENT. Because I do have some concerns about the extent to which we have flexed. I understand the need for the flexibility and I understand the constraint you are under with the motor license fund and the State Constitution that prohibits you using any of the State highways collections, the taxes and the license funds, for the mass transit. So if you could just comment on the flexing and how that has impacted this.

Governor RENDELL. Sure. First of all, all a governor can do is recommend to the MPOs. The MPOs are the ones that decide whether flexing occurs or not. We were very fortunate in 2004 when we flexed, we flexed $420 million to mass transit, but we were also able to flex $580 million to roads, bridges, and highways. The reason was, number one, PennDOT, under Secretary Biehler's leadership, had instituted some cost savings that freed up a couple hundred million dollars. And secondly, because ISTEA or NEXTEA or BESTEA, whatever it was——

Mr. DENT. SAFETEA-LU.

Governor RENDELL. Right. Because that was not reauthorized immediately, Pennsylvania got money at the old level which was higher than we had been planning for. We knew under the new level our percentage would go down. But because it took a couple of years for the reauthorization, we had a windfall and that enabled us to do that. I have told everybody to not look at flexing as a way to solve this problem for any length of time. We might flex for a few months but with the understanding that once the State revenue source kicked in, the flexed money would be repaid. So we are not going to look towards flexing as a solution here, just maybe as a stopgap.

Mr. DENT. I think you pointed out something else that is interesting, and that is, the fact that the highway bill was delayed actually helped Pennsylvania because the formula was——

Governor RENDELL. The previous formula was very generous to us.

Mr. DENT. And the new formula is still pretty good.

Governor RENDELL. Still pretty good.

Mr. DENT. Not as good as the old formula, but it is still good.

Governor RENDELL. I would say we are no longer on the Shuster formula. We are on a fair formula but it is not the Shuster.

Mr. DENT. We have a new Shuster here now. But I guess my other comment on the flexing, you took about $420 million for mass transit.

Governor RENDELL. For mass transit, right.

Mr. DENT. Was that just a one-year allocation?

Governor RENDELL. No. That was for two years. And during those two years, that is why I formed the Transportation Reform Funding Commission, they are to come back and say that after these two years are up, we have to bite the bullet and we have to do what we have to do. We have to do something. As I have said to the legislature, and the Chairman reflected that, the only thing that Pennsylvania cannot do is nothing. That is the only thing that we cannot do. If we are going to meet the needs of our people, that is the only option that is not an option.

Mr. DENT. Did I understand you correctly that the monies that have been flexed were monies before SAFETEA-LU, previous monies?

Governor RENDELL. Yes.

Mr. DENT. Thank you for that clarification. Thank you. I have no further comments. Good to see you, Governor.

Governor RENDELL. Thank you, Congressman.

Mr. DEFAZIO. I will take the Democratic round and then we will go to Ms. Fallin.

Governor, first, I am concerned when you refer to Governor Daniels and Mayor Daley, again, I think we have already visited that ground, they have non-compete agreements, they have floors on the tolls, and they entered into these agreements without any transparency. We just had testimony from the chair of the State House Transportation Committee in Indiana that they were rushed into doing something they did not understand and, basically, they would undo it if they could. But it is committed now for three generations and they are very concerned about those terms. So I would hope that unless you want to bring them in as examples of what not to do, I would suggest that is not going to be particularly instructive.

But let us just revisit, because, again, I think it is a fairly critical point, you are telling us that you have such extraordinarily high gas tax. But the Department of Revenue has a web site and they say the gas tax is 12 cents a gallon. The other part of the web site, they say the franchise rate is 153.5 mils for liquid fuels, gasoline, 208.5 for fuels, diesel, on a cents per gallon basis. It says 57 mils, more than a third of the tax, are deposited as unrestricted motor license fund revenues, and I will ask you what that means, the remaining monies are deposited to various restricted accounts within the fund, for example, revenues received from 55 mils of levy on fuels are deposited in the highway/bridge restricted account. So of all this money that you are collecting in a franchise which may or may not get passed through directly to the consumer, so I think it is hard to say you are assessing 30 cents at the pump, is all of that money currently going into transportation, all of that franchise fee?

Governor RENDELL. Yes. Some of it goes to restricted areas of transportation but it all goes into non-mass transit, by the State Constitution. It is 30 cents. And you can bring in any oil company or any franchise or distributor and they will tell you they pass it on.

Mr. DEFAZIO. Because it is not a competitive business, as you pointed out, and we agreed on that already about their pricing structure.

I am curious, you have a State pension fund, I assume.

Governor RENDELL. Yes.

Mr. DEFAZIO. What is your annualized rate of return on investment, do you know?

Governor RENDELL. We have two funds; one for the teachers, and one for the public employees. I think it varies from year to year. The teachers fund has done better I think. They have been in the last three years about 12 or 13 percent. The public employees fund not nearly as well.

Mr. DEFAZIO. Okay. Hopefully, you will model, if you do go down this route, the teachers fund. Because the assumptions on the revenues you are talking about are basically, according to Morgan Stanley, to come close to your goal, you would have to lease the highway for 99 years and you would have to get a 9 percent annualized rate of return for those 99 years to get to $1.62 billion, which is just shy of where you want to be at $1.725 billion.

Governor RENDELL. Right.

Mr. DEFAZIO. Anyway, I think we have kind of exhausted that topic. But I just wanted to ask that question.

Ms. Fallin.

Mr. FALLIN. Thank you, Mr. Chairman. Governor, thank you for coming today. I had the opportunity in my State to serve as Lieutenant Governor to Governor Keating for eight years and then Governor Henry for four. So I have been around this trying to finance our roads and bridges. I came in late to your presentation, but I just wanted to ask you about some of the innovative solutions that the governors are thinking about, and of course your proposal for public-private partnerships on the turnpikes, as we have thought about those things before in various States. But how do we protect the public interest, and what are you doing to protect the public interest as a Governor when it comes to developing these partnerships with other innovative solutions on the roads?

Governor RENDELL. What I told the Chairman in response to his question, we are going to control the rate of increase in tolls, with the understanding that the more controls we put in place, the less money we would get to annuitize off of, and we are going to control maintenance and repair schedules. That is going to be part of the lease that we enact. And that will be transparent. In fact, I am going to ask the legislature to join with us in setting the appropriate limits.

But I also want to say one thing, because there is a lot of talk in the Committee, in the letter the Committee sent out, about protecting the public interest. Well, Madam Congressman, protecting the public interest is making sure that in Altoona, Pennsylvania, where the transit agency just announced the end of night time and weekend service—meaning, if you do not have a car in Blair County and you are a nurse and work Saturdays and Sundays, you cannot get to work any more; meaning, if you are a senior citizen and you depend on that bus to get you into see your doctor on Saturdays, you cannot get in there any more. That is the public interest I have to protect as well. I have to protect the safety. You did not hear that we have 5,900 unsafe, structurally deficient bridges in Pennsylvania. I have to protect the public interest by repairing as many of them as quickly as I can.

So when we talk about protecting the public interest, let us remember that there are all sorts of charges to protect the public interest. It is not just protecting the public interest in the deal we fashion, but how do I protect the public interest if I cannot generate these type of dollars?

Mr. FALLIN. That is a good point. I appreciate that. What about the liability issue? How do you structure that in a proposal with a partnership on the turnpikes as far as who assumes liability if there is a huge accident on the road?

Governor RENDELL. That is currently being worked out right now by our general counsel's office and the financial advisor. I do not have an answer for you yet, but I will be happy to get you an answer on that.

Mr. FALLIN. I was just curious how you would work that out. You said on the maintenance that the partnership will assume maintenance of the roads?

Governor RENDELL. Right. But there will be a required maintenance schedule that we build into the lease itself.

Mr. FALLIN. My experience has been that when you have a contract with a private entity they many times will come back with an addendum or amendment to the contract because they have cost overruns. And if you get into that situation with the maintenance, have you thought about how you are going to handle those issues?

Governor RENDELL. If I am still around, I am going to tell them tough luck. You contracted for it, you bargained for it, it is on you, go back to your investors.

Mr. FALLIN. And then on your percentage of your people who use the toll roads, our experience has been that the majority of the people who would use our toll roads are out of State people. Do you find that is a large percentage of the people who will be paying this ticket item, per se?

Governor RENDELL. Well, if you took truckers out of it, with truckers that is absolutely correct, maybe 65 to 70 percent of the trucks are pass-through. For citizens themselves, I would say it is probably slightly more Pennsylvanians than non-Pennsylvanians. But if you live in New York City and you are going to Chicago, you are going to go through the Pennsylvania Turnpike. But it is pretty close. But for trucks, clearly a significant majority of them are non-Pennsylvania based.

Mr. FALLIN. I had a meeting, Mr. Chairman, this morning with the American Trucking Associations and they were expressing some concern about the level of increases in the toll roads and, of course, their increased costs, because they have got high fuel costs right now. They were concerned about partnerships and how we control the level of increase of the tolls. So that is always something we have to keep in mind when we are looking at these partnerships.

Governor RENDELL. And I discussed this with Congressman Altmire when he was here. For Pennsylvania, you can pass East to West through the turnpike, that is probably the easiest, but there are two or three other alternate fairly good highways that you can pass through right now for free, and many truckers take that option. If the private lessee were to let maintenance go down, for example, then in fact those truckers might take the other option.

So I think it is important to have that competitive structure in place. But I love the truckers. They always complain about the conditions of our roads, the way PennDOT or the Turnpike Commission keeps them, and now they are complaining about the potential condition of the roads under private management.

Mr. FALLIN. Can I just say one last thing I heard this morning. They were talking about two States that had privatized their toll roads and the tolls had gone up really high. So the truckers were not going on the toll roads, they would take subsidiary highway——

Governor RENDELL. Right. Which they could do in Pennsylvania.

Mr. FALLIN. Which cause some problems, too, because then the tolls fell because they were not collecting those tolls off the truckers, which is a big portion of their revenues, but it also caused a lot of damage on the side roads. So I do not know how we balance that yet, but it is just an issue we need to think about.

Governor RENDELL. We would not have damage to our side streets. We have a lot of good pass-through alternative highways. So we would not have backups or damage on the side streets at all. But again, the goal is to keep these things within balance so that people can continue to use them. I think we can reach that goal. But as I said to the Chairman, if we put in the proper controls and we go to market and find that we are not going to yield as much in a yearly annuity as we suspect or hope, then we will not do this. Plain and simple.

This is in many ways a financial decision governed by the need to protect that part of the public interest. I understand that we have a fiduciary responsibility to protect that very significant public interest. But I also have a fiduciary responsibility to do something about those 5,900 deficient bridges, to do something about mass transit's cuts that are unbelievable. I am going up from here to a meeting of the Southeastern Pennsylvania Transit Authority, that is Philadelphia and its suburbs. The cuts that they are about to enact today at their board meeting because we do not have any funding, that is more dangerous to the public interest than anything we could contemplate here. We have to stop those.

One of the things I advocated to the Chairman, and I hope that you would take a look at it, too, I do not believe America will ever cure its infrastructure problems, and I am not just talking about transportation—water and sewer, ports, airports, et cetera—until we have a Federal capital budget and that Federal capital budget is devoted to a significant infrastructure repair program, as every one of the G-7 nations has undertaken in the last decade. President Clinton had a commission on the Federal capital budget. I do not know if you remember, Mr. Chairman, what the conclusion of that commission was, but it made no recommendation. It made no recommendation.

The time has come to get serious everywhere. These are serious issues for us. If I could have avoided going down this road, I would have. But these are serious issues and they are borne out of the fact of necessity. Someone has to come up with an answer to that necessity.

Mr. FALLIN. Thank you, Mr. Chairman. I appreciate the time. And I want to commend you, Governor, for finding innovative ways to do things.

Mr. DEFAZIO. Governor, thank you for your time. I had forgotten to convey Chairman Oberstar's regrets. He had a death in the family and could not be here.

Governor RENDELL. I understand.

Mr. DEFAZIO. I also want to thank you for coming to what you knew might not be the most receptive session. We have invited Governor Daniels and he has demurred. So I have got to say you are a good sport. I also wish California had said what you said to that contractor when they came to unanticipated geological conditions and wanted a huge increase. Tough luck would have been a good answer. But that may have had something to do with the agreement. So you have to be very, very careful in these agreements.

Governor RENDELL. And the warnings you have given are absolutely accurate. And I will make sure the Committee, if the legislature does go down the road and allows us to go to auction, I will send the Committee a copy of the lease. I think you will find that we are not just seeking to maximize revenues. We balance the need to maximize revenues with the public concerns that you have raised.

Mr. DEFAZIO. All right. And on Ms. Fallin's questions, I think she was getting at the issue of non-compete agreements. Again, there are a number of things that will drive up the value but which have a great detriment to the public. And since you earlier agreed that those are not going to be part of whatever RFP you put out, we will look forward to seeing how you proceed.

Governor RENDELL. Absolutely.

Mr. DEFAZIO. Thank you, Governor.

We welcome the third panel today. There is a series of votes coming up. We want to hear your testimony as quickly as possible.

I would first recognize the Honorable Bill Graves, President and CEO of American Trucking Associations, former Governor of the great State of Kansas.

Mr. Graves.

TESTIMONY OF BILL GRAVES, PRESIDENT AND CEO, AMERICAN TRUCKING ASSOCIATIONS, ALEXANDRIA, VIRGINIA; TODD SPENCER, EXECUTIVE VICE PRESIDENT, OWNER-OPERATOR INDEPENDENT DRIVERS ASSOCIATION, GRAIN VALLEY, MISSOURI; GREG COHEN, PRESIDENT, AMERICAN HIGHWAY USERS ALLIANCE, WASHINGTON, D.C.; MICHAEL REPLOGLE, TRANSPORTATION DIRECTOR, ENVIRONMENTAL DEFENSE, WASHINGTON, DC.

Mr. GRAVES. Mr. Chairman, Congressman Duncan, Members of the Subcommittee, thanks for the opportunity to testify on this important and timely subject. The trucking industry, as you know, is essential to the Nation's economy. A safe, reliable, and national network of highways is essential to the delivery of the Nation's freight.

Mr. Chairman, our industry faces growing challenges. Significant portions of the highways in this country are gridlocked for longer and longer periods of time every day. This makes it difficult for our members to meet their customers' schedules at a cost that allows these customers, that is U.S. businesses, to remain competitive in an increasingly global economic environment. Clearly, additional highway investment on a very large scale is required if we are to have the transportation and logistics system that we need to deliver the goods today and meet the ever-greater challenges projected for the future.

The trucking industry is willing to invest in an expanded Federal highway program. We have two caveats, however. First, the money should be spent on those projects that make the most sense from a broad national economic standpoint. This means primarily fixing bottlenecks on heavily travelled Interstate freight routes. Over the long term, we need to consider whether it makes sense from a safety and an economic standpoint to invest in a national network of truck-only highways. Our second caveat is that the financing mechanism must make sense from an economic standpoint primarily, but also in terms of the effects on highway safety, the environment, and energy use. How these projects are financed is just as important as how the funds are spent.

ATA believes highway user fees should be reasonably uniform among various classes of vehicles; they should be based chiefly on highway use; they should not be easily avoided; they should be inexpensive and easy to comply with and enforce; and they should not create impediments to interstate commerce.

Mr. Chairman, we already have a system of taxation in place which meets all of those criteria. It is the fuel tax. Unfortunately, some people seem to want to write the fuel tax's obituary and replace it with private financing. And while private financing may have its place and could play a very limited role in highway funding, the reality is that the fuel tax is, from our perspective, as close to ideal as we have or are likely to have at our disposal within the foreseeable future and should be enhanced, not abandoned or minimized. Private financing is a poor substitute for the fuel tax in nearly all cases. Ultimately, whether they are paying a fuel tax or a toll, highway users pay the price for infrastructure improvements. However, when using toll financing, those users pay a 20 to 30 percent premium over the fuel tax to pay for collection cost.

Furthermore, tolls, especially when they are imposed on existing roads, push traffic onto secondary roads that are likely to be less safe and were not built for heavy traffic.

ATA is particularly concerned about long-term concessions on toll roads. Under these deals, not only do the users of these facilities pay the normal toll road premium, but they also finance the cost of the up-front concession fee, and they fund a considerable profit that is paid to concessionaires, management, and shareholders. Pawning off critical highway assets to the highest bidders and carving up the highway system is not in the best long-term interest of the Nation. We urge Congress to monitor these deals closely and take action if appropriate.

Mr. Chairman, I would like to thank you and Chairman Oberstar for the letter that was sent to the States last week urging them to make sure that private financing of highways is always done with the best interest of the public in mind. Too often safety, mobility, and the larger economic purposes served by a national transportation system of highways are overlooked. These financing proposals should not force highway users to contribute disproportionately to solving public financial challenges that are not of their making.

Mr. Chairman, ATA looks forward to working with you, with Mr. Duncan, the other Members of the Subcommittee to come up with solutions to the transportation crisis that serves the best interests of highway users and the U.S. economy.

Thank you, Mr. Chairman.

Mr. DEFAZIO. Thank you for that very direct testimony.

We now turn to Mr. Todd Spencer, Executive Vice President, Owner-Operator Independent Drivers Association. Mr. Spencer.

Mr. SPENCER. Good morning, Mr. Chairman, Ranking Member Duncan. I am pleased to be here today to talk on this very important issue.

OOIDA has been engaged in the debate regarding public-private partnerships for quite some time now, including actively opposing the Chicago Skyway deal and the Indiana Toll Road. Our membership is small business truckers that would be very negatively impacted by ever-increasing tolls, as what will clearly be laid out in both of these situations.

Given the Nation's infrastructure needs, we are not of the impression that all public-private partnerships are necessarily bad. There may be situations where it makes sense for public entities to team up with the private sector on infrastructure projects and where private sector money can help to jump start projects that would add capacity to the Nation's roadways. However, every transportation deal should be entered into cautiously with all factors being weighed and with total confidence that the overall net benefits clearly side with the public. All public-private partnerships should be done transparently and with full input from the public and, most importantly, highway users.

We do not see any such caution about benefitting the public in the discussions now taking place in many States. Before Governor Mitch Daniels signed away the Indiana Toll Road, he claimed there was no political will in his State for increasing tolls on the route. But just like magic and over the objections of two-thirds of the

State's citizens, the political will appeared as he singlehandedly doubled the toll rates on that toll road to make it more attractive to investors.

Imposing significant tolls on interstate highways without corresponding tax abatement will force truckers and other highway users to use alternative routes such as local roads and State highways that were never intended for the type of traffic that will be on those roads. The decision of truck drivers to use these less suitable roads is not based on an attempt to maximize their profits; rather it is an exercise in survival because they can neither offset or absorb those increased costs. As has been seen in States where toll rates have been raised, traffic congestion will increase significantly on alternative routes, adjacent communities will be disrupted, and safety on these roads will be dramatically reduced.

It is laughable that officials at the U.S. Department of Transportation have tried to use the emotional hot button issue of traffic congestion to sell the public on deals such as those in Chicago and Indiana. Yes, congestion is a major problem in many of our Nation's urban centers. However, the companies tossing around billions of dollars to invest in U.S. roads are out to make the maximum profit they can. The principal way they make profit is by producing that congestion. You would be hard pressed to find a company willing to ink a deal without the contract including non-compete clauses in some form or fashion that restrict the State's ability to expand or improve roads that compete with the toll road being sold.

We are not against every form of public-private partnership. But I should point out our Nation's highway system was built with dedicated highway-user fees paid principally by truckers and other highway users. The typical one truck member of our organization right now will pay $16,000 every year in Federal and State highway user fees—just highway user fees. We paid for the highways that we use; we continue to pay for the highways we use.

We have heard nothing from any of the governors or any of these proposals that talk about addressing the contributions that we made and we continue to make. We think we can do a whole lot better than the system that they have of patchwork highways, charge what the absolute market will bear, no competition from other routes. I really resent the term "free routes" because, again, $16,000 a year our members pay to use the roads we run on. That is 36 percent of the total of the Federal Highway Trust Fund plus the State fees on top of that.

In my concluding comments, I just want to thank you, Chairman DeFazio, and also Chairman Oberstar for the direction, the guidance that you provided to State lawmakers, who I have witnessed first-hand when these issues come up do not have the needed perspective, understanding, and awareness of what a 75 or a 99-year commitment can do to their States. Again, thank you for providing that guidance.

I look forward to working with the Committee. I am happy to answer any questions you may have.

Mr. DEFAZIO. Thank you, Mr. Spencer. And again thanks for very direct testimony

Mr. Greg Cohen, President, American Highway Users Alliance.

Mr. COHEN. Chairman DeFazio, Ranking Member Duncan, and Members of the Subcommittee, I appreciate this opportunity to discuss public-private partnerships on behalf of The Highway Users. As you know, The Highway Users Alliance brings together the interests of users of all the highway modes that contribute to the trust fund. The two gentlemen to my right are members of our board.

But The Highway Users is not just simply a freight-type organization. Our roster includes numerous AAA clubs from coast to coast, bus companies, motorcyclists, RV enthusiasts, and hundreds of other businesses that require safe, reliable, efficient roads to facilitate the movement of their employees, customers, and products.

Some may argue that PPPs are not a Federal issue and that Congress should not get involved. The Highway Users disagrees for two reasons. One, Governor Rendell just spoke about, and that is PPP agreements involve tolls on major commerce routes often carrying traffic from out of State, they carry interstate motorists, truckers, and tourists primarily, and if the tolls are not invested directly for the benefits of the motorists, they are really highway corridor taxes.

They impact interstate commerce which makes them a Federal issue under the Constitution. U.S. DOT's oversight is a legitimate role for T&I Committee as well. Many are concerned that DOT's promotion of PPPs may be intended to undercut future potential funding decisions that would come from this Committee and that would prevent the Federal highway program from growing and strengthening the national highway network.

I would like to make it clear that The Highway Users support some PPP agreements; we have in the past and we probably will in the future, particularly those that are negotiated to build new roads and new highway lanes. Traditional Government funding is often not available for new roads and new lanes. We do have aging infrastructure, we do have tremendous maintenance needs, and we are not building roads in this country like in some of the other countries around the world. Private companies may be able to raise the capital to build roads that would not be otherwise built by government agencies.

So that is one positive opportunity. Another opportunity is in forceful performance standards that States may be able to enforce. And there are a couple of other opportunities, including perhaps faster project development and innovation in materials.

But I would also like to talk to you about some threats that our policy committee has listed. We are particularly concerned about PPP agreements in which long-term leases or concession agreements involving existing toll roads already built with highway user fees. In general, public toll roads built in the United States were designed to provide a high quality ride for the lowest possible toll. This is the mission of most turnpike authorities. Under private operation, the mission has to change. You are not maximizing the public benefits; instead, you are maximizing net revenue.

Lease agreements typically involve a large up-front payment, whether it be received immediately or annuitized, it is an up-front payment in which private investors give money to the State or local government, and then the private investor received the future toll revenues. Behind closed doors, the two parties to the agreement may have the financial incentive to execute a deal which puts the monied interests above those of the road users.

Let us talk about other threats. Number one is the diversion of funds, as the Chair mentioned, in the case of Chicago. Highway users are deeply concerned about the windfall revenue acquired by State or local government being used for non-highway projects.

Non-compete clauses. As the name suggests, non-compete clauses are designed to prevent market competition and would prevent new roads and new capacity being added to nearby roads.

Unfair tolling practices or toll increases. High tolls could lead to safety consequences on local streets if there is large decision to avoid these roads. Toll increases should be limited to levels far below inflation under a PPP, as they are in France. In the case of Indiana, you mentioned that the toll increases are floored at GDP or 2 percent. But in France, they are limited to only 70 percent of CPI inflation. Obviously, they are looking out to make sure the toll increases are below inflation. We are not doing that here.

Longevity of agreements. Extremely long leases without profit caps generate much larger up-front payments but cannot be revisited for three or four generations.

Also, disruption of Interstate or National Highway System continuity.

And double taxation. On privately-operated roads, highway users may still be expected to pay fuel taxes. They should be refunded since the user fees were paid while driving on non-publicly maintained roads.

In conclusion, considering both the opportunities that I mentioned and the risks, we would consider support for PPP agreements that:

Are executed primarily for the construction of new roads;

Involve substantially streamlined construction;

Do not restrict vehicular access to free parallel roads;

If the premium lanes are tolled and the general lanes are not tolled, all vehicles should have the choice to use either the premium or general lanes;

Have high safety, mobility, payment, and performance standards;

Direct all government-acquired lease revenue to highway projects;

Do not have non-compete clauses;

Protect highway users from excessive toll increases; and, I think most importantly,

Have highway users participate in the negotiations involving the monied interests.

Thank you for considering our perspectives on public-private partnerships. We think PPPs provide some innovative opportunities to build new lanes and roads. With public funding in short supply, it is something that should be considered but we have to watch out for the pitfalls.

We look forward to working with the Subcommittee and Full Committee to support your actions to ensure that highway-related PPPs serve the highway users' interests. We also are committed to strengthening the trust in the Highway Trust Fund and supporting continued strong Federal involvement to support our national highway network. Thank you.

Mr. DEFAZIO. Thank you.

Next, Mr. Michael Replogle, Transportation Director, Environmental Defense, Washington, DC.

Mr. REPLOGLE. Thank you, Mr. Chairman, Ranking Member Duncan, and Members of the Subcommittee. I am transportation director for Environmental Defense. We are a nonprofit group and our half million members use America's roads and transit systems on a daily basis. I am here to thank you for your efforts to ensure that those systems are operated and developed not only to improve mobility, but also to better protect public health and the environment.

We all breath air that is affected by air pollution. We and future generations face unprecedented problems related to global climate change which is still growing due to our expanding dependence on fossil-fueled transportation. To achieve the needed 80 percent reduction in CO2 emissions over the next half century, we must adopt an economy-wide cap and trade system, cut carbon fuel content, boost vehicle fuel economy, and meet our mobility needs with less motor traffic.

Growing congestion and transportation funding problems threaten our economic competitiveness. But new information and communication technologies could help us to manage transportation systems much more effectively. Public-Private partnerships and tolls could play a vital role in accelerating this innovation, promoting air quality, public health, and greenhouse gas reductions, if these public-private partnerships are structured right and with good public oversight. But these strategies will gain broad public support only if they deliver improved performance and expanded travel choices, and if PPP contracts are designed not merely to meet today's weak environmental and system standards, but to ensure superior user system and environmental performance. My written testimony offers more details on these ideas.

Many construction and finance interests support PPP financing and tolls to build and expand their business opportunities. Many highway user groups, like those you have just heard, oppose a lot of PPPs and tolls. People do not often like being asked to pay more especially if they are not sure what they are going to get for their money.

Environmental Defense, my organization, has no vested interest in PPPs and tolls, but we do believe that these tools, if properly used, could help reduce environment and public health burdens associated with increasing mobility. If used just to build more roads faster or to relieve short-term fiscal problems, PPPs and tolls could increase congestion on existing roads and spur pollution, fuel use, and emissions for years to come. Indeed, we are seeing the backlash to PPPs and tolls in some States like Texas, due in part to failure to consider alternatives that could reduce these burdens together with top-down secretive deal-making. Such issues should be addressed through stronger Federal law, regulation, and enforcement of existing environmental and planning laws.

But if this Committee is serious about doing something about climate change, it should encourage tolls and PPPs to spur better system management and performance-based pricing on both new and existing roads, and use PPPs to spur innovative travel to land management and better public transportation. It should ensure that such efforts are designed to expand access to jobs and public facilities for all without undue time and cost burdens. It should foster reforms in how we fund and price transportation, correcting perverse incentives that now lead consumers and decision makers to make choices that actually worsen our problems.

States like Oregon are pioneering approaches such as VMT fees that could lay a foundation for future transition to more effective system management. Other areas are encouraging pay-as-you-drive car insurance and car sharing opportunities that boost mobility while saving money for consumers who drive less. New York City is launching a strategy like London to charge motorists to enter the core to fund better transit. And the public in cities like London and Stockholm have really come around when they have seen the benefits from congestion pricing. We could use these approaches and things like emission-based tolls to help better manage our Interstate highway system and do this as part of lease deals or public financing.

With your leadership, we can better align how we fund and price transportation with our broader system management goals. I appreciate and applaud your concern for the protection of the public interest in these deals, but urge you to strengthen the framework to spur more effective private engagement, not to stifle it, and to ensure that investment is consistent with our State and metro transportation plans and goals. We look forward to working with you on this. Thank you.

Mr. DEFAZIO. Thank you for your testimony.

I guess I would ask each panel member, given I think the widespread acknowledgement that the current level of infrastructure investment, whether your goal is to mitigate congestion, facilitate movement, or you have other goals in mind, is that we are not investing enough. So what is your preferred alternative to get more Federal investment? Mr. Graves?

Mr. GRAVES. As I said in my testimony, and I think it has been stated before I think in the presentation of Mr. Duncan from Federal Express some time ago, we continue to favor the fuel tax as the traditional source of funding for highway infrastructure investment. The ATA intends to be fully engaged in a conversation about the willingness to pay more fuel tax in exchange for a more robust reauthorization proposal. We feel very strongly about a strong national role in highways.

Mr. DEFAZIO. Okay. Thank you. Mr. Spencer?

Mr. SPENCER. Our organization is on record too as supporting the fuel tax as the principal means of most efficiently addressing highway user issues historically. We are certainly willing to come to the table to discuss those issues, whatever the appropriate level.

I can also tell you that our members feel very, very strongly about how highway user revenues are used for things other than highways. One of the things that was striking from Governor Rendell was he talked about safety priorities for how they spend transportation dollars and routing transportation dollars to transit in Philadelphia. Well, he also mentioned they had 1,500 deficient bridges that he implied were somehow about to fall down.

Well, the $420 million came from the money that was supposed to be used for those highways and bridges. So that is really, really important to our members. We think that is in the interest of fairness. That is not to say that other transportation things should not be funded. But our highways cannot be the cash cow for everything, nor can our members as truckers be the cash cows. Small business truckers are the majority of the industry and their pockets are not very deep.

Mr. DEFAZIO. Thank you, Mr. Spencer. Mr. Cohen?

Mr. COHEN. I would agree with that sentiment. Also, you asked about Federal funding, we would like it to continue to be funded by the highway user fees and through a Federal Highway Trust Fund. We are also concerned about the diversion. In reality, we all know the highway user fees need to be increased.

And the goal—I think it is commendable that the Committee is taking this slow, taking time before reauthorization to make the case to the American public that this program will really serve them—that we take the time, we establish the mission of this program, we reconsider exactly what the purpose of this thing is, and then groups like The Highway Users Alliance and I think a lot of others will be willing to go out and charge out to the media, the editorial boards, our own members and our grassroots supporters to defend paying more for that program.

Mr. DEFAZIO. Mr. Replogle?

Mr. REPLOGLE. Environmental Defense has not taken a formal position on a gas tax increase. But our key concern is that whatever revenue mechanisms are used to enhance transportation funding, that they come along with better accountability for performance to make sure that the revenues are spent in ways that help deliver more mobility improvements and support for economic development with fewer emissions and less fuel use.

We need to be making sure that we are making progress on managing traffic growth and its contribution to greenhouse gas emissions. Fuel taxes could play a role in helping to foster more efficiency in vehicle choices and in travel decisions. But direct user fees like congestion pricing, VMT fees, and things like that also deserve a lot of consideration as you deliberate about these matters.

Mr. DEFAZIO. Since you raised congestion pricing, it seems many times to be sort of accepted as a benign thing. The problem I have with congestion pricing, and I will use the example of Portland, where I do not live, Portland, Oregon, housing in the city is extraordinarily expensive and a lot of people are priced out of the city. The system does not necessarily accommodate them in any other way than by automobile to get to work in the city or on the other side of the city, which is virtually impossible to get to with any combination of transit from where they live. They do not choose when they go to work.

So, to me, if you are going to have congestion pricing, a person has to have a viable alternative that is comparable or even better in terms of their time commitment and affordable before you can begin to apply congestion pricing. Would you agree with that principle?

Mr. REPLOGLE. I would agree that we need to give people a guaranteed better performance and increased travel choices. I do not know that we can give everyone completely equivalent travel choice to what we get from our deeply subsidized system of sprawl and car dependence. We have a lot of people who made rational and intelligent decisions on the basis of very cheap gasoline, on the basis of roads that have been subsidized out of general revenues, and on the basis of car insurance designed so that once bought, it is essentially a fixed cost.

So that the actual marginal cost of driving a mile is only about 15 percent for the user of what the real total cost to society is. So we are in a situation where our transportation system often breaks down because the users do not perceive the costs that ultimately each decision to make a trip imposes on the rest of the system. When you subsidize any good, people tend to consume more of it. So we end up paying for it by being stuck in queues in traffic congestion.

There is some recent work that has been done, the Transportation Research Board did a competition about how congestion pricing can actually help produce higher efficiency on our highways. I think it is a telling thing. If you take a pound bag of rice, pour it through a glass funnel and let it back up in the funnel and time how long it takes to go through, it might take 30 seconds with that backup. If you take that same rice and you meter the flow through the funnel and pour it at about the rate it comes out the bottom, it will go through about a third faster because it does not have the friction of the backup.

So if we use a whole set of tools in our toolbox of congestion management, and road pricing is one of them, then we can actually get the system to deliver more through-put without building more——

Mr. DEFAZIO. Right. I understand that. And I am sure the $40 round trip here in Washington, D.C. will allow those people in the chauffeur-driven limousines to get in and out of the city very quickly. That is a very great use of a public asset.

I will have to turn to Mr. Duncan. I think we have some disagreement over that.

Mr. DUNCAN. Thank you, Mr. Chairman. I want to thank all of the witnesses for very helpful and very informative testimony.

Governor Graves, I was sitting here thinking this is my 19th year on the Committee and we have had many governors testify but I only remember one former governor. I remember Governor Baliles of Virginia who headed up an aviation commission. But we are pleased to have you here. I do remember seeing the Johnny Carson Show many years ago that Governor Pat Brown was on and he said a week after he left the governor's office he was stopped by a California Highway Patrolman, and he said to the patrolman you must not recognize me, I am Governor Brown, and he said the patrolman said you mean ex-Governor Brown and wrote him a ticket. And you have a very important position now.

I do appreciate, Mr. Spencer, both yours and Governor Graves' groups. The trucking companies and truckers in this country do so much for this Nation and we take you so much for granted how much you mean to us.

Governor Graves, I am told by the staff that your group supported the Indiana Toll Road leasing. Is that correct?

Mr. GRAVES. We have sort of a colored past. We are a federation. We have 50 State associations and we tend to respect the positions of our States. The State association was engaged in and discussed with Governor Daniels the creation of the arrangement in Indiana. I think it would be fair to say that when the other 49 States, again, most of whom are companies engaged in interstate commerce, were able to see the details when it was finally revealed as to what all the implications might be for the industry as a whole, there was a certain push back.

ATA has taken, and I think that was the catalyst, ATA has taken a very strong position in opposition. Not in all instances. In fact, I discussed with Governor Daniels in his proposal on that commerce corridor around the south part of town, it was capacity that otherwise might not have been built. That could have been an example of where we might have not had the great concerns. But nonetheless we are a little conflicted in the original beginnings of that Indiana deal.

Mr. DUNCAN. We had Governor Daniels here I think last year and he testified about it. As a former governor, you had the responsibility of maintaining the State's highways and so forth. Would your testimony have been different if you had been here as a governor?

Mr. GRAVES. During my two terms we raised the fuel tax twice in support of a fairly large, at least by Kansas measures, a fairly large multimodal transportation plan. I think it was the right thing to do then and, as you can tell from my testimony, I still think it is the right thing to do.

And if you would allow me to opine one subject that has not been brought up this morning that continues to concern me now as a former governor.

Mr. DUNCAN. Sure.

Mr. GRAVES. That is, if the States who can do these things, if there are ways that you can be successful, and let us use Governor Rendell's example, if he can in fact create that huge pot of money that addresses many of the infrastructure problems in Pennsylvania, my concern would be that as you all go forward in your difficult and important work, what does that mean in terms of the willingness of Members of the Pennsylvania delegation in that case to want to join with others who are looking for a national solution to transportation finance.

Do we create a scenario where we have haves and have-nots and the haves lose even further interest in casting some tough votes that perhaps support a national system of transportation? Again, we support very strongly seeing that increased strong Federal role occur.

Mr. DUNCAN. Thank you.

Mr. Spencer, we had a nice visit in my office several months ago and I appreciated that and also your giving me an opportunity to write an article for your magazine. But I notice in your testimony you say that the truck operators pay 36 percent of the cost on the highways now. Do you think your members are paying more than their fair share?

Mr. SPENCER. You know, Congressman Duncan, that is a really, really dicey issue. Trucks make up something on the order of 3 percent of all the vehicles that use the roads, and of course we only use a very small percentage. The 36 percent represents the total amount that trucking pays into the Highway Trust Fund. We think that is a tremendous amount of money.

There will be plenty of people who will argue whether or not it is a fair share or not. But it certainly is a significant sum. As you know well, sir, most of trucking is small business that struggles to offset those costs. You are keenly aware of those in your State of Tennessee, and I was somewhat surprised that Governor Rendell did not seem to be especially aware of all the small business truckers in Pennsylvania because there are thousands there.

Mr. DUNCAN. I will tell you what I have always said. I think we ought to pin a medal on anybody who survives in small business today because every industry seems to be geared so much towards the big giants. But we have run out of time. We have to go for the votes now. Thank you very much for being here. I will turn it back to the Chairman to close.

Mr. DEFAZIO. I want to thank the panel for their time. I want to thank the Ranking Member for his active participation. And with that, the Committee is adjourned.

[Whereupon, at 12:42 p.m., the Committee was adjourned.]

Jason Altmire

<u>Subcommittee on Highways and Transit</u>

Hearing on the "Public-Private Partnerships: State and User Perspectives"
Thursday, May 24, 2007

Statement – Congressman Jason Altmire (PA-04)

Thank you, Mr. Chairman. Thank you, Governor Rendell, for testifying before us today on your efforts to generate additional revenue for the unmet transportation needs of the Commonwealth. ~~Time and again,~~ You have always shown a willingness to ~~stand up and propose~~ offer innovative solutions to the serious challenges that confront our state. I commend you for your leadership on these issues.

Under Chairman DeFazio's leadership, this committee has had the opportunity to examine how public-private partnerships are entered, as well as the impact of recent lease agreements for the operation and maintenance of the Chicago Skyway and Indiana Toll Road. Other examples include the Pocahontas Parkway in Virginia, the Southern Connector in South Carolina, SR-125 in California, and the Trans-Texas

Corridor. Each of these agreements between states and the private sector provides us with guidance on how similar deals should or should not be structured in the future in order to ensure the public interest is protected.

As Governor Rendell is fully aware, substantial investment in Pennsylvania's highways, bridges, and public transit is required to meet our Commonwealth's future transportation needs. According to the 2006 report of the Transportation Funding and Reform Commission, $1.~~725~~ 3/4 billion in highway and transit funding will be needed per year for the foreseeable future. It is critical that we provide the necessary resources to meet our growing transportation needs, including repair of existing aged infrastructure and proper planning for the future.

While I do have some reservations about ~~public-private~~ this issue ~~transportation partnerships,~~ I look forward to learning more about Governor Rendell's proposal. ~~In this hearing, I also hope that we will have an opportunity to address some central questions about public-private partnerships. How do we ensure the best possible deal is~~

achieved in entering these agreements? How is public control and accountability maintained in the operation and maintenance of our public highways? Is the information that we have to make these decisions, including the assessed value of public transportation infrastructure, accurate and reliable?

Governor Rendell, thank you again for being here today and thank you, Mr. Chairman, for calling today's hearing. I yield back the balance of my time.

# # #

Statement of Congressman Leonard L. Boswell
Submitted to the House Committee on Transportation and Infrastructure
Subcommittee on Highways and Transit
May 24, 2007

Chairman DeFazio, Ranking Member Duncan, members of the Subcommittee, I thank you for holding this very important hearing. Today we will hear from many distinguished panelists, but I would like to take this opportunity to recognize one of them, Mr. Todd Spencer of the Owner-Operator Independent Drivers Association.

Mr. Spencer is before the committee to represent the interests of the independent owner-operators and professional drivers in the trucking industry. The membership of the Owner-Operator Independent Drivers Association hails from all parts of the country.

Mr. Chairman, quite simply, if the trucks are not running, then commerce stops, and I am confident that I am not the only Member of Congress who holds this opinion. The state of Iowa, which I am honored to represent, would suffer greatly if the trucking industry was not able to carry our products to market.

Mr. Chairman, Todd Spencer is an articulate spokesman for the over the road men and women of this nation and a strong advocate for the views of his members and the trucking industry in general, and I feel the subcommittee will greatly benefit from the views he will present and we all need to thank him personally and the Owner-Operator Independent Drivers Association for taking the time and interest to testify today. Thank you.

Doris O. Matsui

Statement by Congresswoman Doris O. Matsui
Transit and Highways Subcommittee
Hearing on
Public-Private Partnerships: State and User Perspectives
May 24, 2007

Thank you Chairman Defazio for calling this important hearing.

I want to welcome the Honorable Alan Lowenthal, state senator from California, who will testify on the second panel. When he isn't in Long Beach, he spends his time in my district in Sacramento as the Chair of the Senate Transportation and Housing Committee.

I am looking forward to Senator Lowenthal's testimony because I know that we in California have tried every which way to inject more funding into our infrastructure---whether it is local sales, taxes, state gas taxes or bond initiatives.

I agree with Senator Lowenthal that public-private partnerships for Goods Movement projects are a natural place to begin examining this issue.

I know that for example, in Sacramento, we have several infrastructure assets that, if utilized properly, could be very beneficial to facilitating goods through the northern California region.

On a broader scale, I applaud Chairman Defazio for holding a hearing that asks the hard and unavoidable questions facing our federal transportation system---how will we fund our transportation system in the 21st century that is being asked to support a growing population and move more goods?

As members of this Committee we should certainly be entertaining all ideas.

However, we must enter this debate on public-private partnerships with the understanding that the underlining principal is that we must have an accessible, safe and secure transportation system---for everyone to use.

This is not a one size fits all issue.

What often gets lost in this debate is the true intent of a national transportation system. In order for our transportation to be efficient----we must have continuity. This is a difficult issue because transportation investments are reflective of the local community and needs.

I am looking forward to hearing from today's witnesses.

1 Harry E. Mitchell

Statement of Rep. Harry Mitchell
House Transportation and Infrastructure Committee
Subcommittee on Highways and Transit
5/24/07

--Thank you Mr. Chairman.

--As you know, Arizona is now the fastest growing state in the nation.

--The Phoenix metropolitan area, long the largest in our state, is now one of the largest in the nation. According to the U.S. census, our metropolitan area is now the 13th largest in the nation, just behind San Francisco and Boston.

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--Our rapid growth has created an urgent need for highways…a need that is out-pacing our ability to pay for them.

--According to the Arizona Department of Transportation, over the next 20 years, we will need at least $9 billion for just 12 of our major highway corridors…and these corridors represent just 36% of our state's total highway miles.

--In the last hearing on this issue, I was inspired to hear of the different ways that public-private partnerships are being implemented throughout the country.

--If we are serious about meeting our growing highway needs, we must think creatively.

--Arizona has a long tradition of toll-free highways.

--This tradition has been the primary concern in state and local debates on this issue.

--I think we pay enough taxes, and should not have to pay more for what we already have.

--When the public pays to build a road, and then years later, someone throws up a toll booth to start charging for what we already own…that's a double-tax.

--On the other-hand, if a private developer wants to voluntarily contribute to a highway project, that seems like less of a problem.

--I look forward to hearing from today's witnesses, and learning about their experiences in other states.

--I yield back the balance of my time.

Testimony of State Representative Terri Austin (D-Indiana)
House Subcommittee on Transportation and Infrastructure
May 24, 2007

Thank you, Chairman Oberstar and Chairman DeFazio for the opportunity to testify before this committee. My name is Representative Terri Austin from Anderson, Indiana. For the past several months, I have served as the Chairman of the Roads and Transportation Committee in the Indiana House of Representatives.

In March 2006, the Indiana General Assembly enacted legislation that gives our state's executive branch the authority to enter into public-private partnership agreements for the financing and development of limited-access facilities, tollways, roads and bridges, and other infrastructure assets.

This same legislation, House Enrolled Act 1008, also allowed a quasi-state entity called the Indiana Finance Authority to enter into an agreement with a private consortium to lease the Indiana Toll Road. The Indiana Toll Road is a 150-mile stretch of east-to-west roadway in northern Indiana that includes Interstates I-80 and I-90 and ends at the Illinois State Line and the Chicago Skyway. The lease agreement, finalized with the multi-national firm Cintra-Maquerie, was a concessions model that gave up tolling revenue and rights to the road for a period of 75 years in exchange for a one-time upfront payment of $3.8 billion dollars.

The Indiana Toll Road Concession and Lease Agreement gave the exclusive franchise and license to operate, manage, maintain, rehabilitate and toll this thoroughfare. In addition to the toll revenue, the private entity also obtained the rights to all revenues generated by agreements with vendors providing goods or services along the Toll Road.

In order to safeguard the public interest and provide for adequate public involvement, it is crucial that the executive branch and legislative branch work in partnership to determine project priorities, development and implementation, and evaluation and reporting processes. I would like to offer for your consideration four principles that deserve consideration by this committee and any legislative body that is being asked to consider public-private partnership agreements.

1. Adequate Public Debate Regarding P3 Agreements
First and foremost, elected officials should debate whether or not public-private partnerships based upon agreements that last through two, three or four ***generations*** represent good public policy and good transportation policy.

For this to happen, the public and their duly elected representatives need more than a few short weeks to build a knowledge base about P3 agreements, examine prospectus reports and understand the unprecedented amounts of information that accompany projects of this nature. This includes an opportunity to examine the various P3 models and weigh the pros and cons of such agreements so that both legislators and the public can participate in meaningful discussions.

Indiana has a part-time citizen legislature, and the eight weeks of the 2006 legislative session did not afford enough time to consider such a complex and far-reaching proposal before we were asked to cast a vote that would effectively tie the hands of both the executive and legislative branches for decades to come.

Ultimately, the public ***should*** have some level of discomfort with elected officials who serve two-, four-, or even six-year terms when they propose to enter into 75- or 99-year ***contractual*** obligations. As legislators, we know that laws can be amended and even repealed. However, there are simply very good reasons why long-term leases of public assets deserve extra scrutiny.

Citizens deserve the right to change their minds about public policy and the courses that their leaders have charted. Even if it reduces the windfall from a long-term P3 agreement, government needs to make certain that agreements are not too difficult to extract ourselves from.

Secondly, we need to make sure we are not pursing P3s solely to avoid other policy options that may be even more complex or perhaps more politically difficult. Are the most common methods of funding transportation, like per gallon gasoline taxes, sustainable as we strive towards greater fuel efficiency? What are the alternatives? Are we neglecting mass transit options because of the lure of building roads with someone else's money?

These are difficult questions that should be pursued at the same time as we examine P3 agreements. There must be a diverse strategy for keeping our nation's infrastructure strong. We should not put all of our eggs in one basket simply because private equity firms are flush with cash and looking for roads to lease.

2. Verified Project Need and Support
Projects that are being promoted for P3 financing should be part of an established comprehensive, long-range plan for transportation infrastructure. The decision to undertake any project should not be about "following the money" or taking advantage of a newly-found "cash cow." There should be an identified need for the project that is substantiated by feasibility studies and verifiable data.

When vetting a project and an agreement, there should be strong support from local elected officials and residents, and a thorough examination and understanding of the consequences of implementation. It would desirable to have local involvement and support throughout the entire scope of the project, including the conceptualization, design, implementation and evaluation of the proposal. For projects that involve federal transportation assets, substantial involvement of federal officials should also be accommodated. Roadways, by their very nature, cross multiple jurisdictions and a systemic approach should be employed when considering changes that will be in effect for many years to come.

3. Transparency, Due Diligence, and Independent Monitoring
In the case of Indiana's P3 agreement for the lease of the toll road, it was essentially a *fait accomplit*. An RFP for the project had already been developed, disseminated and responses were received prior to any legislative knowledge or involvement. Although requests for information were submitted by both legislators and the public, answers to all requests were not provided by

parties involved in the negotiations. Specifically, prospective bidders names were not released, nor was the public and other elected officials provided opportunities to examine any additional bids prior to the final selection. Any reluctance to disclose any documentation, terms of any agreement or lease, or financial reports does little to foster confidence that such transactions are above board and in the public interest.

There must also be adequate opportunities for due diligence because of the complex nature of the proposals and the agreements. Any entity hired to negotiate, or examine and evaluate a P3 proposal should be free from any actual or perceived conflicts of interest or opportunities to profit from the proposal. Such neutral entities should also be used to evaluate the ongoing performance of P3 projects to make sure that the terms of the contract (such as service levels, required investments and repairs, etc.) are being met. Once a deal is entered into, it is incumbent upon elected officials to be vigilant and make sure that all parties live up to promises made.

The clarity of the language in the contract itself must be able to withstand years of legal challenge and interpretation. In the actual contract for Indiana's agreement, some language appeared to be in conflict with other parts of the document. In some instances, the transaction was referred to as a sale, and in other instances it was referred to as a lease. This designation (sale) was necessary to allow Cintra-Maquerie to take advantage of tax breaks as a part of the final negotiations. However, years down the road, in the event of a legal dispute, how will we be able to guarantee that courts interpret the language as intended?

4. Asset Realization and Distribution

Cash-strapped state and local governments seem to be choosing to receive the funds realized from P3 agreements as large, up-front sums of money. When this occurs, all monies should fall under the appropriation authority and oversight of the legislative branch. In Indiana's case, the bulk of the funds from the toll road lease will be reinvested in transportation infrastructure. However, in my view, the distribution of the proceeds was not based on demographics or transportation priorities.

Resources were diverted from statewide needs and allocated to specific regional areas to gain favor for the proposal. $360 million dollars was allocated among seven counties and the remaining 85 Indiana counties shared in $150 million dollars for local road and street projects. It is important to note that Indiana still has unfunded needs of over $2 billion dollars in local road, street and bridge projects that have not been addressed by the General Assembly or the executive branch.

Summary:

In closing, I want to be perfectly clear that I do not think that all public-private partnership agreements are bad and should be rejected out-of-hand. However, based on what I have witnessed in Indiana and as reported in other states, asset monetization and the long-term lease of transportation infrastructure deserves far more public discussion and debate than it has received.

As state legislators and leaders, we are very aware of the challenges faced by federal and state officials who are trying to do more with less. We are also aware of the impending crisis in the Highway Trust Fund and how it will impact revenues available to state and local governments.

Our reluctance to raise state fees for almost twenty years and your reluctance to raise the federal gasoline tax have contributed to our current dilemma. I am not convinced that more taxes are the answer to this problem, however. Nor do I believe that we can build our way out of congestion--public mass transit deserves to be a part of state and federal discussions and funding considerations.

As a state legislator, I look forward to working in partnership with you to address these challenges and identify creative solutions to transportation funding so that we can ensure sound public policy decisions are made in the interest of citizens and future generations.

Highway Users' Perspectives on Public-Private Partnerships

Testimony of Gregory M. Cohen, P.E.
President and CEO
American Highway Users Alliance

Subcommittee on Highways and Transit
Committee on Transportation and Infrastructure
U.S. House of Representatives
May 24, 2007

Introduction

Chairman DeFazio, Ranking Member Duncan, and Members of the Subcommittee, I am pleased to present testimony on behalf of the American Highway Users Alliance (The Highway Users) on the subject of "Public-Private Partnerships." We commend you for convening this timely hearing to address an issue that is gaining a great deal of attention from motorists, government agencies, transportation and investment companies, and the general public.

About The Highway Users

The American Highway Users Alliance (The Highway Users) is a non-profit, non-partisan organization, which advocates for public policies that improve mobility and safety, to benefit the millions of American road users. We are an association that brings together the interests of users of all the highway modes that contribute to the Highway Trust Fund, through a membership roster that includes numerous AAA clubs from coast-to-coast, trucking groups, bus companies, motorcyclists, and recreational vehicle enthusiasts. These members and the hundreds of other member businesses and associations require safe, reliable, and efficient roads to facilitate the movement of their employees, customers, and products. Since 1932, The Highway Users has worked closely with this Committee as a key stakeholder and grassroots advocate for improvements in surface transportation legislation and for a strong and trustworthy Highway Trust Fund.

Background: PPPs

Broadly defined, Public-Private Partnerships (PPPs) are government-sanctioned projects with greater private sector participation than traditional projects. Greater private investment in road projects has been viewed by many as a way to help supplement scarce public resources in an era of extreme, unmet needs. For this reason, The Highway Users supported provisions in the 2005 SAFETEA:LU highway bill to permit the Department of Transportation authority to issue $15 billion in tax-exempt private activity bonds for highways and surface freight transfer facilities.

Our support for PPPs in SAFETEA:LU was based on the appreciation that the private capital would help build new roads, for the primary benefit of highway users. Since 2005, we have become increasingly concerned that <u>some</u> PPP agreements have not been negotiated in the best long-term interests of motorists and/or may not even involve new construction. We are also concerned that the U.S. Department of Transportation's promotion of PPPs may be intended to undercut potential funding proposals that would grow the federal-aid highway program and strengthen the national highway network.

<u>Long-Term Lease Agreements</u>

In particular, we are concerned about long-term leases or "concession agreements" on existing toll roads. In general, public toll roads built in the United States were designed to provide a high-quality ride for the lowest possible toll. In many cases, tolls were instituted to pay for road construction, with the intention to remove tolls once major costs were repaid. Toll rates on public roads generally rise slowly or stay flat for long periods of time.

Under private operation, the mission of the toll road must change. If investors are seeking the highest possible returns, the new mission must be changed from maximizing the public good to maximizing profit for investors. Under such a scenario, tolls are raised regularly and the process is not subject to public or political review.

Lease agreements typically involve a large up-front payment from private investors to the State or local government, after which the private investor receives the toll revenue, and is held responsible for road maintenance, operations, and performance standards. The first agreement of this type in the U.S. was the 99-year lease of the Chicago Skyway, executed in January 2005, for $1.8 billion.

Without highway user involvement and congressional oversight, such deals may be harmful to motorists, especially interstate drivers. The two parties to the deal have powerful, financial incentives to execute a deal which may put their interests above those of the road users. On one side of the negotiating table, an elected official is motivated to complete the deal quickly and maximize the upfront payment. These two goals may work against each other if an elected official feels pressured to accept a less-than-reasonable amount of cash in order to seal the deal quickly. For example, there are questions about whether the $3.85 billion acquired by the State of Indiana in exchange for a 75-year lease of the Indiana Toll Road was undervalued, despite the fact that other bidders offered much less. In addition, a State or local official may be politically motivated to negotiate toll increases that disproportionately impact non-local motorists or "undesirable" vehicles. Pennsylvania's Governor Rendell observed at a National Press Club event that out-of-state truckers would pay for much of the lease of the Pennsylvania Turnpike. This line-of-reasoning means Congressional oversight is critically important. On the other side of the negotiating table, the private investors will want to maximize their profits. On both sides of the table, each party can get more of what they want by giving the motorists short shrift. The only way to truly protect road users is to require transparent negotiations, oversight from an impartial board of highway users, and congressional review to protect interstate commerce.

Opportunities abound for PPPs to provide benefits to road users, but threats also exist, and we recommend that this Subcommittee develop standards to judge whether a PPP project is reasonable.

Opportunities

- **Performance Standards.** Generally, State and local governments are not obligated to maintain performance standards for safety, congestion, pavement conditions, structural standards, winter maintenance, litter removal, etc. Under an enforceable contract, private operations and/or maintenance may be required to meet tough performance standards and can be held financially accountable when standards aren't met.

- **New Roads or New Capacity.** In recent decades, government agencies have done a poor job of addressing growing highway capacity needs. Since 1980, vehicle miles of travel have increased at more than 15 times the growth rate of lane miles. Traditional government funding is often not available for new roads and new lanes. Private companies may be able to quickly raise the capital to build roads and lanes that government agencies might otherwise take decades to construct. The return on investment comes from private companies collecting tolls paid by highway users or collecting "shadow tolls" paid by the government.

- **Faster Project Development.** There are a number of incentives for private companies to streamline project construction. The most obvious is the desire to begin earning revenue from tolling as soon as possible. For both tolled and non-tolled projects, financial rewards may be provided by the government for early project completion. Government agencies tend to move slower, more cautiously, and deliberately.

- **Fostering Innovation.** Many experts consider private companies to be more willing to innovate, using cutting-edge technologies and materials. Larger companies may also be able to draw from international experience to recommend processes that are unfamiliar to State and local governments.

Potential Threats

Threats to highway users should be avoided during PPP negotiations. Once a long-term agreement is signed, it may be difficult to revisit omissions.

- **Diversion of Funds.** Highway users are deeply concerned that windfall revenue acquired by a State or local government in exchange for the lease of a toll road may be invested in non-highway projects. For example, in New Jersey there has been discussion of leasing the New Jersey Turnpike and Garden State Parkway, in order to provide property tax relief, pay down State debt, and fund school construction. In Chicago, the payment for the Skyway was used to pay city debt and fund social programs. The fact that highway users had paid tolls for 47 years on the Skyway did not dissuade the city from diverting the funds to non-highway purposes.

- **Non-Compete Clauses.** As the name suggests, non-compete clauses are designed to prevent market competition from new roads and capacity improvements to nearby roads. The use of non-competes brings into doubt the claim that privately-operated roads are "free market" innovations. Non-competes effectively create monopoly-like restrictions to prevent competition. Also, highway users are concerned that the public may not be fully informed in advance about the details of non-compete clauses or the provisions may be confusing.

- **Toll Increases / Unfair Tolling Policies.** High tolls also lead to safety consequences on local streets, particularly if large trucks choose to divert to main streets to avoid the tolls. Toll increases should be limited to levels far below inflation to prevent unreasonable rate hikes that disproportionately harm the poor. In France, tolls on leased roads cannot increase faster than 70% of CPI. But in Chicago and Indiana, tolls can increase at 100% of CPI or GDP (whichever is higher). High tolls designed to exclude certain vehicles should not be permitted. For example, a road operator may attempt to raise tolls to effectively ban motorcycles or hazmats to reduce liability and increase safety performance. Extremely high tolls in areas with few alternate routes are another unfair method of increasing profits.

- **Highway Users Barred from Negotiations.** As discussed above, when highway users are not included in the contract negotiating process, there are financial incentives for both the government and private negotiators to give the motorists a less-than-fair deal. For example, without highway users' involvement, a government negotiator may agree to sharper toll escalation, longer lease terms, lower performance standards, etc., in exchange for more up-front cash.

- **Longevity of Agreements.** Lease agreements in Chicago, Virginia, and Indiana range from 75 to 99 years. Yet modern French leases range from 22 to 27 years. Extremely long leases yield much larger upfront payments, but cannot be revisited for three or four generations! In Europe, many leases have profit caps. Once the cap is reached, a road reverts back to public ownership.

- **Disruption of Interstate/National Highway System Continuity.** Most roads on the National Highway System, including the Interstate Highway System, are free of tolls. Where tolls exist, the burden is generally minor, and is typically kept as low as possible to reimburse construction costs, pay for maintenance, and raise funds for capital improvements. When a road is leased to private investors, the tolls are raised to maximize profit (or tolls are raised to a rate ceiling prescribed by the terms of the lease). This change makes leased toll roads more financially burdensome than free roads or public toll roads. If widely deployed, such a system would effectively replace the existing network with a patchwork of private toll roads with high rates, different operators, and potentially different toll collection methods. Some proponents of road leasing have an eye on a larger prize: converting the entire Interstate Highway System into a patchwork of privatized toll roads. While such a policy may be supported by those who wish to do away with the current fuel and truck tax funded federal-aid highway program, this has major implications for interstate commerce.

- **Accessibility.** In rural areas, private road operators have tremendous leverage over the value of private land adjacent to the road. Opening new entrances to the privatized road or closing existing entrances would naturally raise or lower land values. In addition, private road operators could manipulate the success of roadside businesses and would be incentivized to do so if the private operator commercialized property within his right-of-way.

- **Double Taxation.** On privately-operated roads, highway users may still be expected to pay fuel taxes. These should be refunded since the user fees were paid while driving on non-publicly maintained roads.

- **Undervaluation.** As discussed above, a lack of professional expertise in negotiating lease deals with private investors combined with a rush to complete deals quickly may cause properties to be undervalued, even if offers are competitively bid. Independent reviews, profit caps and shorter leases should help reduce risk of undervaluation.

Principles

Considering both the opportunities and risks inherent in public-private partnerships, we would consider support for PPP agreements that:

- **are executed primarily for the construction of new roads or capacity;**
- **involve substantially streamlined construction;**
- **do not restrict vehicular access to free parallel routes;**
- **if premium lanes are tolled and general lanes are not tolled, all vehicles have the choice to use either the premium or general lanes;**
- **have high safety, mobility, pavement, structural, and maintenance performance standards;**

- **direct all government-acquired lease revenue to highway projects;**
- **do not have non-compete clauses;**
- **protect all highway users from excessive toll increases; and**
- **have highway users' formally participate in agreement negotiations.**

Conclusion

Thank you for considering highway users' perspectives on public-private partnerships. We believe that PPPs provide innovative opportunities for building new roads and lanes. With public funding in short supply, PPPs may be used to advance new road projects that might otherwise be delayed or cancelled. However, we remain concerned that poor agreements, particularly involving long-term road leases, may present real threats to motorists. We also continue to be concerned by the unqualified support for PPPs from the Department of Transportation and greatly appreciate the oversight of the Department from the Committee on Transportation and Infrastructure.

We look forward to working further with the Subcommittee and Full Committee to support actions to ensure that highway-related PPPs serve the highway users' interests. We also are committed to strengthening the trust in the Highway Trust Fund and supporting continued, strong federal involvement and support for our nation's national highway network. PPPs may provide an additional tool to solve our highway needs, but in no way do they diminish the need for a strong federal-aid highway program.

Before the

SUBCOMMITTEE ON HIGHWAYS AND TRANSIT OF THE COMMITTEE ON TRANSPORTATION AND INFRASTRUCTURE UNITED STATES HOUSE OF REPRESENTATIVES

Statement of

THE AMERICAN TRUCKING ASSOCIATIONS, INC.

On

PUBLIC-PRIVATE PARTNERSHIPS: STATE AND USER PERSPECTIVES

Bill Graves
President and CEO
American Trucking Associations

May 24, 2007

AMERICAN TRUCKING ASSOCIATIONS

Driving Trucking's Success

The American Trucking Associations, Inc.
2200 Mill Road
Alexandria, VA 22314-4677

INTRODUCTION

Chairman DeFazio, Congressman Duncan, members of the subcommittee, thank you very much for inviting the American Trucking Associations[1] to testify on this critical and timely topic.

Mr. Chairman, before I begin, I want to thank you and Chairman Jim Oberstar for the leadership you have shown in cautioning the states against rushing to judgment on the entire issue of public-private financing of our nation's highway program. It is vital that as you so eloquently state, "the public interest and the integrity of the national system" be protected.

The trucking industry is the linchpin in the nation's freight transportation system. The industry hauls 69 percent of the freight by volume and 84 percent by revenue. In addition, the trucking industry plays an important role in the movement of intermodal rail, air and water freight. Truck tonnage is projected to increase, reaching toward the 14 billion ton mark by 2017, and rising 31 percent over 12 years. Intermodal rail, meanwhile, will grow by 77 percent, yet it will account for only two percent of the total tonnage. Trucking revenue accounts for $623 billion of our nation's economy. The rest of the transportation modes combined account for $116 billion. By 2017, we expect to see 79 percent growth, and trucking revenue will exceed $1.1 trillion. This growth, of course, means a lot more trucks will be on the road. We estimate another 2.7 million more trucks will be needed to serve the nation's economy, a 40 percent increase.[2]

A seamless, reliable national network of highways is crucial to our industry's ability to deliver goods safely, rapidly and on schedule. Since deregulation and completion of the Interstate Highway System over the previous quarter century, the trucking industry has made continuous improvements that have allowed its customers to significantly reduce inventories and create manufacturing and supply chain efficiencies that have saved the U.S. economy billions of dollars, increased salaries, slowed consumer price increases and created innumerable jobs. Any disruption to the movement of freight on our nation's highway system will jeopardize these gains.

We strongly believe that while private financing of highway infrastructure may play a limited role in addressing future transportation needs, certain practices may generate unintended consequences whose costs will vastly exceed their short-term economic benefits. In particular, we are very concerned about attempts by some states to carve up the most important segments of the highway system for long-term lease to the highest bidder. Long-term concession agreements which turn control over highway assets to private parties are inconsistent with these objectives.

MEETING HIGHWAY INVESTMENT NEEDS

As has been well documented by other witnesses who have appeared before this committee during previous hearings, the highway system is woefully underfunded, many of our most

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[1] The American Trucking Associations is the largest national trade association for the trucking industry. Through a federation of other trucking groups, the industry-related conferences and its 50 affiliated state trucking associations, ATA represents more than 37,000 members covering every type of motor carrier in the United States.

[2] Global Insight, *U.S. Freight Transportation Forecast to...2017*, 2006.

critical highways are congested and large parts of our aging system must be rebuilt. The trucking industry, our customers and, ultimately, the American worker and consumer, will pay a steep price for the highway system's deficiencies. It is readily apparent that additional money must be found to address these needs, and that we must be smarter about how we invest these resources. ATA's members are willing to contribute additional funds in order to meet highway investment needs. However, before we can support a specific proposal, we must be satisfied that the additional money will be invested in highway projects which are most likely to meet the most pressing national needs; that federal regulations which hamstring efforts to improve the industry's safety and productivity are reformed; and that methods of user fee collection meet our criteria.

Highway user fees should:

- be reasonably uniform in application among classes of highway users;
- be based chiefly on readily verifiable measures of highway and vehicle use;
- not provide opportunities for evasion;
- be inexpensive and simple for government to administer, collect and enforce without imposing excessive administrative and record keeping burdens on highway users; and
- not create impediments to interstate commerce.

Tolls Versus Fuel Taxes

ATA believes that fuel taxes meet all of the above criteria, while tolls fail on certain critical points. Because of important measures adopted by Congress and by state and federal taxation agencies, fuel tax evasion is relatively low compared to other highway user fees. Tolls, on the other hand, are often easily evaded, usually by motorists using alternative, less safe routes that were not built to handle high levels of traffic.

There are significant capital and operating costs associated with collecting tolls, while fuel taxes are relatively inexpensive to administer. An analysis of a sample of publicly available toll authority financial reports found that revenue collection costs ranged from 21.9% to 30.3% of revenue, compared with collection costs of one to two percent for state fuel taxes, and even lower costs for collecting federal fuel taxes.[3] Moving to electronic toll collection requires significant initial capital investments; therefore, cost recovery due to administrative savings may take many years.

Furthermore, as the number of toll facilities grow, so too do the number of points of collection, creating an administrative nightmare for trucking companies who operate throughout the country and are often required to establish accounts with multiple tolling authorities. A lack of transponder uniformity will also force carriers to purchase and install multiple units.

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[3] American Transportation Research Institute, *Defining the Legacy for Users: Understanding Strategies and Implications for Highway Funding*, May 2007.

Toll Road Privatization

In recent years, some state and local governments have come to the realization that their highway assets may have value beyond these facilities' traditional role of providing a means of conveyance for people and freight. Due to overtures from mostly foreign investment firms, mayors, governors and other elected officials have concluded that locked up in these assets is a significant source of potential revenue that can be used to achieve various policy goals. Public officials from Kansas to New Jersey have been approached by investors seeking to take over toll roads in exchange for a one-time concession fee that can be worth billions of dollars. Indeed, Governors Corzine of New Jersey and Rendell of Pennsylvania have recently expressed support for privatization of some of the most important highway freight corridors in the country.

While the discussions tend to center on financing concepts and the great public benefits from concession fee revenue, what often gets lost or ignored is the impact of these deals on the users of the toll facilities and on the general public. Chief among the concerns is the impact of toll road privatization on toll rates. Demand elasticity, the art and science of determining how high rates can increase before a significant number of users will abandon the toll road, is the private operator's chief method for deciding appropriate toll rates. Private toll road operators need not be concerned about the social impacts of toll rates on low-income workers, or on the costs to businesses that depend on the highway for transporting employees, customers, goods or services. Nor do private operators care about the extent of traffic diversion to lesser quality, usually less safe, roads. Their sole concern is to maximize the toll road's profitability within the confines of the lease agreement and the law.

Supporters of privatization point out that toll rates are unlikely to increase substantially because customers will choose to simply migrate to toll-free roads. In some cases, this may be true – a reasonable toll-free alternative may be available. On most major toll roads, however, the only alternative may be a two-lane road with traffic lights and a significant amount of local traffic or, in the case of a toll bridge or tunnel, no alternative at all. Complicating the situation is the common practice of including non-compete clauses in lease agreements, which prohibit or severely restrict improvements to competing roads.

Privatization boosters also point to caps on toll rate increases that have been a standard part of privatization agreements. However, the two major lease agreements that have been completed in the United States – the Indiana Toll Road and Chicago Skyway – have been accompanied by very large initial rate increases combined with caps on future increases that by some estimates could exceed six percent annually. Close examination of these deals reveals the extent of the problem and should serve as warnings about future privatization efforts.

Chicago Skyway

In January 2005, the City of Chicago agreed to a concession agreement in which Cintra-Macquarie would take control of the highway for 99 years in exchange for a lump-sum payment of $1.8 billion. Concession revenue is to be used primarily to pay off city debt.

Macquarie-Cintra used similar toll escalation caps for both the Indiana Toll Road and Skyway deals. However, the availability of free alternatives may hold rates down on the Skyway. On the other hand, because the Chicago area is already very congested, an acceptable loss of traffic to the owners of the Skyway due to toll rate increases may have a negative impact on mobility on the alternative routes. Again, however, profit, not regional mobility or the larger public interest, is the operator's primary concern. Therefore, by giving up control of this asset, the city has also given up the ability to incorporate it into a broader transportation strategy, and may have inadvertently created a disconnect between its broader, short-term financial goals and long-term transportation and land-use planning objectives.

Toll rates will increase by 150% over the first 12 years of the lease and then are capped at about 6% (based on historical GDP/capita). Most Skyway users are Indiana residents, so there is little political impact from these increases and little recourse for users of the toll road other than to vote with their wallets and use an alternative route if possible. The toll rate increases are essentially a commuter tax, with the lessees and the city, not the payers of the tax, enjoying the benefits of the revenue. This points to another consequence of concessions: the government effectively surrenders its taxing authority to the private sector.

Indiana Toll Road

In 2006, the state of Indiana agreed to a 75 year lease with Cintra-Macquarie in exchange for a $3.85 billion concession fee. Under the agreement, toll rates for a 5-axle truck increase incrementally from $14.55 to $32.00 in 2010 (all figures assume the truck traverses the entire length of the highway). On June 30, 2010 the lessee can increase toll rates by 8.2%, the rate of inflation (CPI) or the annual rate of change in national GDP/Capita, compounded over the previous 4 years. Since 1960, the annual average rate of change in GDP/capita was 6.2%. From 2004 to 2005, the increase was 5.4%. Assuming a 5.5% annual average, the toll rate for a 5-axle truck may therefore increase by up to 23.9%, or to a rate of $39.64. Therefore, toll rates for a 5-axle truck may increase by about 172% over five years if the lessees decide to maximize toll rate increases.

The experience from toll rate increases on the Ohio Turnpike during the 1990s is instructive. When the Ohio Turnpike increased its truck toll rate to 17.6 cents/mile for 5-axle trucks, the result was massive diversion to alternate routes. The Ohio Department of Transportation found that a decade after the increase, growth in truck traffic on the turnpike was static, while truck traffic on parallel roads tripled. ODOT determined that these parallel routes had much higher accident rates. For example, U.S. 20, which saw a 267% increase in truck traffic, had a fatal accident rate that was 17 times higher than the Turnpike's rate. By 2010, the truck toll rate on the Indiana Toll Road is likely to be approximately 25 cents per mile, 42 percent higher than the Ohio Turnpike's toll rate at its peak. The two highways are essentially the same route, and have similar alternatives. Therefore, it is reasonable to expect a level of diversion on the Indiana Toll Road that is at least as great as was experienced in Ohio. This creates a significant safety concern for ATA and the industry.

The major difference between the states, of course, was that because the Ohio Turnpike Commission is a public authority, the Governor and Secretary of Transportation were able to make changes – including lowering truck toll rates and increasing speed limits – which attracted a substantial amount of truck traffic back to the turnpike. Because control of the Indiana Toll Road has shifted from public to private hands, addressing these types of issues will not be quite as easy, and the lessees will base all changes in their operations on the potential impacts on their profitability, and not on the impacts on the public welfare.

As bad as the situation may be under the 2010 toll rates, it may even get worse. Beginning on June 30, 2011, the lessees may use the same criteria identified for annual toll increases. Assuming an average annual 5.5% increase in GDP/Capita, the maximum potential toll rates for a 5-axle truck are:

- 5 years: 51.81
- 10 years: 67.71
- 20 years: 115.56

It has been suggested that these massive toll rate escalations are unrealistic because, as has been demonstrated on other facilities, including the Ohio Turnpike, raising the toll rate too high forces significant traffic off the highway. However, the lessee will set a toll rate to a level that maximizes profitability, not traffic. Indeed, a recent financial report by Macquarie revealed that while traffic on the Indiana Toll Road's barrier system actually declined by 1.6% between July 2006 and March 2007, and increased by just 0.2% on the ticket system, revenues shot up by a whopping 46.2% due to large toll rate increases.[4]

Lessees have no interest in and no responsibility for what happens off the toll road. In fact, if Indiana wants to build an Interstate-quality highway to address traffic problems caused by diverted toll road traffic, the state will have to compensate toll road owners for loss of revenue. This creates a perfect scenario for the lessee: a portion of the revenue lost due to diversion of traffic as a result of high tolls will simply come back as compensation from the state, and the lessee profits additionally by avoiding maintenance and expansion costs that it would otherwise have borne had that traffic not diverted. The combination of state construction costs and compensation to the lessee could very well exceed the state's concession fee over the course of a 75 year lease.

Finally, the projected toll rates, by the very nature of a concession with a for-profit company, will far exceed what is necessary to raise sufficient money for the operation, maintenance and improvement of the Indiana Toll Road. This means that toll road users will be forced to subsidize other state functions and enrich toll road investors, with little or no benefit to themselves.

Recommendations

Beyond the concerns over toll rates, there are also questions about whether private toll road operators will act in the public's best interest. It is impossible to predict changing circumstances

[4] Macquarie Infrastructure Group. *Management Information Report for the Quarter Ended 31 March 2007.* May 1, 2007 p. 7.

over the life of a lease, which tend to be long-term – up to 99 years in duration. Many of the facilities under consideration for private takeover are among the most critical links in our freight and military logistics chains. They are also important commuter and tourist arteries. Will the private operators act in the public interest, even if it cuts into their bottom line? Given that their responsibility is to their shareholders, this is unlikely. When other corporations act in a manner that is not perceived to be in the public's best interest, the free market tends to correct their behavior. In a situation where the corporation essentially has a monopoly, these market forces do not exist. When the free market fails, government must often step in to protect the public. ATA believes that when it comes to the long-term lease of critical highway infrastructure, it is necessary and appropriate for the federal government to take action to prevent the public from being gouged and to establish interstate commerce protections, as delegated to the federal government by the Constitution.

Securitization of Toll Facilities

An alternative to a private-sector concession is public-sector securitization, in which a public toll authority retains control of the facility, but makes lump-sum payments to the state with borrowed money that is backed by anticipated future toll revenue. Supporters suggest that this approach should allay some of the concerns associated with transferring control over an asset to a non-governmental entity. While this may be true, one fundamental problem still exists – the toll road user still pays a higher toll rate than is necessary to maintain, operate and improve the facility, and is thus forced to subsidize unrelated public expenditures. We do not believe that securitization is an acceptable alternative to privatization.

The Public Opposes Privatization

Public opinion surveys clearly demonstrate that voters oppose toll road leases. A recent survey of 800 likely voters in Pennsylvania found that 59% opposed leasing the Turnpike, while just 31% supported the concept.[5] The survey showed that respondents were not swayed by arguments in favor of a lease, such as the generation of significant revenue for state priorities or the prospect of more efficient and more customer-responsive management.

A separate survey found similar opposition to leasing the New Jersey Turnpike and Garden State Parkway. A poll of that state's voters found that 56% opposed the idea, while just 34% supported it.[6]

A statewide survey of Indiana voters shows that Hoosiers were unconvinced of the value of the Indiana Toll Road lease.[7] The survey, conducted several months after the lease agreement was finalized, revealed that 52% of respondents opposed the lease, while only 33% supported it. A survey of voters in northern Indiana who live in counties through which the toll road travels found even greater opposition by a margin of 66%-22%.

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[5] Susquehanna Polling and Research, April 12-17, 2007. Survey of 800 likely Pennsylvania voters (margin of error +/-3.4%).

[6] Quinnipiac University survey of 1,302 New Jersey voters (margin of error +/- 2.7%), February 20 – 25, 2007.

[7] The polling company, Inc. Survey of 500 likely voters statewide (margin of error +/- 4.4%) and survey of 400 likely voters in northern Indiana (margin of error +/- 4.45%), Nov. 10-16, 2006.

Tolling Existing Highways

ATA is strongly opposed to tolls on existing Interstate highways. While federal law generally prohibits this practice, Congress has, over the years, created a number of exceptions. Imposing tolls on existing lanes of the Interstate System would have a devastating effect on the trucking industry. Virginia, for example, recently considered a truck-only toll on I-81 of $0.37 per mile. The trucking industry is highly competitive and it will be extremely difficult for carriers to recover these costs.

Tolls also represent double taxation. Truckers currently pay a federal diesel fuel tax of 24.4 cents per gallon, a 12% excise tax on new tractors and trailers, an annual vehicle use tax of up to $550, and a tax on tires. They also pay various state highway user fees. While the industry supports a system of taxation based on highway use, charging tolls on top of these fees is inefficient, inequitable and unfair.

Mandatory tolls have other detrimental effects. They create two classes of drivers: those who can afford to pay a toll and those who cannot. And they cause diversion of traffic to other, often less safe roads.

The trucking industry is not alone in its opposition to tolls. The public, by a wide margin, opposes tolls on the existing Interstate system. In a national survey commissioned by ABC/*Time*/*Washington Post* and conducted in January 2005, 88% of responders opposed a toll to drive into city centers, and 68% opposed using tolls to control congestion. Other surveys have shown similar results.

Miscellaneous Funding Sources

We encourage Members to consider potential additional revenue sources identified in a new report by the American Transportation Research Institute.[8] Many of these funding sources could be considered "low-hanging fruit."

Eliminate Government Vehicle Subsidies

Government fleets represent a very large hidden subsidy vis a vis their exemption from, or tax reimbursement of, fuel taxes. These fleets are large and consume well over 3 billion gallons of fuel annually. The simplistic argument is that government ought not charge itself taxes. Unfortunately, the more pressing, and unstated, issue is user-payment equity and unfair subsidies. It is well understood that publicly owned vehicles such as transit buses, snow-plows and road construction trucks transmit considerable axle-weight pressures. ATRI research shows that a significant percentage of these government vehicles do not pay state and/or federal fuel taxes. The effect is that pavement damage, infrastructure maintenance costs, and related revenue shortfalls caused by government fleet exemptions are borne by, and blamed on, the private-sector users.

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[8] American Transportation Research Institute, *Defining the Legacy for Users: Understanding Strategies and Implications for Highway Funding*, May 2007.

All IRS federal fuel tax exemptions must be eliminated in order to identify, attribute and collect the desired federal user fees. Alternatively, any subsidies must be borne by general funds, not by the Highway Trust Fund. The impact of exempting government fleets from state fuel taxes is also significant and important, but more politically challenging. The value to just the Federal HTF exceeds $1 billion per year. Eliminating state subsidies would generate hundreds of millions in additional dollars for highway investments.

Eliminate LUST Fund

Eliminate all state and local LUST funds. In nearly every instance that a state "leaking underground storage tank" remediation fund has been challenged in court as not being an appropriate use of HTF revenues, the court has required the removal of the LUST fund from the HTF. The Federal LUST fund receives about $70 million each year from gas and diesel fuel taxes.

Redirect HTF Interest to Transportation

Since 1998 interest generated by the HTF has been deposited in the General Fund. Redirecting the interest back into the HTF could add an average of $2 billion annually.[9]

Reduce Fuel Tax Evasion

While Congress, the states and the Internal Revenue Service have made solid progress toward reducing federal fuel tax evasion, opportunities exist to reduce revenue illegally withheld from the HTF. According to one analysis, as much as 25%, or $9 billion, of federal fuel tax revenue may be lost annually to evasion.[10] However, other estimates suggest the rate of evasion might be far lower.

CONCLUSIONS

Thank you for giving ATA the opportunity to comment on this very important topic. We firmly believe that an over reliance on private financing of highways is not in the best interest of highway users. While private financing may be appropriate under some very limited circumstances, fuel taxes will continue to be the primary financing mechanism for highway projects well into the future. We look forward to working with the Subcommittee to develop highway funding options that serve the best interests of highway users and the U.S. economy.

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[9] Cambridge Systematics. *Future Highway and Public Transportation Finance. Phase I: Current Outlook and Short-Term Solutions.* National Chamber Foundation, United States Chamber of Commerce. 2005

[10] FHWA. *Fuel Tax Evasion.* Office of Transportation Policy Studies. Jun 29. 2005d. Available at http://www.fhwa.dot.gov/policy/otps/fueltax.htm.

Testimony of California State Senator Alan Lowenthal
May 24, 2007

Mr. Chairman and Members:

Thank you for inviting me here today to discuss California's experience with public-private partnerships and to share my thoughts concerning a direction that a policy on PPPs might take.

When it comes to transportation funding, California is in the midst of the same struggle as is the federal government: California has not raised its gas tax since 1994, and the value of the tax has eroded substantially due to inflation and rising construction costs. At the same time, the state expects tremendous population growth, with the number of vehicle miles traveled growing at an even faster rate. People are driving increasingly more, placing greater demands on our transportation system. As a result, the state has been in the uncomfortable position of under-investing in its transportation infrastructure. And today we have some of the worst congestion in the nation.

PPPs have been increasingly presented to policy makers as a "tool" to finance much needed transportation facilities. In California, the debate has focused solely on using PPPs for greenfield development, that is, a situation whereby a public agency enters into a long-term concession or lease agreement with a private entity for the design, build, finance, and operation of a new transportation facility. As a state, we are not considering the "sale" of existing assets such as the Golden Gate Bridge.

California's Experience with PPPs

PPPs are not new to California. In 1989, the Legislature passed legislation that authorized the state Department of Transportation, referred to as Caltrans, to enter into contractual agreements with private entities for the construction and operation of four privately financed toll roads. The first project developed under this authority was the SR 91 Express Lanes, which consisted of toll lanes in the median of an existing state highway. The California Private Transportation Company (CPTC) entered into a franchise lease agreement with Caltrans to construct and operate the toll lanes, which were constructed for $139 million and opened in 1995.

The SR 91 toll lanes generated substantial controversy. A clause in the lease agreement between Caltrans and CPTC prohibited the department from granting similar franchise rights to third parties or developing any public transportation facility within an "Absolute Protection Zone." This restriction, commonly referred to as the "non-compete clause," was deemed necessary to protect the toll road's profitability and CPTC's investment. Caltrans proposed to make a number of "safety" improvements totaling $30.6 million, in order to curb the growing number of congestion-related accidents, but after CPTC sued, Caltrans settled and the improvements were not made. Congestion on SR 91 continued to worsen. In 2002, legislation was passed that allowed the Orange County Transportation Authority (OCTA), a public agency, to purchase the franchise rights to the toll lanes from CPTC, effectively repealing the non-compete clause and facilitating improvements along the corridor. OCTA acquired the SR 91 toll lanes for $207.5 million, making California's first operational private toll project a public facility.

California's second and only other PPP is State Route 125. This project was begun in 1991, but the project approval process proved to be lengthy, and final environmental clearance was not granted until 2001. In 2003, the project received financing from Macquarie Infrastructure Group and construction began. The 12 ½-mile project has experienced significant cost overruns and project delays. Who bears responsibility for these increased costs – the public or the private partner - is subject to dispute between the two parties. To facilitate the resolution of this dispute, the state legislature passed legislation to extend CTV's lease agreement and the period of time that tolls may be charged for use of the facility. This facility is not yet in service, and already the authority to charge motorists tolls has been extended.

Costs versus Benefits

California's experience with PPPs lends support to the following concerns about these arrangements:

- Concession agreements may limit the ability of a public agency to adapt to the changing transportation needs of a region. For example, non-compete clauses and clauses which require a public agency to pay "just compensation" to a private entity for the development of a nearby, competing facility constrains the ability of the public agency to make improvements to the area's transportation system and increases the cost of those projects for the public agency.

- Working with a private entity may be a contentious, potentially litigious endeavor for public agencies because private companies may work to protect their investment over the public interest.

While PPPs have a troubled history in California, the state recognizes that an important advantage of development concessions may be that, because private companies use their own capital to finance the construction of a facility, state and local agencies may be able to build a larger number of projects and/or projects that are larger in scope. For this reason, I offer the following thoughts as a potential way forward on this issue.

A Way Forward: PPPs in Goods Movement

One arena in transportation that might be ripe for public-private partnerships is goods movement. Last year, the California Legislature passed legislation to authorize four PPPs in the realm of goods movement. The state's infrastructure can barely handle existing trade activity, let alone accommodate the coming growth. Forty-five percent of the nation's seaborne cargo enters the state via the Ports of Los Angeles and Long Beach, the majority of which is simply passed through our state to other parts of the country, and the level of trade is expected to double by 2020. Southern California is experiencing a public health crisis due to poor air quality associated with goods movement-related emissions. And, the federal government is nowhere in sight.

Under the current system of transportation funding, retailers and manufacturers profit from using California's transportation infrastructure. Public-private partnerships could provide needed goods movement-related facilities. Examples of projects include truck-only toll lanes, toll bridges, and rail projects, among other types of facilities.

The primary users and beneficiaries of these facilities would be private entities such as retailers and manufacturers, and the trucking companies or railroads employed to move their cargo. Limiting PPPs to goods movement, where a private company (concessionaire) charges other private companies (retailers, manufacturers, trucking companies) for the use of the facility, evens the "playing field" so to speak between those who control the facility and those who pay to use it. Cargo owners have a greater ability to pay for their use of the facility and/or pass on their costs and they have a greater ability to choose different facilities (e.g., other ports) if the price of doing business using that facility becomes too high.

In short, I believe one direction a policy on PPPs may take is to encourage their use for the development of goods movement-related infrastructure projects to demonstrate their actual potential and their actual risks.

Since passing legislation authorizing PPPs for this purpose, we have heard concerns that the authority is not broad enough or creates obstacles that are two difficult to overcome. Rather than suggesting amendments to the current policy for PPPs in goods movement, advocates for PPPs have sought to expand the authority to include all types of transportation projects. Before the state will consider a broader policy, the following questions must be addressed:

- Assuming the authority to impose tolls or user fees exists, what legal and financial obstacles preclude a public agency from developing a toll facility and achieving the same benefits as a PPP? What is the advantage of involving the private sector in finance?

- What is the proper assignment of risk in these transactions? How much risk should the public sector bear versus that which the private sector bears?

- Do facilities developed by a private company, which has a duty to provide a reasonable rate of return to its investors, ultimately cost the public (i.e., the users) more if it were developed by a private company than if it were developed by a public agency, which has no such duty?

- To what extent would the capacity of a project to generate revenue dictate which transportation projects were developed and which were not, potentially leading to a fragmented transportation system that may not, over time, meet the needs of the state as a whole?

Before I close, I would also like to suggest that there are a series of intermediate steps that states may take to address infrastructure dilemmas and to take advantage of private sector benefits such as innovation and efficiency. First, states could develop more publicly-operated toll facilities, which also invite private capital into the mix through the sale of tax-exempt bonds. States could allow a greater role for the private sector in the operation of facilities. Finally, regardless of whether a facility is public or private, both the federal government and states should do more to encourage demand management strategies in order to achieve higher performance from our existing facilities.

Thank you very much for your time. I am happy to answer any questions you may have.

Tolls, User Fees, and Public-Private Partnerships: The Future of Transportation Finance in California?

An Informational Hearing of the Senate Transportation and Housing Committee

Wednesday, January 17, 2007
1:30 – 4:30 pm
Room 4203, State Capitol Building

Background

Introduction

This hearing will consider the state's policy concerning the use of user fees to fund transportation projects. Questions before the Committee include whether and in what ways to expand the authority to develop toll facilities, and whether and under what conditions to allow public agencies to enter into lease agreements with private companies to do so.

As part of Governor Schwarzenegger's Strategic Growth Plan last year, the Administration proposed authorizing state and local agencies to enter into long-term lease agreements with private entities for the design, build, finance and operation of transportation facilities, arrangements known as "public-private partnerships (PPPs)." One objective of the Administration's proposal was to leverage public funds with private sector investment to enable state and local agencies to develop more transportation projects than otherwise might be possible.

It its proposal, the Administration sought broad, open-ended authority, yet failed to clearly describe to the Legislature its specific objectives or to identify potential projects that would achieve those goals. In response, the Legislature passed AB 1467 (Núñez), Chapter 32, Statutes of 2006, allowing for four transportation facilities to be developed through PPPs with the condition that projects "be primarily designed to improve goods movement." The legislation also authorized transportation authorities to operate high occupancy toll (HOT) lanes, including exclusive lane facilities for public transit service and the administration of a value pricing program.

Due to remaining questions regarding the scope of this policy, in concert with a growing inability to fund the state's transportation needs adequately, the Senate Transportation and Housing Committee is re-examining AB 1467. In doing so, it is taking a step back from the narrow issue of PPPs and considering a broader policy on user fees, usually paid in the form of tolls, as a way to provide funding for transportation facilities.

Today's hearing has three objectives. The first is to learn about California's existing public and private transportation facilities that are financed at least in part by charging tolls to users. What lessons have been learned that the Legislature should understand as it considers a policy on user fees and private sector investment to finance transportation facilities? The second objective is to understand some of the benefits of tolling. In what ways can tolling regimes be established to achieve multiple transportation goals, such as reduced congestion, improved air quality, and increased transportation choices for the public? The third is to understand the circumstances under which PPPs serve the public's interest, and whether it is appropriate for the private sector to be involved in the development of a system that is intended to provide a benefit to the public? What criteria should be used in evaluating whether a PPP is an appropriate option for developing a needed facility? What are the benefits and risks of PPPs and what can a public agency do to maximize the benefits while reducing the risks to the public?

The Problem of Transportation Funding Today: Increasingly Fewer Options to Pay for Increasingly Costly Projects

Funds for transportation projects have traditionally come from two sources: taxes and user fees. The vast majority of state and federal transportation funding comes from taxes on fuel. State and federal excise taxes are flat, and have lost much of their value to inflation and rising construction costs.

The federal excise tax on gasoline is currently 18.3 cents per gallon, and some estimates indicate that between 1996 and 2008, the real value of the tax will decline 26%. The federal government is projected to spend more on transportation than it earns from the gas tax. To address this issue, the last federal transportation act – the Safe, Accountable, Flexible, Efficient Transportation Equity Act - A Legacy for Users (SAFETEA-LU) – established the Surface Transportation Policy and Revenue Study Commission to examine options to replace or supplement the fuel tax.

California charges an 18-cent per gallon excise tax on gasoline and diesel fuel. This tax, known as the "gas tax," has not increased since 1994, and has lost approximately 40% of its value. As an indication of the growing gap between funding and needs, in 2006, gas tax revenues were insufficient to fund California's most basic highway rehabilitation needs, let alone to pay for new projects.

In 2002, voters approved Proposition 42, which dedicated the sales tax on gasoline to transportation projects. Unfortunately, these funds have not made up for the lost value of the excise tax on gas and its dedication to transportation has been suspended on several occasions to help address the state's on-going budget deficit.

As the value of federal and state fuel taxes has eroded, continued population growth places increasing demands on the state's transportation system and the cost of construction has increased dramatically. California currently has 37 million residents. By 2025, the population will approach 50 million people. Further, according to an analysis prepared by the Public Policy Institute of California, the vehicle miles traveled (VMT) by Californians is increasing at a much faster rate than population growth. People are driving increasingly more.

The cost of construction to accommodate the growth in population and the number of miles they drive has risen at a steep, and often unpredictable rate. Between January 2000 and December 2006, for example, the cost of construction has increased by approximately 30%.

Last year, voters approved Proposition 1B, which authorized the sale of approximately $20 billion in bonds for transportation purposes. While an important step in strengthening California's infrastructure, Proposition 1B represents a one-time investment to address a backlog of transportation projects. To realize fully the benefits of this investment, it will be critical for the state to develop a stable, sustainable source of revenue for future transportation projects.

Despite the calls by many to increase fuel taxes, or at a minimum, index them to inflation, the cost of construction, or some other measure, there is not much will to increase taxes at this time. This political reality brings us to the other traditional source of transportation funding: user fees. User fees are most commonly paid by motorists in the form of tolls on highways.[1]

Toll Roads, Express and HOT Lanes, and Public-Private Partnerships

<u>Toll Roads</u>
Publicly owned and operated toll facilities are generally financed by issuing tax-exempt bonds to raise funds for the project. Bond holders are later repaid with toll revenues. The federal government has been increasingly supportive of building toll roads and lanes, and state interest in tolling has grown. According to the Federal Highway Administration (FHWA), 26 states have undertaken toll road projects since 1992 to build 2,719.5 miles of new roads.

California has five toll roads, all located in the County of Orange. In 1986, the Legislature gave the Transportation Corridor Agencies (TCA) authority to develop and operate a series of toll roads in Orange County, including San Joaquin Hills Toll Road (SR 73), Foothill Toll Road (SR 241), and the Eastern Toll Roads (SR 241, 261, and 133). The Transportation Corridor Agencies is made up of two public agencies: the San Joaquin Hills Corridor Agency and the Foothill/Eastern Transportation Corridor Agency. Each agency is governed by a board of

[1] In the realm of goods movement, user fees have been paid in the form of "container fees." The Alameda Corridor Transportation Authority, for example, charges railroads $18.04 per twenty-foot equivalent unit (TEU) (TEU is a measure of container size) to use the Alameda Corridor, which is a 20-mile freight rail expressway between the neighboring ports of Los Angeles and Long Beach and the transcontinental rail yards and railroad mainlines near downtown Los Angeles.

directors consisting of elected officials from the County of Orange and each city through which the toll roads operate.

An important advantage of publicly operated tolls roads is the presence of a public body that may be held accountable for the impacts the facility has on users. A second advantage is that excess toll revenues are often reinvested into the corridor to increase the capacity of the facility or provide other transportation options such as bus rapid transit.

The principal criticism of toll roads, relative to non-tolled roads, is that users of the facility are being "double-taxed." Members of the public have already paid taxes on fuel to support transportation; by paying a toll, users would be burdened by an additional fee. Further, by facilitating the movement of people and goods, an effective transportation system supports the economy as a whole. Is it fair for individual users of a facility to bear the full costs of a facility that ultimately benefits an entire region?

Express Lanes and High Occupancy Toll (HOT) lanes

Express lanes and HOT lanes are located in the median or adjacent to free lanes, but charge a toll for their use. Express lanes are simply designed to provide a reliable, congestion-free trip. HOT lanes began as high occupancy vehicle (HOV) lanes (i.e., carpool lanes), but as many HOV lanes were under-utilized and congestion increased on the non-HOV lanes, legislation was passed to allow single-occupant vehicles to use the HOV lanes for a fee.

To manage congestion on these toll facilities, toll authorities began to employ a pricing method known as "congestion pricing." Congestion pricing, also referred to as value pricing, variable pricing, or dynamic pricing, refers to adjusting the price of tolls throughout the day according to the volume of traffic using the facility. As volume and the potential for congestion increases, for example at peak commute times, the toll increases accordingly. Congestion pricing is based on the principle that increasing the toll will cause some drivers to choose not to use the toll lanes, thus reducing traffic volume and preventing congestion.

There are two primary advantages of this tolling method. The first is the ability to provide the guarantee of a reliable trip on those lanes for those who need it. This is helpful not only to individuals, but also, to businesses who depend on a schedule for the delivery of goods and services. Second, preventing congestion-induced delays on one lane may allow a greater number of vehicles to pass through the corridor as a whole.

California has two HOT lane facilities currently in operation - the SR 91 Express Lanes in Orange County and an 8-mile segment of I-15 in San Diego County – and two others in development - a 14-mile segment of I-680 in Alameda County and a 20-mile extension of the I-15 HOT lanes in San Diego. The Riverside County Transportation Commission recently approved a proposal to pursue projects that would extend the SR 91 Express Lanes into Riverside County and add two HOT lanes in either direction on I-15.

The principal criticism of express and HOT lanes is reflected in the term, "Lexus Lanes," which is used to suggest that affluent users are given advantages over lower-income drivers who may not be able to afford the cost of tolls. Opponents of toll lanes believe that transportation agencies should invest in facilities in ways that provide benefits to all users.

Public-Private Partnerships

As the debate concerning how to involve the private sector in transportation has evolved in recent years, the term "public-private partnerships" has been applied to a broad array of arrangements and engendered much confusion. Indeed, there are many ways to involve the private sector, including in project design and construction (e.g., design build method of construction procurement), financial planning, operations, toll collection, or maintenance. For example, the Bay Area Toll Authority, a public agency, has a contract with ACS State and Local Solutions, a private company, to manage toll operations on the Bay Area's six state-owned toll bridges.

For purposes of financing transportation facilities, the most relevant form of PPPs occurs when a public entity enters into a long-term concession (or lease) agreement with a private entity that finances, operates, and maintains the facility for a profit. While not new, the concession of transportation facilities in the United States is in its early stages. Twenty-one states, including California, have statutes in place allowing for PPPs in some form, but the scope of the policy, level of private sector involvement, and other conditions placed on the concession vary greatly from state to state.

In general, there are two types of concession arrangements. The first concerns the "sale" of an existing asset to a private company. Under this arrangement, the private entity pays a negotiated price in return for the right to charge tolls or other fees for a specified period of time in order to earn a reasonable rate of return on its investment. An example of this type of arrangement was the 99-year lease of the Chicago Skyway to the Macquarie Infrastructure Group-Cintra Consortium for $1.83 billion in 2004.

The second type of concession arrangement, and one that is most relevant to today's hearing, occurs when a public agency enters into a long-term agreement with a private entity for the design, build, finance, and operation of a new facility. This is known as a development concession. As will be discussed in a subsequent section of this report, California has experience with development concessions for two facilities: the State Route 91 Express Lanes in Orange County and State Route 125 in San Diego County.

The concessionaire, or leaseholder, raises its own money to finance the development of the facility. To pay underlying project debt, which includes providing a reasonable rate of return to investors, the project must have a dedicated source of revenue. This revenue source is most often found in the form of user fees (tolls). Although in a very limited number of projects, a public agency has agreed, as part of the concession agreement, to make payments to the concessionaire on a periodic basis based on usage of the facility or the attainment of specified performance goals.

An important advantage of development concessions is that private companies use their own capital to finance the construction of a facility, relieving a public agency from the burden of raising sufficient funding. Because of this advantage, state and local agencies may be able to build a larger number of projects and/or projects that are larger in scope. A second advantage of private concessions is that they may shift responsibility for raising tolls to meet ongoing operation and maintenance costs away from public officials, who may feel reluctant to do so.

While PPPs may be a tool to help state and local agencies meet growing transportation needs, they raise a number of questions, concerns, and criticisms among the public. These include:

- With an expanded authority to toll, a public agency may be able to generate sufficient funds to develop transportation facilities on its own without relying on private capital.

- An individual project may cost the public (i.e., the users) more if it were developed by a private company, which has a duty to provide a reasonable rate of return to its investors, than if it were developed by a public agency, which has no such duty.

- The capacity of a project to generate revenue may dictate which transportation projects are developed and which are not, potentially leading to a fragmented transportation system that may not, over time, meet the needs of the state as a whole.

- Concession agreements may limit the ability of a public agency to adapt to the changing transportation needs of a region. For example, clauses in a lease agreement which require a public agency to pay "just compensation" to a private entity for the development of a nearby, competing facility constrains the ability of the public agency to make improvements to the area's transportation system and increases the cost of those projects for the public agency.

- Working with a private entity may be a contentious, potentially litigious endeavor for public agencies because private companies will work to protect their investment over the public interest.

- Public officials are "outsourcing" political will to address funding shortfalls.

California's Experience with PPPs

In 1989, the Legislature approved AB 680 (Baker), Chapter 107, which authorized the Department of Transportation to enter into contractual agreements with private entities for the construction and operation of toll roads. Four demonstration projects were authorized in order to augment or supplement public sources of revenue because "(p)ublic sources of revenue to provide an efficient transportation system have not kept pace with California's growing transportation needs."

Under that bill, a private entity could obtain an exclusive development agreement for 35 years to construct a toll road facility. These agreements required that toll revenues be applied to "payment of the private entity's capital outlay costs for the project, the costs associated with operations, toll collection, and administration of the facility, reimbursement to the state for the costs of maintenance and policy services, and a reasonable rate of return."

Supporters of the measure saw it as an innovative way to address the problem of traffic congestion, contending that private roadways could serve as an important component of the state highway system. Only two projects have been constructed with this authority: SR 91 toll lanes in Orange County and SR 125 in San Diego County.

State Highway Route 91 Toll Lanes

The SR 91 project consisted of toll lanes in the median of existing SR 91 extending 10 miles. State Route 91 is an 8-lane, non-tolled freeway extending from I-405 in Los Angeles County to Interstate 15 in Riverside County. California Private Transportation Company (CPTC) entered into a franchise lease agreement with Caltrans to construct and operate toll lanes in the median of SR 91. The toll lanes were constructed for $139 million and opened in 1995.

The SR 91 toll lanes generated substantial controversy. A clause in the lease agreement between Caltrans and CPTC prohibited the department from granting similar franchise rights to third parties or developing any public transportation facility within an "Absolute Protection Zone." This zone was comprised of the area 1 ½ miles on either side of the centerline of the toll road facility. This restriction, commonly referred to as the "non-compete clause," was deemed necessary to protect the toll road's profitability and CPTC's investment. Caltrans proposed to make a number of "safety" improvements totaling $30.6 million, in order to curb the growing number of congestion-related accidents. Caltrans' accident statistics indicated that the accident rate on this portion of the freeway was approximately 72% higher than on comparable freeways in the state. In response to the proposal, CPTC filed a lawsuit against Caltrans for violating the non-compete clause of its franchise agreement, arguing that the proposed project was not safety related, but in fact designed to increase capacity. Caltrans settled on October 12, 1999.

Additionally, although usage of the toll lanes increased from 1995 to 1998, the toll lanes experienced only one profitable year, 1998. The CEO of CPTC suggested in a newspaper article that the company would not turn a profit until 2004 unless the company could refinance its debt or find a buyer. CPTC was purportedly involved with the formation of NewTrac, a nonprofit company that could use tax-exempt bonds to buy the SR 91 toll road project. The sale raised a number of concerns about the nonprofit company and the propriety of the sale, and the sale was ultimately abandoned.

Meanwhile, congestion on SR 91 continued to worsen, reaching intolerable levels. In 2002, AB 1010 (Correa), Chapter 688, allowed the Orange County Transportation Authority (OCTA) to purchase the franchise rights to the toll lanes from CPTC, effectively repealing the non-compete clause and facilitating improvements along the corridor. OCTA acquired the SR 91 toll lanes for $207.5 million, making California's first operational private toll project a public facility.

State Highway Route 125

The SR 125 highway project consists of a 3.2-mile public, non-tolled segment (referred to as the "Gap and Connector" project that will be operated by the San Diego Association of Governments) and a 9.3-mile privately operated, tolled segment. Together, this highway will connect SR 905 near the international border to SR 54. Both segments are being constructed by California Transportation Ventures, Inc. (CTV), a wholly-owned subsidiary of Macquarie Infrastructure Group, but CTV is only responsible for the costs of the private segment. Under the franchise lease agreement with the state, CTV will charge tolls for 35 years in order to recoup its costs and earn a reasonable rate of return on its investment. CTV's rate of return is capped at 18.5% over the 35-year period of the lease.

The extension of SR 125 has been included in the state's freeway plans since 1959, and the route was added to San Diego's 20-year regional transportation plan in 1984. Following the enactment of AB 680 in 1989, plans were initiated for this facility. In 1991, a lease agreement was completed and initial project studies and design were begun. Development and project approval proved lengthy and final environmental clearance was not granted until 2001. In 2003, the project received financing from Macquarie Infrastructure Group and construction began.

The cost for the Gap and Connector project (public, non-tolled segment), which CTV is building, is $138 million. The 9.3-mile private segment that CTV will operate was originally estimated to cost approximately $400 million, but the actual costs today are closer to $635 million, representing a 70% increase. The project as a whole is currently estimated to cost approximately $786 million, and delays have pushed the opening of the facility to the summer of 2007.

Both the tolled and non-tolled segments have experienced significant cost overruns and now project additional future costs, which have been and will continue to be borne by both SANDAG and CTV. Who bears responsibility for these increased costs – SANDAG or CTV – is subject to dispute between the two parties. The total amount in dispute is $72 million.

Last year, the Legislature passed SB 463 (Ducheny), Chapter 446, to extend CTV's lease agreement and the period of time that tolls may be charged for use of the facility. The purpose of this bill was to provide a mechanism for SANDAG and CTV to determine how these increased costs will be addressed, regardless of who is ultimately deemed responsible.

The increased costs that remain to be resolved are due to several factors. The principal drivers of the cost increases, and those for which revenue from the extension period would be used, include the following:

Compensation for competing facilities. The franchise agreement included a "just compensation" clause requiring CTV to be compensated for loss of revenue due to the expansion or construction of competing transportation facilities. SANDAG is currently planning three projects in the adjacent I-805 corridor, which are not included in the lease agreement. These projects are expected to be completed in 2012, 2015, and 2030. Under the current lease agreement, CTV will be due compensation for any traffic and revenue reductions that these three projects create.

Increased costs of rights-of-way. Over the course of the project, the costs of acquiring rights-of-way have increased. SANDAG estimates that approximately $18-$20 million will be needed to complete the purchase of the necessary rights-of-way for the project. About $10 million is for rights-of-way for the tolled segment that CTV is required to pay for, and $8-$10 million is for the non-tolled segment that CTV is constructing on behalf of Caltrans (though paid for by SANDAG) and for which it is seeking reimbursement.

Increased costs for environmental and community mitigation measures. Three mitigation measures seem to be driving the cost increase. The first concerns an alignment change of the non-tolled highway segment that CTV is constructing. The original alignment would have traversed an environmentally sensitive area, so the alignment was changed. The new alignment, however, went over rock that was especially difficult to build through. This caused construction delays and increased costs. The second environmental challenge concerned the Cedar Fires of 2004, which burned the habitat preservation CTV had completed as part of its responsibility to mitigate the environmental impacts of the project. Finally, the process of acquiring rights-of-way and necessary property has been ongoing and the costs of community mitigation measures (e.g., the construction of ball fields) have been higher than originally anticipated.

The cost over-runs, project delays, and the ongoing dispute between SANDAG and CTV give some pause as to whether and how the private sector can effectively provide a public facility. The facility is not yet in service and already increased costs are being transferred to motorists who will be paying tolls for a longer period of time.

Relevant Legislation

AB 521 (Runner), Chapter 542, Statutes of 2006 amended AB 1467 (Núñez), stipulating that the Legislature has 60 legislative days to act after submittal of a negotiated lease agreement with a private entity for the design, build, finance, and operation of a transportation facility. The agreement will be deemed approved unless both houses of the Legislature concur in the passage of a resolution rejecting the agreement.

SB 463 (Ducheny), Chapter 446, Statutes of 2006 allowed for the extension of the franchise lease agreement between the state and the private entity that is constructing and operating State Highway Route (SR) 125 in San Diego County for up to ten years. This bill also authorized the San Diego Association of Governments (SANDAG), upon expiration of the franchise lease agreement, to continue charging tolls on SR 125, provided specified conditions are met.

AB 1467 (Núñez), Chapter 32, Statutes of 2006 authorized Caltrans to enter into up to four lease agreements with private entities for transportation projects related to goods movement. The measure also authorized regional transportation agencies to develop and operate high-occupancy toll lanes, including the administration and operation of a value pricing program and exclusive or preferential lane facilities for public transit.

AB 2032 (Dutra), Chapter 418, Statutes of 2004 authorized SANDAG, the Sunol Smart Carpool Lane Joint Powers Authority, the Santa Clara Valley Transportation Authority, and the Alameda County Congestion Management Agency to allow single-occupant vehicles to use the high occupancy vehicle lanes for a fee and to undertake value pricing programs.

AB 1010 (Correa), Chapter 688, Statutes of 2002 reduced the number of public-private partnership agreements authorized under AB 680 from four to two, and prohibited Caltrans from entering into any new agreement with private entities to develop and operate toll facilities after January 1, 2003.

AB 680 (Baker), Chapter 107, Statutes of 1989 authorized Caltrans to enter into up to four lease agreements with private entities for the construction and operation of transportation projects.

Testimony of

Governor Edward G. Rendell

Subcommittee on Highways and Transit

House Committee on Transportation and Infrastructure

May 24, 2007

Good Morning Mr. Chairman and members of the Committee. I am happy to be here to talk about the approach we are taking in Pennsylvania to deal with our very real transportation funding crisis.

As you know, earlier this year I proposed that Pennsylvania explore a variety a methods for using the Pennsylvania Turnpike to generate siginficant transportation funding for our state. A public-private partnership similar to what was done in Chicago and Indiana is one of the options we are considering, but not the only one.

Before I get into the details of this I would like to familiarize you with the dramatic transportation funding shortfall we face in Pennsylvania. Our situation is not so different from that of other states, but due to the age of our infrastructure the repair bill we are facing is dauntingly large.

Pennsylvania has the highest number of deficient bridges in the nation – more than 5,900. A major reason for this is our status as the nation's leader in another category – the number bridges more than 75 years old. We have not been ignoring this problem – during my tenure as Governor we've spent more on bridge repair than ever before, going from $259 million in 2002 to $558 million this year. But even at this pace we are just not in position to catch up given the funding we have available.

And our highway investment needs are no less stark. Since I have been Governor we have invested nearly $8 billion in highway and bridge contracts, yet our system is so large that we still have 8,528 miles of roadway in poor condition. That equates to 21 percent of the nearly 40,000 miles of state-maintained highways controlled by PennDOT.

To get a handle on the true size of this problem in 2005 I created a Commission called the Transportation Funding and Reform Commission. It spent a year studying the problem and issued a final report showing that we would need an additional $965 million per year to meet our highway funding needs and another $760 million per year for transit. This totals just over $1.7 billion per year every year for the next 20 years.

Some states with big funding gaps are in that situation because they have lacked the political will to tax their own citizens at a realistic level. This is not our situation. As things stand today, the taxes Pennsylvania dedicates to roads and bridges are not low. Our aggregate level of gas tax, including both the traditional gasoline excise tax and something we call the Oil Company Franchise Tax, is just over 30 cents per gallon, much higher than the level of taxation the Federal government has been willing to adopt and among the highest of any state.

In the face of this challenge we have prioritized the repair of existing roads and bridges over the contruction of new road capacity – nearly 90 percent of our capital funding repairing these existing assets rather than building new ones – but even this has not been enough to solve our problems.

In short, our state's road and bridge system is huge and it is old and it needs help. We are doing everything that can reasonably be expected to do at the state level both to dedicate state funds to this problem and prioritize the use of these funds. We could certainly use more funding from the federal Government – I'm sure you hear that a lot – but I don't think anyone here expects a major boost in federal funding any time soon.

The bottom line is this: the traditional methods of dealing with our funding shortfall are not up to the task. This is the context in which we are exploring a public-private partnership or some other method of deriving value from the Pennsylvania Turnpike.

As you know, in December, 2006 I issued a call for expressions of interest from firms interested in partnering with us on some sort of Turnpike transaction. In March of this year we signed a contract with Morgan Stanley & Co. to advise on a two-track strategy for doing this.

Under this process, we are doing what Chicago and Indiana did; we are preparing to solicit offers for a long term lease of the Turnpike. The analysis completed by Morgan Stanley just a few days ago estimates that such a lease could bring the Commonwleath between $12 and $18 billion in a one-time payment, or between $800 million and $1.6 billion per year in ongoing revenue. In our case a reliable ongoing revenue stream is a better match for the long-term nature of our funding need and would avoid all the temptations that can come with receiving such a large one-time payment.

But as we prepare for this we are also pursuing another track. Together with Morgan Stanley, we are developing a competing option that would turn over control to the Turnpike to a new public corportation that could refinance the roadway in much the same way the private would do, but without any private equity investment. Morgan Stanley estimates that a transaction along these line could bring in between $900 million and $1.4 billion per year.

And finally, our efforts to pursue these two options have prompted the Pennsylvania Turnpike Commission, which currently operates the roadway, to make it's own proposal. Under this scenario, and combination of various tolls and fees would raise $965 million per year.

Based on this information, on Monday of this week we forwarded a draft bill to our Legislature that would authorize PennDOT to solicit bids for a long-term lease, develop one or more public finance alternatives, and select a winner based which option offers the best combination of revenue for the State's transportation needs and protection of the public interest.

This approach is different from what was done in other places and I would like to explain why we have chosen to proceed in this way.

The most important reason is that it is impossible to know what level of funding can really be provided by any of these methods without actually testing the market. You will recall that a moment ago I said Morgan Stanley's estimate of the revenue available from a long-term lease ranged from $800 million per year to $1.6 billion per year. This is a very wide range. It is so wide because for all the sophisticated math that goes into estimating what price the market will offer, it's just an estimate.

It's a little like selling a house: the real estate agent might say your house is worth $300,000, but the only way to really know is to ask for offers. If you're offered $400,000 you'll be tempted to sell; at $200,000 you probably won't be. The question you have to answer at the end of the day is not 'Should sell my house?'; but 'Should I sell my house given what I'm being offered?" It's a matter of both principle *and* practicality.

So in our case, we don't want to decide that a private lease is the right choice when we don't know how much it will bring. Likewise for any public finance option. When we open the final bids, if the best offer from the private sector is $1 billion per year and we have a public options that gets us $1.1 billion per year, that's a pretty easy choice. But if the high private bid is $1.6 billion per year, that choice looks very different.

This approach has other advantages; one is the power of competition. If our legislation is approved and we go out to private bidders, I want them to understand that we have other options; we're not so desperate that we'll accept a bid that fails to meet our expectations because it's the only game in town. And the same goes for the public sector. Those with an interest in seeing the Turnpike managed under a more traditional structure need to understand that their efforts will be measured against the best the private sector can do. The net result is that both groups are highly motivated to help the Commonwealth solve it's transportation funding shortfall, and that's good no matter how you look at it.

And so if there is one thought I can leave you with it is this. It is very tempting for each of us to decide where we stand on the question of toll road leases based only on principal. On one side are those that feel the private sector is inherently better suited to this task, and that privatization should be a policy goal in its own right beyond whatever financial benefits it might bring. Others feel that roads are an inherently public function, and that government should not turn them over to private operators regardless of how the economics look.

I embrace neither of these views. I have spent most of my adult life in government, and that has given me a healthly appreciation for the many ways in which government can fall short. As a result I have been open to the provision of public services using the private sector where the benefits of doing so are clear. But I the reason I have spent my life in government service is that I believe wholeheartedly that government can and should be a force for good in people's lives, and that it should never cede its role as the protector of the public interest.

I approach the question of what to do with our Turnpike in this spirit – mindful of the important principles involved, but aware that principle must coexisit with practicality.

Thank you, and I would be happy to respond to any questions.

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ENVIRONMENTAL DEFENSE

finding the ways that work

Statement of Michael Replogle, Transportation Director
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Before the Committee on Transportation and Infrastructure
Subcommittee on Highways and Transit

May 24, 2007

Mr. Chairman, Ranking Member Duncan and members of the Subcommittee. Thank you for the opportunity today to testify before you today on Public-Private Partnerships (PPP), transportation financing and protection of the public interest.

I am transportation director for Environmental Defense, a national non-profit group representing over half a million members. Our goal is to promote market-based solutions to the many environmental challenges we face today, both here in the United States and around the globe. Today I'd like to discuss how public-private partnerships in transportation financing can be used to advance important transportation, environmental, and public health goals.

I. Need for a Stronger Public Policy Framework to Guide PPPs in Transportation

Wide-spread reluctance to increase taxes and growing long-term fiscal challenges[1] have governments at all levels scrambling to find new transportation financing. Increasingly in the U.S. and abroad governments are turning to public-private partnerships (PPPs) as a way to increase private investment in transportation infrastructure and services and to promote innovation in the sector. PPPs can encompass a broad spectrum of contracting and financing strategies ranging from short-term service and operating contracts to long-term concession leases that may turn over to a private consortium control of planning, design, building, operating, and managing transportation facilities and services in a corridor for some period of time. PPP agreements are being increasingly used in many countries to develop and manage new and existing highways, public transportation, railways, ports, airports, electric utilities, water infrastructure, schools, hospitals, and other facilities and services.

Some deals have generated big up-front capital payments for cash-strapped governments by "monetizing" the value of existing public assets. The 99-year Chicago Skyway lease and 75-year Indiana Toll Road lease together netted $5.65 billion, and Texas recently signed an $8.5 billion concession deal for a new 600-mile highway corridor. Private firms enter into such partnerships in return for the prospect of a steady return on investment from tolls, user fees, performance-based fees, related real estate development or other revenues. McKinsey & Co. recently projected

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[1] U.S. General Accountability Office, *21st Century Challenges. Reexamining the Base of the Federal Government*, February 2005, GAO-05-325SP.

a $330 billion global market for infrastructure PPP deals between 2005 and 2010, including $45 billion in U.S. road projects.[2]

Whether they involve leasing existing toll roads or ports or building new facilities, these deals are at times controversial. Many are asking if individual deals are a good value for the public and if PPPs are being done to evade public involvement, oversight, and accountability to environmental, labor, health, and community protections that might apply if the same initiative was publicly financed and developed. Are PPPs adding value compared to other alternatives?

Aggressive, top-down promotion of PPP deals, as with some Texas toll roads, has sometimes led to public backlash. But other deals have delivered projects and services that have won broad public support. PPPs have at times won support from both left and right political parties in the U.S. and world-wide, and have also been fiercely attacked by from both directions. Interest in PPPs is growing, and legislation is moving forward at both state and federal levels to open the door to many more such partnerships.

Environmental Defense's primary concern is that there is no policy framework in place to ensure environmental benefits in PPPs and that public oversight is often weak in these big-money, long-term deals. That could sacrifice our future for short-term gains.

While some ask, "are you for PPPs and tolls or are you against them?", we think this is the wrong question. Instead, elected officials and the public should ask how we want to use these tools. Well designed PPPs have the potential to finance transportation, save motorists time, improve reliability and customer service, boost transit choices, curb fuel use and emissions, and reduce harm to communities and the environment. But tolls and PPP deals can alternatively increase congestion on existing roads, spur pollution, fuel use, emissions, facilitate sprawl for years to come, and spur public backlash against tolls and PPP financing. Should we use PPPs just to build more roads faster and to increase short-term cash flow to deal with fiscal problems? Or use them to better manage transportation systems to deliver high performance for mobility, the environment, and public health?

Environmental Defense thinks PPP initiatives should advance along with publicly financed and managed transportation investments and strategies only if they are part of transportation plans and programs designed to accomplish the planning objectives articulated in SAFETEA-LU – to improve mobility and support economic development while reducing fuel use and air pollution.[3] Engaging private capital and expertise in these efforts could accelerate innovation and progress on these goals, but only if such engagements are designed to advance these public policy objectives—not simply to finance more system capacity. The public will support neither increased privatization of public transportation infrastructure nor the toll strategies needed to manage congestion and to attract private partners into transportation system finance unless public-private partnerships are focused on maximizing public benefits.[4]

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[2] Cheatham, Benjamin and W. Oblin, "Private-investment opportunities for public transport," *The McKinsey Quarterly: The Online Journal of McKinsey & Co.*, April 2007.

[3] 23 U.S.C. § 134(a)(1).

[4] Public skepticism of PPPs for transportation financing runs high, even within the business community. For example, *BusinessWeek*, in its May 7, 2007 edition, carried a cover story entitled: "*Hey Buddy, You Wanna Buy a*

Protecting public health and the environment must be core values of our transportation policy, along with enhancing mobility, access, and the financial stability of our transportation system. These values must be reflected in public-private partnerships agreements. More work is needed to ensure that PPP agreements safeguard public welfare.

Our goal is to create new, private-sector financing models that expand use of congestion pricing, spur investment in innovative transit, and add health and climate performance criteria into public private partnership contracts. Partnerships between environmental stakeholders and major infrastructure banks and operators are needed to demonstrate examples of success in key locations. There are also fast-moving opportunities now to craft legislation and policy that will govern public-private partnerships for decades. We look forward to working with this committee in this important effort.

This month this committee held its' first-ever hearings on climate change—a topic of central public concern. While this is not a new issue—Congress has been struggling to develop a national policy consensus in this area for decades---it is a relatively new issue for this committee. Transportation-related greenhouse gas emissions have historically been an issue for other congressional committees, with jurisdiction over fuel economy standards, energy and environmental issues. No more. In a carbon-constrained world all federally-assisted programs that directly or indirectly increase carbon emissions will attract increasingly intense public scrutiny. Transportation infrastructure financing is one such program.

Public Private Partnerships (PPPs) will not escape this scrutiny. Unless new and more effective federal and state policies towards PPP road projects are adopted, PPP road projects insulated by decades-long concession contracts could become an out-of-control source of greenhouse gas emissions that defies needed accountability. This could pose problems similar to those America has faced in recent decades trying to clean up ever-expanding old coal-fired power plants.

According to Fitch Ratings, over the period 2000-2005 the more than 50 Fitch-rated, stand-alone toll road projects experienced an *average* annual rate of traffic growth of 6.7%, more than triple the national average annual increase in travel growth (as expressed in Vehicle Miles Traveled or VMT) of 1.9%.[5] This was in spite of the recession in the early part of this decade and the spike in oil prices in 2005. While such rapid increases in traffic volume are good for the financial stability of the tolled facility, they turn such roads into major linear carbon emission sources.

Tolling and PPP policies can and should be designed to advance emerging climate and public health goals. While toll roads require traffic to ensure their financial performance, they do not need to increase their carbon footprint to achieve this result. To the contrary, performance-focused PPP contracts can be designed to reward facility operations strategies that cut pollution while improving mobility and encourage adoption of smart traffic management, expanded travel

Bridge?" Why Investors are Clamoring to take over America's roads, bridges, and airports,---and why the public should be nervous."

[5] *U.S. Toll Road Projects: A 2006 Performance Report,* Fitch Ratings (Special Report April 19, 2006) at 1. see www.fitchratings.com.

choices, and toll discounts for cleaner, low-carbon vehicles and off-peak travelers. PPPs may also have an important role to play in improving public transportation performance.

II. Public-Private Partnerships: Aligned with Performance Objectives?

There are a wide array of activities and forms for Public-Private Partnerships (PPPs), ranging from service contracts, to management and maintenance contracts, operations and maintenance concessions, pre-development agreements, and build-operate-transfer concessions. Beyond this, greater private sector participation involves full privatization. PPPs may be used to directly or indirectly achieve a wide variety of public objectives, offering at times various advantages such as enhanced capacity to introduce new technologies, management strategies, and timely mobilization of private capital. But PPP concessions may also at times work against public welfare interests, harming labor, communities and the environment.[6]

PPP mechanisms for compensating concessionaires come in a variety of forms. These include letting concessionaires keep whatever tolls are collected, or providing a shadow toll payment based on usage of the facility. Many European PPP infrastructure concessions in recent years provide concessionaires with availability payments based on the amount of time infrastructure is available for use while meeting service standards. Another option used in England is a congestion management payment based on both the amount and speed of traffic carried on each small segment of a highway by the hour. This is a variation of a performance payment or penalty framework. Yet other concessions rely in part, explicitly or implicitly, on revenues that may be derived from service areas, side-concessions, or value-capture related to real estate development opportunities. And concessions may include combinations of grants, user fees, and other revenue guarantees. Each of these may create hidden or explicit incentives for a PPP concession to serve or work against various system and public welfare objectives.

For example, basing payment to a concessionaire on actual tolls collected on a road provides an incentive to maximize traffic volume, while shifting the traffic risk to the concessionaire. In some cases, such an approach may raise profiteering issues with some members of the public. In a quest to limit such concerns, some concession deals impose toll rate caps, which in turn may severely limit the ability of the concessionaire to use dynamic time-of-day tolling strategies to manage peak period congestion. When concessionaires are compensated based on actual toll revenue collected, concessionaires often seek to include non-compete agreements in contracts to restrict the ability of the public sector agencies to expand non-tolled highways or transit services that might compete with the facility managed by the concessionaire. Such a non-compete agreement was so objectionable in the SR-91 Riverside County corridor in southern California that it prompted the County to buy-out the concession in order to remove the non-compete clause and enable the public agencies to expand parallel highway capacity.

Shadow tolls are typically based on traffic counts and the length of the roadway. These may be used on non-tolled facilities, transferring traffic forecast risk to operator while encouraging higher traffic growth by avoiding user fees. For tolled facilities, use of a shadow toll PPP compensation approach may insulate toll rate-setting from concerns about profiteering while

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[6] Sclar, Elliott D. (2000). *You Don't Always Get What You Pay For: The Economics of Privatization*. Ithaca: Cornell University Press: 28-44, 62-68.

enabling a concessionaire to employ dynamic time-of-day charging strategies to manage traffic congestion on the facility and maximize network productivity. Such a shadow tolling approach could be designed to reward a concessionaire for delivering greater mobility for more people and goods while reducing congestion and minimizing both emissions and fuel use.

Availability payment concession contracts rewards the contractor based on available facility lane-miles or lane-kilometers, taking into account the impact of maintenance closures, or the quality or quantity of other specified performance outputs. This approach is also often used on non-tolled facilities, encouraging effective facility maintenance while maximizing traffic growth. On tolled facilities, this approach could also insulate toll rate setting from concerns about profiteering. Such a payment approach could also be designed to reward minimized congestion, emissions and fuel use and maximized facility availability and reliability.

A "congestion management payment" approach has been used on a 54-kilometer stretch of the Darrington-to-Dishforth A1 Highway in Yorkshire, England to reward the concessionaire based on measured actual hourly traffic speeds and flows by 2 kilometer road segment, as shown in Figure 1. Payments are reduced when the average speed of traffic falls below the target average speed, giving an incentive to the concessionaire to manage any congestion causing event in the corridor. An allowance is made to lessen the impact of the reduction penalty as flow approaches the established road capacity, reducing the risks associated with congestion due to lack of capacity. If traffic flow exceeds the rated capacity, the concessionaire receives a bonus for traffic traveling above a minimum speed under high flow conditions. This provides an incentive for the concessionaire to actively manage and bring forward proposals to keep traffic flowing freely. If at any time minimum performance criteria are not met no payments are made for the relevant section of road.

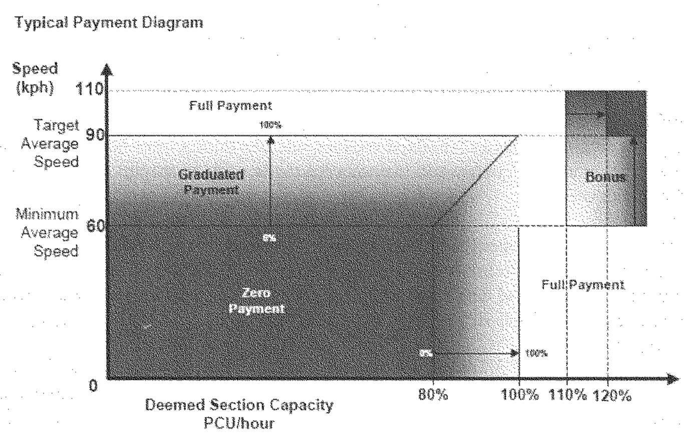

Figure 1: Congestion Management Payment on A1 Highway (Highways Agency, Leeds [7])

[7] see also: *http://wip.tu-berlin.de/workshop/2005/papers/briggs_drewett_Private%20_Financing_of_Projects.pdf*

Using new monitoring and performance measurement technologies based on toll transponders, GPS, or cell phone probes, this approach could be modified and extended to provide incentives for concessionaires to manage and develop corridors so that they move more people and more ton-miles of freight (rather than just vehicles) while meeting level-of-service standards, environmental performance standards, and the terms of community benefit agreements. Such a framework could be used to expand the market for PPP toll concessions with broader public support won by delivering guaranteed congestion relief and emission reductions to customers and communities.

III. U.S. Case Studies of PPP Toll Roads

A small sample of recent PPP road concession agreements related to both existing transportation facilities and the development of new transportation assets illustrates some of the range of experience with toll PPP highways recently advancing in the U.S.

California

SR-91, Orange and Riverside County, California. The passage of AB 680 in California in 1989 opened the door for the California Department of Transportation to enter into franchise agreements for development of new roads. Several roads - including SR-91 and SR-125 - have been developed under this law, which was repealed in 2005.

The opening in 1995 of the newly constructed Express Lanes in the median of California's SR-91 made this road the first fully automated, variably-priced toll road in the nation. Originally planned as an HOV facility, the four-lane toll facility was built years earlier than public funding would have allowed thanks to this PPP agreement. The facility was originally financed, owned, and operated under a franchise agreement between the California Private Transportation Company (CPTC) and the state.

Tolls on the roadway vary from $1.05 during off-peak hours to $6.25 during peak periods, although carpoolers with three or more people (HOV3+), zero emission vehicles (ZEVs), motorcycles, disabled plates and disabled veterans ride free during most hours. The revenues from the tolls are used to operate and maintain the roads, with no surplus revenue left over for transit or other uses.

Since the Express Lanes opened, the facility has logged more than 64 million vehicle trips and saved more than 32 million hours of commuting time. Yet, the HOT lanes have undoubtedly facilitated additional sprawl development in Riverside County, which serves as an affordable bedroom community to job-rich Orange County, offsetting some of the environmental benefits of the project.

The SR-91 project development agreement between CPTC and the state contained a non-compete clause that barred public authorities from making improvements on competing transportation facilities. However, in 2002, under intense public pressure, the Orange County

Transportation Authority purchased SR-91 back CPTC in order to abrogate the non-compete clause and make improvements on parallel non-tolled lanes in the corridor.[8]

SR-125, San Diego, California. A franchise agreement with the San Diego Expressway Limited Partnership provided for the private financing and construction of SR-125, a 9.3-mile toll highway that forms the longest segment of a 12.5-mile highway that when complete in 2006 will connect the California-Mexico border as part of an outer edge area beltway. Once the project is complete the private concessionaire will transfer ownership of the road back to the State and then lease the rights to operate and maintain the facility for a period of 35 years.[9,10]

The franchise agreement allows the private concessionaire to earn a maximum 18.5% return on total investment with additional allowed incentive return for actions to increase average vehicle occupancy on SR-125. The concessionaire has sought adding an additional 10 years to the agreement to recover its project costs, which have grown from $400 million to $635 million. Permitting delays, a lengthy environmental review process and a subsequent law suit brought in 2001 by the Center for Biological Diversity, Preserve South Bay, San Diego Audubon Society, the Sierra Club, and Preserve Wild Santee, contributed significantly to these cost increases. In fact, environmental clearances were not obtained until 2001, a decade after the franchise agreement was signed. The environmental groups that opposed this project did so because of its negative effects on sensitive wildlife habitat and because it will induce additional sprawl.

Virginia

Pocahontas Parkway. In 1995, the Virginia legislature passed the Public-Private Partnership Act (PPTA) of 1995, which enabled "private entities to acquire, construct, maintain, and/or operate 'qualifying transportation facilities' under agreement with a responsible public entity" Opened in 2002, the Pocahontas Parkway was the first project built under the PPTA. The Parkway is a toll road that serves as a bypass around Richmond. Under a 30-year franchise agreement, the road was designed and built and is now operated, including imposing and collecting tolls, by the Pocahontas Parkway Association, a nonprofit consortium.[11]

The Parkway does not rely on variable or time-of-day pricing to determine the toll rate for drivers. Instead, toll rates on the road are static, currently $1.75 for cars, trucks or buses using electronic transponders, and $2.00 for vehicles paying with cash. The revenue is used to pay off the debt incurred to build the road.

Prior to the opening of the road, traffic estimates were developed based on motorist surveys and county growth projections. During the first year of operation, actual traffic and toll revenues were

[8] U.S. General Accountability Office (GAO). (2004). *Private Sector Sponsorship of and Investment in Major Projects Has Been Limited.* Washington, DC: GAO-04-419.
[9] Federal Highway Administration (FHWA). (2005). *SR 125 Toll Road San Miguel Mountain Parkway.* Retrieved on 4/27/05 at http://www.fhwa.dot.gov/ppp/sr125.htm.
[10] U.S. Department of Transportation (DOT). (2004). *Report to Congress on Public-Private Partnerships.* Washington, DC.
[11] Regimbal, J., Jr. (2004). *An Analysis of the Evolution of the Public-Private Transportation Act of 1995.* Prepared for the Southern Environmental Law Center.

42 percent less than the projected. Since then, traffic has increased, but not to projected levels. Much of the difference between the estimated and observed traffic levels has been attributed to slower than predicted economic growth in the Richmond area, and in particular at Richmond International Airport.[12] The project was successfully refinanced in 2006.

Illinois

Chicago Skyway. The 7.8-mile Chicago Skyway was owned, operated and maintained by the City of Chicago for more than 50 years. City officials had not raised tolls on the road for more than 15 years, even though only a quarter of the traffic on the highway consists of City residents. Nor had they fully modernized toll collection and operations. Faced with a gaping budget deficit and an underperforming asset, the City of Chicago with little public consultation signed a 99-year concession agreement in 2004 with the Skyway Concession Company (SCC) – a partnership of Macquarie and Cintra. Under terms of the 300-page agreement, SSC got rights to boost long frozen tolls (within limits), and agreed to detailed standards for long-term maintenance of the highway, with some safeguards for labor and adjacent communities.

In return, the City of Chicago received $1.8 billion. Of this, $463 million went to pay-off the Skyway's debt, $392 million was used to pay off city debt, $875million was put into city government budget reserves, and $100 million was dedicated to quality of life initiatives over the next five years, including funding for the homeless, home heating assistance, home modifications for the disabled, affordable housing programs, job training for ex-offenders, a Small Business Development Fund, and programs for children and seniors.

Indiana

Indiana Toll Road. The state of Indiana in 2006 enacted legislation (HB 1008) authorizing a $3.8 billion lease of the Indiana Toll Road for a 75 year period. The Act creates several trust funds which will be used primarily to accelerate a $10.3 billion road construction program across Indiana, with detailed allocation of funding to various counties and projects, weighted towards the counties near the toll road corridor. Some funds are dedicated to job training in the depressed communities near Gary, through which the toll road passes, but there are no provisions to provide virtually non-existent transit access to connect the low income and minority areas of Gary and Hammond with the higher wage suburban activity centers that lie just south of the toll road. The deal has been controversial, especially in the toll road corridor. Much popular opinion is focused negatively on foreign companies controlling Indianan infrastructure.

According to the terms of the concession agreement, Statewide Mobility Partners – a partnership of Macquarie and Cintra – has the right to impose and collect tolls, subject to a toll increase schedule. The tolling provisions do not authorize the Concessionaire to raise tolls at times of congestion above the toll rate caps. The agreement includes prescriptive guidelines that call for the annual submission of various operating plans. However, the standards appear unclear and thus of limited contractual value. Monitoring and enforcement provisions appear weak.

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[12] Samuel, P. (2005, June 16). "Transurban moves to buy troubled Pocahontas Parkway VA". *Toll Road News.* Retrieved on 7/25/05 at http://www.tollroadsnews.com/cgi-bin/a.cgi/Ohgiyt7KEdmcEIJ61nsxIA.

Texas

Trans Texas Corridor. In 2003, Texas enacted state legislation (HB 3588) authorizing the Trans-Texas Corridor (TTC) project, The TTC project is slated to be the largest public works project in Texas history, a proposed 1,200-foot wide, 4,000-mile long network of planned and existing toll roads, railways and utility corridors, to be developed over the next 50 years. This network is designed not to connect any existing cities and towns, but to run almost entirely through what are now non-urban Texas counties. To date, two TTC corridors are advancing through the environmental review process, the 560-mile TTC-35 running north-south across central Texas, and TTC-69, a planned 1600-mile corridor running from Larado parallel to the Gulf Coast to northeast Texas.

In parallel with the TTC effort, Texas officials have made bold efforts to promote the widespread adoption of tolling under legislation authorizing Regional Mobility Authorities (RMAs) in metropolitan areas of Texas, seeking to accelerate substantial planned highway system expansion using tolling and PPP concessions. A half dozen RMAs scattered across the state have sought to advance as much as $20 billion worth of toll concession deals, focused on building new toll lanes or new toll highways.

In 2004, Texas officials received an unsolicited proposal from a private consortium - led by Cintra Concesiones de Infraestructuras de Transporte and Zachry Construction Corporation - to develop the initial element of the Trans-Texas Corridor, known as TTC-35. The Cintra-Zachry proposal includes $6 billion in private investment to design, construct and operate for up to 50 years a four-lane, 316-mile toll road loosely connecting from near Dallas to near San Antonio. The proposal also transfers the right to build and operate TTC-35 as a toll facility from the state to the private consortium. In return, the state is to receive $1.2 billion. These proceeds are to be used to fund road improvements or high-speed and commuter rail projects along I-35 or the TTC-35 corridor. The TTC-35 and several other proposed Texas toll highways are seen by some as a strategy to redirect Asian freight traffic away from unionized U.S. west coast ports and trucking services, via cheaper Mexican ports and non-unionized Mexican trucking services and inland U.S. ports.[13]

Without public notice or input, the Texas Department of Transportation (TxDOT) signed a pre-development agreement (or umbrella agreement) with the Cintra-Zachry consortium in 2005, authorizing the preparation of a master plan, non-binding master financial plan, project management plan and quality management plan for TTC-35. Under the Special Experimental Program (SEP)-14 and the SEP-15 programs (under which U.S. DOT has asserted authority to waive provisions of federal transportation law), TxDOT selected a private partner prior to completing the NEPA review process and made this selection earlier in the planning process than is typically allowed under law. Almost two years after the signing of the deal, more than 200 pages of the 300-page pre-development agreement remain secret despite an order for their release by the Texas Attorney General that was blocked by a law suit filed by the concessionaire.

[13] Howie, Craig. (2006). "US Divided by Superhighway Plan," *The Scotsman*, June 16, 2006, http://thescotsman.scotsman.com/

This pre-development agreement provides Cintra-Zachry with unprecedented access and opportunities to evaluate and identify ways to finance a portfolio of commercially viable projects very early in the planning process. Such an arrangement has the potential to produce cost savings and other benefits that can flow from a fully integrated design-build process. But the sweeping powers conferred to TxDOT and its concessionaires under the authorizing law, HB 5388, as well as the manner in which this mega-project has thus far been advanced, has left many concerned that the project is likely to short-circuit or overwhelm environmental protections, override the interests of local governments and private property owners, and curb full consideration of viable alternatives, including investment and system management options that may be considered in local and regional transportation plans but that lack current public financing. And many Texans just do not like the idea of paying tolls.

For these reasons, the TTC has been opposed by many local governments and environmental, civic and property-rights groups from the Sierra Club and Environmental Defense to the Texas Farm Bureau and Texas Republican Party. Efforts to reign in the TTC have had only limited success in the Texas Legislature, but a political backlash may yet pose a serious challenge to the wider use of tolls and PPPs. While Texas currently leads the U.S. in developing new toll roads, local opposition to tolls and PPP concession deals has grow to the extent that the Texas Legislature by an overwhelming margin in May 2006 sent to the Governor's desk a bill that would put a 2-year moratorium on new PPP toll roads in Texas, giving time to strengthen the public policy framework and public involvement.

IV. PPP Toll Road Concession Projects: Finding a Balanced Approach

As experience with PPP toll road concessions grows, a variety of issues are surfacing as opportunities where deals might come undone or be improved to support better transportation system performance, stronger protection for the environment and equity concerns, and increased community acceptance. This discussion is not comprehensive, but highlights several emerging areas where deals might be made more effective, challenged, or debated.

1. Non-compete Clauses

Non-compete clauses have been used to bar capacity improvements to adjacent public roads and public transportation facilities. To make improvements on parallel non-tolled lanes in the corridor, public authorities in California purchased SR-91 from the concessionaire so they could eliminate the original contract's non-compete clause. At the same time, non-compete clauses are important to private owners because improvements to parallel roads can result in less traffic and lower toll revenue. The original Dulles Greenway concession agreement did not contain a non-compete clause and the consequent expansion of nearby Virginia Route 7 by the state DOT played a significant role in suppressing demand for the toll road, a major factor in the project's default shortly after its opening.

The PPP world learned a lot from the SR-91 case. Shortly after Riverside County officials purchased the SR-91 Express Lanes, Caltrans officials amended the SR-125 concession agreement to remove restrictions on their ability to expand the capacity of transportation facilities not in the current long-term plan. In return, Caltrans must reimburse the private developer for revenues lost due to the expansion. This type of solution allows necessary improvements to occur but also protects the private partner. Today, it appears few pubic agencies are willing to agree to the type of rigid non-compete clause included in the original SR-91 contract. Indeed on certain types of projects, the 2005 federal SAFETEA-LU federal transportation law Section 1604(c) would bar such non-compete agreements.

The Chicago Skyway does not include any kind of non-compete clause. The Indiana Toll Road lease has a very limited non-compete clause, allowing local parallel expressways but not the creation of another statewide competing road within 20 miles of the leased road.

The SR-125 non-compete clause includes protection measures that ensure a minimum level of service. If congestion exceeds a certain threshold and the concessionaire is not diligently pursuing the development and construction of additional capacity expansion, they risk losing exclusive franchise rights to the tolled corridor. While this type of contract clause may help protect the public against degradation of service in the corridor, in combination with toll rate caps that are commonly part of PPP contracts, there is a real danger such a clause may prevent a concessionaire from considering or applying the most cost-effective traffic management strategies to avoid or reduce congestion delays, such as time-of-day tolls accompanied by better corridor transit and paratransit services, even where these may be more cost-effective and less harmful to the environment and communities adjacent to major highways.

2. Toll Rate Caps

Public-private partnership agreements use a variety of contractual techniques to control toll rate increases and maximum rates. Toll rate caps for the Indiana Toll Road are to be set according to a detailed toll rate schedule. The agreement allows the concessionaire to adjust tolls by time of day. However, the tolling provisions do not authorize the private owner to raise tolls at times of congestion above the toll rate caps. This impedes the ability of the concessionaire to apply time-of-day pricing to ensure free flowing traffic at all hours of operation.

Chicago Skyway maximum toll rates are also limited by schedule through 2016. But an exemption to this schedule allows the operator to raise tolls for vehicles with three or more axles at times of congestion above the toll rate caps. This enables the operator to use time-of-day pricing as a traffic management tool, but only for trucks and buses.

Under the terms of the SR-125 agreement, the private owner has the right to impose and collect tolls, subject to limitations on its overall rate of return. This provides flexibility to establish and modify toll rates by (a) various classes of vehicles, (b) vehicle occupancy levels, (c) times of use and (d) section.

An alternative to toll rate caps that might improve environmental performance would mandate toll adjustments by time-of-day might such that the tolled portion of a road remains free flowing at all hours of operation, with off-peak discounts, without limiting the maximum toll. Or such an approach could be linked to toll rate caps that do not apply to peak hour tolls, but to average daily toll collections, allowing the concessionaire to adjust the distribution of tolls among vehicle classes and by time-of-day for most efficient facility operation, while encouraging or requiring toll discounts for registered low income travelers and high occupancy vehicles (HOVs).

3. Environmental Performance Standards and Agreements

The environmental review process has been singled out by many industry groups and PPP advocates as the most significant impediment to private sector participation in the development of transportation projects.[14] SR-125 illustrated to private sector partners the risks associated with proceeding on a project without environmental clearances in place, leading Macquarie to declare its unwillingness to fully commit to new concession agreements for greenfields road projects lacking in such clearance. Under the SEP-14 and SEP-15 programs, U.S. DOT has asserted broad authority to waive federal contracting and review procedures to encourage innovative activities to accelerate the development of PPP projects.

Public-private partnerships in combination with the SEP-15 program may enable agencies to push forward projects that stood little chance of being built under traditional procurement models. An important question then is whether these expedited agreements for the development of new transportation facilities can be designed to maximize consideration of alternatives that accommodate mobility growth while moderating the need for road system expansion and encourage a coordinated, transparent planning and environmental review with adequate public involvement.[15]

The reality is that most state transportation agencies and public authorities are less risk averse than private transportation PPP developers and investors to the consequences of a long drawn-out or failed environmental review process that ends up having to be redone because of its inadequacies. Private sector project developers and investors want to learn quickly whether they can get a bankable deal accomplished. Conversations with the latter parties suggests that many are willing to consider alternatives, indirect, secondary, and cumulative impacts, and effective impact avoidance and mitigation measures, if they are asked to do so by public agencies or if this will reduce the risk that their project will be held up or stopped by regulatory or political problems. Many are willing to see extra mitigation costs included if it results in a project that can get a robust approval with broad support of concerned stakeholders and still make financial sense.

These are all big "ifs," but there are several strategies that can help ensure such a result, including the greater use of performance based contracting, environmental performance and community benefit agreements, and concession frameworks that seek to implement an array of cost effective "fix-it-first" asset management strategies, including improvement of corridor operations, management, and transit or paratransit services, prior to advancing major new capital investments.

However, most concession agreements to date have not taken this approach. While they may include clear and enforceable operating standards for such matters as toll collection, traffic safety

[14] U.S. Department of Transportation (DOT). (2004). *Report to Congress on Public-Private Partnerships.* Washington, DC.

[15] Environmental Defense and Natural Resources Defense Council. (2004). *Do Faster Transportation Project Reviews Deliver Better Stewardship? An Analysis of Experience with Expedited Reviews Under Executive Order 13274.* Washington, DC.

and management and pavement quality, clear metrics for environment performances are largely absent from these agreements. Instead, environmental requirements in these agreements often take the form of rudimentary, process-driven standards that are difficult to measure, monitor and enforce. As indicative of the vast majority of concession agreements, the operating standards of the Indiana Toll Road concession lease include prescriptive guidelines and criteria for the development and annual submission an Environmental Management Plan. The problem with such standards is that they focus merely on "how" rather than "what" to achieve and the details are to be worked out long after the major money decisions have been made to put a value on the concession deal. At that point, better environmental performance may too often just look like an extra cost at risk of being value-engineered out as the concessionaire looks to cut costs.

Over the past decade, businesses and many governmental agencies have increasingly focused on establishing outcome-based standards to measure performance. Outcome-based performance standards focus on measurable objectives and allow flexibility in determining how best to achieve those objectives. One of the most frequently cited benefits of public-private partnerships is that such partnerships provide more flexibility to maximize the use of innovative technologies that can lead to the development of better, faster and less expensive ways to design, build and manage highway facilities. Mandating the annual submission of an Environmental Management Plan without standards, after the concession agreement has been negotiated and financed, will do little to spur the use of innovative technologies except as these might cut the concessionaire's operating costs. Nor does it provide a strong incentive for robust environmental self-monitoring and compliance or oversight. A better time for all to focus on setting environmental performance goals is early in the design of the concession bidding process. Although it currently does not do so, model federal PPP guidance and state legislation on PPPs should require environmental performance goals and contract incentives in PPP deals.

Clear and enforceable voluntary environmental performance agreements have not yet been incorporated broadly into PPP toll road projects, which have instead simply been subject to the routine application of existing federal and state environmental requirements on transportation projects. However, such performance agreements are coming into use in other transportation sectors, such as airport and port operations and infrastructure management.

A 2004 Community Benefits Agreement (CBA) between local officials and residents regarding the modernization of Los Angeles International Airport serves as one example. In this instance, 26 community, environmental, labor, and civic groups agreed not to challenge approval of an LAX expansion plan in return for an enforceable CBA that obligated a half billion dollars towards mitigation activities aimed at reducing air pollution and noise problems while ensuring other community benefits, such as job training programs for community residents.

The San Pedro Bay Clean Air Action Plan, announced in June 2006, lays out a framework for the Port of Los Angeles and the Port of Long Beach to work with their many private and public sector partners and stakeholders to ensure substantial measurable reductions in particulate and NOx pollution from the overall activities of the ports while accommodating significant growth in freight traffic. This will be achieved by adopting a one in 10 million cancer risk standard that will be applied to all future leases, tariff changes, and project activities related to the port operations, coordinated with ground side port access plans and engagement with other ports across the Pacific Rim.[16]

Elements incorporated into toll road PPP concession agreements, or as enforceable parts of the accompanying environmental approvals, might include various provisions to ensure that tolls will be used to manage congestion and generate revenue for impact mitigation and that the project will be managed to produce superior environmental performance, public health protection, and respect for communities and others affected by the transportation system.

Environmental performance and equity in the distribution of benefits of tolled projects may be degraded if all toll revenues are dedicated to pay for new road capacity without ensuring adequate financing for provision of transit services in tolled corridors where transit might find a market.[17] Where HOV lanes are converted to High Occupancy Toll (HOT) lanes or toll managed lanes, it is often practical to generate surplus toll revenues that can be dedicated to transit and impact mitigation, as on San Diego's I-15 HOT lanes. But where costly new road capacity is added, studies in many corridors show that it is often a struggle for such projects to be fully self-financing with tolls unless pricing is also applied to some of the existing corridor capacity.

To maximize environmental performance, PPP toll project designs should consider whether it might be more cost-beneficial to minimize new road capacity by instead applying tolls to better manage existing HOV and general purpose lanes for high productivity and to generate a revenue stream for monitoring, minimizing and avoiding adverse impacts. Among the impacts that might be considered are:

- Monitoring potential air pollution hot spots close to highways that might present a threat to public health or the environment. Purchasing improved ventilation equipment for nearby residences and schools.

- Making use of more costly, but longer-lasting and much quieter rubberized pavements to reduce noise impacts. Constructing sound barriers.

- Improving storm water management to remediate existing problems that cause combined sewer system overloads or that lead to excess storm water loads on nearby streams, producing erosion, habitat loss, and inadequate ground water recharge.

- Ensuring timely progress towards more equal access to jobs and public facilities without undue time and cost burdens for low-income people and those without cars who live or work in areas near the tolled corridor.

- Aligning the compensation and penalty structure of the concession so that contractors are clearly rewarded for superior environmental performance and penalized for failure to meet

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[16] Port of Los Angeles and Port of Long Beach. (2006). *San Pedro Bay Ports Clean Air Action Plan,* June 28, 2006, http://polb.com/civica/filebank/blobdload.asp?BlobID=2953.

[17] Replogle, Michael and Keri Funderburg. (2006). *No More Just Throwing Money Out the Window: Using Road Tolls to Cut Congestion, Protect the Environment, and Boost Access for All,* Environmental Defense, Washington, DC.

environmental performance standards, with incentives for timely compliance and for timely remediation of contracting failures.

- Careful monitoring of greenhouse gas emissions from transportation in the project corridor, subregional, or regional network, together with the development of strategies to reduce such emissions through mobility management, incentives, and market-based trading under a cap-and-trade system.

4. Use of Revenue

State enabling legislation typically specifies how toll revenues and lease proceeds are to be distributed. These revenue streams have been distributed for a wide range of purposes. The City of Chicago used the proceeds of its $1.8 billion lease to close the budget deficit, set up a rainy-day fund, and invest in human service programs for the old, the young, and the poor. In contrast, the lease proceeds from the Indiana Toll Road are to be used primarily to accelerate a state-wide highway construction program. Any excess toll revenues from SR-125 are to be paid into the California State Highway Account. Pennsylvania's Governor Rendell has proposed using proceeds from a Pennsylvania Turnpike lease to fund an annuity that might ensure the long-term ongoing repair and maintenance of the state's bridges and roads while shoring-up precarious transit service finances in Pittsburgh and Philadelphia.

This broad range in use of profits is indicative of the current disagreement among elected officials, transportation experts, and the public as to how best to re-invest such revenue. Some question the wisdom and morality of having toll revenues used to subsidize transit, claiming that such practice is simply a new taxation of mobility. Others argue it is often wise for PPP toll roads to cross-subsidize transit, viewing the transportation system as a portfolio of assets that should be managed to best address the array of objectives, stakeholder, and market place needs.[18] Dedicating a portion of toll or lease revenues to transit may help optimize mobility performance and increases the likelihood that the toll road will benefit a greater share of the potential travelers in the corridor, not just those who can afford to pay the tolls. It may offset some of the adverse impacts on those who live close to these roadways.

It is not uncommon for toll revenues or the proceeds of concession leases to be put into statewide or regional agency transportation funds, general government funds, or investments in other corridors. In the U.S. federal transportation bill reauthorization process in 2004-05, a broad coalition of transportation and environmental groups took the position that such diversions of toll revenues out of the corridor in which they are collected should be allowed for other transportation purposes only if a toll project operator is on track in meeting its financial obligations and satisfying the performance goals established for their project relating to satisfactory operations and maintenance of the toll corridor, including meeting environmental, equity, and system performance objectives established at the initiation of the project. This language became a requirement under Section 1604(b), which pertains to the Express Lanes

[18] Giglio, Joseph M. (2006). *Mobility: America's Transportation Mess and How to Fix It*, Hudson Institute, Washington, DC.

Demonstration Program, one of six programs established by SAFETEA-LU to authorize toll roads and toll lanes. Under that program[19] -

> *the Transportation Secretary, in cooperation with State and local agencies and other program participants and with opportunity for public comment, shall –*
>
> *i. develop and publish performance goals for each express lane project;*
>
> *ii. establish a program for regular monitoring and reporting on the achievement of performance goals, including –*
>
> *a. effects on travel, traffic, and air quality;*
>
> *b. distribution of benefits and burdens;*
>
> *c. use of alternative transportation modes; and*
>
> *d. use of revenues to meet transportation or impact mitigation needs.*

PPP concession agreements may employ various means to ensure that environmental, community and system performance goals will be met through the duration of the concession, including making these enforceable as part of environmental approvals and concession agreements, developing incentive-based performance contracting agreements, and considering such instruments as performance bonds, funding set-asides, and enforceable contingency measures.

5. Disclosure, Transparency, Oversight, Public Involvement

The Chicago Skyway, Indiana Toll Road, SR-125 all mandate annual financial and performance disclosure, and require independent oversight and auditing of compliance with applicable laws. This is common practice in the PPP world. However, these deals fell short on providing opportunities for public input prior to contract approval. For instance, public hearings on the Indiana Toll Road Lease Agreement were held only after the lease was formally announced by Governor Mitch Daniels. Some lawmakers criticized the hearings as a pro forma process that insults the public.[20] In a similar manner, Texas officials signed the TTC-35 pre-development agreement without public notice. If the terms of public-private partnership agreements are negotiated in a more transparent manner and encourage public input, they may win easier acceptance by the public and other stakeholders, rather than facing delays and longer-term risks to regulatory and political stability or the kind of backlash that is now happening in Texas.

Clearly there is a tension between concerns over confidentiality of business financial information and investor interests vs. needs for oversight, transparency, and timely disclosure to enable effective public input on major PPP projects. Failure to release to the public hundreds of pages of the contracts related to the proposed Trans-Texas Corridor PPP fueled public distrust and contributed to the pending adoption of a two-year moratorium on new toll PPP projects in that state. Virginia's public-private partnership legislation provides somewhat greater opportunities

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[19] U.S. Congress (2005). *Conference Report of the Committee of Conference on H R 3, Safe, Accountable, Flexible, Efficient Transportation Equity Act: A Legacy for Users, SAFETEA-LU*, 109th Congress, 1st Session, Report 109-203, Section 1604.

[20] DeAgostino, Martin. (2006). "After Fact, State Sets Toll Road Hearings," South Bend Tribune, http://www.southbendtribune.com/apps/pbcs.dll/article?AID=/20060322/News01/603220372/-1/NEWS01/CAT=News01, March 22, 2006.

for public oversight with a two-part submission process and review by an advisory panel and localities. Yet many local and civic stakeholders find that Virginia's process also falls short.

The I-95/395 corridor HOT lanes project in Northern Virginia illustrates why many environmental and transit advocates are concerned about the way that PPPs are now being developed in some states. This project could help advance better transit service and congestion relief in a fast-growing corridor.[21] The project developer, Fluor, won guarded support for its proposal from some environmental and civic groups over a competing proposal in part by promising a $500 million a contribution toward transit capital and operating costs over the life of the concession. But in the following year this shrank to a public $390 million commitment. And in the financing plan released only days before a vote on the project by regional officials, only $195 million in new money would actually be provided by the project and toll revenues. The other funding --transit program grants ($38 million) and the fare box recovery ($157 million) funds -- could be generated for a direct transit upgrade in the corridor without turning this public asset over to a private contractor. As of May 2007, as the metropolitan planning organization voted to include the project for conformity testing, the publicly available project summary sheet has not made clear the duration of the concession period for this project, the projected toll revenues, or the proposed profit-margin for the private investors, so there is no way of knowing if this transit investment is a fair or adequate share of the corridor investment.

These matters need to be addressed through the planning and environmental review process if the public is to have opportunities for input. Binding contractual agreements for environmental performance and transit benefits should be built into project and plan approvals and any resulting concession agreements to ensure that these promises are not just a marketing façade, but it is unclear whether or when Virginia DOT will make these agreements available for public review and comment prior to their adoption. These concerns are exacerbated by the project sponsor's intent to advance the project as a Categorical Exclusion under the National Environmental Policy Act, rather than carrying out a full Environmental Impact Study and considering alternatives, thus curtailing opportunities for public review and comment.

A number of recent studies have revealed the tendency of traffic and revenue forecasts from green-field toll road projects to significantly overestimate demand and serious questions have been raised about conflicts of interest between forecasters and project construction interests.[22,23] Revenue forecasting for existing highway facilities is a far more certain business, which makes concessioning of existing toll properties far less risky than greenfield projects that are developing new right-of-way with uncertain demand. Advance forecasting of toll revenues from the application of tolls to existing untolled road networks, such as the cordon charging systems in London, Stockholm, Oslo, Bergen, Trondheim, and Singapore, is nearly as challenging a task as greenfield road revenue forecasting.

As a result of demand estimation problems, a large share of greenfield PPP toll road projects, including Pocahontas Parkway and Dulles Greenway in Virginia, the Orange County toll roads

[21] Breakthrough Technologies Institute and Environmental Defense, Changing Lanes: Linking Bus Rapid Transit and High Occupancy Toll Networks in Northern Virginia, September 2005, Washington, DC.

[22] Barron, Kelly. (2001). "Roads Less Traveled: New Toll Roads Have Been a Bonanza for Consultants, but not for Bondholders," *Forbes Magazine*, September 3, 2001.

[23] Plunkett, Chuck. (2006). "Roads to riches: Paved with bad projections," *Denver Post*, May 28-30, 2006.

in California, and E-470 in Colorado, go through refinancing shortly after opening. Directly or indirectly, bondholders or taxpayers may end up with the bill when project finances are restructured to extend the repayment period for bonds, spurring greater long-term financing costs. Public debate over the efficacy of long-term concessions has often been clouded by a lack of knowledge of the officials and stakeholders over trade-offs on the length of concession terms, or lack of opportunity for any public discussion because contracts are negotiated in secret. This too often cedes the public debate to cynical talk radio demagogues, undermining opportunities to help build public trust in informed civic leadership through open fact-based public deliberation. The "Value-for-Money" analyses and public cost comparators that are required in several countries as part of PPP deals, prior to financial close, can help address these issues with better public disclosure and more open and fair competition, potentially dispelling concerns that these are nothing but insider-driven, bad value for the public deals.

Greater public oversight and independent auditing of transportation and revenue forecasts prior to final project approvals might also help reduce some of these problems in the future. Beyond this, development of more effective performance-based contracting frameworks that focus on improving the operation of existing transportation corridors using shorter-term PPP operating and management concessions prior to any design-build investment in new capacity may be a better way to ensure wise and cost-effective decisions about new corridor capacity.

V. Use of Tolls in PPPs and Publicly-Financed Projects

While tolls need not be part of PPPs, they are often a part of the financial element that makes a corridor attractive for private investment. Environmental Defense believes several principles should guide new tolling initiatives, whether advanced by public agencies or through PPPs.[24]

1. **Tolled roads and PPPs should be designed to optimize traffic management and the use of public transportation.** A key method for optimizing performance is to dedicate a portion of toll revenues to transit to guarantee that the toll road will benefit all travelers, and not just those who can afford to pay the tolls.

2. **Toll road projects should be designed to meet enforceable short- and long-term performance goals for system performance, environmental and community protection, and equitable transportation access to jobs and opportunities.** If projects are designed to meet these goals, they will likely win faster public acceptance rather than facing years of controversy, delay, and possible legal or regulatory challenges.

3. **Tolls should be set at a level to insure that all project goals are met.** Well intended populist efforts to curb tolls may undermine the capacity of project managers to fulfill commitments to communities for improved transit services, reduced traffic delay for trucks, or other impact mitigation. This may undermine not only system effectiveness and equity, but the very capacity of government to sustain public support for mobility investments.

[24] For more discussion see: Replogle, Michael and Keri Funderberg, *No More Just Throwing Money Out the Window: Using Road Tolls to Cut Congestion, Protect the Environment, and Boost Access for All*, Environmental Defense, Washington, DC, June 2006. (www.environmentaldefense.org/go/highperformancenetworks)

4. **Agencies should consider alternatives that apply time-of-day, automated tolling to a portion of existing road capacity.** Converting existing road capacity to tolled lanes is often a more cost-effective way to reduce congestion and protect the environment. More U.S. officials are considering this approach in light of the successful experience in London, Stockholm, and other cities. The SAFETEA-LU federal transportation law provides authorization for any U.S. highway to be tolled and U.S. DOT is encouraging such efforts. Engineering science shows that during times of peak congestion toll managed lanes can carry twice as many vehicles at three times the speed compared to free lanes. Thus, for every two free unmanaged motorway lanes upgraded to toll managed lanes, it is like creating a new virtual lane of motorway capacity (see Figure 2 below).

5. **Agencies should consider emission-based tolling.** Emission based tolls can achieve a more robust revenue stream due to the premium paid by high-emitter, inefficient vehicles, and an accelerated fleet turnover to low-emission vehicles to reduce toll charges. In addition, the toll premium collected from high-emitter vehicles can be used to finance vehicle retrofits of Auxiliary Power Units to reduce idling and installation of low-carbon fueling stations at rest areas. This further reduces total carbon emissions from these tolled facilities.

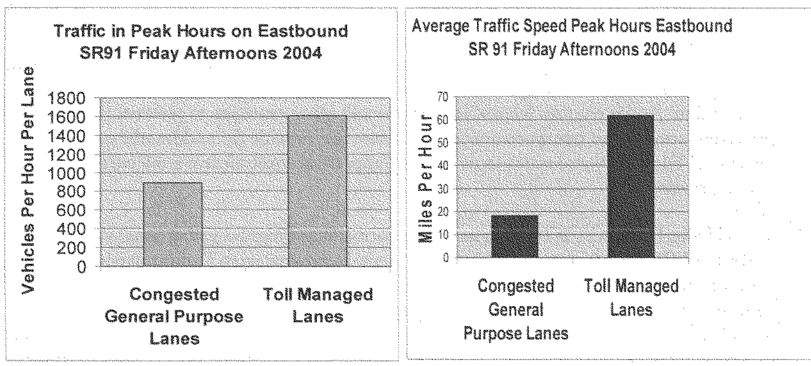

Figure 2: Upgrading existing free lanes to toll managed lanes could recover lost capacity with two toll managed lanes carrying as much traffic – at three times the speed – as moved in four free, but congested lanes (Federal Highway Administration, *Report to Congress on the Value Pricing Pilot Program Through March 2004*, US Federal Highway Administration, 2004.)

Germany and Switzerland both toll legacy trucks at significantly higher rates than newer low-emitter trucks. This has accelerated the purchase of modern clean vehicles and promoted smarter logistics planning to cut the number of empty freight backhauls. London will also implement an emissions-based pricing policy for the entire city in 2008.

Americans are used to thinking of tolls as a revenue tool to pay for new roads, which is how they have most often been used. However, several states are using tolls to manage traffic flow as well. California's experience with High Occupancy Toll Lanes on SR-91 and I-15 demonstrate that when tolls are adjusted by time-of-day to prevent traffic from backing up at bottlenecks, tolls can play a different role, yielding higher traffic throughput than on ordinary freeways. This can reduce congestion delay for all the travelers in a corridor, whether they pay the toll or not, whether they are drivers, passengers, or bus riders.

Experience suggests the public will accept tolling of existing lanes only when they get viscerally better performance and expanded travel choices. Attractive, high quality public transportation and other new travel services, such as rapid traffic incident management and improved traveler information should be made available before introducing tolls on existing lanes. Travelers need to be convinced that they will get better performance from the transportation system in return for new congestion charges. If drivers think they will still get stuck in traffic while getting stuck with new tolls, they will see a toll as just another tax. New tolls should be used as part of a smart traffic management toolbox and linked to funding for high performance public transportation and new performance based funding and contracting strategies.

VI. Can PPP Concessions Foster High Performance Metro and State Transportation Plans?

U.S. Metropolitan Planning Organizations (MPOs) and states face challenging new federal planning requirements that will press them to consider how to transform today's low efficiency roads into high performance corridors and networks. The 2005 SAFETEA-LU law requires regional transportation plans to include "operational and management strategies to improve the performance of existing transportation facilities." It requires state and metropolitan transportation plans to "achieve the objectives of the planning process," with a focus on serving mobility needs and fostering economic growth and development while minimizing fuel use and air pollution. And it requires "capital investment and other strategies to preserve the existing and projected future metro transportation infrastructure and provide for multimodal capacity increases." For MPOs and states to do all this under fiscal constraints is a tall order demanding new approaches.

To its credit, U.S. DOT is through its Urban Partnership Program giving some incentive for states and MPOs to think about such performance-based strategies. Unfortunately, U.S. DOT has failed to issue criteria to help states and MPOs evaluate how effectively they are complying with these planning requirements. Yet the challenge remains for states and MPOs to develop plans that accomplish all four objectives together, using appropriate measures of performance. The requirements, if implemented, could give impetus to strategies that create high-performance corridors, either through better public agency coordination or new kinds of public-private partnerships, with more focus on system operations and management and less emphasis on just building more roads and adding new lanes.

Experience shows that there is a significant opportunity to cut congestion and reduce fuel use and air pollution with a combination of traffic management, signalization improvement, toll managed lanes, improved transit service, and market incentives such as pay-as-you-drive insurance and parking cash-out. This approach — along with the creation of complete streets that accommodate pedestrians and cyclists, bicycle-transit integration, and truck-only toll lanes — could be part of a comprehensive asset management framework. Such a high performance transportation strategy would be much more cost-effective and practical than the long-failed "let's-try-to-build-our-way-out-of-congestion" strategy advocated on May 16, 2007, to this committee by the American Highway Users Alliance.

As Federal Highway Administrator, Richard Capka, said at a hearing of this subcommittee on June 27, 2006, "The answer is not just building extra capacity, but to maximize use of the current system. We need to make better use of the current system." He said policymakers should "look at the use of highways as utilities," adopting congestion pricing strategies to make the system work more effectively and to handle ever-increasing environmental impacts.[25]

Some states are already pressing forward. Oregon has for some years been moving to adopt a fix-it-first approach in its planning and asset management. Oregon DOT has linked its Highway Economic Requirement System (HERS) asset management analysis systems to some of the nation's most advanced transportation models to account for induced travel and behavior impacts of investment choices. Oregon has for some years used performance goals seeking to reduce traffic growth per capita and to manage sprawl, linking transportation investment decisions to land use and natural resource planning. Washington State is also advancing tolls and other market incentives, such as pay-as-you-drive insurance and parking-cash-out, as traffic management tools.

States are beginning to look at tolls as a tool to manage traffic in existing lanes. Maryland DOT is proposing to add one toll managed lane in each direction on the Capital Beltway while upgrading an existing lane in each direction to a toll managed lane, rather than just adding new toll lanes. A study carried out by Pat DeCorla-Souza of the Federal Highway Administration looking at the Capital Beltway in Virginia showed that this kind of investment and operations strategy would produce just as much congestion relief as adding two new toll managed lanes in each direction, but would cost less and produce three times more revenue which could be used to fund better public transportation, spurring much less new traffic and sprawl development.[26]

Pioneering metropolitan areas have gone a step farther by tolling existing lanes while improving public transportation and road traffic management. London, Oslo, Singapore, Stockholm and other cities have produced stunning results with considerable popular support. Stockholm's experience is illustrative. Since the January 2006 implementation of a variable time-of-day central area cordon charge combined with adding 197 new buses and 16 new bus lines, motor vehicle traffic to and from the central city is down by 20-25 percent, with half the former motor vehicle trips switching to the public transport system, queue times are down 30-50 percent in most locations inside and outside the charging zone, CO_2 emissions are down 14 percent in the inner city and by 2-3 percent regionally. Before implementation, 44 percent of those polled in the region thought the cordon charge was a good decision and 51 percent thought it a bad decision. Experience with the cordon charge caused public opinion to reverse and a majority of Stockholm voters voted by referendum to reinstate the charge. Today, two-thirds of the public in the Stockholm area support the cordon charge, which was initially put in place by a Green-Social Democratic coalition government that has since lost power. The cordon charge is being reinstated by a new conservative coalition government that had initially campaigned against congestion pricing but now supports it because it cuts congestion and can raise a lot of money for transportation.

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[25] Bureau of National Affairs. (2006). *Transportation / Environment Alert*, Volume 8, Issue 42, June 23, 2006.

[26] DeCorla-Souza, Patrick (2003) "Evaluation of Toll Options Using Quick-Response Analysis Tools: A Case Study of the Capital Beltway," *Transportation Research Record 1839*. Paper No.03-2946, Transportation Research Board, Washington, DC.

These innovations are being considered widely now in America. From Miami to Seattle, San Diego to New York, agencies and investors are moving road tolls and innovative financing tools into the mainstream of planning and transportation development. Last year, the San Francisco County Transportation Authority began a $1 million study of how congestion charging might help address its urban traffic problems. Noting the success of these strategies abroad, on December 8, 2006, the U.S. Department of Transportation announced a $100 million Urban Partnership Initiative aimed at reducing congestion through better transportation management in U.S. metropolitan areas, soliciting proposals for integrated congestion charging, bus rapid transit, traffic management, and telework strategies.

America's mayors and governors can and are starting to rise to the challenge. More than 15 applications were submitted to USDOT under this initiative at the end of April 2007 according to press reports. Most notable is the proposal by New York City's Mayor Bloomberg in April 2007 to initiate an $8 a day toll for traffic entering Manhattan below 86th Street to cut congestion and fund bus rapid transit and rail service improvements across the city. This is part of a comprehensive plan to cut pollution and greenhouse emissions in the city by 30 percent.

Performance-based contracting may provide a way forward in some metropolitan areas in the face of public distrust of tolls as a traffic management tool. In a paper presented at the 2006 Transportation Research Board Annual Meeting, FHWA's Patrick DeCorla-Souza, described how this might work. An "Operate-Design-Build-Operate contract model" would focus first on inviting a concessionaire to operate an existing highway corridor for higher productivity with such strategies as improved transit and rideshare services, rush hour shoulder lanes, improved transit access, ramp-metering, and peak-period congestion management tolls. Investment in new capacity would follow only in response to a demonstration of cost-effectiveness compared with operational and service improvements. Peak period tolls set to manage congestion would not be retained by the private concessionaire as profit, but managed publicly with accountability and transparency.[27,28]

More widespread in the U.S. is the consideration of road pricing as a strategy for conversion of existing or planned HOV lanes to HOT lanes, in conjunction with additions of new lane capacity. A number of studies published by the Reason Public Policy Institute have advocated this approach.[29] This approach is also embodied in a planning study released by the Metropolitan Washington Transportation Planning Board in fall 2006 which envisions creating a 600+ lane-mile network of HOT lanes composed of existing or planned HOV lanes, including about 250 additional lanes of motorway capacity beyond what is now planned for 2030. That study showed that tolls would have to be as high as several dollars per mile on many segments of a HOT lanes network to keep these lanes free-flowing, while leaving other lanes jammed with congestion.

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[27] DeCorla-Souza, Patrick. (2006). *A New Financing Approach for Transportation Infrastructure Expansion.* Presented at Transportation Research Board Annual Meeting, Washington, D.C.

[28] DeCorla-Souza, Patrick. (2004). *A New Public-Private Partnership Model for Road Pricing Implementation.* 2005 Annual Meeting of the Transportation Research Forum, Federal Highway Administration,Washington D.C.

[29] Poole, Robert W., Jr. and C. Kenneth Orski. (2003). *HOT Networks: A New Plan for Congestion Relief and Better Transit,* Reason Public Policy Institute, Policy Study 305. http://www.reason.org/ps305.pdf , accessed June 30, 2006

An alternative approach is to convert and upgrade metropolitan motorways in their entirety to metropolitan toll managed networks. Pat DeCorla Souza, heads the Value Pricing Program at the U.S. Federal Highway Administration, has been an articulate advocate for this approach.[30] This approach avoids the complex merges, direct connector ramps, and operational problems poised by creating and integrating parallel high-speed toll managed lanes next to lower productivity and often congested, low-speed, unmanaged free lanes. Studies suggest this approach would have lead to far lower tolls while providing congestion relief for all and opportunities for financing much greater transit improvements with less new road capacity.

A recent study by Smart Mobility for Environmental Defense shows the impacts of a high performance corridor strategy in one portion of the metro Washington, DC region compared to business-as-usual. The Metro Washington MPO in 2005 added to its transportation plan and program a proposed new $3 billion, 6-lane tolled outer beltway that would run east-west for 18 miles in suburban Maryland, about 7-10 miles north of the existing Capital Beltway. Environmental Defense's 2005 study, using current official transportation and emission models, shows this would in 2030 increase gasoline use by 13 million gallons per year for the entire Washington metropolitan area compared to doing nothing, resulting in 2.5 more million metric tons (MMT) of CO_2, a 5 percent increase.

An alternative to this planned outer beltway that would at less cost improve existing highways with toll traffic management and public transportation represents a low end estimate of what might result from a high performance corridor approach. This latter scenario would do more to relieve traffic congestion and would reduce 2030 gasoline use by 29 million gallons per year, resulting in 4.7 MMT of CO_2, an 11 percent decrease from doing nothing.[31] Thus, the high performance corridor approach would deliver a 16 percent decrease in CO_2 emissions by 2030 from business-as-usual. In the project study area, the proposed outer beltway produces hydrocarbon emissions 7 percent higher than doing nothing and 14 percent higher than the high performance corridor approach. The proposed outer beltway produces nitrogen oxide emissions 9 percent higher than doing nothing and 18 percent higher than a high performance corridor approach.[32]

The new SAFETEA-LU planning requirements ought to prompt wider consideration of the full array of high performance transportation strategies by state DOTs and MPOs in coming years – cordon charging, HOT networks, and fully toll-managed motorways linked to improved public transportation. While it remains to be seen how readily MPOs and state DOTs will embrace such an integrated approach, clearly planners will be spending more time in coming years focusing on how traffic operations, safety, and management of the existing system can deliver better performance. Guidance from U.S. DOT on criteria to quantify performance could still

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[30] DeCorla-Souza. (2003) Clearing Existing Freeway Bottlenecks with Fast and Intertwined Regular Networks: Costs, Benefits and Revenues. 2004 TRB Annual Meeting. http://knowledge.fhwa.dot.gov/cops/hcx.nsf/All+Documents/A5A934A66798F6AA85256DE00000A713/$FILE/Paper%2004-3993.pdf, accessed June 30, 2006.

[31] Environmental Defense (2005) Maryland's Intercounty Connector: Exacerbating Petroleum Dependence and Global Warming, www.environmentaldefense.org/go/iccoptions.

[32] Environmental Defense, et al. (2005) The Intercounty Connector: Performance and Alternatives. (http://www.environmentaldefense.org/article.cfm?contentid=4220)

help guide state and MPO efforts to implement these new provisions. Congress should press the Administration to issue such guidance.

Conclusion. Surface transportation finance, management, and operations in the U.S. and abroad are being transformed as information and communications technologies and market incentives are incorporated into the systems architecture. This is part of a transformation from a mid-20th century system that focused on the accommodation of ever-growing traffic through construction of physical infrastructure to a 21st century system that focuses on understanding and meeting customer needs and delivering more cost-effective performance through systems management and integration of services. Public-private partnerships will likely be a growing part of that unfolding story.

Will we throw away our existing transportation system by building a new toll road system and letting the old systems decay, leaving behind millions of citizens who can't afford to use the new highways? Or will we revitalize and restore the dynamic potential of our existing system of streets, highways, and public transportation to renew our older communities and knit them together in a fabric that encourages walking, biking, transit, electronic communications, and smooth, efficient driving opportunities, using pricing to keep a balance? The decisions this committee makes in the coming months leading up to the reauthorization of our federal transportation program in 2009 could help set the stage for the next chapter of the story.

Thank you for your attention.

Testimony of

TODD SPENCER
EXECUTIVE VICE PRESIDENT
OWNER-OPERATOR INDEPENDENT DRIVERS ASSOCIATION

Before the

UNITED STATES HOUSE OF REPRESENTATIVES
COMMITTEE ON TRANSPORTATION AND INFRASTRUCTURE
SUBCOMMITTEE ON HIGHWAYS AND TRANSIT

Regarding

PUBLIC-PRIVATE PARTNERSHIPS:
STATE AND USER PRESPECTIVES

MAY 24, 2007

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Submitted by

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Good morning Chairman Defazio, Ranking Member Duncan and members of the Subcommittee. Thank you for inviting me to testify this morning. Public-private partnerships have obviously garnered a tremendous amount of attention as states and the federal government face difficult decisions related to the funding needs for our roads, bridges and tunnels.

My name is Todd Spencer. I have been involved with the trucking industry for more than 30 years, first as a truck driver and owner-operator; and then as a representative for our nation's small-business trucking professionals and professional truck drivers. I am currently the Executive Vice President of the Owner-Operator Independent Drivers Association (OOIDA).

OOIDA is a not-for-profit corporation established in 1973, with its principal place of business in Grain Valley, Missouri. OOIDA is the national trade association representing the interests of independent owner-operators and professional drivers on all issues that affect small-business truckers. The more than 153,000 members of OOIDA are small-business men and women in all 50 states who collectively own and operate more than 260,000 individual heavy-duty trucks. Owner-operators' trucks represent nearly half of the total number of Class 7 and 8 trucks operated in the United States.

The Association actively promotes the views of small business truckers through its interaction with state and federal regulatory agencies, legislatures, the courts, other trade associations and private entities to advance an equitable business environment and safe working conditions for commercial drivers. Public-private partnerships and all other highway-funding mechanisms used by the federal and state governments have a direct impact on the livelihoods of all truckers.

As such, OOIDA has been engaged in the debate regarding public-private partnerships for quite some time, including actively opposing the long-term leases of the Chicago Skyway and the Indiana Toll Road. OOIDA also played an integral role in the formation of the Americans for a Strong National Highway Network – a coalition of national organizations representing a full range of highway users that are working together to oppose the outright sale of public highways to private companies, while also working to identify viable funding solutions for our nation's infrastructure needs.

Truckers are Vested Stakeholders

Small business trucking professionals know first-hand that America's economic future and ability to compete in the global marketplace relies on the existence of a safe, secure, seamless, reliable, and efficient national highway network. Small business truckers (companies operating six or fewer trucks) comprise close to 90 percent of the motor carrier industry. Considering that roughly 69 percent of freight tonnage in the United States is moved by truck, it is certainly not a stretch to say that small business truckers are truly the backbone of our nation's economy.

On average, these small business truckers drive more than 115,000 miles per year, which adds up to more than 3 million miles in their lifetimes, and spend more than 240 nights per year away from home. They transport virtually every type commodity that moves in commerce, particularly those that require special handling.

Small business truckers typically pay in excess of $10,000 in federal taxes and state taxes of more than $6,000 per truck each year. To put some perspective on that $16,000 paid in taxes, that equates to about half of the annual net income of the average truck driver.

OOIDA members and other trucking companies make a significant financial contribution to federal and state governments' transportation funds through a combination of taxes. Taxes they pay into the federal Highway Trust Fund include a 24.4 cent per gallon federal diesel tax, 12 percent excise taxes on new equipment, an annual Heavy Vehicle Usage Tax, and tire taxes. In addition, truckers must pay state fuel taxes, weight mileage taxes, licensing and registration fees. Heavy-duty trucks account for less than 10 percent of our nation's highway traffic, yet contribute at least 36 percent of the money going into the federal Highway Trust Fund.

Public-Private Partnerships and Privatization

Not all public-private partnerships related to highway infrastructure are created equal and OOIDA does not oppose all PPPs. There certainly are situations where it makes good sense for public entities to team up with the private sector on infrastructure projects and where private sector money can help to jumpstart projects that will add capacity to our nation's roadway systems. However, every transportation deal should be entered into cautiously with all factors being weighed and with total confidence that the overall net benefits clearly side with the public. All public-private partnerships should be done transparently and with full input from the public including highway users.

There are major differences between so-called "brownfield" and "greenfield" projects. Brownfields generally being the term used to reference existing infrastructure and greenfields referencing projects where a new infrastructure or additional capacity is being planned.

It seems the most aggressive proponents of PPPs in the United States, including the U.S. Department of Transportation, have done a real disservice to the overall advancement of PPPs by focusing the majority of their promotional energy on deals involving brownfields. In regards to the efforts of those proponents and with in recognition that Pennsylvania, New Jersey and several other states are actively moving toward long-term lease deals with private companies, this morning I will primarily focus on these "asset transfer" public-private partnerships that we feel flatly equate to privatization.

To be very clear, OOIDA and its members are adamantly opposed to the long-term leasing (also referenced as asset transfer, selling, monetizing or privatizing) of existing publicly owned infrastructure to private entities. Our interstates and highways were built to provide the citizens of our nation with the ability to move about freely as well as to move freight in an efficient and affordable manner for the benefit of the citizens and our economy. "User fees" paid by the motoring public, primarily through fuel taxes, have provided the capital for building and maintaining those roads. Our interstates and highways, including those with tolls, were not built to become profit centers or cash cows for the public or the private sectors.

Proponents have justified long-term leasing/selling of major toll roads by pointing to cash that will be made available through these deals to state government to use for other state transportation projects or non-transportation programs. And, admittedly, private companies seem willing to put up some extraordinary amounts of money to entice states into selling their roads.

Regardless how the money is ultimately going to be used, two things are very clear – the private companies will make healthy profits from the deals and the users of those toll roads will be fleeced for much more than just the operating and maintenance costs of those roadways. In these situations, tolls cease to be "user fees" as they were originally intended. Rather, to paraphrase Dennis Enright of the NW Financial Group, the tolls will now have become "corridor taxes."

Proponents of highway privatization also gloss over the principal reason that companies are willing to put up large lump sums of cash for long-term deals – that is the prospect of collecting consistently increasing tolls. As the old adage goes, "there ain't no such thing as a free lunch." The money made available to the states and the profits private companies enjoy in these deals are not generated from some magical rearrangement of assets or change in operating procedures. The vast majority of that money, if not all of it, ultimately comes from the private operators' ability to increase tolls year after year. The greater the company's ability to increase tolls, the more they will be willing to shell out up front for the deal.

The "concessionaire agreements" for both the Chicago Skyway and the Indiana Toll Road deals include clauses permitting annual increases in tolls that are tied to the highest of three benchmarks: the consumer price index, the nominal gross domestic product per capita or 2 percent a year. To put this in perspective, during the past 60 years the nominal GDP per capita has grown by an average of 7 percent per year and the has grown CPI by about 4 percent annually. Before the lease, Governor Mitch Daniels of Indiana enacted a hefty phased-in toll increase to attract private companies to bid on the Indiana Toll Road. Tolls on the Indiana Toll Road have already risen by more than 50 percent for trucks since last year at this time. And, they are scheduled to increase an additional 113 percent before the private concessionaire's begin their annual increases in 2009.

Imposing significant tolls on Interstate highways without corresponding tax abatement will force truckers and other highway users to use alternative routes such as local roads and state highways that were not intended for the type and volume of traffic that Interstate highways are designed to handle. The decision of truck drivers to use these less suitable routes is not based on an attempt to maximize their profits; rather it's an exercise in survival. The high tolls can impose a severe financial hardship on small-business truckers who are already coping with narrow to non-existent profit margins. Since small business truckers are paid by the mile and not by the hour, waiting in traffic on secondary roads is often better than shaving a few hours off of travel time and paying large tolls out of pocket. As has been commonly seen in states where toll rates have been raised, traffic congestion will increase significantly on these alternative routes, adjacent communities will be disrupted, and the safety of traveling on these roads will be dramatically reduced because of the increased traffic loads.

In 2004, Governor Bob Taft directed the Ohio Department of Transportation to implement strategies to draw truckers back to the state's turnpike. The cornerstone of the plan was to provide "a meaningful toll reduction to truckers." The Governor publicly acknowledged that since tolls on the turnpike were raised by 82 percent in 1999, truck traffic on the highway had decreased dramatically and traffic congestion had increased significantly on the alternative routes. As Governor Taft stated, "My tour of routes parallel to the turnpike in northern Ohio provided a dramatic look at the heavy congestion and safety hazards caused by trucks avoiding the turnpike." Fortunately for Governor Taft, the Ohio Turnpike was still in the public domain and the state had the ability to make the necessary adjustments to the toll rate to attract truckers back onto the roadway.

Residents of Indiana will not be so fortunate as Governor Daniels signed away control of the Indiana Toll Road and its toll rates for 75 years – leaving governors of the state yet to be born without any say over the toll road. The public will be faced with paying for roadways adjacent to the Indiana Toll Road to be improved to accommodate traffic diversions. To add insult to injury, non-compete clauses contained in Governor Daniels' lease agreement will require the public to purchase the rights to significantly improve or add capacity to those roadways from the leasing entity. Ultimately, the citizens of northern Indiana will be left to pick up the tab and deal with the consequences.

Proponents of the asset-transfer form of public-private partnerships claim that market forces will rein in tolls imposed by private road operators. This line of reasoning falls short when you consider that those companies are only interested in roads with high traffic volumes, particularly high volumes of truck traffic, and with few alternate routes that compete for traffic. As the Macquarie Infrastructure Group stated in a presentation to their investors on the Indiana Toll Road, the road presents "minimal bypass risk." The presentation went on to say "Each alternate route presents a number of issues for motorists," specifically that the western alternatives are "heavily trafficked" and the eastern alternatives are "not freeway standard."

It is laughable that officials at the U.S. Department of Transportation have tried to use the emotional, hot button issue of traffic congestion to sell the public on deals such as those in Chicago and Indiana. We are not going to disagree with the fact that congestion is a major problem in many of our nation's urban centers. However, the companies tossing around billions of dollars to invest in U.S. roads are out to rake in as much profit as they possibly can for their own investors. Those companies are much more prone to "induce" congestion on the roads they profit from, not reduce it. You will be hard pressed to find a company willing to ink a deal without the contract including "non-compete" clauses in some form or fashion that restrict the state's ability to expand or improve roads that compete with the toll road being sold.

There are numerous other concerns that arise from selling off our public roadways such as foreign control, instability in the debt equity market, undervaluing of public highways, asset turnover by private investors, appropriate use of funds obtained from sales, etc. and so many other problems that will arise over the course of 30, 50, 75 or 99 years.

Conclusion

Our country's system of interstates and highways has been a major factor in boosting the United States of America to its present position of international economic dominance. It has been the central element of a coordinated infrastructure network that provides the country with the ability to efficiently move people and resources to workplaces and finished products to consumers with ever-increasing speed and reliability. The resulting economic activity has created a quality of life that continues to be envied throughout the world.

We recognize that our country is facing very difficult challenges with maintaining highways and other surface transportation facilities, when there is a need to add capacity to the overall system. We also recognize that elected officials are confronted with extremely difficult funding decisions. However, we must not fall into a "pawnshop" mentality – hocking your assets for cash now, but ultimately paying much more down the road.

We need to be looking for solid solutions that are beneficial in the short-term and especially in the long-term. Unfortunately, there are far too many public officials that are either unwilling to tighten their belts and put transportation funding toward transportation or simply are just looking for a quick fix to funding problems while they are in office, regardless of the impact in the future.

Of greatest concern is that officials at the U.S. DOT, with the blessing of the White House, are aggressively promoting the privatization of our highways. They have spent an extraordinary amount of time, effort and taxpayer resources to persuade state governments to talk with private companies and to pass legislation to enable the sale of their roads.

To be clear, we do not categorically oppose private involvement in constructing new capacity, provided the project is developed in a transparent manner, involves significant input from highway users, adds to existing capacity in an effort to relieve congestion, provides choice for users, removes fees once the project is paid for, excludes non-compete clauses, and considers state and local land rights.

We believe there are contributions the private sector can make that will assist federal, state, and local governments in better assessing the true nature and needs of our nation's infrastructure, for example, potentially limited roles for the private sector to assist the public sector in better managing and maintaining current assets without relinquishing control of those infrastructure assets.

However, as truckers and as Americans we will do all that we can to keep the roads that we have bought and continue to pay for from being sold off to the highest bidder. Selling our roads may be good for private companies and their investors, but it is certainly not good for those Americans who depend on those roads to make a living or for our nation's economic well being.

There is no doubt "leasing" our nation's highways will leave an enduring legacy on our country. Unfortunately, small business truckers have difficulty envisioning it to be a positive one.

Chairwoman DeFazio, Ranking Member Duncan and members of the Subcommittee, thank you for providing me with this opportunity to testify on behalf of the members of OOIDA.

I would be pleased to answer any questions that you may have.

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GOVERNMENT MANAGEMENT, ORGANIZATION, AND PROCUREMENT

June 8, 2007

The Honorable Peter DeFazio
Chairman, Subcommittee on Highways and Transit
House of Representatives
2165 Rayburn House Office Building
Washington, D.C. 20515

Dear Mr, DeFazio:

I respectfully request that the enclosed statement from TysonsTunnel.org be inserted into record of the May 24, 2007 subcommittee hearing *Public-Private Partnerships: State and User Perspectives*.

Thank you for your consideration.

With kindest regards, I am

Yours truly,

JOHN J. DUNCAN, JR.
Member of Congress

JJD:aw

STATEMENT OF TYSONSTUNNEL.ORG
SUBMITTED FOR THE RECORD OF THE HEARING
BEFORE THE
SUBCOMMITTEE ON HIGHWAYS AND TRANSIT
OF THE
HOUSE TRANSPORTATION AND INFRASTRUCTURE COMMITTEE
ON
"PUBLIC-PRIVATE PARTNERSHIPS: STATE AND USER PERSPECTIVES"

MAY 24, 2007

TysonsTunnel.org

TysonsTunnel

Under not Over!

TysonsTunnel
Under not Over!

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My name is Scott Monett. I am Chairman of the McLean Chamber of Commerce and President of TysonsTunnel.org, an unprecedented coalition of large and small businesses, environmental organizations, civic groups, homeowner associations and private citizens of Northern Virginia. TysonsTunnel.org was formed in October, 2006 with the goal of establishing a fair, open and competitive bidding process for the Metrorail extension to Dulles International Airport and reopening consideration of a tunnel under Tysons Corner.

We thank Chairman DeFazio, Ranking Member Duncan and the Subcommittee for holding this important hearing which seeks input from affected communities, businesses, and state and local governments regarding their insights on and experiences with public-private transportation partnerships. We also understand that Committee Chairman Oberstar recently contacted state and local officials urging caution in proceeding with such agreements.

It is not within the mission of TysonsTunnel.org to comment generally on the wisdom or drawbacks of public-private transportation partnerships. However, we offer to the Subcommittee our experience with the Dulles Corridor Metrorail Project as evidence of what can go terribly wrong when a public-private venture is not negotiated and managed with transparency, accountability and competition.

Tysons Corner is the 12th largest business district in the Nation and the economic engine of our region. Plans are underway to extend the region's Metrorail through Tysons to Dulles International Airport. TysonsTunnel.org and the majority of citizens support bringing mass transit to the area. However, a significant and growing number of Tyson Corner area businesses, residents and commuters oppose the current plan to construct an aerial system through the heart of our community under a sole-source contract which lacks fixed pricing and protections for county taxpayers and Dulles Toll Road commuters. Our opposition stems in no small part from the fact that many of the details of the agreement with the contractor have not been publicly disclosed.

To date, more than 18,000 individuals and businesses have signed a petition urging that the process for extending the Metrorail be opened to competitive bidding and that the tunnel option be considered side-by-side — "apples to apples" — with the aerial alignment.

This multi-billion dollar project, which sits in the backyard of the Nation's Capital, is the largest, most expensive transportation effort undertaken in Fairfax County history and is being financed entirely with public funds. Jurisdictions, urban planning groups and development organizations around the country are watching how the Federal Government, Congress, the Commonwealth of Virginia and Fairfax County handle this massive public-private partnership project.

TysonsTunnel.org and a swelling number of concerned citizens and businesses support the rapid, cost-effective completion of the Dulles Corridor Metrorail Project. We also believe strongly that when, as in this case, public investment and a public contract valued in billions of dollars are at stake, common sense, best business practice and public interest demand that all agreements and final design and construction work are subjected to the most open, robust, public, transparent and competitive bidding process possible.

This has not been the case to date with the Dulles Corridor Metrorail Project.

Attached to this statement is the petition ("Petition")and supplement TysonsTunnel.org has submitted to the Federal Transit Administration (FTA) enumerating our concerns with the Federal and state process under which this public-private partnership endeavor is being conducted. The Petition was filed because FTA has an obligation to ensure full and open competition to qualify for Federal funds and because of the U.S. Department of Transportation's experience with major transportation infrastructure contracts.

The Petition requests that FTA re-open the environmental review process to conduct a full and independent feasibility study of a 3.4-mile, large-bore tunnel under Tysons Corner and take all necessary steps to ensure that the project sponsor, the Commonwealth of Virginia, follows the competitive procurement procedures established under Federal law.

Following is a summary of the key concerns TysonsTunnel.org has with respect to the public-private partnership known as the Dulles Corridor Metrorail Project.

Using "Public-Private Partnership" Legislation to Avoid Competition. The Dulles Corridor Metrorail Project is being developed under Virginia's Public-Private Transportation Act (PPTA) as a "public-private partnership." The PPTA is intended to allow flexibility in contracting, as a means of increasing private-sector investment and shifting some financial risks to the private sector. The PPTA specifically requires competitive procurement, either in the form of competitive sealed bids or competitive negotiation. *But for this project, the PPTA process has been used to avoid any real competition.* As detailed in the enclosed Petition, the process set up under the PPTA effectively commits the Commonwealth to negotiate a design-build contract for this entire multi-billion-dollar project with a single entity — Dulles Transit Partners (DTP). The result, not surprisingly, has been a one-sided contract that leaves the public exposed to major risks of cost overruns. This experience underscores the risk to the public when increased contracting flexibility is used as a means of avoiding competitive procurement.

Lack of Transparency and Accountability. The negotiations between the project sponsor and Dulles Transit Partners (DTP), a consortium including Bechtel Corporation and Washington Group International, have been mired in secrecy and many of the details of their agreement to construct the aerial alignment, including key financial information, have not been disclosed. No access to these critical terms of the agreement is provided either to the funding partners (i.e. Fairfax County) or to the public through the Freedom of Information Act (FOIA).

Furthermore, as this project moves forward, the prospects for achieving greater transparency and accountability are dim. The Washington Metropolitan Airports Authority (MWAA), which will become the project sponsor upon approval of the final design-build contract, claims that its status as an entity created by interstate compact makes it exempt from Federal and Virginia FOIA requirements.

No Fixed-Price Contract. The current contract reportedly provides a fixed-price agreement for less than 45 percent of this multi-billion dollar project. That means that more than half of the cost of the project is at this time unknown and DTP will be able to negotiate costs along the way. This open-ended approach gives the contractor enormous leverage to inflate prices at a later date and shifts the burden of paying for cost-overruns from DTP to the taxpayers. In essence, the advertised "price" of this project today becomes merely a floor upon which higher prices can be imposed in the future.

Spiraling Costs. The consequences of negotiating a massive public works contract that has not been competitively bid and lacks 100 percent guaranteed pricing and cost-escalation protections for taxpayers are shockingly evident. In December 2004, the price tag for Phase I of the current Metrorail extension plan (the portion to run through Tysons Corner) was estimated at approximately $1.5 billion. Today, the estimated cost is nearly $2.7 billion. That is a staggering 76 percent increase in the project cost in just 27 months! And that is before construction even begins. If the aerial option's costs continue trending rapidly upward, the current sole-source contract could endanger the project's ability to qualify for Federal funding.

No Competitive Bidding. The Final Design-Build contract for the aerial plan to extend Metrorail has not been competitively bid. In fact, the entire concept of extending the current Metrorail system to Dulles Airport by any alignment has not been subjected to an open, competitive bidding process. (See pages 26-33 of the Petition.) Competitive bidding would be the single most effective way to ensure adequate transparency and accountability with respect to all aspects of this huge public works project and to secure the best price and value for the public investment.

Failure to Consider Reasonable Alternatives. Construction of the aerial option as currently designed will dramatically increase traffic congestion and the associated environmental impacts in an area already choked in traffic. The road closures that will be needed to perform the extensive surface construction of the aerial system will significantly disrupt businesses and negatively impact business revenues. The supporting columns spaced every 100 feet, the huge elevated platform towering in some spots up to 70 feet, and two 1,800-foot concrete walls will split the vibrant Tysons Corner area in two and dominate its landscape. It is little wonder that businesses in the Tysons Corner area are beginning to publicly contemplate relocating.

A reasonable, cost-effective alternative to the aerial project — a 3.4-mile, large-bore tunnel — is available and should be considered by policy makers. However, the lack of transparency, accountability and competitive bidding in the Dulles Metrorail public-private partnership venture has impeded full and open consideration of any other options to date.

In conclusion, TysonsTunnel.org believes strongly that transparency, accountability and competitive bidding are essential to ensuring that the public interest and public investment are protected in public-private partnership endeavors.

We thank the Subcommittee for holding this hearing and appreciate the opportunity to share our experience with a major public-private partnership project.