REVIEW DRAFT

I-5 Columbia River Crossing Partnership

Analysis of Selected Tolling Issues for the Columbia River Crossing Project

Working Paper 6.2

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1. Introduction

1.1 Purpose of Report

There is a large array of issues that emanate from the consideration of tolling options for the Columbia River Crossing Project. This Working Paper focuses on two of these issues, which were raised as immediate concerns of the DOTs.

First, the Working Paper addresses the relationship of 'Purpose and Need' statement to the possible inclusion of tolling options in the project. A preliminary "purpose and need" statement will be needed to initiate the scoping process. The statement will also be used by the DOTs and federal agencies to determine the scope of the project and the alternatives to be considered in the environmental process. In these regards, tolling options are no different than any other type of options (i.e. modal, alignment or design options). However, it is different in one respect; the potential inclusion of tolling is primarily a financing issue. Thus, the question arises as to whether 'purpose and need' statements can use financial constraints or objectives to include or exclude alternatives in the environmental process.

Second, the traffic and tolling studies prepared by Vollmer and DEA show that if tolling is included on the I-5 Bridge, it may be necessary to also toll the I-205 Bridge to avoid significant traffic impacts caused by diverted traffic. However, it was reported in Technical Memorandum 8.1 that an integrated I-5/I-205 Bridge tolling program would only be permitted under 23 USC 129(a)(1), if FHWA determined that I-5 and I-205 operate as 'one route.' Technical Memorandum 8.1 also concluded that neither of the two tolling-related Pilot Programs in TEA-21 provides the desired federal authority; although it is possible that the Value Pricing Pilot Program may be useful. The question arises as to whether FHWA's new SEP-15 Program or the upcoming transportation reauthorization bill might provide the needed federal authority should FHWA reject the 'one route' concept.

1.2 Organization of Report

The remainder of this report is organized as follows:

- Section 2 addresses relationship of 'Purpose and Need' statement to how the possible tolling options are considered during the DEIS process.

- Section 3 addresses the potential affect of current House and Senate transportation reauthorization bills on the possible tolling options for the Columbia River Crossing Project.

- Section 4 discusses the use of SEP-15 to provide the needed federal authority to support integrated tolling options for Columbia River Crossing Project

- Section 5 draws summary findings and observations.

2. Relationship of 'Purpose and Need' Statement to Tolling Options

2.1 Current FHWA Guidance

FHWA recently issued guidance on whether tolling or funding availability can be included as part of a purpose and need statement, and whether such factors can be used to eliminate alternatives as "unreasonable."[1] The Colorado Department of Transportation (CDOT) raised this issue as a result of a planning study that identified corridors where toll revenues could cover transportation improvement costs. However, at the time CDOT requested guidance from FHWA, none of these toll projects were included in the area's long-range transportation plan. FHWA analyzed the facts as follows:[2]

> *A toll road is usually perceived as a solution to a transportation problem, not a statement of the problem itself. However, in some circumstances, tolling might be part of the purpose and need for the project. If the need for a toll road came out of the transportation planning process (or another similar process), it could represent an element of the community's "vision" for its future transportation system. Conducted properly, the planning process identifies and balances the competing needs of an area, and reflects a judgment about how to maximize limited resources to obtain the most transportation improvements possible. If the long-range transportation plan identifies a toll road or other public-private partnership as a goal, this may mean the community has determined that other non-toll sources of funds are needed for projects on which tolls would not be a viable option. In this circumstance, a toll road becomes necessary to fulfill the community's vision of its optimal transportation system, and thus could appropriately be included in the purpose and need statement.*

According to FHWA, this type of planning process dovetails with NEPA in the manner envisioned by Congress and the CEQ and FHWA NEPA regulations.[3] FHWA could not find any case law directly on point, but noted that while the courts have cautioned not to write purpose and need statements so narrowly as to "*define competing 'reasonable*

[1] Memorandum by D.J. Gribbin, FHWA Chief Counsel, entitled "*NEPA Analysis of Toll Roads*," October 15, 2004

[2] Id.

[3] FHWA notes that: (i) Section 102(2)(A) of NEPA directs all Federal agencies to "utilize a systemic, interdisciplinary approach which will insure the integrated use of natural and social sciences and the environmental design arts in planning and decision-making," (ii) the CEQ regulations implementing NEPA require decision-makers to "integrate[e] the NEPA process into early planning to ensure appropriate consideration of NEPA's policies and to eliminate delay" (40 CFR 1501.1(a)), and (iii) FHWA NEPA regulations provide that "To the fullest extent possible, all environmental investigations, reviews and consultations be coordinated as a single process.…" (23 CFR 771.105(a)).

alternatives' out of consideration (and even out of existence)",[4] they have generally deferred to the sponsoring federal agencies when reviewing the adequacy of purpose and need statements. FHWA further noted that there have been many cases in non-tolling settings where the availability of funding options or prohibitive costs has been upheld as a valid basis for narrowing alternatives.[5] In other cases, EISs examining only toll alternatives have been approved by a court without specifically addressing whether consideration of non-toll options were required.[6] And there has been at least one case in which the purpose and need statement was held valid even thought it may have been written so narrow as to only be met by toll road options.[7]

Based on this analysis, FHWA concluded that:[8]

> *If the need for a toll road comes out of the transportation planning process, then tolling could be included as part of the purpose and need statement for an environmental analysis under NEPA. Absent these circumstances, specific goals and objectives of a project, such as the urgency of the project or the need to relieve congestion, could narrow the range of reasonable alternatives to only toll road alternatives. Finally, the economic feasibility of a particular alternative, especially when considered in conjunction with other factors, might provide the basis for eliminating that alternative as unreasonable.*

2.2 Principles to be Followed

FHWA provided three principles that may be important in determining the validity of a purpose and need that includes a toll road under NEPA:

- The transportation planning process must have taken into account the availability of public and private resources and analyzed its transportation priorities based on these.
- Using toll revenues to enhance funding for transportation projects must have been specifically included as one of the goals and objectives of a transportation plan.
- The analysis demonstrating the validity of the purpose and need statement must be properly documented.

FHWA also provided three principles to eliminate non-toll alternatives based on economic feasibility:

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[4] *Simmons v. U.S. Army Corps of Engineers*, 120 F.3rd 664 (7th Cir. 1997)
[5] *Valley Citizen for a Safe Environment v. Aldridge*, 886 F.2d 458 (1st Cir. 1989); and *Sierra Club v. Lynn*, 502 F.2d 43 (C.A. Tex. 1974)
[6] *Laguna Greenbelt v. DOT*, 42 F.3d 517 (1994)
[7] In *Sierra Club v.USDOT*, 962 F.Supp. 1037 (N.D. Ill. 1997), a District Court found that FHWA's inclusion of some specific objectives in its purpose and need statement that could be solved best by a toll road was allowable under NEPA, so long as other broader objectives were not artificially excluded.
[8] Memorandum by D.J. Gribbin, FHWA Chief Counsel, entitled "*NEPA Analysis of Toll Roads,*" October 15, 2004

- Merely a preference for constructing toll roads instead of public roads will not be adequate to meet NEPA's standards; rather a demonstration that using non-toll financing is infeasible or impractical is required.
- If available, explain any other reasons, in addition to economic feasibility, that might also justify eliminating an alternative.[9]
- Once reasonable alternatives are identified and their comparative merits presented, the agency can select any alternative regardless of the impacts, as long as they comply with other environmental laws. At this point, the availability of funding can be a key factor - or even the determining factor - in making a decision about which alternative to select.

3. Affect of Reauthorization Bills on Tolling Options

3.1 Introduction

In March 2005, the U.S. House of Representatives passed HR-3, the "*Transportation Equity Act: A Legacy for Users*" ("TEA-LU") and the Senate Environment and Public Works Committee passed the "*Safe, Accountable, Flexible, and Efficient Transportation Equity Act of 2005*" ("SAFETEA"). Both of these bills contain new provisions regarding tolling highways, which are discussed in the sections that follow.

3.2 House and Senate Bill Provisions regarding Tolling High Occupancy Vehicle Lanes

Section 1606 of SAFETEA and Section 1208 of TEA-LU would establish generally similar provisions regarding tolling HOV lanes (with one exception discussed below). Essentially, these provisions would authorize DOTs to allow non-HOV motorists to use a HOV Lane, provided that the non-HOV motorist pays a toll. DOTs would be authorized to toll any HOV facility for this purpose, including HOV facilities on the Interstate System. This tolling must terminate if the use of the HOV lane by non-HOV vehicles causes service levels on the HOV lane to "degrade." The House Bill would require special toll rates be provided for low-income motorists.

3.3 House and Senate Bill Provisions regarding Interstate System Reconstruction and Rehabilitation Toll Pilot Program

Section 1603 of TEA-LU and Section 1609(a) would reauthorize the Interstate System Reconstruction and Rehabilitation Toll Pilot Program. Both bills essentially tinker with details of the program that existed under TEA-21, none of which are material to the Columbia River Crossing Project. Both would permit three pilot projects. However, both require "reconstruction or rehabilitation" of the facility being tolled; a pre-requisite that is not satisfied by the I-205 Bridge.

[9] For example, if it can be demonstrated that an economically infeasible alternative has greater environmental impacts than other alternatives considered in detail in the EIS, it will have a stronger case for eliminating the alternative.

3.4 Senate Bill Provisions regarding the Fast and Sensible Toll (FAST) Lanes Program

Section 1609(b) of SAFETEA would amend 23 USC 129 by creating the Fast and Sensible Toll (FAST) Lanes Program. FAST would permit DOTs (and private entities) to collect tolls on any highway, bridge, or tunnel, including facilities on the Interstate System, provided the facility is one of the following:

- A facility in existence on the date of enactment of this subsection that collects tolls;
- A facility in existence on the date of enactment of this subsection that serves high occupancy vehicles;
- A facility modified or constructed after the date of enactment of this subsection to create additional tolled capacity (including a facility constructed by a private entity or using private funds); and
- In the case of a new lane added to a previously non-tolled facility, only the new lane.

Tolls on a FAST lane can only be collected through the use of "non-cash electronic technology that optimizes the free flow of traffic on the tolled facility."

3.5 House Bill Provisions for an Interstate System Construction Toll Pilot Program

Section 1604 of TEA-LU would establish the "*Interstate System Construction Toll Pilot Program*." This provision offers the most sweeping change to federal tolling law in either bill, but it allows only three (3) pilot programs nationally. Although it offers a glimmer of hope to resolving the I-205 Bridge issue, it probably does not.

For up to three pilot projects, the pilot program would permit a state or interstate compact to "*collect tolls on a highway, bridge, or tunnel on the Interstate System for the purpose of constructing Interstate highways*." Applications to be designated a pilot project must contain, among other items, the following:

- An assurance that the MPO has been consulted concerning the placement and amount of tolls on the facility.
- An analysis demonstrating that financing the construction of the facility with the collection of tolls under the pilot program is the most efficient and economical way to advance the project.
- A facility management plan that includes, among other items:
    - a plan for implementing the imposition of tolls on the facility
    - a schedule and finance plan for the construction of the facility using toll revenues
    - a description of whether consideration will be given to privatizing the maintenance and operational aspects of the facility, while retaining legal and administrative control of the portion of the Interstate route

The criteria for selecting the pilot projects include:

- The State plan for implementing tolls on the facility takes into account the interests of local, regional, and interstate travelers
- The State plan for construction of the facility using toll revenues is reasonable
- The State will develop, manage, and maintain a system that will automatically collect the tolls
- A program permitting low-income drivers to pay a reduced toll amount
- Preference is given to using a public toll agency with demonstrated capability to build, operate, and maintain an Interstate toll system.

If selected as a pilot project, the state must enter into an agreement providing that all toll revenues received from operation of the toll facility will be used only for:

- Debt service;
- Reasonable return on investment of any private person financing the project; and
- Any costs necessary for the improvement of and the proper operation and maintenance of the toll facility, including reconstruction, resurfacing, restoration, and rehabilitation of the toll facility

3.6 House Bill Provisions or Reauthorize the Congestion Pricing Pilot Program

Section 1209 would reauthorize the "*Congestion Pricing Pilot Program.*" It would expand the program to 25 pilot projects; require provisions for low-income toll discounts; and other relatively minor changes.

4. Possible Use of SEP-15 to Expand Tolling Options for Columbia River Crossing Project

4.1 Introduction

On October 6, 2004, FHWA published notice in the Federal Register, announcing the initiation of a new Special Experimental Project (SEP-15) to encourage experimentation in the "*entire development process for transportation projects*."[10] SEP-15 is an experimental program admnistered by FHWA to identify and evaluate new public-private partnership approaches to project delivery. It is authorized in TEA-21 under FHWA's general authority to undertake research activities. FHWA has preliminarily indicated, in the abstract, that it may be possible to undertake an integrated I-5/I-205 Bridge program under SEP-15.

[10] Federal Register, October 6, 2004 (Volume 69, Number 193) Page 59983-59986

4.2 SEP-15 Program Background

SEP-15 builds on the experimental contracting practices explored under the SEP-14 program, which began in 1990 and advanced a number of contracting practices that have since become a regular part of the highway program, such as design-build, cost-plus-time bidding, lane rental, and the use of warranties. SEP-15 also builds on the innovative finance techniques examined in Test and Evaluation Program Number 045 (TE-045). However, FHWA determined that these previous efforts did not address the full-range of project management and financing issues that arise in public-private partnerships, in particular those that place a significant role on the private partner.

This led to FHWA's initiation of the SEP-15 program, which is intended to "*encourage tests and experimentation in the entire project development process, specifically aimed at attracting private investment, leading to increased project management flexibility, more innovation, improved efficiency, timely project implementation, and new revenue streams*."[11] A key element of SEP-15 is to "*identify impediments in current laws, regulations, and practices to the greater use of public-private partnerships and private investment in transportation improvements and to develop procedures and approaches that address these impediments*."[12]

SEP-15 addresses, but is not limited to, four major components of project delivery:

- contracting
- compliance with environmental requirements
- right-of-way acquisition
- project finance

FHWA anticipates that SEP-15 projects will include suggested changes to the FHWA's traditional project approval procedures, may require some modifications in the implementation of FHWA policy, deviations from federal highway statutes (Title 23, U.S. Code) or FHWA regulations.[13]

4.3 Scope of SEP-15 regarding Project Finance

FHWA has indicated that SEP-15 will focus on financing innovations specifically associated with public-private partnerships. The Federal Register notice calls-out several funding issues that it has a specific desire to study in SEP-15, although it does not limit SEP-15 project proposals to these issues. The first funding study priority specifically referenced in the Federal Register relates to the loan authority provided by 23 U.S.C. 129(a)(7):[14]

[11] Id.
[12] Id.
[13] Memo by Frederick G. Wright, Jr. entitled SEP-15 Application Process, October 14, 2004
[14] Federal Register, October 6, 2004 (Volume 69, Number 193) Page 59983-59986

The FHWA welcomes proposals to use this '129(a)(7)' authority, which allows highway apportionments to be used for low cost loans to projects with dedicated revenue sources, as part of a three-way financing partnership between the State, the private venture partner, and the FHWA. By coupling `"129(a)(7) authority" with TIFIA, tax-exempt bond financing, and Federal-aid grant funding as an integrated financing package, FHWA believes that this kind of partnership will serve as a catalyst for moving public-private partnerships quickly from concept to construction. When the State makes a 129(a)(7) loan to an eligible public or private entity, the State receives reimbursement from FHWA and is repaid the loan amount plus applicable interest by the borrower, which the State may then use for any eligible title 23 U.S.C. purpose; thus, assisting the State to establish a revolving loan fund for future projects.

The second funding study priority specifically referenced in the Federal Register relates to joint development:[15]

In addition to the transportation project itself, significant benefit and revenue potential may be realized from joint use of the transportation facility. Thus, the ROW may be used both for transportation purposes and other uses that are compatible with the transportation use, such as airspace development. Even joint use of the airspace of Interstate and other limited access highways is favored, so long as the transportation purpose is not impaired. States are encouraged to enter into joint development agreements with private parties by current Federal law, 23 U.S.C. 156. Under this provision, if FHWA participates in the cost of acquiring real property needed for a proposed project, there are specific requirements that apply to the sale or lease of the real property acquired with Federal funds (such as air rights). These requirements may include such things as ensuring that the amount realized by sale or lease represents the fair market value of the interest at issue. The net realized must be dedicated to transportation purposes. Waivers of the requirement to charge the fair market value are available in limited circumstances.

4.4 SEP-15 Application Procedures

The project sponsors, which are generally viewed as consisting of a public and private sponsor, must prepar an application to FHWA. This application must describe the:

- Project
- Specific Federal-aid program areas of experimentation
- Innovative techniques proposed
- Expected value of those techniques
- Proposed performance measures to evaluate the success of the proposed innovative technique

[15] Id.

The project sponsor(s) submit a completed application to the applicable FHWA Division Office, which then processes the application as follows:[16]

- Division Office forwards the application to the Deputy Administrator who appoints the Division Administrator and a senior member of FHWA Leadership to be co-facilitators for the project.
- The co-facilitators form a team consisting of FHWA staff and, if appropriate, staff from other agencies potentially affected by the application to assist the co-facilitators in preliminarily deciding whether the application is an appropriate candidate for SEP-15.
- If the co-facilitators determine the project is not appropriate for SEP-15, the Division Administrator will notify the applicant; otherwise, the project sponsors are asked to make a formal presentation of SEP-15 application.
- After the meeting, the co-facilitators determine if they have sufficient information upon which to form a recommendation. If they have sufficient information, the co-facilitators forward a recommendation to the Deputy Administrator who makes the final determination on whether the application should be approved as a SEP-15 project.
- If the Deputy Administrator approves the application, the co-facilitators and project sponsors negotiate an Early Development Agreement (EDA) that sets forth the key project development parameters, such as project planning and design, environmental review, ROW acquisition, procurement method, regulatory compliance, timelines, financing, construction and operation, and the performance measures that will be used to evaluate the success of the SEP-15 project.

4.5 SEP-15 Evaluation Report

Upon the completion of major milestones, the project sponsors are responsible for submitting an independently prepared report that summarizes lessons learned from the SEP-15 process. These reports must (i) address the experiment undertaken, (ii) describe the lessons learned, (iii) evaluate the success of the process and its impact on the project, and (iv) recommend statutory and regulatory changes with an explanation of the benefits of the proposed changes. The reports is submitted to the co-facilitators.

5. Summary Conclusions and Observations

- The *I-5 Project Strategic Plan*, which was enacted by Metro and RTC, the applicable MPOs, included recommendations that tolling options be considered for the project. However, neither this recommendation nor the regional tolling policies in the applicable regional transportation plans rise to the level of establishing a tolling program as a regional goal. Further, there is no current analysis that demonstrates that tolling is a practical necessity for funding the

[16] In their SEP-15 application, project sponsors, may suggest revisions to the procedures if other procedures would better meet the goals of SEP-15.

Columbia River Crossing Project. Thus, at this time, tolling cannot be used as a criterion for rejecting alternatives (although it can be used as a reason for including alternatives). If during the DEIS it is determined that tolling is a practical necessity for funding the Project, in whole or part, that determination can be used as a basis for selecting the preferred alternative.

- While it is helpful that FHWA has preliminarily indicated that SEP-15 might provide authority to establish an integrated I-5/I-205 Bridge tolling program (should the Project be selected as a SEP-15 test case and such a tolling program be selected), it is not clear that this approach works without a public-private partnership. It is possible that a 'design-build' project delivery would be sufficient to qualify the project as a 'public-private partnership,' but not certain. Prospects can be improved for being approved as a SEP-15 project by establishing a loan program for the Project to be repaid with toll revenues. If this course is taken, the DOTs should consider demonstrating the use of GARVEE bonds backed by formula federal funds as a method to loan funds to the Project for engineering and early construction activities. By doing so, the DOTs may be able to demonstrate that this approach reduces early borrowing costs and minimizes impacts on other elements of the states' transportation programs, while facilitating the development of the subject project.

- None of the tolling-related provisions in the current reauthorization bills resolve the need for authority to establish an integrated I-5/I-205 Bridge tolling program.

- Because neither the reauthorization bills nor SEP-15 are certain to provide the needed federal authority for an integrated I-5/I-205 Bridge tolling program, the 'one route' concept should continue to be pursued. The traffic diversion impacts found in the Vollmer/DEA traffic and tolling results should be provided to FHWA as part of its continuing assessment as to the applicability of the 'one route' concept.