

TEXAS TRANSPORTATION COMMISSION

ALL Counties

MINUTE ORDER

Page 1 of 1

ALL Districts

The Texas Transportation Commission (commission) finds it necessary to adopt new §§21.301-21.311 relating to Leasing of Highway Assets for Transportation Facility to be codified under Title 43, Texas Administrative Code, Part 1.

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

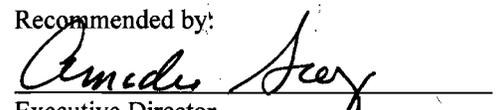
IT IS THEREFORE ORDERED by the commission that new §§21.301-21.311 are adopted and are authorized for filing with the Office of the Secretary of State.

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

Submitted and reviewed by:


Director, Texas Turnpike Authority Division

Recommended by:


Executive Director

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Minute
Number

Date
Passed

1 Adoption Preamble

2 The Texas Department of Transportation (department) adopts new
3 Subchapter J, Leasing of Highway Assets for Transportation
4 Facility, new §§21.301 - 21.311. New §21.301 is adopted with
5 changes to the proposed text as published in the October 15,
6 2010 issue of the *Texas Register* (35 TexReg 9218). New §§21.302
7 - 21.311 are adopted without changes to the proposed text as
8 published in the October 15, 2010 issue of the *Texas Register*
9 (35 TexReg 9218) and will not be republished.

10
11 EXPLANATION OF ADOPTED NEW SECTIONS

12 In Texas, freight traffic has experienced significant growth,
13 and forecasts indicate that it will continue to grow in the
14 future. While this growth represents economic opportunity for
15 the state, it has also resulted in increased congestion on the
16 state's transportation infrastructure. In many areas, truck
17 traffic of freight contributes significantly to highway
18 congestion, leading to lost time for drivers, increased energy
19 consumption, and increased air emissions. Much of this traffic
20 also translates into operational and maintenance costs for state
21 and local governments. Furthermore, there is concern over the
22 impact of emissions on air quality conditions.

23
24 In response to these issues, the department is considering ways
25 to foster viable and sustainable solutions for freight
26 transportation across the state by encouraging more efficient

1 strategies. One option is to explore how underutilized state
2 assets, like highway right of way, can be used to encourage
3 implementation of alternative freight transportation services
4 and potentially provide another source of revenue to address
5 transportation needs. The department previously sought ideas
6 for creating new transportation facilities through a Request for
7 Information - Concepts for New, Low Carbon Emitting, Freight
8 Transportation Facilities, which was published December 19, 2008
9 in volume 33, *Texas Register*, page 10385.

10
11 New §21.301, Purpose, sets forth the purpose of the subchapter,
12 which is to establish the procedure for leasing department right
13 of way for transportation facilities to reduce highway
14 congestion and improve air quality. The right of way may not be
15 leased for a pipeline, an electric transmission line, or another
16 utility facility. The procedure provided by this subchapter is
17 in addition to the procedure established under 43 TAC Chapter
18 21, Subchapter L (relating to Leasing of Highway Assets).

19
20 New §21.302, Definitions, provides definitions for "commission,"
21 "department," and "executive director."

22
23 New §21.303, Request for Proposals, describes how the department
24 may solicit proposals for the lease of right of way for low

1 emission alternative freight transportation facilities. This
2 section states the information that proposers must include in
3 the proposal and provides that the department may set geographic
4 limitations on right of way to be leased. The request for
5 proposal will set out in detail the specific evaluation criteria
6 that the department establishes for the project under §21.305.
7 It also describes how the department will give notice of the
8 request for proposals. These provisions ensure that the
9 procurement process is conducted efficiently and inform entities
10 on how to participate in the process.

11
12 New §21.304, Proposals, describes the information a proposer
13 must submit to the department in response to a request for
14 proposals. The required information includes a description of
15 the facility, description of the technology to be used, a
16 financial plan, and right of way to be leased. The information
17 must include information on air emissions. It must show the
18 facility's effects on the state highway system. It must show
19 the proposer's qualifications and the proposed business terms.

20
21 New §21.305, Selection of Entity, describes how the department
22 will select an entity. The department will evaluate proposals
23 based on the criteria that the department reasonably determines
24 are relevant for the project, including among other factors, the

1 comparative value of estimated emissions reductions generated by
2 the proposed transportation facility, the revenue potential to
3 the state, the current viability of proposed technology, or the
4 financial viability of the proposer. In the request for
5 proposal for a project, the department will set out in detail
6 the specific evaluation criteria that the department has
7 established for that project. The department may select more
8 than one proposer. Alternatively, the department may reject all
9 proposals. This allows the department to determine if any
10 proposals merit further consideration but does not obligate the
11 department to select a proposal if none would be beneficial to
12 the department. The department will submit its recommendations
13 to the commission which will select a proposal if the commission
14 determines that: (1) at least one alternative for moving freight
15 available that has lower emissions than by truck for an
16 equivalent load and distance; (2) a suitable part of the right
17 of way of, the airspace above, or the underground space below a
18 highway on the state highway system will not be needed for a
19 highway purpose during the term of the lease; (3) the use of
20 that property for the alternative facility is not inconsistent
21 with applicable highway use; and (4) the lease of that property
22 would be economically beneficial to the department, considering
23 the receipt of lease payments and any resulting reduced
24 maintenance costs on the state highway system.

25

26 New §21.306, Negotiation with Selected Entity, provides that the

1 department will attempt to negotiate an agreement with a
2 selected entity to lease right of way from the department. The
3 department may end negotiations with the entity if an acceptable
4 agreement cannot be negotiated or if it appears that the
5 entity's proposal will not offer the apparent best value. If
6 the department ends negotiations, it may choose to reject all
7 proposals, modify the request for proposals and reinitiate the
8 procurement process, or if authorized by the commission, attempt
9 to negotiate a lease agreement with the proposer of the next
10 most highly ranked proposal.

11
12 New §21.307, Agreement, describes an agreement between the
13 department and a selected entity. The agreement must be in
14 writing, executed by the executive director, and approved by the
15 Federal Highway Administration. An agreement may not impair the
16 state's right to use the right of way for a highway purpose if
17 necessary. The section identifies certain subjects that must be
18 covered in an agreement, for example, term, lease payments, and
19 bond requirements. The agreement will also identify certain
20 subjects that the selected entity is responsible for, for
21 example, obtaining any environmental approvals.

22
23 New §21.308, Termination of Agreement, identifies the conditions
24 under which an agreement may be terminated and the terms that
25 must be included in the agreement concerning termination. The
26 agreement may provide the department and the selected entity

1 with specified rights to terminate an agreement. Additionally,
2 the department may terminate the agreement on the failure of the
3 selected entity to comply with the agreement, but only after
4 notice of and an opportunity to correct the deficiency. The
5 agreement also will specify that on termination the selected
6 entity must either take certain actions to dismantle and remove
7 the facility from the right of way or provide for the
8 improvement of the facility to comply with the hand-over
9 provisions in the agreement.

10

11 New §21.309, Payment, establishes the basic requirements for the
12 lease payments. The lease payments will include both a fair
13 market value payment for use of the right of way, unless the
14 commission authorizes an exception to those charges under
15 Transportation Code, §202.052(d), and may include an
16 administrative cost component to reimburse the department for
17 expenses associated with the contract administration. All funds
18 associated with this contract would be deposited into the state
19 highway fund. This ensures that the department obtains a
20 reasonable price for its assets and is compensated for
21 additional expenses it incurs.

22

23 New §21.310, Sublease, provides that a sublease of the lease
24 must be approved by the department. If a sublessee is a utility
25 provider, the facility must comply with the department's utility
26 accommodation rules.

1
2 New §21.311, General Requirements, describes miscellaneous
3 requirements for and restrictions on an agreement. The
4 department may not convey or sever from the real property an
5 improvement constructed on the leased area. The lessee is
6 prohibited under the lease from providing outdoor advertising,
7 and it is responsible for any common carrier obligation
8 associated with the transportation facility. The lessee's use
9 of the leased right of way does not constitute abandonment of
10 the property by the department.

11
12 COMMENTS

13 Comments on the proposed new sections were received from Lamar
14 Advertising Company, Texas Transportation Institute, Union
15 Pacific Company, and BNSF Railway Company.

16
17 Comment: Lamar Advertising Company commented that the ban on
18 outdoor advertising found in §21.311 is not necessary. It noted
19 that outdoor advertising is permitted on privately owned
20 railroad right of way. Advertising on train platforms would be
21 seen only by commuters. The company suggested that allowing
22 outdoor advertising on train platforms may help subsidize the
23 cost of high-speed rail.

24
25 Response: The rules concern the development of a freight
26 transportation facility, and so there would be no train

1 platforms for commuters. The rules also do not concern the
2 development of a high-speed rail facility. The department
3 believes the nature of a freight project under the rules would
4 prevent outdoor advertising. The facility would be in highway
5 right of way where the appropriate signs would be for traffic
6 control, not advertising. The department's policy is to
7 prohibit outdoor advertising signs within the right of way of a
8 public roadway, as codified at 43 TAC §21.148.

9

10 Comment: Texas Transportation Institute, Union Pacific Company,
11 and BNSF Railway Company submitted a joint comment, suggesting
12 the addition of wording that would disallow the lease of
13 department right of way for purposes of "heavy freight railroad
14 transportation." The commenters requested the prohibition
15 saying the rules otherwise would adversely impact the interests
16 of private railroads.

17

18 Response: Based on this comment, the department has made changes
19 to §21.301(b) in order to prohibit the use of the subchapter for
20 leasing highway right of way for rail lines that are part of the
21 general system of rail transportation, as those terms are used
22 in federal law. The department agrees with the concern that the
23 operation of freight trains would pose a great number of
24 engineering challenges because the highway rights of way were
25 not originally designed to handle freight trains. Also, the
26 requirements for grade separation would be so onerous as to be

1 impracticable.

2

3 STATUTORY AUTHORITY

4 The new sections are adopted under Transportation Code,
5 §201.101, which provides the Texas Transportation Commission
6 with the authority to establish rules for the conduct of the
7 work of the department, and more specifically, Transportation
8 Code, §§202.052 and 202.053, which authorize the department to
9 lease a highway asset.

10

11 CROSS REFERENCE TO STATUTE

12 Transportation Code, Chapter 202, Subchapter C.

1 SUBCHAPTER J. LEASING OF HIGHWAY ASSETS
2 FOR TRANSPORTATION FACILITY

3 §21.301. Purpose.

4 (a) This subchapter establishes the procedure to be used
5 for leasing state-owned right of way for freight movement to
6 reduce congestion on the state highway system and to improve air
7 quality when the commission authorizes such a lease for a
8 specified project.

9 (b) This subchapter may not be used for the lease of right
10 of way for the purposes of a pipeline, electric transmission
11 line, or other utility facility. Additionally, this subchapter
12 may not be used for the lease of right of way for rail lines
13 that are part of the general system of rail transportation and
14 require a certificate from the United States Surface
15 Transportation Board under 49 U.S.C. §10901.

16 (c) The procedure provided by this subchapter is separate
17 from and in addition to the procedure established under
18 Subchapter L of this chapter (relating to Leasing of Highway
19 Assets).

20
21 §21.302. Definitions. The following words and terms, when used
22 in this subchapter, shall have the following meanings unless the
23 context clearly indicates otherwise.

1 (1) Commission--The Texas Transportation Commission.

2 (2) Department--The Texas Department of Transportation.

3 (3) Executive director--The executive director of the
4 department or the executive director's designee, not below the
5 level of deputy executive director or assistant executive
6 director.

7

8 §21.303. Request for Proposals.

9 (a) The department may issue a request for proposals from
10 public and private entities for the submission of detailed
11 documentation regarding a proposed project and the associated
12 lease of right of way.

13 (b) The request for proposals will provide the information
14 necessary for a responsive proposal.

15 (c) The request for proposal will set out in detail the
16 specific evaluation criteria that the department establishes for
17 the project under §21.305 of this subchapter (relating to
18 Selection of Entity).

19 (d) A request for proposal may describe the geographic
20 limits of potential right of way to be leased.

21 (e) The department will publish notice of the intent to
22 issue a request for proposal on the department's Internet
23 website and in the *Texas Register* and at least one newspaper of

1 general circulation in the state. The department may also
2 furnish notice to entities associated with freight movement that
3 the department believes might be interested and qualified to
4 participate in submitting a proposal.

5 (f) The deadline for submitting a proposal will not be
6 before the 31st day after the date that the notice is published
7 in the *Texas Register* under subsection (e) of this section.

8 (g) The department will not accept unsolicited proposals
9 under this subchapter.

10

11 §21.304. Proposals.

12 (a) To be responsive to a request under this subchapter, a
13 proposal must set out in detail:

14 (1) the description of the property that is proposed to
15 be leased;

16 (2) the proposed lease term, amount to be paid under
17 the lease, and the payment schedule;

18 (3) the proposer's qualifications and demonstrated
19 technical competence related to the proposed project;

20 (4) proposed technologies to be used for the proposed
21 project, including information from test facilities or
22 operational facilities;

23 (5) schematic designs and architectural designs

1 sufficient to show the extent and nature of the proposed
2 project;

3 (6) the proposer's ability to meet schedules;

4 (7) a detailed financial plan, including cost
5 methodology, cost proposals, and project financing approach;

6 (8) the estimated air emissions of the proposed
7 transportation facility and a comparison to the estimated
8 emissions from equivalent truck transportation;

9 (9) the effects on the highway facility, including
10 changes in access, clear-zones, lines of sight, signage,
11 drainage, vegetation, and safety; and

12 (10) any other information that the department
13 considers relevant or necessary.

14 (b) The information provided under subsection (a)(8) of
15 this section must provide an evaluation of the type of
16 emissions, including regulated pollutants and carbon, and the
17 impacts on existing air quality conditions in the area of the
18 proposed facility.

19

20 §21.305. Selection of Entity.

21 (a) The department will evaluate proposals based on the
22 criteria that the department considers appropriate for the
23 project. The criteria may include the comparative value of

1 estimated emissions reductions generated by the proposed
2 transportation facility, the revenue potential to the state, the
3 current viability of proposed technology, the financial
4 viability of the proposer, or other factors that the department
5 reasonably determines are relevant for the project.

6 (b) Based on the evaluation criteria described under
7 subsection (a) of this section, the department will rank all
8 proposals that are complete, responsive to the request for
9 proposals, and in conformance with the requirements of this
10 subchapter.

11 (c) The department may select one or more entities whose
12 proposals offer the apparent best value to the department, or
13 may reject all proposals.

14 (d) The department will submit a recommendation to the
15 commission regarding approval of the proposal or proposals
16 determined to provide the apparent best value to the department.
17 The commission may disapprove the recommendation or the
18 commission may approve the recommendation, if it finds that:

19 (1) one or more alternative transportation facilities for
20 moving freight are available that have lower emissions than
21 emissions produced for the movement of the same amount of
22 freight an equivalent distance by truck;

23 (2) part of the right of way of, the airspace above, or

1 the underground space below a highway that is part of the state
2 highway system will not be needed for a highway purpose during
3 the term of the lease and is suitable for the identified mode of
4 moving freight;

5 (3) the use of the right of way, airspace, or underground
6 space for the identified mode of moving freight would not be
7 inconsistent with applicable highway use; and

8 (4) the lease of the property described in paragraph (2)
9 of this subsection would be economically beneficial to the
10 department, taking into account the receipt of lease payments
11 and the reduced maintenance costs on the state highway system.

12 (e) The department's execution of the agreement is subject
13 to the successful completion of negotiations, any necessary
14 federal action, and satisfaction of such other conditions that
15 are identified in the request for proposals or by the
16 commission.

17

18 §21.306. Negotiation with Selected Entity.

19 (a) The department will attempt to negotiate an agreement
20 with the approved proposer for the lease right of way from the
21 department and for the design, development, construction,
22 financing, operation, and maintenance of the proposed
23 transportation facility.

1 (b) If an agreement that is satisfactory to the department
2 cannot be negotiated with that proposer, or if, in the course of
3 negotiations, it appears that the proposal will not provide the
4 department with the overall best value, the department will
5 formally end negotiations with that proposer, and, in its sole
6 discretion:

7 (1) if authorized by the commission, proceed to the next
8 most highly ranked proposal and attempt to negotiate an
9 agreement with that entity in accordance with this subsection;

10 (2) reject all proposals and end the process; or

11 (3) modify the request for proposals and begin the
12 process under this subchapter again.

13

14 §21.307. Agreement.

15 (a) An agreement under this subchapter must be in writing,
16 must be executed by the executive director, and must contain the
17 terms specified in this section. The agreement is subject to
18 approval by the Federal Highway Administration.

19 (b) The department may not execute an agreement that would
20 impair or relinquish the state's right to use the property for a
21 right of way purpose when the property is needed to construct or
22 improve the roadway for which it was acquired.

23 (c) If the proposed project does not obtain the required

1 governmental approvals or permits, the department will cancel
2 the lease.

3 (d) The agreement must contain:

4 (1) the term of the lease, the amount of rent and
5 required deposits, if any, and the method of payment;

6 (2) a detailed description of the right of way to be
7 leased, including a three-dimensional description if needed;

8 (3) the general design for the use of the leased right of
9 way, including any improvements to be constructed, all maps,
10 plans, or sketches necessary to set out the pertinent features
11 in relation to any highway facility, and a description of any
12 temporary improvements to be provided by the lessee;

13 (4) a performance bond and payment bond, as provided
14 under Transportation Code, §202.053;

15 (5) a removal bond in an amount equal to the anticipated
16 future cost of removing any improvements, as well as the
17 restoration and mitigation of the right of way to a suitable and
18 safe condition, based on a removal, restoration, and mitigation
19 plan approved by the department;

20 (6) appropriate terms relating to indemnity, liability,
21 insurance, and risk of loss; and

22 (7) any other provisions considered necessary or
23 desirable by the department.

1 (e) The agreement must provide that the selected proposer
2 is responsible for:

3 (1) preparation of any environmental review documents
4 required under federal law or Chapter 2 of this title (relating
5 to Environmental Policy);

6 (2) preparation of applications and obtaining any
7 environmental permits or other approvals by third parties or
8 governmental entities;

9 (3) funding all planning, design, testing, construction,
10 operation, or maintenance of the lessee's proposed activities,
11 with acknowledgement of the lessee's right to mortgage or
12 otherwise pledge or grant a security interest in the leasehold
13 to secure financing for the acquisition of the leasehold and for
14 the construction and operation of an improvement permitted under
15 the lease;

16 (4) making any changes to existing highway facilities at
17 its sole expense for the proper operation and maintenance of the
18 facilities if the department determines that the proposed use of
19 the leased right of way requires changes or additions;

20 (5) acquiring additional real property rights located
21 outside of the department's holdings that are necessary to
22 conduct the proposed activities; and

23 (6) all utility adjustments and relocations required for

1 its proposed activities.

2

3 §21.308. Termination of Agreement.

4 (a) An agreement under this subchapter may be terminated
5 if, in the department's sole opinion:

6 (1) the leased assets are not being used in accordance
7 with the lease or have been abandoned; or

8 (2) the selected proposer has not complied with the terms
9 of the agreement.

10 (b) The department will give written notice to the selected
11 proposer of noncompliance with the agreement and specify a
12 reasonable period during which the selected proposer may correct
13 the noncompliance. If the selected proposer fails to correct
14 the issues within the specified period, the department may
15 terminate the agreement.

16 (c) The agreement may contain a provision for early
17 termination of the agreement by either party with or without
18 cause. The right of either party to terminate the agreement
19 without cause before the stated termination date may be
20 conditioned on the payment to the non-terminating party of an
21 amount negotiated by the parties and specified in the agreement.

22 (d) Upon termination of the agreement for any reason, the
23 department may require the selected proposer to:

1 (1) dismantle and remove the freight transportation
2 facility and to restore the right of way at no cost to the
3 department; or

4 (2) hand back the facility to the department in a
5 condition complying with minimum specified criteria and
6 standards.

7 (e) The selected proposer shall bear the cost of any
8 remedial or rehabilitation work identified as being necessary to
9 improve the facility to comply with the minimum specified
10 criteria or standards under subsection (d)(2) of this section.

11

12 §21.309. Payment.

13 (a) The department will charge for the lease of right of
14 way under this subchapter not less than fair market value,
15 unless the commission authorizes an exception under
16 Transportation Code, §202.052(d). The department may consider
17 its costs in administering the agreement in establishing the
18 amount to be paid for the lease.

19 (b) All payments received under this subchapter will be
20 deposited into the state highway fund.

21

22 §21.310. Sublease. Any proposed sublease of a lease under this
23 subchapter must be approved by the department. If a sub-lessee

1 is a utility provider, the installation, adjustment, relocation,
2 and maintenance of its facilities must be in accordance with the
3 department's utility accommodation policy in Subchapter C of
4 this chapter (relating to Utility Accommodation).

5

6 §21.311. General Requirements.

7 (a) The department may not convey title to, or sever from
8 the real property, a permanent improvement constructed on the
9 property leased under this subchapter.

10 (b) Outdoor advertising will not be permitted under an
11 agreement under this subchapter.

12 (c) The person who enters into an agreement with the
13 department under this subchapter is responsible for any common
14 carrier obligation associated with the facility developed under
15 the agreement.

16 (d) A person's use of right of way under an agreement under
17 this subchapter does not constitute abandonment of the property
18 by the department.