

TEXAS TRANSPORTATION COMMISSION

ALL Counties

MINUTE ORDER

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ALL Districts

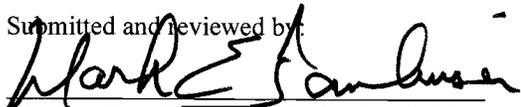
The Texas Transportation Commission (commission) finds it necessary to propose new §§21.301-21.311 relating to Leasing of Highway Assets for Transportation Facility to be codified under Title 43, Texas Administrative Code, Part 1.

The preamble and the proposed 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*.

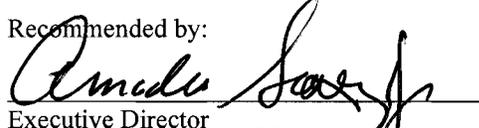
IT IS THEREFORE ORDERED by the commission that new §§21.301-21.311 are proposed for adoption and are authorized for publication in the *Texas Register* for the purpose of receiving public comments.

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

Submitted and reviewed by:


Director, Texas Turnpike Authority Division

Recommended by:


Executive Director

112431 SEP 30 10

Minute
Number

Date
Passed

1 Proposed Preamble

2 The Texas Department of Transportation (department) proposes new
3 Subchapter J, Leasing of Highway Assets for Transportation
4 Facility, new §§21.301 - 21.311.

5

6 EXPLANATION OF PROPOSED NEW SECTIONS

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

18

19 In response to these issues, the department is considering ways
20 to foster viable and sustainable solutions for freight
21 transportation across the state by encouraging more efficient
22 strategies. One option is to explore how underutilized state
23 assets, like highway right of way, can be used to encourage
24 implementation of alternative freight transportation services
25 and potentially provide another source of revenue to address

1 transportation needs. The department previously sought ideas
2 for creating new transportation facilities through a Request for
3 Information - Concepts for New, Low Carbon Emitting, Freight
4 Transportation Facilities, which was published December 19, 2008
5 in volume 33, *Texas Register*, page 10385.

6
7 New §21.301, Purpose, sets forth the purpose of the subchapter,
8 which is to establish the procedure for leasing department right
9 of way for transportation facilities to reduce highway
10 congestion and improve air quality. The right of way may not be
11 leased for a pipeline, an electric transmission line, or another
12 utility facility. The procedure provided by this subchapter is
13 in addition to the procedure established under 43 TAC Chapter
14 21, Subchapter L (relating to Leasing of Highway Assets).

15
16 New §21.302, Definitions, provides definitions for "commission,"
17 "department," and "executive director."

18
19 New §21.303, Request for Proposals, describes how the department
20 may solicit proposals for the lease of right of way for low
21 emission alternative freight transportation facilities. This
22 section states the information that proposers must include in
23 the proposal and provides that the department may set geographic

1 limitations on right of way to be leased. The request for
2 proposal will set out in detail the specific evaluation criteria
3 that the department establishes for the project under §21.305.
4 It also describes how the department will give notice of the
5 request for proposals. These provisions ensure that the
6 procurement process is conducted efficiently and inform entities
7 on how to participate in the process.

8
9 New §21.304, Proposals, describes the information a proposer
10 must submit to the department in response to a request for
11 proposals. The required information includes a description of
12 the facility, description of the technology to be used, a
13 financial plan, and right of way to be leased. The information
14 must include information on air emissions. It must show the
15 facility's effects on the state highway system. It must show
16 the proposer's qualifications and the proposed business terms.

17
18 New §21.305, Selection of Entity, describes how the department
19 will select an entity. The department will evaluate proposals
20 based on the criteria that the department reasonably determines
21 are relevant for the project, including among other factors, the
22 comparative value of estimated emissions reductions generated by
23 the proposed transportation facility, the revenue potential to
24 the state, the current viability of proposed technology, or the

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

22

23 New §21.306, Negotiation with Selected Entity, provides that the
24 department will attempt to negotiate an agreement with a
25 selected entity to lease right of way from the department. The

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

9
10 New §21.307, Agreement, describes an agreement between the
11 department and a selected entity. The agreement must be in
12 writing, executed by the executive director, and approved by the
13 Federal Highway Administration. An agreement may not impair the
14 state's right to use the right of way for a highway purpose if
15 necessary. The section identifies certain subjects that must be
16 covered in an agreement, for example, term, lease payments, and
17 bond requirements. The agreement will also identify certain
18 subjects that the selected entity is responsible for, for
19 example, obtaining any environmental approvals.

20
21 New §21.308, Termination of Agreement, identifies the conditions
22 under which an agreement may be terminated and the terms that
23 must be included in the agreement concerning termination. The
24 agreement may provide the department and the selected entity
25 with specified rights to terminate an agreement. Additionally,

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

9

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

21

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

13 James Bass, Chief Financial Officer, has determined that for
14 each of the first five years the new sections as proposed are in
15 effect, there will be fiscal implications for state or local
16 governments as a result of enforcing or administering the new
17 sections.

18
19 No new employees or consultants will be engaged for this
20 proposed rule change. Requisite duties will be absorbed within
21 existing resources. The cost for these resources is expected to
22 be offset by lease payments which will begin during the final
23 years of the five years included in this study.

24
25 Lease payments may exceed stated costs and any such surplus

1 revenues would be used for transportation purposes.

2

3 Mark Tomlinson, Director, Texas Turnpike Authority Division, has
4 certified that there will be no significant impact on local
5 economies or overall employment as a result of enforcing or
6 administering the new sections.

7

8 PUBLIC BENEFIT AND COST

9 Mr. Tomlinson has also determined that for each year of the
10 first five years the sections are in effect, the public benefit
11 anticipated as a result of enforcing or administering the new
12 sections will be the movement of freight in a manner that
13 reduces highway congestion and improves air quality. The
14 department has not yet received proposals under the rules and so
15 it is not possible to quantify all potential benefits at this
16 time. Additional possible impacts include reduced highway
17 pavement wear and the development of innovative methods of
18 freight transportation. There are no anticipated economic costs
19 for persons required to comply with the sections as proposed.

20

21 There will be no net adverse economic effect on small
22 businesses. Potential losses in business by trucking companies
23 may be offset by the creation of new manufacturing jobs
24 associated with Texas-based construction of new transportation
25 technologies, and the subsequent operation and maintenance of

1 those systems.

2

3 TAKINGS IMPACT ASSESSMENT

4 The department has evaluated the proposed rulemaking in
5 accordance with Government Code, §2007.043(b) and §2.18 of the
6 Office of the Attorney General's Private Real Property Rights
7 Preservation Act Guidelines to determine whether a detailed
8 takings impact assessment is required. The department has
9 determined that the proposed rulemaking does not affect private
10 real property in a manner that requires real property owners to
11 be compensated as provided by the Fifth and Fourteenth
12 Amendments to the United States Constitution or Article I,
13 Sections 17 and 19 of the Texas Constitution. Furthermore, the
14 department has determined that the proposed rulemaking would not
15 affect any private real property in a manner that restricts or
16 limits the owner's right to the property that would otherwise
17 exist in the absence of the new rule. The purpose of the rules
18 is to lease existing state-owned right of way for transportation
19 purposes. The state does not anticipate that there will be
20 takings.

21

22 SUBMITTAL OF COMMENTS

23 Written comments on the proposed new sections may be submitted
24 to Mark Tomlinson, Director, Texas Turnpike Authority Division,
25 Texas Department of Transportation, 125 East 11th Street,

1 Austin, Texas 78701-2483. The deadline for receipt of comments
2 is 5:00 p.m. on November 15, 2010.

3

4 STATUTORY AUTHORITY

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

11

12 CROSS REFERENCE TO STATUTE

13 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.

12 (c) The procedure provided by this subchapter is separate
13 from and in addition to the procedure established under
14 Subchapter L of this chapter (relating to Leasing of Highway
15 Assets).

16
17 §21.302. Definitions. The following words and terms, when used
18 in this subchapter, shall have the following meanings unless the
19 context clearly indicates otherwise.

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

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

22 (3) Executive director--The executive director of the
23 department or the executive director's designee, not below the

1 level of deputy executive director or assistant executive
2 director.

3

4 §21.303. Request for Proposals.

5 (a) The department may issue a request for proposals from
6 public and private entities for the submission of detailed
7 documentation regarding a proposed project and the associated
8 lease of right of way.

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

11 (c) The request for proposal will set out in detail the
12 specific evaluation criteria that the department establishes for
13 the project under §21.305 of this subchapter (relating to
14 Selection of Entity).

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

17 (e) The department will publish notice of the intent to
18 issue a request for proposal on the department's Internet
19 website and in the *Texas Register* and at least one newspaper of
20 general circulation in the state. The department may also
21 furnish notice to entities associated with freight movement that
22 the department believes might be interested and qualified to
23 participate in submitting a proposal.

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

4 (g) The department will not accept unsolicited proposals
5 under this subchapter.

6

7 §21.304. Proposals.

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

10 (1) the description of the property that is proposed to
11 be leased;

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

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

16 (4) proposed technologies to be used for the proposed
17 project, including information from test facilities or
18 operational facilities;

19 (5) schematic designs and architectural designs
20 sufficient to show the extent and nature of the proposed
21 project;

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

23 (7) a detailed financial plan, including cost

1 methodology, cost proposals, and project financing approach;

2 (8) the estimated air emissions of the proposed
3 transportation facility and a comparison to the estimated
4 emissions from equivalent truck transportation;

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

8 (10) any other information that the department
9 considers relevant or necessary.

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

15

16 §21.305. Selection of Entity.

17 (a) The department will evaluate proposals based on the
18 criteria that the department considers appropriate for the
19 project. The criteria may include the comparative value of
20 estimated emissions reductions generated by the proposed
21 transportation facility, the revenue potential to the state, the
22 current viability of proposed technology, the financial
23 viability of the proposer, or other factors that the department

1 reasonably determines are relevant for the project.

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

7 (c) The department may select one or more entities whose
8 proposals offer the apparent best value to the department, or
9 may reject all proposals.

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

15 (1) one or more alternative transportation facilities for
16 moving freight are available that have lower emissions than
17 emissions produced for the movement of the same amount of
18 freight an equivalent distance by truck;

19 (2) part of the right of way of, the airspace above, or
20 the underground space below a highway that is part of the state
21 highway system will not be needed for a highway purpose during
22 the term of the lease and is suitable for the identified mode of
23 moving freight;

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

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

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

13

14 §21.306. Negotiation with Selected Entity.

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

20 (b) If an agreement that is satisfactory to the department
21 cannot be negotiated with that proposer, or if, in the course of
22 negotiations, it appears that the proposal will not provide the
23 department with the overall best value, the department will

1 formally end negotiations with that proposer, and, in its sole
2 discretion:

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

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

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

9

10 §21.307. Agreement.

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

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

19 (c) If the proposed project does not obtain the required
20 governmental approvals or permits, the department will cancel
21 the lease.

22 (d) The agreement must contain:

23 (1) the term of the lease, the amount of rent and

1 required deposits, if any, and the method of payment;

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

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

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

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

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

18 (7) any other provisions considered necessary or
19 desirable by the department.

20 (e) The agreement must provide that the selected proposer
21 is responsible for:

22 (1) preparation of any environmental review documents
23 required under federal law or Chapter 2 of this title (relating

1 to Environmental Policy);

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

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

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

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

19 (6) all utility adjustments and relocations required for
20 its proposed activities.

21

22 §21.308. Termination of Agreement.

23 (a) An agreement under this subchapter may be terminated

1 if, in the department's sole opinion:

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

4 (2) the selected proposer has not complied with the terms
5 of the agreement.

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

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

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

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

23 (2) hand back the facility to the department in a

1 condition complying with minimum specified criteria and
2 standards.

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

7

8 §21.309. Payment.

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

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

17

18 §21.310. Sublease. Any proposed sublease of a lease under this
19 subchapter must be approved by the department. If a sub-lessee
20 is a utility provider, the installation, adjustment, relocation,
21 and maintenance of its facilities must be in accordance with the
22 department's utility accommodation policy in Subchapter C of
23 this chapter (relating to Utility Accommodation).

1

2 §21.311. General Requirements.

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

6 (b) Outdoor advertising will not be permitted under an
7 agreement under this subchapter.

8 (c) The person who enters into an agreement with the
9 department under this subchapter is responsible for any common
10 carrier obligation associated with the facility developed under
11 the agreement.

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