

TEXAS TRANSPORTATION COMMISSION

ALL Counties

MINUTE ORDER

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ALL Districts

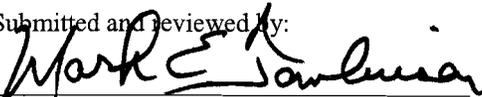
The Texas Transportation Commission (commission) finds it necessary to propose new §27.90, Purpose, §27.91, Definitions, and §27.92, Financial Terms, relating to Determination of Terms for Certain Toll Projects, to be codified under Title 43, Texas Administrative Code, Part 1.

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*.

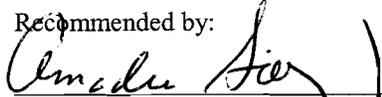
IT IS THEREFORE ORDERED by the commission that new §27.90, §27.91, and §27.92, are proposed for adoption and are authorized for publication in the *Texas Register* for the purpose of receiving public comments.

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

112723 JUN 30 11

Minute
Number

Date
Passed

1 Proposed Preamble

2 The Texas Department of Transportation (department) proposes new
3 §27.90, Purpose, §27.91, Definitions, and §27.92, Financial
4 Terms, concerning Determination of Terms for Certain Toll
5 Projects.

6

7 EXPLANATION OF PROPOSED NEW SECTIONS

8 Transportation Code, §228.013, added by Senate Bill 1420, 82nd
9 Legislature, Regular Session, 2011, requires, for certain
10 department toll projects in which a private entity has a
11 financial interest in the project's performance, that the
12 distribution of the project's financial risk, the method of
13 financing for the project, and the tolling structure and
14 methodology be determined by a committee comprised of
15 representatives from the department, any local toll project
16 entity for the area in which the project is located, the
17 applicable metropolitan planning organization, and each
18 municipality or county that provides revenue or right of way for
19 the project. The proposed new sections prescribe the process
20 for a committee's issuance of its determination.

21

22 The new sections define the circumstances in which a committee
23 must be established and the process for the issuance of a report
24 containing the committee's determination. The terms determined
25 by a committee will affect the project procurement and the terms
26 of the comprehensive development agreement for the toll project.

1 Accordingly, a determination must be issued as soon as practical
2 after a procurement has been authorized. The new sections only
3 apply to projects developed under comprehensive development
4 agreements. Based on the terms of agreements that have been
5 used by the department for the development, construction, and
6 operation of toll projects, a private entity will only have a
7 financial interest in the performance of a project developed
8 under a comprehensive development agreement.

9

10 New §27.90 describes the purpose of the new sections.

11

12 New §27.91 defines words and terms used in the new sections.

13

14 New §27.92 provides that the new sections only apply to a toll
15 project that will be developed under a concession agreement or
16 an availability payment contract. Of the comprehensive
17 development agreements entered into or contemplated to be
18 entered into by the department, only a concession agreement or
19 an availability payment contract provides a private entity with
20 a financial interest in the project's performance.

21

22 New §27.92 limits the applicability of the new sections to a
23 toll project for which funds allocated to a metropolitan
24 planning organization or local funds are expected to be used to
25 pay for project costs, property of a municipality or county is
26 expected to be used as project right of way, or a municipality

1 or county is expected to pay for the acquisition of right of way
2 for the project. It is in the state's interest to have a
3 determination issued as soon as possible. It may not be
4 possible to know with certainty whether funds allocated to a
5 metropolitan planning organization or city or county funds will
6 be used to pay for project costs. Accordingly, new §27.92
7 provides that new Subchapter H of Chapter 27 applies if those
8 funds are expected to be used to pay project costs.

9
10 Transportation Code, §228.013 does not define what funds are
11 dedicated to or controlled by a region, municipality, or county.
12 The only funds a regional body has responsibility for allocating
13 to department toll projects are the funds the Texas
14 Transportation Commission (commission) allocates to metropolitan
15 planning organizations. Funds of a city or county that are
16 granted to the municipality or county by the department and not
17 used to meet local participation requirements would not be
18 dedicated to or controlled by the municipality or county. This
19 construction of the statute is consistent with the department's
20 understanding that the purpose of the statute is to provide
21 local and regional stakeholders with a say in project terms that
22 affect the risk of loss of local and regional funds committed to
23 a project.

24

25 New §27.92 provides that the membership of a committee will be
26 determined after the commission authorizes the department to

1 initiate a procurement for a toll project subject to the new
2 sections. New §27.92 also provides that a committee shall
3 submit a report to the department's executive director prior to
4 the date the department issues a request for qualifications for
5 a toll project, except for a project for which the department
6 and a local toll project entity have agreed on the terms and
7 conditions for the project under Transportation Code, §228.0111,
8 or for which a local toll project entity has waived its option
9 to develop, construct, and operate the project. For those
10 projects, many of the terms to be considered by a committee have
11 already been settled. The report for those projects must be
12 submitted prior to the date the department issues a request for
13 proposals for the project. The terms determined by a committee
14 will affect the project procurement, the delivery method used,
15 and the terms of the comprehensive development agreement for the
16 toll project. Accordingly, a determination must be issued as
17 soon as practical after a procurement has been authorized.
18 Delay in issuing a request for qualifications or request for
19 proposals and entering into an agreement for the delivery of a
20 toll project will result in additional costs and increased
21 congestion because of the delay in completing those needed
22 projects.

23
24 In order to have a determination issued as soon as possible, the
25 membership of a committee would be determined before it is clear
26 whether a particular entity is required to be represented. New

1 §27.92 provides that a committee will be comprised of one member
2 appointed by each metropolitan planning organization and local
3 toll project entity within whose boundaries all or part of the
4 proposed project may be located, and one member appointed by
5 each city and county with which the department intends to enter
6 into an agreement under which the city or county will provide
7 local funds to pay for right-of-way acquisition or other project
8 costs or to acquire right of way for the project, or will
9 provide property of the city or county for use as project right
10 of way.

11
12 New §27.92 provides that a report issued by a committee will
13 contain a determination concerning the distribution of project
14 financial risk, which is defined as the allocation of revenue
15 risk for a toll project between the department and the private
16 entity with which the department enters into an agreement for
17 the project. New §27.92 also provides that a report issued by a
18 committee will contain a determination concerning the method of
19 financing for the project, which is defined as a determination
20 of whether the project should be funded with private or public
21 funding or a combination of private and public funding.

22 Transportation Code, §228.013 does not define those provisions.
23 The definitions in the new sections are consistent with the
24 department's understanding that the purpose of the statute is to
25 provide local and regional stakeholders with a say in project
26 terms that affect the risk of loss of local and regional funds

1 committed to a project.

2

3 New §27.92 provides that a report issued by a committee will
4 also contain a determination concerning the project's tolling
5 structure and methodology, unless the project is subject to a
6 regional tolling policy or the terms and conditions of a market
7 valuation agreement or market valuation waiver agreement.

8 Regional tolling policies have been adopted by certain
9 metropolitan planning organizations that include, among other
10 things, policies on toll rates and toll rate escalation. The
11 membership of a metropolitan planning organization's policy
12 board generally will include the municipalities, counties, and
13 local toll project entities that would be part of a committee
14 established under Transportation Code, §228.013. Similarly, a
15 market valuation agreement or market valuation waiver agreement
16 will include agreed terms and conditions for the development,
17 construction, and operation of a toll project that include toll
18 rates and toll rate escalation.

19

20 New §27.92 provides that if a committee does not submit a report
21 by the date the department is scheduled to issue a request for
22 qualifications or request for proposals, as applicable, for a
23 project, the department will use any business terms applicable
24 to the project that have been adopted by the metropolitan
25 planning organization and that relate to the determinations to
26 be included in the report. As discussed above, the membership

1 of a metropolitan planning organization's policy board generally
2 will include the entities that would be part of a committee.

3

4 New §27.92 includes provisions relating to committee meetings
5 and administrative support of a committee that are intended to
6 ensure the efficient operation of the committee, including
7 having a division or office of the department schedule meetings
8 for the committee and having the committee chair and the
9 department finalize meeting agendas. Notices of meetings must
10 comply with the requirements of the Open Meetings Act. The
11 department shall provide information to the committee, including
12 the project procurement schedule, necessary for a committee to
13 issue a report in a timely manner.

14

15 New §27.92 defines a quorum of a committee as one half of the
16 number of members appointed to the committee, and provides that
17 a committee may act only by majority vote of the members present
18 at the meeting and voting. These provisions will ensure that a
19 committee is able to carry out its functions in a timely manner.

20

21 New §27.92 provides that a committee will cease to exist after
22 submitting its report, but that the department may reconvene a
23 committee if changed circumstances may result in a change in the
24 committee's determinations.

25

1 FISCAL NOTE

2 James Bass, Chief Financial Officer, has determined that for
3 each of the first five years the new sections as proposed are in
4 effect, there will be fiscal implications for state or local
5 governments as a result of enforcing or administering the new
6 sections. The fiscal impact cannot be quantified with any
7 certainty as it will depend on the number and type of toll
8 projects developed by the department.

9

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

14

15 PUBLIC BENEFIT AND COST

16 Mr. Tomlinson has also determined that for each year of the
17 first five years in which the sections are in effect, the public
18 benefit anticipated as a result of enforcing or administering
19 the new sections will be to facilitate local and regional
20 support of department toll projects while providing local and
21 regional stakeholders with a say in project terms that affect
22 the risk of loss of local and regional funds committed to a
23 project. There are no anticipated economic costs for persons
24 required to comply with the sections as proposed. There will be
25 no adverse economic effect on small businesses.

26

1 SUBMITTAL OF COMMENTS

2 Written comments on the proposed new §§27.90 - 27.92 may be
3 submitted to Mark Tomlinson, Director, Texas Turnpike Authority
4 Division, Texas Department of Transportation, 125 East 11th
5 Street, Austin, Texas 78701-2483. The deadline for receipt of
6 comments is 5:00 p.m. on August 15, 2011.

7

8 STATUTORY AUTHORITY

9 The new sections are proposed under Transportation Code,
10 §201.101, which provides the commission with the authority to
11 establish rules for the conduct of the work of the department,
12 and more specifically, Transportation Code, §223.209, which
13 requires the commission to adopt rules, procedures, and
14 guidelines governing selection of a developer for a
15 comprehensive development agreement and negotiations to promote
16 fairness, obtain private participants in projects, and promote
17 confidence among those participants.

18

19 CROSS REFERENCE TO STATUTE

20 Transportation Code, §223.209 and §228.013.

1 SUBCHAPTER H. DETERMINATION OF TERMS FOR CERTAIN TOLL PROJECTS

2 §27.90. Purpose. Transportation Code, §228.013 requires, for
3 certain department toll projects in which a private entity has a
4 financial interest in the project's performance, that the
5 distribution of the project's financial risk, the method of
6 financing for the project, and the tolling structure and
7 methodology be determined by a committee comprised of
8 representatives from the department, any local toll project
9 entity for the area in which the project is located, the
10 applicable metropolitan planning organization, and each
11 municipality or county that provides revenue or right of way for
12 the project. This subchapter prescribes the process for a
13 committee's issuance of its determination.

14

15 §27.91. Definitions. The following words and terms, when used
16 in this subchapter, shall have the following meanings, unless
17 the context clearly indicates otherwise.

18 (1) Availability payment contract--A comprehensive
19 development agreement under which payments are made to a private
20 entity from project and other revenue to compensate the private
21 entity for capital, operating, and financial costs, which may be
22 based on the private entity's performance under the agreement.

23 (2) Commission--The Texas Transportation Commission.

1 (3) Committee--A committee established under this
2 subchapter.

3 (4) Comprehensive development agreement--An agreement
4 with a private entity that, at a minimum, provides for the
5 design and construction, reconstruction, extension, expansion,
6 or improvement of a toll project and may also provide for the
7 financing, acquisition, maintenance, or operation of a toll
8 project.

9 (5) Concession agreement--A comprehensive development
10 agreement under which a private entity agrees to develop,
11 finance, and construct a toll project, and to assume operation
12 or maintenance responsibilities for a toll project, in exchange
13 for rights to revenue of the project.

14 (6) Department--The Texas Department of Transportation.

15 (7) Executive director--The executive director of the
16 department or the executive director's designee.

17 (8) Local funds--Funds of a city or county, any other
18 funds paid by a city or county to meet local participation
19 requirements, and money deposited in a subaccount created under
20 Transportation Code, §228.012.

21 (9) Local toll project entity--Has the meaning assigned
22 by Transportation Code, §373.001.

23 (10) Metropolitan planning organization--The organization

1 or policy board of an organization created and designated under
2 23 U.S.C. §134 and 49 U.S.C. §5303, as amended, to make
3 transportation planning decisions for a metropolitan planning
4 area in which a toll project is located and to carry out the
5 metropolitan transportation planning process.

6 (11) Toll project--Has the meaning assigned by
7 Transportation Code, §201.001.

8
9 §27.92. Financial Terms.

10 (a) Applicability. This subchapter applies only to a toll
11 project that will be developed under a concession agreement or
12 an availability payment contract, and for which:

13 (1) funds allocated to a metropolitan planning
14 organization are expected to be used to pay for project costs;

15 (2) local funds are expected to be used to pay for
16 project costs; or

17 (3) property of a city or county is expected to be used
18 as project right of way or a city or county is expected to pay
19 for the acquisition of right of way for the project.

20 (b) Membership of committee. The membership of a committee
21 shall be determined after the commission authorizes the
22 department to initiate a procurement for a toll project that
23 provides for the potential delivery of the project through a

1 concession agreement or an availability payment contract. A
2 committee consists of the following members:

3 (1) one member appointed by each metropolitan planning
4 organization within whose boundaries all or part of the proposed
5 project may be located;

6 (2) one member appointed by each local toll project
7 entity within whose boundaries all or part of the proposed
8 project may be located;

9 (3) one member appointed by each city and county with
10 which the department intends to enter into an agreement under
11 which the city or county will provide local funds to pay for
12 right of way acquisition or other project costs or to acquire
13 right of way for the project, or will provide property of the
14 city or county for use as project right of way; and

15 (4) one member appointed by the executive director to
16 represent the department.

17 (c) Officers. The commission may appoint a chair and vice-
18 chair or may delegate to a committee the responsibility for
19 electing a chair and vice-chair by majority vote of the members
20 of the committee.

21 (d) Duties. A committee established under this subchapter
22 shall submit a report to the executive director before the date
23 the department issues a request for qualifications for the toll

1 project, except for a project for which the department and a
2 local toll project entity have agreed on the terms and
3 conditions for the project under Transportation Code, §228.0111,
4 or for which a local toll project entity has waived its option
5 to develop, construct, and operate the project, in which case
6 the report shall be submitted before the date the department
7 issues a request for proposals for the project. A report shall
8 contain the following determinations:

9 (1) the distribution of project financial risk, which is
10 the allocation of revenue risk for a toll project between the
11 department and the private entity with which the department
12 enters into an agreement for the project;

13 (2) the method of financing for the project, which is a
14 determination of whether the project should be funded with
15 private or public funding or a combination of private and public
16 funding; and

17 (3) unless the project is subject to a regional tolling
18 policy or the terms and conditions of a market valuation
19 agreement or market valuation waiver agreement, the project's
20 tolling structure and methodology.

21 (e) Failure to submit report. If a committee does not
22 submit a report by the date the department is scheduled to issue
23 a request for qualifications or request for proposals, as

1 applicable, for a project, the department will use any business
2 terms applicable to the project that have been adopted by the
3 metropolitan planning organization and that relate to the
4 determinations to be included in the report.

5 (f) Meetings.

6 (1) Meeting requirements. The department's Office of
7 General Counsel will submit to the Office of the Secretary of
8 State notice of a meeting of the committee at least eight days
9 before the date of the meeting. The notice will provide the
10 date, time, place, and purpose of the meeting. A meeting of a
11 committee will be open to the public. A committee will follow
12 the agenda set for each meeting under paragraph (2) of this
13 subsection.

14 (2) Scheduling of meetings. Meeting dates, times,
15 places, and agendas will be set by the office designated under
16 subsection (g) of this section. Any committee member may
17 suggest an agenda item, provided that the agenda item must be
18 approved by the chair of the committee and the department. A
19 committee may only discuss items that are within the committee's
20 jurisdiction. The office designated under subsection (g) of
21 this section will provide notice of the time, date, place, and
22 purpose of meetings to the members, by mail, email, telephone,
23 or any combination of the three, at least eight calendar days

1 before each meeting. All meetings must take place in Texas and
2 must be held in a location that is readily accessible to the
3 general public.

4 (3) Committee action. A quorum of the committee is one
5 half or more of the number of members appointed to the
6 committee. A committee may act only by majority vote of the
7 members present at the meeting and voting.

8 (4) Record. Minutes of all committee meetings shall be
9 prepared and filed with the executive director. The complete
10 proceedings of all committee meetings must also be recorded by
11 electronic means.

12 (5) Public information. All minutes, transcripts, and
13 other records of the advisory committees are records of the
14 department and as such, are subject to disclosure under the
15 provisions of Government Code, Chapter 552.

16 (g) Administrative support. For each committee, the
17 executive director will designate an office or division of the
18 department that will be responsible for providing any necessary
19 administrative support essential to the functions of the
20 committee. The department will provide project information and
21 other information to the committee to assist the committee in
22 carrying out its duties, including the project procurement
23 schedule.

1 (h) Duration. After a committee submits the report
2 described in subsection (d) of this section, the committee
3 ceases to exist. The department may, in its discretion,
4 reconvene a committee if changed circumstances may result in a
5 change in the committee's determinations.