



## AMERICAN TRUCKING ASSOCIATIONS

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U.S. Department of Transportation  
Dockets Management Facility  
Room PL-401  
400 Seventh St., SW  
Washington, DC 20590

### **RE: FHWA-2008-0136: NPRM; Request for Comments on “Fair Market Value and Design-Build Amendments”**

The American Trucking Associations (ATA)<sup>1</sup> is responding to a Notice of Proposed Rulemaking and request for comments posted in the October 8, 2008 *Federal Register*, pp. 58908-58913 regarding “Fair Market Value and Design-Build Amendments.”

The NPRM incorrectly attempts to redefine concession payments, regardless of how the revenue is spent, as operational costs. This contradicts Congressional intent with regard to the expenditure of toll revenue under the Interstate Reconstruction and Rehabilitation Pilot Program and other Title 23 tolling provisions. Furthermore, the NPRM incorrectly utilizes a provision in 23 U.S.C 156 to force States that enter into concession agreements involving a federal-aid highway to charge fair market value for the lease or sale of the highway.

#### Treatment of Concession Payments

One of the key elements of the NPRM is the classification of concession payments as an operational cost. This cannot be justified. A concession payment is not an essential element of a lease agreement, and is not necessary to the operation of a toll facility. If the State demands a concession payment in return for a third party’s right to operate a toll road, that is done at the State’s option, but it certainly is not a necessary requirement, and not an essential operating cost or necessary to the operation of the toll facility. Therefore, concession payments should not be considered to be an operating cost.

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



Expenditure of toll revenue from the Interstate Reconstruction and Rehabilitation Pilot Program is limited to expenses related to the tolled facility. Furthermore, several other provisions under 23 U.S.C 129 which allow federal participation in tolling limit expenditure of toll revenue to debt service, reasonable return on investment, and operational and maintenance costs. If the State certifies that the tolled facility is being adequately maintained, the State may use excess toll revenues for projects eligible under Title 23 (and Title 49 in some cases).

If this provision of the NPRM were allowed to stand, Congressional intent with regard to expenditure of excess revenue would be defeated. It would be the height of naiveté to assume that the lessee would not build the costs of the concession fee into the toll rates. In effect, the State collects the toll revenue up front through the concession fee, with the expectation that the lessee will recover the costs through a toll rate which exceeds an amount which is necessary to simply operate and maintain the facility, and draw a reasonable rate of return. Therefore, any revenue derived by the State from a concession fee should be considered excess toll revenue and subject to Section 129 restrictions.

This interpretation would preclude highways tolled under the Interstate Reconstruction and Rehabilitation Pilot Program from being leased under a concession arrangement, and would prevent toll revenue collected on tolled facilities subject to Section 129 restrictions from being used for purposes other than those allowed by Title 23 (or Title 49 where appropriate). It is important to ensure that this critical feature of Federal tolling policy remains in place in order to prevent abuse at the State level. For example, a recent application to toll I-80 in Pennsylvania under the Interstate Reconstruction and Rehabilitation Pilot Program, and to then lease the highway to the Pennsylvania Turnpike, proposed classifying concession fees as operational costs. This proposal was designed to subvert the pilot program's requirement that all toll revenue must be invested back into the toll facility. None of the revenues from the concession fee would be invested in I-80, contrary to Federal law. Allowing Pennsylvania and other States to tax users of Interstate Highways in order to fund unrelated governmental functions would violate the letter and spirit of the law, as enumerated in Title 23, Section 129. It would also permit the imposition of barriers to interstate commerce, which the Federal government is obligated to protect under the Constitution.

### Section 156 Requirements

The NPRM suggests that concession agreements are subject to requirements under 23 U.S.C. 156 regarding proceeds from the sale or lease of real property. However, the Conference Report to the 1987 law establishing Section 156 (H.R. Conf. Rep. 100-27, 1987 U.S.C.C.A.N. 121) explicitly limits the language to cover only non-highway uses of highway right-of-way (ROW) airspace. The Report makes it clear that this provision is to be applied only in cases where use of the highway right-of-way is unrelated to the primary purpose of the highway (i.e. highway use by motor vehicles). The Report cites the rental of space on highway ROW for fiber optic cables as an example, and is apparently the reason this provision was adopted. Clearly, applying Section 156 to

concession agreements involving the use of highway infrastructure is inconsistent with Congressional intent.

Further, the NPRM argues that the Section 156 exclusion of Title 23 eligible projects from a fair market value requirement does not apply to highway concession agreements because, according to FHWA, concession revenues are to be considered “legal and administrative costs.” As pointed out above, it is clear that the lessee of a tolled highway facility will attempt to recoup the costs of the concession payment, and will adjust the rate of the toll appropriately. Therefore, there is a direct relationship between the amount of the concession fee paid by the lessee to the State and the amount of the toll charged to users of the facility. As a result, the revenues from a concession payment should be treated as toll revenues. Whether the fee is collected from toll facility users by the State directly, or indirectly through a third party, is inconsequential. The effect on facility users is the same and the law should apply equally in both situations.

Thank you for the opportunity to comment.

Sincerely,

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