



December 6, 2017

Peter Alviti, Jr., P.E.
Director
Rhode Island Department of Transportation
Two Capitol Hill
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ATTN: David Fish, P.E.

Dear Director Alviti:

The American Trucking Associations (ATA)¹ and the Rhode Island Trucking Association (RITA) are pleased to offer comments on The Environmental Assessment (EA) for Toll Locations 1 and 2 (November 1, 2017) under the RhodeWorks program. The question before the Federal Highway Administration is whether to make a Finding of No Significant Impact (FONSI) or to require an Environmental Impact Statement (EIS). For the reasons delineated below, ATA and RITA believe that a FONSI is not supported by the EA. A new, revised EA that addresses the network effects of imposing tolls at all proposed locations should be issued and released for public comment, or FHWA should immediately require an EIS that includes an evaluation of the network effects.

1. The Environmental Assessment should not consider Locations 1 and 2 separately from other proposed tolling locations.

The EA only addresses the impacts of tolling at two locations, and does not take into account the cumulative impacts that tolls at the additional tolling locations identified by RIDOT² would have on travelers passing through the toll gantries at Locations 1 & 2. Nor does the EA account for potential cumulative effects should the alternative routes for Locations 1 & 2 also be used as an alternative route to avoid other toll gantries under a broader tolling scenario.

¹ ATA is a united federation of motor carriers, state trucking associations, and national trucking conferences created to promote and protect the interest of the trucking industry. Directly and through its affiliated organizations, ATA represents more than 30,000 motor carriers in the United States, Canada, and Mexico encompassing every type of motor carrier operation.

² <http://www.dot.ri.gov/projects/tollingprogram/>.

Furthermore, imposing tolls at only two locations near the state’s border, where interstate travel is likely disproportionately high relative to travel elsewhere in the state, raises serious concerns under the U.S. Constitution’s Commerce Clause. According to Figure 6-3 of the Berger Report, Locations 1 & 2 have the lowest proportion of repeat trips, which suggests a lower percentage of local traffic. While two percent of the trips are repeat traffic at these locations, the total for all gantry locations is 7.5%, and is as high as 17.1% at the individual locations.

This sort of collection-point manipulation, designed to ensure that interstate users will be assessed a toll while users involved in purely intrastate movements will escape charges, appears to violate the Commerce Clause by discriminating against interstate commerce. *See, e.g., Chemical Waste Mgmt. v. Hunt*, 504 U.S. 334, 342 (1992) (Commerce Clause forbids states from burdening “a transaction or incident more heavily when it crosses state lines than when it occurs entirely within the State”) (internal quotation marks omitted); *Camps Newfound/Owatonna v. Harrison*, 520 U.S. 564, (1997) (when a burden “falls by design in a predictably disproportionate way on out-of-staters,” it is just as invalid under the Commerce Clause as a burden “targeting out-of-staters alone”).

For these reasons FHWA should not issue a FONSI based on an environmental assessment of an arbitrary—and constitutionally infirm—subset of the RhodeWorks tolling scheme.

2. Selection of diversion routes is incomplete.

The EA, supported by the Traffic & Revenue Analysis³ (Berger Report) only considered a single alternative route (RI Route 3) when analyzing the potential for traffic diversion. In fact, for those vehicles traveling between Connecticut and points west, and Providence, another alternative route, I-395 - U.S. 6, is also an attractive alternative and should have been included in the EA. According to Google Maps, this route would have added just 1.6 miles and 13 minutes to the trip. Under the value-of-time (VOT) assumptions used in the Berger Study, the additional cost of taking this route is lower than the cost of paying the toll for short-distance trips and slightly above the toll costs for long-distance trips (under a negative 25% VOT scenario used in the sensitivity analysis the long-distance cost is also below the toll charge). Continuing on to Boston using this route and connecting to I-295 adds approximately 10 minutes and one mile compared to using I-95, according to Google Maps. The additional cost of taking this route is approximately equivalent to or below the toll cost for both long- and short-distance trips.

These are just two examples of alternative routes that the Berger Report failed to consider. The traffic and revenue analysis should be revised to include all feasible alternative routes and the EA (or subsequent EIS) should be revised to reflect the new information.

³ Louis Berger Group, *Rhode Island Department of Transportation Investment-Grade Tolling Study Final Report*, Nov 3, 2017.

3. The EA did not analyze the economic impacts of tolling and the resulting effects on traffic patterns.

Truck-dependent businesses are likely to consider operational changes in response to tolling that will impact travel patterns in Rhode Island and the surrounding region. For example, one company with a large distribution center in Rhode Island that services much of New England is considering reducing the number of loads serviced by this facility and shifting this traffic to a different location with lower transportation costs if tolls are implemented. Not only will this change truck travel patterns in the region, it will also affect commuter travel, since jobs will be repositioned to the new location. Furthermore, this issue presents another reason for why Locations 1 & 2 cannot be considered separately. An EA or EIS that fails to account for the cumulative economic costs, and subsequent environmental effects, will be inadequate.

The cumulative economic impacts of tolls at all proposed locations should be included in a revised EA, or an EIS.

4. The EA/Berger Report assumed that toll rates would be static through 2040.

The assumption that nominal toll rates will remain unchanged through 2040 results in understating estimated traffic diversion over time, since the inflation-adjusted toll rate decreases over time, a fact acknowledged by the Berger Report.⁴ It is standard practice for tolling agencies to increase toll rates to account for inflation, higher than expected expenses, or lower than expected revenue.⁵ Furthermore, RIDOT has the legal authority to increase rates above those assumed by the analysis. Therefore a static toll rate is an unrealistic assumption that does not accurately reflect the likely level of diversion and does not accurately capture the impacts of diversion.

The EA (or EIS) should be revised to include a diversion analysis that does not rely on the unrealistic assumption that toll rates will *decrease* in inflation-adjusted terms.

5. The EA minimizes traffic diversion impacts by using traffic counts at a time of day when counts are low.

The EA used “peak hour”—*i.e.*, 4:00 p.m. to 5:00 p.m.—traffic counts in its analysis of the impacts of diversion. However, according to the Berger Report, tractor-trailer traffic is at a relatively low level during this time period at Locations 1 & 2, further distorting the impacts of diversion.⁶ For example, at the I-95 counting station north of Nooseneck Hill Road, which falls between Locations 1 and 2, there were 119 tractor-trailers at 4:00 p.m. and 117 at 5:00 p.m. However, peak volume at 6:00 a.m. – 256 tractor-trailers – was more than double the count used for the EA. In fact, the “peak hour” counts were below even the average hourly count of 161 tractor-trailers. While it may be appropriate to analyze congestion impacts based on peak hour travel periods for all vehicles, the EA does not account for passenger-car equivalent (PCE) impacts.

⁴ *Louis Berger Study*, p. 101.

⁵ *U.S. Toll Roads Since 1950: Trends in Toll Rates per Mile Compared with Inflation*, Transportation Research Record: Journal of the Transportation Research Board Volume 2450, Issue 12, 2014, pp. 144-151. This study found that since 1960, annual average toll rates on U.S. toll roads increased by 3.2% for passenger cars and 3.6% for commercial vehicles. Using the 3.6% average, the 2040 toll rate would increase to \$8.18-\$10.52 at Locations 1 & 2.

⁶ *Louis Berger Study*, App. A.

The EA (or EIS) should be revised to consider PCE impacts during different times of day to ensure that maximum environmental impacts are determined.

6. The EA failed to produce a safety analysis.

Even though it is well documented that Interstate highways have a lower crash rate than the lower-order roadways that vehicles are expected to divert on to,⁷ the EA does not attempt to analyze the impacts of shifting traffic to less safe roadways. Furthermore, crashes cause additional congestion, which affects the proposal's environmental impact assessments. A RIDOT representative specifically acknowledged that the roads that have been identified as potential diversion routes under the tolling proposal have an injury rate "2-3 times higher than those on freeways."⁸ The representative also stated that "[i]t is also safer for tractor trailers to remain on the freeways as they will not have to interact with pedestrians, bicyclists, or traffic turning into and out of side streets or driveways."⁹

The EA (or EIS) should be revised to include a safety analysis, including the environmental impacts that result from the congestion effects of changes in the number of crashes that result from traffic diversion.

7. The EA does not consider the potential impacts of a successful legal challenge to the toll structure.

Per compliance with the legislation authorizing tolls, the EA assumes that toll rates will have several different caps:

- Tolls are limited to once per toll facility, per day in each direction;
- Tolls are limited to a \$20 total for a border-to-border through trip on I-95 from Connecticut to Massachusetts; and
- Tolls will not exceed \$40 per day.

However, both these caps and other aspects of the RhodeWorks program are likely to render its tolling scheme unlawful under the Commerce Clause of the U.S. Constitution. More specifically, the U.S. Supreme Court has explained that, under the Commerce Clause, a transportation user fee is permissible only "if it (1) is based on some fair approximation of use of the facilities, (2) is not excessive in relation to the benefits conferred, and (3) does not discriminate against interstate commerce." *Northwest Airlines v. Kent*, 510 U.S. 355, 369 (1994). See also *Selevan v. N.Y. Thruway Auth.*, 584 F.3d 82, 98 (2d Cir. 2009) (holding that the *Northwest Airlines* test is "the applicable test" for "evaluat[ing] the constitutionality of a highway toll"). The proposed Rhode Island tolls fail this test for a variety of reasons.

First, both the daily caps and the truck-only nature of the tolls mean that they are not "based on some fair approximation of use." On the contrary, the per-facility limitation means that a

⁷ See for example: <http://www.massdot.state.ma.us/highway/Departments/TrafficandSafetyEngineering/CrashData/CrashRates/RoadwayFunctionalClassification.aspx>; <http://apps.itd.idaho.gov/apps/ohs/Crash/14/2014RoadClass.pdf>.

⁸ Statement by Steve Pristawa, Chief Civil Engineer, RIDOT. Minutes from the Rhode Island State Traffic Commission meeting, Aug. 17, 2017.

⁹ *Ibid.*

truck passing through the same toll gantry 100 times a day would pay the same toll as a truck passing through it once; and the daily system-wide cap makes no attempt to fairly approximate the use of trucks who continue to drive the tolled roads after hitting them. In addition, a scheme under which tolls are restricted to a small class of vehicles, while the vast majority of users pay no tolls whatsoever, is not based on *any* approximation of use, much less a fair one.

Second, for similar reasons, the cap arrangement renders the tolls excessive in relation to the benefits conferred: if, for example, \$40 is the appropriate price for a truck that hits the daily cap and continues to travel dozens or hundreds more miles on the tolled facilities, it is by the same token excessive in relation to the benefit obtained by a truck who just hits that daily cap. The same is true of the truck-only nature of the tolls: if the proper price for the vast number of road users is \$0, *any* toll imposed on heavy trucks for the use that is available to all others free of charge will, by definition, be excessive.

Finally, the RhodeWorks toll scheme discriminates against interstate commerce by carefully engineering the scheme to favor in-state users over out-of-state users. While both in-state and out-of-state trucks nominally pay tolls under the same schedule, the daily cap inevitably means that in-state trucks—which are more likely to hit the cap and continue to use the roads without paying additional tolls—will obtain more benefit for the fees they pay than out-of-state trucks who pass through Rhode Island or enter the state for a short period. As the Supreme Court has held, user fees “discriminate against out-of-state vehicles” when they predictably “subject them to a much higher charge per mile travelled in the State,” and “do not even purport to approximate fairly the cost or value of the use of [the] roads.” *American Trucking Associations v. Scheiner*, 483 U.S. 266, 289-90 (1987).

The truck-only nature of the tolls—and the interstate nature of the trucking industry—also means that out-of-state users will bear a heavier proportion of the toll bill than they would under an evenhanded toll scheme that applied to all users. And by deciding to toll only tractor-semitrailers—which are particularly likely to come from out of state—and not the kind of heavy garbage and construction vehicles that are more likely to be locally based, the RhodeWorks scheme further ensures that the burden of maintaining Rhode Island’s roads will be paid disproportionately by travelers in interstate commerce. Indeed, the Rhode Island legislature and the administration have made no secret of the fact that central to the RhodeWorks scheme was ensuring that the bill goes primarily to out-of-state users who cannot hold them accountable at the ballot box. *See, e.g.*, Ian Donnis, “On 52-11 Vote, RI House Approves Truck Toll Plan,” Rhode Island Public Radio, <http://ripr.org/post/52-21-vote-ri-house-approves-truck-toll-plan> (Feb. 10, 2016) (quoting House Speaker stating that “[p]eople should know that 60 percent of the money is going to come from out of state”); Stephanie Johnston and Rosie Woods, “One Year Later: Gov. Raimondo, RIDOT Review RhodeWorks,” WPRI.com, <http://wpri.com/2017/02/22/one-year-later-gov-raimondo-ridot-review-rhodeworks/> (Feb. 22, 2017) (administration officials expect “much of the funding for the infrastructure ... to come from a new toll on *tractor trailers driving through the state*) (emphasis added).

Given these serious legal infirmities, the EA fails to consider the impacts of removing the daily toll caps, of tolling all vehicles, or of having to cease toll collection altogether (if the scheme is deemed unlawful, but the legislature chooses not to rehabilitate it by lifting the caps or authorizing tolls on all vehicles). At a minimum, the state should conduct a sensitivity analysis taking into account the likelihood of those scenarios.

For reasons described below, capping the toll rates clearly favors intrastate travelers, and is likely illegal under the Constitution's Commerce Clause. At a minimum, the state should conduct a sensitivity analysis to determine the impacts of uncapping toll rates. Furthermore, tolling only tractor-semitrailers may also be found to be discriminatory since these vehicles engage in a disproportionately high level of interstate travel. Therefore the analysis should consider the impacts of tolling all vehicles. In addition, RIDOT should be required to order and make public an independent legal review prior to FHWA approval in order to determine whether a legal challenge is likely to be successful.

8. The Berger Report assumed nonexistent access restrictions that caused a severe underestimate of diversion and overestimate of revenue collection.

The Berger Report assumed that RIDOT would impose access restrictions on tractor-semitrailers to prevent through trucks from avoiding tolls by using alternative routes. The report assumed that enforcement of these restrictions would reduce traffic diversion by 50 percent.¹⁰ However, on August 17, 2017, the Rhode Island State Traffic Commission rejected RIDOT's request to impose these restrictions.¹¹ Therefore, the Berger Report severely underestimates traffic diversion. Since the EA based its estimates of impacts on the Berger Report's underestimated diversion figures, all of the impact assessments that are adjustable according to the number of diverted vehicles are inherently erroneous.

Furthermore, as a result of this adjustment, the projected revenue is lower than RIDOT claims is needed to meet the purpose and need of the proposal. According to a sensitivity analysis that excluded the enforcement actions, gross revenue would be reduced by approximately \$10 million per year under this scenario.¹² When toll capital and administrative costs are factored in, ATA estimates that net annual average revenue over the first 10 years of the program (2016-2025) is \$27.48 million. This includes the 10-year, \$68.9 million contract with Kapsch Traffic Com IVHS, Inc. for gantry installation and other capital equipment, including maintenance and operational support.¹³ It also includes payment to the Rhode Island Toll & Bridge Authority, which is to manage billing and collection services at an estimated cost of five percent of revenue.¹⁴ Furthermore, the Berger Report did not appear to consider the effects of "leakage" due to non-payment of tolls. This will further deplete the net revenue from tolls.

¹⁰ *Louis Berger Study*, pp. 94-95.

¹¹ Minutes from the Rhode Island State Traffic Commission meeting, Aug. 17, 2017.

¹² *Louis Berger Study*, Table 6-9, p. 104.

¹³ <http://www.ri.gov/press/view/30581>.

¹⁴ http://www.planning.ri.gov/documents/tip/2017/RI_STIP_FFY2017_2025_Amended_07212017-Final.pdf, p. 35.

9. The EA did not consider alternatives other than tolling.

The EA claims that eliminating non-toll alternatives is justified based on standards established under the *American Association of State Highway and Transportation Officials Practitioner's Handbook No. 3: Managing the NEPA Process for Toll Lanes and Toll Roads*.¹⁵ However, RIDOT has not met the AASHTO standards for excluding non-toll alternatives. As stated in the EA, the criteria are as follows:

- Tolling revenue is assumed in Rhode Island's state transportation planning process;
- Tolling revenue is the basis for meeting fiscal constraint of the STIP;
- Tolling is an element of the proposed Project's purpose and need; and
- Non-tolled alternatives were eliminated from consideration during the planning process.

The EA goes on to state the following:

*The revenue generated from Toll Locations 1 and 2 would be used to support the funding of necessary reconstruction or replacement of the Wood River Valley Bridge, the Tefft Hill Trail Bridges, and the Baker Pines Bridge as intended in the RhodeWorks legislation, and within the allowances of 23 U.S.C. 129.*¹⁶

According to the most recent Rhode Island Transportation Improvement Program posted to RIDOT's website,¹⁷ of the approximately \$32 million currently programmed for the three bridges scheduled for reconstruction or replacement, just \$2 million, or six percent of the total, is toll revenue. Improvements to only one of the bridges – the Wood River Valley Bridge – are to be funded with toll revenue. It is patently absurd to claim that RIDOT is unable to identify an alternative source for \$2 million, which represents less than one-half of one percent of RIDOT's annual budget.¹⁸

Furthermore, the Federal Highway Administration advises transportation agencies that “[e]ven if non-tolled options may be eliminated during the transportation planning process or through NEPA's alternatives analysis, it is advisable to examine non-tolled alternatives if there is public opposition to tolls.”¹⁹ That public opposition exists was quite clear during the November 21, 2017 public meeting on the EA, where the public witnesses were unanimously opposed to the tolling scheme.

Conclusions

This tolling proposal is unique and unprecedented. Never before has a state either tolled trucks only, or tolled existing Interstates, on a network basis. In fact, we are not aware, in the 61-year history of the Interstate system, of any state that has even explored such a scenario. The proposal is unparalleled in our nation's history and potentially precedent setting. There is

¹⁵ Environmental Assessment, p. 4-2.

¹⁶ *Ibid.*

¹⁷ *State of Rhode Island Transportation Improvement Program FFY 2017-2025*, Adopted September 8, 2016 Amended July 21, 2017.

¹⁸ *Ibid.*

¹⁹ Federal Highway Administration. *Public-Private Partnership Oversight: How FHWA Reviews P3s*, Jan. 2015, p. 19.

no previous experience to rely on, and no studies of other states' experience to point to when determining the potential effects on traffic congestion, the environment, safety or the economy. Neither RIDOT nor FHWA can today say with confidence what would happen if vehicles traveling on a previously untolled Interstate highway are subjected to tolling. It is clear that neither the Environmental Assessment nor the Traffic and Revenue analysis provide these answers. Both are fatally flawed documents that cannot and should not lead FHWA to issue a FONSI for Locations 1 and 2.

Thank you for your consideration of our comments.

Sincerely,



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