

TEXAS TRANSPORTATION COMMISSION

ALL Counties

MINUTE ORDER

Page 1 of 1

ALL Districts

The Texas Transportation Commission (commission) finds it necessary to adopt amendments to §§5.51-5.59, relating to pass-through fares and tolls, to be codified under Title 43, Texas Administrative Code, Part 1.

The preamble and the adopted amendments, attached to this minute order as Exhibits A and B, are incorporated by reference as though set forth at length verbatim in this minute order.

IT IS THEREFORE ORDERED by the commission that the amendments to §§5.51-5.59 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:

JAMES M. BASS
Chief Financial Officer

Recommended by:

M. W. Behren
Executive Director

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Minute Number Date Passed

1

2 Section 5.51 is amended to include the new statutory language
3 adding design, development, and financing as subjects suitable
4 for a pass-through agreement. Section 5.51 is also amended to
5 reference new Transportation Code, §222.104(c), which allows the
6 department to receive a pass-through toll payment from a public
7 or private entity. In addition, §5.51 is amended to reference
8 new Transportation Code, §91.075(b), which allows pass-through
9 fares on railway projects.

10

11 Section 5.52, concerning Definitions, is revised to add new
12 definitions, delete definitions that are no longer necessary,
13 and amend existing language. Paragraph (3) is amended to
14 generalize the definition of department estimate so it will
15 apply equally whether the department is paying or receiving
16 pass-through tolls or fares.

17

18 For the same reason, paragraph (4) is amended to delete the
19 definition of developer. Throughout the amended rules, the term
20 developer is replaced by the term public or private entity.

21

22 New paragraph (6) is added to clarify that references to a
23 highway include facilities necessary or convenient to the
24 highway's construction.

25

1 New paragraph (8) is added to define the term pass-through
2 agreement. The use of this term allows general references that
3 will address both pass-through tolls and pass-through fares.

4
5 New paragraph (9) is added to define the term pass-through fare.
6 The definition establishes that the term includes both passenger
7 and freight rail and encompasses fares, surcharges, and user
8 fees. Otherwise, the definition tracks the statutory language.

9
10 New paragraph (10) is amended so the definition of pass-through
11 toll will more closely track the statutory language.

12
13 New paragraph (11) is added to define the phrase public or
14 private entity, which is used throughout the rules to identify
15 the entity with which the department may enter a pass-through
16 agreement. This phrase replaces the term developer, which is
17 used in the current rules, and is no longer appropriate because
18 the law now allows the department to be the entity that develops
19 a project.

20
21 New paragraph (12) is added to define railway so that it
22 includes both passenger and freight rail and any facility in
23 connection with a railway. This definition is essential to
24 achieving the purpose of House Bill 2702 in allowing pass-
25 through fares on any railway project.

1

2 Section 5.53(a), paragraph (1) is amended to require submission
3 of a project location map with the public or private entity's
4 proposal. Experience has shown that a project location map is
5 extremely useful to the department in evaluating proposals.

6

7 Section 5.53(a), paragraph (5) is amended to clarify that
8 experience in developing highway projects is only relevant if
9 the pass-through agreement is for a highway project. Section
10 5.53(a), new paragraph (6) is added to impose a corresponding
11 requirement for a statement of experience with regard to a pass-
12 through agreement for a railway project. Subsequent paragraphs
13 are renumbered.

14

15 Section 5.53(a), renumbered paragraph (7) is amended to clarify
16 that information on development experience is unnecessary if the
17 proposer will not be the one developing the project.

18

19 New paragraph (8) is added to address the corresponding
20 situation in which the project will be developed by the
21 department and the proposer will be making payments; the
22 proposer must then provide information sufficient to show the
23 proposer's ability to make the promised payments.

24

25 Section 5.53(a), paragraph (10) is amended to clarify that

1 information on tolling is only necessary and relevant if the
2 project will be for a highway.

3
4 Section 5.53(a), paragraph (11) is amended to clarify that
5 information about the proposer's intention to enter a
6 comprehensive development agreement is only necessary and
7 relevant if the project will be for a highway.

8
9 Section 5.53(c) is amended to distinguish between highway and
10 railway projects. For highway projects, the relevant citation
11 for comprehensive development agreements is 43 TAC Chapter 27,
12 while the corresponding citation for comprehensive development
13 agreements for railway projects is 43 TAC Chapter 7.

14
15 Section 5.54 is amended to improve the grammatical construction.
16 In addition, the amendments clarify that the initial approval by
17 the Texas Transportation Commission (commission) permits the
18 executive director to negotiate financial terms of a pass-
19 through agreement, but that the detailed agreement itself will
20 be negotiated after final commission approval of the financial
21 terms. The amendments to paragraphs (3), (7), (8), and (9),
22 clarify when certain requirements are only relevant to highway
23 projects and impose corresponding requirements for railway
24 projects. Paragraph (10) is amended to require additional
25 information about the proposer's financial capability when the

1 department will be constructing a project in reliance on future
2 pass-through payments from the proposer.

3
4 Section 5.55(c) is amended to recognize that some of the listed
5 factors will not be relevant to all pass-through agreements and
6 to add the financial capability of the proposer as one of the
7 criteria to be considered in evaluating proposals.

8
9 Section 5.55(g) is amended to recognize that the department
10 cannot know in advance whether negotiations will be successful.

11
12 Section 5.56(a) is amended to reflect that at the time of
13 commission approval, the department and the proposer will have
14 negotiated the financial terms of the agreement, but may not
15 have reached agreement on every word of a contract. Final
16 commission authorization will be based on various criteria,
17 including the new criterion that the project will serve the
18 public interest and not merely a private interest. This
19 criterion is added to ensure that the public interest is always
20 paramount, particularly when a private entity is the proposer.

21
22 Section 5.56, new subsection (b), is added to list the required
23 terms of any pass-through agreement. These terms combine in one
24 place various terms that were previously implicit in several
25 rules or were located in former §5.58(e). Experience with the

1 pass-through mechanism has indicated that it is possible and
2 desirable to combine the financial terms and project development
3 terms in a single legal document. The list of matters that must
4 be addressed in a pass-through agreement also includes items
5 that have been shown through experience to be useful, such as a
6 map of the project, a project schedule, and an estimated project
7 budget.

8
9 Section 5.57, new subsection (a), is added to provide a method
10 for calculating pass-through fares for railway projects. In
11 concept, the methodology is similar to and runs parallel to the
12 methodology used to establish pass-through tolls and considered
13 in more detail in connection with new subsection (b).

14 Subsection (a)(2)(B) allows pass-through fares to be calculated
15 on any reasonable basis, including number, type, and class of
16 passengers; type of freight; tonnage of freight; number or type
17 of cars; mileage traveled; or characteristics of track. This
18 flexibility is essential to allow pass-through fares to be
19 tailored to the particular circumstances of a given railway.

20
21 New subsection (b)(1) of §5.57 is amended to clarify the
22 standards to be considered by the commission in establishing the
23 level of pass-through tolls. This includes rewording to improve
24 the structure and clarity of the standards. One standard is
25 added to ensure that the commission considers any benefit from

1 the more rapid construction of a project. Amendments to this
2 paragraph also clarify that the commission will not approve a
3 level of pass-through tolls that exceed the department's cost
4 estimate except by an amount equal to the savings realized
5 through earlier construction of the project. Finally, the
6 amended paragraph establishes that the commission will not
7 compensate a public or private entity for its financing costs.
8 As a whole, the amendments to new subsection (b)(1) establish
9 necessary parameters that are designed to encourage the proper
10 use of pass-through tolls while curbing demands that could
11 result in excessive expenditures from the state highway fund.

12
13 Section 5.57(b)(2) is amended to improve the clarity of its
14 original meaning by improving the grammatical structure.
15 Paragraph (2), subparagraph (B) is rewritten to generalize the
16 types of pass-through toll that will be allowed and to add
17 whether the highway is tolled as a possible basis for varying
18 pass-through toll payments. Paragraph (3) is rewritten to
19 clarify the existing procedure with regard to overruns and
20 underruns and to add a corresponding provision governing
21 overruns and underruns when a project will be developed by the
22 department. The provision governing overruns and underruns when
23 a project will be developed by the department places the risk of
24 overruns and underruns on the public or private entity unless
25 the commission directs otherwise. Paragraph (3), subparagraph

1 (B) rewrites the provision governing traffic volume to clarify
2 the existing procedure.

3
4 Section 5.58(a) is amended to permit department, rather than
5 commission, approval of environmental review. This allows
6 projects to proceed expeditiously after receiving the
7 commission's final approval of financial terms. New subsection
8 (b) is added to establish procedures for right of way
9 acquisition and the adjustment of utilities. In general, a
10 public or private entity is required to follow the same
11 procedures as would apply to the department. For right of way
12 acquisition, alternative procedures may be approved if it would
13 be sufficient to meet legal requirements.

14
15 Section 5.58, new subsection (c), is amended to make explicit
16 that the standards in the former rule are intended for
17 application to highway projects under the former rule and to
18 establish design criteria for railway projects. The design
19 criteria for railway projects are comparable in scope and nature
20 to the preexisting design criteria for highway projects. Former
21 subsection (c) is deleted because the specific provisions
22 previously considered for a separate project development
23 agreement will now be handled in a single pass-through toll
24 agreement. This provides for a single definitive legal document
25 and thus reduces the department's legal risk, and it also

1 reflects the department's successful experience to date in
2 negotiating pass-through agreements that are complete and
3 comprehensive.

4
5 Section 5.59 is amended to clarify the distinction between the
6 standards applicable to highways and those applicable to
7 railways. New subsection (d) is added to establish maintenance
8 standards for railways. The railway maintenance standards are
9 comparable in scope and nature to the preexisting maintenance
10 standards for highways.

11
12 COMMENTS

13 One comment was received, from the Southwest Commuter Rail
14 Corporation of Texas. The comment states that the proposed
15 rules are inconsistent with relevant statutes, cause the pass-
16 through fare methodology to be legally inadequate and
17 inequitable, and violate public policy.

18
19 The comment cites the reference to financing in Transportation
20 Code, §91.075, as evidence that the commission is required to
21 pay interest on bonds issued to finance a pass-through fare
22 project. The commission disagrees with this reading of the
23 statute. The statute is permissive in allowing, but not
24 requiring, the department to enter pass-through fare agreements.
25 The comment also errs in suggesting that the department would be

1 placing limits on the use of reimbursed funds. Rather, the
2 rules describe the basis on which the amount of the
3 reimbursement will be calculated, a determination that is
4 admittedly within the authority of the commission. How those
5 funds are used after they are paid to the developer is not
6 addressed by the rules.

7
8 The comment also states that the failure to reimburse a
9 developer for interest expense makes the pass-through fare
10 methodology inadequate and unfair. In support, the comment
11 cites a case relating to condemnation. The analogy is not
12 applicable. The department is constitutionally required to
13 provide full reimbursement whenever property is taken without
14 the owner's consent; the department is not constitutionally or
15 statutorily required to provide full reimbursement for all costs
16 in a pass-through fare agreement, which is entered only with the
17 consent of both parties.

18
19 Finally, the comment asserts that public policy requires the
20 reimbursement of interest expense. No articulated public policy
21 is cited in support. In contrast, for example, the Texas
22 Uniform Grant Management Standards do not require the payment of
23 interest expense and indeed forbid it in some instances.

24
25 Overall, the comment mistakes the fundamental nature of a pass-

1 through agreement. Pass-through agreements are not in the
2 nature of public utility regulation, eminent domain, or loan
3 guarantees. Rather, pass-through agreements are joint
4 contractual endeavors in which the parties must agree on the
5 distribution of costs and risks. In declining to reimburse a
6 developer for its interest expenses, the department is properly
7 using its discretion under the statute to set limits on the
8 extent to which the department will bear the burden of the
9 developer's costs and risks.

10

11 STATUTORY AUTHORITY

12 The amendments are adopted under Transportation Code, §201.101,
13 which provides the commission with the authority to establish
14 rules for the conduct of the work of the department, and more
15 specifically, Transportation Code, §222.104, which authorizes
16 the department to enter agreements for pass-through tolls, and
17 Transportation Code, §91.075, which authorizes the department to
18 enter agreements for pass-through fares.

19

20 CROSS REFERENCE TO STATUTE

21 Transportation Code, §91.075, and §222.104.

1 SUBCHAPTER E. PASS-THROUGH FARES AND TOLLS

2 \$5.51. Purpose. Transportation Code, §222.104(b) authorizes
3 the Texas Department of Transportation to enter into an
4 agreement with a public or private entity that provides for the
5 payment of pass-through tolls to the public or private entity as
6 reimbursement for the design, development, financing,
7 construction, maintenance, or operation of a toll or non-toll
8 facility on the state highway system by the public or private
9 entity. Transportation Code, §222.104(c) authorizes the
10 department to enter into an agreement with a private entity that
11 provides for the payment of pass-through tolls to the department
12 as reimbursement for the department's design, development,
13 financing, construction, maintenance, or operation of a toll or
14 non-toll facility on the state highway system by the public or
15 private entity. Transportation Code, §91.075(b) authorizes the
16 department to enter into an agreement with a public or private
17 entity that provides for the payment of pass-through fares to
18 the public or private entity as reimbursement for the
19 acquisition, design, development, financing, construction,
20 relocation, maintenance, or operation of a passenger railway
21 facility or a freight railway facility by the entity. This
22 subchapter prescribes the policies and procedures governing the
23 department's implementation of these statutory provisions

NOTE: Additions underlined
Deletions in []
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Exhibit B

1 [~~Transportation Code, §222.104(b)~~].

2

3 §5.52. Definitions. The following words and terms, when used
4 in this subchapter, shall have the following meanings, unless
5 the context clearly indicates otherwise.

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

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

8 (3) Department estimate--An estimate of what it would
9 cost the department to perform [~~complete~~] the work proposed by
10 the public or private entity, whether the work is proposed to be
11 performed by the department or whether it is proposed to be
12 performed by the public or private entity [~~developer~~]. The
13 estimate is developed or updated by the department after receipt
14 of a public or private entity's [~~developer's~~] request and prior
15 to the time the department executes an agreement with the public
16 or private entity [~~developer~~].

17 [~~(4) Developer--The public or private entity that enters~~
18 ~~into a pass-through toll agreement with the department under~~
19 ~~this subchapter for the construction, maintenance, or operation~~
20 ~~of a state highway.]~~

21 (4) [~~(5)~~] Environmental Permits, Issues, and Commitments
22 (EPIC)--Any permit, issue, coordination, commitment, or
23 mitigation obtained to satisfy social, economic, or

1 environmental impacts of a project, including [~~7, but not limited~~
2 ~~to~~] sole source aquifer coordination, wetland permits,
3 stormwater permits, traffic noise abatement, threatened or
4 endangered species coordination, archeological permits, and any
5 mitigation or other commitment associated with any of those
6 issues.

7 (5) [~~6~~] Executive director--The executive director of
8 the department or the executive director's designee not below
9 district engineer, division director, or office director.

10 (6) Highway--Includes any facility convenient or
11 necessary to the operation of a highway.

12 (7) Operation--Includes maintenance.

13 (8) Pass-through agreement--A pass-through toll agreement
14 or a pass-through agreement entered under the terms of this
15 subchapter by the department and a public or private entity.

16 (9) Pass-through fare--A dollar amount, including a
17 surcharge or user fee for freight shipments, that is tied to a
18 measure of actual usage of a railway and is used under this
19 subchapter as a means of calculating payments made by one entity
20 to another to provide reimbursement for some or all of the costs
21 of acquiring, designing, developing, financing, constructing,
22 relocating, maintaining, or operating a passenger or freight
23 railway.

1 (10) [+8] Pass-through toll--A dollar amount that is
2 tied to a measure of actual usage of a highway and is used under
3 this subchapter as a means of calculating payments made by one
4 entity to another to provide reimbursement for some or all of
5 the costs of designing, developing, financing, constructing,
6 maintaining, or operating a highway on the state highway system
7 ~~[per vehicle fee or a per vehicle-mile fee that is determined by~~
8 ~~the number of vehicles using a highway].~~

9 (11) Public or private entity--Any entity authorized by
10 law to enter into a pass-through agreement with the department
11 under this subchapter for the acquisition, design, development,
12 financing, construction, relocation, maintenance, or operation
13 of a highway or railway.

14 (12) Railway--Includes both passenger and freight
15 railways and any facility convenient or necessary to the
16 operation of a railway.

17

18 \$5.53. Proposal.

19 (a) A public or private ~~[governmental]~~ entity ~~[authorized~~
20 ~~to finance, construct, maintain, or operate a state highway or a~~
21 ~~private entity]~~ may submit in writing to the department a
22 proposal for a project~~[r]~~ or a series of projects~~[r]~~ to be
23 developed under a pass-through ~~[toll]~~ agreement. The proposal

1 must include:

2 (1) a project location map showing proposed alignments
3 and description of the project, including the project limits,
4 connections with other transportation facilities, and any [a
5 ~~description of the~~] services to be provided [~~by the developer~~];

6 (2) a statement of the benefits anticipated to result
7 from completion of the project;

8 (3) a description of the local public support for the
9 project and any local public opposition;

10 (4) a proposed project development and implementation
11 schedule;

12 (5) a description of the entity's experience in
13 developing highway projects, if the proposer is a public entity
14 and if the proposal is for the development of a highway project
15 by that entity;

16 (6) a description of the entity's experience in
17 developing railway projects, if the proposer is a public entity
18 and if the proposal is for the development of a railway project
19 by that entity;

20 (7) [~~6~~] complete information concerning the experience,
21 expertise, technical competence, and qualifications of the
22 proposer and of each member of the proposer's management team
23 and of other key employees or consultants, including the name,

1 address, and professional designation of each member of the
2 proposer's management team and of other key employees or
3 consultants, and the capability of the proposer to develop the
4 proposed projects, if the proposer is a private entity and if
5 the proposal is for the development of a project by that entity;

6 (8) complete information sufficient to show the
7 capability of the proposer to make all projected future
8 payments, if the proposal is for the development of a project by
9 the department;

10 (9) [~~7~~] if available, a proposed pass-through [~~tol~~]
11 payment schedule;

12 (10) [~~8~~] for a highway project, a statement indicating
13 whether the proposer intends for the project to be tolled and,
14 if the proposer intends for a tolled project to be first opened
15 to traffic as a non-tolled highway, the approximate date on
16 which the highway will begin to be tolled; and

17 (11) [~~9~~] a statement indicating whether the proposer
18 intends to enter into a comprehensive development agreement, if
19 the proposer is a private entity and if the proposal is for the
20 development of a project by that entity.

21 (b) If requested, and unless prohibited by law, the
22 department will release to the public a proposal submitted under
23 this section.

1 (c) The private entity and the department may agree to
2 develop a project under a comprehensive development agreement if
3 authorized by other law. For a highway project that is
4 developed by the proposer, notwithstanding [~~Notwithstanding~~] any
5 other provision of this subchapter, Chapter 27, Subchapter A, of
6 this title (relating to Comprehensive Development Agreements
7 [~~Policy, Rules, and Procedures for Private Involvement in~~
8 ~~Department Turnpike Projects~~]), applies to the solicitation,
9 advertisement, negotiation, and execution of a comprehensive
10 development agreement. For a railway project that is developed
11 by the proposer, notwithstanding any other provision of this
12 subchapter, Chapter 7, Subchapter B, of this title (relating to
13 Contracts) applies to the solicitation, advertisement
14 negotiation, and execution of a comprehensive development
15 agreement.

16
17 §5.54. Commission Approval To [~~to~~] Negotiate. The commission
18 may authorize the executive director to negotiate the financial
19 terms of a potential pass-through [~~an~~] agreement under this
20 subchapter or, if the proposer is a private entity, authorize
21 the department to solicit competitive proposals under §5.55 of
22 this subchapter, after considering [~~the~~]:

23 (1) financial benefits to the state;

1 (2) local public support for the project;

2 (3) for a highway project, whether the project is in the
3 department's Unified Transportation Program;

4 (4) the extent to which the project will relieve
5 congestion on the state highway system;

6 (5) potential benefits to regional air quality that may
7 be derived from the project;

8 (6) the compatibility of the proposed project with
9 existing and planned transportation facilities;

10 (7) the entity's experience in developing highway
11 projects, if the proposer is a public entity and if the proposal
12 is for the development of a highway project by that entity;

13 [~~and~~]

14 (8) the entity's experience in developing railway
15 projects, if the proposer is a public entity and if the proposal
16 is for the development of a railway project by that entity;

17 (9) [~~8~~] the qualifications of the proposer to
18 accomplish the proposed work, if the proposer is a private
19 entity and if the proposal is for the development of a project
20 by that entity; and

21 (10) the financial capability of the proposer to make all
22 projected pass-through payments, if the proposal is for the
23 development of a project by the department.

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§5.55. Proposals from Private Entities.

(a) If the commission approves the further evaluation of a proposal of a private entity under §5.54 of this subchapter, the department will publish notice of that decision and provide an opportunity for the submission of competing proposals.

(b) The department will publish a notice in the *Texas Register* and in one or more newspapers of general circulation. The notice will state that the department has received a proposal under this subchapter, that it intends to evaluate the proposal, that it may negotiate a pass-through ~~[to]]~~ agreement with the proposer based on the proposal, and that it will accept for simultaneous consideration any competing proposals that the department receives in accordance with this subchapter within 45 days of the initial publication of the notice in the *Texas Register*, or such additional time as authorized by the commission. In determining whether to authorize additional time for submission of competing proposals, the commission will consider the complexity of the proposal.

(c) The notice will summarize the proposed project and identify its proposed location. The notice will also specify the general criteria that will be used to evaluate all proposals and the relative weight given to the criteria. Specific

1 evaluation criteria will be set forth in the request for
2 proposals. The criteria will, at a minimum, include:

3 (1) the factors listed in §5.54 of this subchapter, to
4 the extent applicable;

5 (2) the proposer's qualifications, ~~and~~ technical
6 competence, and financial capability; and

7 (3) an analysis of the proposer's project implementation
8 schedule.

9 (d) A proposal submitted in response to a notice must
10 contain the information required by §5.53 of this subchapter.

11 (e) The original proposer may submit a revised proposal in
12 response to a notice.

13 (f) Upon expiration of the 45-day period, or such
14 additional time as authorized by the commission, the department
15 will evaluate the proposal of the original proposer and any
16 properly submitted competing proposals, utilizing the evaluation
17 criteria set forth in the request for proposals.

18 (g) The department will rank all proposals after the
19 evaluation described in subsection (f) of this section, and may
20 select the private entity whose proposal provides the best value
21 to the department. The department will attempt to negotiate a
22 pass-through ~~to~~ agreement with that proposer.

23 (h) If an agreement satisfactory to the department cannot

1 be negotiated with the proposer, the department will formally
2 end negotiations with that proposer. The department may reject
3 all proposals or proceed to the next most highly ranked proposal
4 and attempt to negotiate an agreement with that party.

5

6 §5.56. Final Approval.

7 (a) Authorization to negotiate final agreement. The
8 executive director will submit to the commission a summary of
9 the final financial terms of a proposed [~~successfully~~
10 ~~negotiated~~] pass-through [~~to~~] agreement. The final financial
11 terms may consist of specific payment terms and schedules or may
12 consist of a range of acceptable parameters. The commission may
13 authorize the executive director to negotiate and execute a
14 final [~~the~~] agreement only if it finds that:

15 (1) the project serves the public interest and not merely
16 a private interest;

17 (2) the proposed pass-through agreement is in the best
18 interest of the state;

19 (3) the project is compatible with existing and planned
20 transportation facilities; and

21 (4) the project furthers state, regional, and local
22 transportation plans, programs, policies, and goals. [~~the~~
23 ~~agreement is in the best interest of the state and the project.~~]

1 ~~[(1) is compatible with existing and planned~~
2 ~~transportation facilities, and]~~

3 ~~[(2) furthers state, regional, and local transportation~~
4 ~~plans, programs, policies, and goals.]~~

5 (b) Contents of pass-through agreement. Before any work is
6 done for which reimbursement will be requested through a pass-
7 through toll or fare, the department and the public or private
8 entity shall execute a pass-through agreement containing, at a
9 minimum, the following:

10 (1) identification of the scope and nature of the work to
11 be performed;

12 (2) all financial terms, as applicable, including the
13 levels of pass-through tolls or fares, maximum and minimum
14 periodic payments, and maximum and minimum total payments;

15 (3) allocation of responsibility for all significant work
16 to be performed, including environmental documentation, right of
17 way acquisition, utility adjustments, engineering, construction,
18 and maintenance;

19 (4) provision for the collection and use of toll or other
20 revenues, if applicable;

21 (5) all provisions required by state or federal law;

22 (6) a map showing the location of the project;

23 (7) a proposed project schedule;

- 1 (8) an estimated budget;
2 (9) procedures and timelines for the submission of
3 materials and for approvals; and
4 (10) for a local government, a copy of the resolution or
5 ordinance authorizing execution of the agreement.

6
7 \$5.57. Calculation [Payment] of Pass-Through Fares and Tolls.

8 (a) Pass-through fares.

9 (1) Amount to be reimbursed.

10 (A) General. The commission shall establish the level
11 of pass-through fares or shall establish parameters within which
12 the department may negotiate the level of pass-through fares.
13 In establishing the level of pass-through fares or parameters
14 within which the department may negotiate the level of pass-
15 through fares, the commission shall consider whether:

16 (i) the project's estimated benefits to mobility
17 warrant a pass-through fare at a level that is more or less than
18 the department's estimate of project costs;

19 (ii) the project will result in a significant
20 economic gain or loss to the entity responsible for its
21 development;

22 (iii) the public or private entity proposes to share
23 in the cost of the project; and

1 (iv) the state or the public or private entity will
2 benefit, and to what extent, if the project is built sooner than
3 would be the case in the absence of a pass-through agreement.

4 (B) Limits on pass-through fare levels.

5 (i) The commission will not approve payment by the
6 department of a level of pass-through fares that exceeds the
7 department's estimate, except as permitted by this subparagraph.
8 The commission may approve the department's payment of a level
9 of pass-through fares that exceeds the department's current
10 estimate, but only by the difference between the department's
11 current estimate and the department's estimate for the time when
12 the project would likely have been completed in the absence of a
13 pass-through agreement.

14 (ii) In determining the level of pass-through fares,
15 the commission will not consider any financing cost incurred by
16 the public or private entity.

17 (2) Payment schedule and method.

18 (A) Payment schedule. The schedule of pass-through
19 fare payments will be calculated based on the department's
20 traffic projections for the railway and a number and frequency
21 of payments to be negotiated between the department and the
22 public or private entity. The payment schedule may include a
23 maximum and a minimum periodic amount to be paid annually or in

1 total.

2 (B) Variable payments. The pass-through fare may vary
3 on any basis that reasonably reflects the value of improvements,
4 the nature of the railway traffic, or benefits to the highway
5 system, including:

6 (i) number, type, and class of passengers;

7 (ii) type of freight;

8 (iii) tonnage of freight;

9 (iv) number or type of cars;

10 (v) mileage traveled; or

11 (vi) characteristics of track.

12 (3) Allocation of risk.

13 (A) Cost overruns and underruns. Unless otherwise
14 authorized by the commission and incorporated in a pass-through
15 agreement by the department, the department's liability under a
16 pass-through agreement shall be neither increased nor decreased
17 by cost overruns or underruns. Pass-through fare payments by
18 the department shall not be increased if there is a cost overrun
19 or decreased if there is a cost underrun unless an adjustment is
20 specifically authorized by the commission and incorporated in a
21 pass-through agreement by the department.

22 (B) Traffic volume. If traffic volume exceeds or falls
23 below expectations, the pass-through fare will not be adjusted.

1 Payments shall not exceed the maximum annual amount specified in
2 the pass-through agreement and shall not be below the minimum
3 annual amount specified in the pass-through agreement. The
4 pass-through agreement shall provide that if required, payments
5 shall continue until the total of all payments equals the total
6 pass-through fare amount specified by the commission in
7 approving the pass-through fare.

8 (b) Pass-through tolls.

9 (1) Level of pass-through tolls.

10 (A) General. The commission shall establish the level
11 of pass-through tolls or shall establish parameters within which
12 the department may negotiate the level of pass-through tolls.
13 In establishing the level of pass-through tolls or parameters
14 within which the department may negotiate the level of pass-
15 through tolls, the commission shall consider whether:

16 (i) the project's estimated benefits to mobility
17 warrant a pass-through toll at a level that is more or less than
18 the department's estimate of project costs;

19 (ii) the project will result in a significant
20 economic gain or loss to the entity responsible for its
21 development;

22 (iii) the public or private entity proposes to share
23 in the cost of the project; and

1 (iv) the state or the public or private entity will
2 benefit, and to what extent, if the project is built sooner than
3 would be the case in the absence of a pass-through agreement.

4 (B) Limits on pass-through toll levels.

5 (i) The commission will not approve payment by the
6 department of a level of pass-through tolls that exceeds the
7 department's estimate, except as permitted by this subparagraph.
8 The commission may approve the department's payment of a level
9 of pass-through tolls that exceeds the department's current
10 estimate, but only by the difference between the department's
11 current estimate and the department's estimate for the time when
12 the project would likely have been completed in the absence of a
13 pass-through agreement.

14 (ii) In determining the level of pass-through tolls,
15 the commission will not consider any financing cost incurred by
16 the public or private entity.

17 ~~[(a) Amount to be reimbursed.]~~

18 ~~[(1) General. Except as provided in paragraph (2) of this~~
19 ~~subsection, the department will reimburse the developer, through~~
20 ~~the periodic payment of pass-through tolls, an amount equal to~~
21 ~~the department estimate.]~~

22 ~~[(2) Exception.]~~

1 ~~[(A) The commission may direct the department to~~
2 ~~provide for reimbursement in an amount less than the department~~
3 ~~estimate if:]~~

4 ~~[(i) it determines that the project's estimated~~
5 ~~benefits to mobility do not warrant full reimbursement,]~~

6 ~~[(ii) it determines that the construction of the~~
7 ~~project will result in a significant economic gain to the~~
8 ~~developer, or]~~

9 ~~[(iii) the developer proposes to share in the cost of~~
10 ~~the project.]~~

11 ~~[(B) The commission may direct the department to~~
12 ~~provide for reimbursement in an amount more than the department~~
13 ~~estimate if the commission determines that there will be a~~
14 ~~financial benefit to the state, through the avoidance of~~
15 ~~inflation, as a result of building the project sooner. The~~
16 ~~additional amount authorized by the commission may not be more~~
17 ~~than the amount of the financial benefit determined by the~~
18 ~~commission.]~~

19 ~~[(C) The commission may establish the precise amount~~
20 ~~to be reimbursed or may establish parameters within which the~~
21 ~~executive director may negotiate.]~~

22 (2) ~~[(b)]~~ Payment schedule and method.

1 (A) [~~1~~] Payment schedule. The schedule of pass-
2 through toll payments will be calculated based on the
3 department's traffic projections for the highway and a number
4 and frequency of payments [~~contract period~~] to be negotiated
5 between the department and the public or private entity
6 [~~developer~~]. The payment schedule may include a maximum and a
7 minimum annual amount to be paid periodically or in total.
8 [~~Payments will be made in accordance with subsection (c)(2) of~~
9 ~~this section.~~]

10 (B) [~~2~~] Variable payments. The pass-through toll
11 [~~per vehicle fee~~] may vary on any basis that reasonably reflects
12 the value of improvements, the nature of the highway, or
13 benefits to other aspects of the highway system, including:
14 [~~within different levels of traffic volume and by type of~~
15 ~~vehicle using the facility.~~]

- 16 (i) the number of vehicles using the highway;
17 (ii) the number of vehicle-miles traveled on the
18 highway;
19 (iii) the condition of the highway; and
20 (iv) whether the highway is tolled.

21 (3) [~~e~~] Allocation of risk.

22 (A) Cost overruns and underruns. Unless otherwise
23 authorized by the commission and incorporated in a pass-through

1 agreement by the department, the department's liability under a
2 pass-through agreement shall be neither increased nor decreased
3 by cost overruns or underruns.

4 (i) Projects developed by the public or private
5 entity. If the project is being developed by the public or
6 private entity, the pass-through toll payments by the department
7 shall not be increased if there is a cost overrun or decreased
8 if there is a cost underrun unless an adjustment is specifically
9 authorized by the commission and incorporated in a pass-through
10 agreement by the department.

11 (ii) Projects developed by the department. If the
12 project is being developed by the department, the pass-through
13 agreement shall provide that the pass-through toll or the
14 maximum amount payable, or both, shall be adjusted to reflect
15 the department's actual costs unless the commission specifically
16 directs that the department shall bear the risk of cost overruns
17 or underruns.

18 (B) Traffic volume. If traffic volume exceeds or falls
19 below expectations, the pass-through toll will not be adjusted.
20 Payments shall not exceed the maximum annual amount specified in
21 the pass-through agreement and shall not be below the minimum
22 annual amount specified in the pass-through agreement. The
23 pass-through agreement shall provide that if required, payments

1 shall continue until the total of all payments equals the total
2 pass-through toll amount specified by the commission in
3 approving the pass-through toll.

4 ~~[(1) Construction and operation costs.]~~

5 ~~[(A) Cost overruns. Unless otherwise specified in the~~
6 ~~agreement, the developer is responsible for cost overruns caused~~
7 ~~by any reason. The department may agree to share identified~~
8 ~~cost overruns if it deems such action to be in the state's~~
9 ~~interest. The department may agree to alter the payment~~
10 ~~schedule based upon cost overruns provided that the agreement~~
11 ~~establishes a maximum amount or rate by which the department~~
12 ~~will do so.]~~

13 ~~[(B) Cost underruns. If actual costs are below the~~
14 ~~department estimate, the developer is not required to repay the~~
15 ~~department the difference between the actual costs and the~~
16 ~~amount designated in the agreement.]~~

17 ~~[(2) Traffic volume.]~~

18 ~~[(A) If traffic volume exceeds projections, the~~
19 ~~department will not be responsible for annual payments above the~~
20 ~~highest amount designated in the agreement. If traffic volume~~
21 ~~is less than projected, the department will pay at least the~~
22 ~~lowest amount designated in the agreement.]~~

23 ~~[(B) If traffic volume exceeds projections, the~~

1 ~~department may agree to reduce the time period in which the~~
2 ~~developer is reimbursed the amount designated in the agreement.~~
3 ~~If traffic volume is less than projected, the term of the~~
4 ~~agreement will be extended until the developer is reimbursed the~~
5 ~~amount designated in the agreement.]~~

6
7 §5.58. Project Development by Public or Private Entity.

8 (a) Social and environmental impact.

9 (1) General. A public or private entity [~~developer~~] that
10 is responsible for the construction of a project shall conduct
11 the environmental review and public involvement for the project
12 in the manner prescribed by Chapter 2, Subchapter C of this
13 title (relating to Environmental Review and Public Involvement
14 for Transportation Projects). The department may choose to
15 conduct the environmental review and public involvement.

16 (2) Department [~~Commission~~] approval. The department
17 [~~commission~~] must approve each environmental review under this
18 section before construction of the project begins.

19 (b) Right of way and utilities.

20 (1) Responsibility. This subsection applies when the
21 public or private entity is responsible for the acquisition of
22 right of way or the adjustment of utilities.

23 (2) Right of way procedures.

1 (A) Manual requirements. The acquisition of right of
2 way performed by or on behalf of the public or private entity
3 shall comply with the latest version of each of the department's
4 manuals.

5 (B) Alternative procedures. A public or private entity
6 may request written approval to use a different accepted
7 procedure for a particular item or phase of work. The use of an
8 alternative procedure is subject to the approval of the Federal
9 Highway Administration. The executive director may approve the
10 use of an alternative procedure if the alternative procedure is
11 determined to be sufficient to discharge the department's state
12 and federal responsibilities in acquiring real property.

13 (3) Utility adjustments. The adjustment, removal, or
14 relocation of utility facilities performed by or on behalf of
15 the public or private entity shall comply with applicable
16 federal and state laws and regulations.

17 (c) [~~b~~] Design and construction.

18 (1) Responsibility. This subsection applies when the
19 public or private entity is [~~The developer is fully~~] responsible
20 for the design, construction, and, operation, as applicable, of
21 each project it undertakes. This responsibility includes
22 ensuring that all EPIC are addressed in project design and
23 carried out during project construction and operation.

1 (2) Design criteria.

2 (A) State criteria. All designs developed by or on
3 behalf of the public or private entity [~~developer~~] shall comply
4 with the latest version of the department's manuals. [~~7~~
5 ~~including, but not limited to,~~]

6 (i) Highway projects. Each highway project shall, at
7 a minimum, comply with the:

8 (I) [~~the~~] Roadway Design Manual; [~~7~~]

9 (II) Pavement Design Manual; [~~7~~]

10 (III) Hydraulic Design Manual; [~~7~~]

11 (IV) [~~the~~] Texas Manual on Uniform Traffic Control
12 Devices; [~~7~~ and]

13 (V) Bridge Design Manual; [~~7~~] and

14 (VI) [~~the~~] Texas Accessibility Standards.

15 (ii) Railway projects. Each railway project shall
16 comply, at a minimum, with the current version of the American
17 Railway Engineering and Maintenance of Right of Way Association
18 standards.

19 (B) Alternative criteria. A public or private entity
20 [~~developer~~] may request approval to use different accepted
21 criteria for a particular item of work. Alternative criteria
22 may include [~~7~~ but are not limited to,] the latest version of
23 the AASHTO Policy on Geometric Design of Highways and Streets,

1 the AASHTO Pavement Design Guide, and the AASHTO Bridge Design
2 Specifications. The use of alternative criteria is subject to
3 the approval of the Federal Highway Administration or the
4 Federal Railroad Administration for those projects involving
5 federal funds. The executive director may approve the use of
6 alternative criteria if the alternative criteria are determined
7 to be sufficient to protect the safety of the traveling public
8 and protect the integrity of the transportation system.

9 (C) Exceptions to design criteria. A public or private
10 entity [~~developer~~] may request approval to deviate from the
11 state or alternative criteria for a particular design element on
12 a case-by-case [~~ease-by-ease~~] basis. The request for approval
13 shall state the criteria for which an exception is being
14 requested and must include a comprehensive description of the
15 circumstances and engineering analysis supporting the request.
16 The executive director may approve an exception after
17 determining that the particular criteria could not reasonably be
18 met due to physical, environmental, or other relevant factors
19 and that the proposed design is a prudent engineering solution.

20 (3) Access to a highway project.

21 (A) Access management. Access to a highway [~~the~~
22 ~~facility~~] shall be in compliance with the department's access
23 management policy.

1 (B) Interstate access. For proposed highway projects
2 that will change the access control line to an interstate
3 highway, the public or private entity [~~developer~~] shall submit
4 to the department all data necessary for the department to
5 request Federal Highway Administration approval.

6 (4) Preliminary design submission and approval. When
7 design is approximately 30% complete [~~+~~] or as otherwise
8 provided in a pass-through [~~an~~] agreement [~~+~~], the public or
9 private entity [~~developer~~] shall send the following preliminary
10 design information to the department for review and approval in
11 accordance with the procedures and timeline established in the
12 project development agreement described in subsection (d) of
13 this section:

14 (A) for a highway project, a completed Design Summary
15 Report form as contained in the department's Project Development
16 Process Manual;

17 (B) a design schematic depicting plan, profile, and
18 superelevation information for each roadway or a design
19 schematic depicting plan, profile, and superelevation based on
20 top of railway for each railway line;

21 (C) typical sections showing existing and proposed
22 horizontal dimensions, cross slopes, location of profile grade
23 line, pavement layer thickness and composition, earthen slopes,

1 and right of way lines for each roadway or subballast and
2 ballast layer thickness and composition for each railway line;

3 (D) bridge, retaining wall, and sound wall layouts;

4 (E) hydraulic studies and drainage area maps showing
5 the drainage of waterways entering the project and local project
6 drainage;

7 (F) an explanation of the anticipated handling of
8 existing traffic during construction;

9 (G) when structures meeting the definition of a bridge
10 as defined by the National Bridge Inspection Standards are
11 proposed, an indication of structural capacity in terms of
12 design loading;

13 (H) an explanation of how the U.S. Army Corps of
14 Engineers permit requirements, including associated
15 certification requirements of the Texas Commission on
16 Environmental Quality, will be satisfied if the project involves
17 discharges into waters of the United States; and

18 (I) for a highway project, the location and text of
19 proposed mainlane guide signs shown on a schematic that includes
20 lane lines or arrows indicating the number of lanes.

21 (5) Highway construction [~~Construction~~] specifications.

22 (A) All plans, specifications, and estimates developed
23 by or on behalf of the public or private entity for a highway

1 project [~~developer~~] shall conform to the latest version of the
2 department's Standard Specifications for Construction and
3 Maintenance of Highways, Streets, and Bridges, and shall conform
4 to department-required special specifications and special
5 provisions.

6 (B) The executive director may approve the use of an
7 alternative specification if the proposed alternative
8 specification is determined to be sufficient to ensure the
9 quality and durability of the finished product for the intended
10 use and the safety of the traveling public.

11 (6) Railway construction specifications.

12 (A) All plans, specifications, and estimates developed
13 by or for the public or private entity for a railway project
14 shall conform to all construction and material specifications
15 established in the American Railway Engineering and Maintenance
16 of Right of Way Association standards.

17 (B) The executive director may approve the use of an
18 alternative specification if the proposed alternative
19 specification is determined to be sufficient to ensure the
20 quality and durability of the finished product for the intended
21 use and the safety of the public and the railway system.

22 (7) [+6] Submission and approval of final design plans
23 and contract administration procedures. When final plans are

1 complete, the public or private entity [~~developer~~] shall send
2 the following information to the executive director for review
3 and approval in accordance with the procedures and timelines
4 established in the project development agreement described in
5 subsection (e) of this section:

6 (A) seven copies of the final set of plans,
7 specifications, and engineer's estimate (PS&E) that have been
8 signed and sealed by the responsible engineer;

9 (B) revisions to the preliminary design submission
10 previously approved by the department in a format that is
11 summarized or highlighted for the department;

12 (C) a proposal for awarding the construction contract
13 in compliance with applicable state and federal requirements;

14 (D) contract administration procedures for the
15 construction contract with criteria that comply with the
16 applicable national or state administration criteria and
17 manuals; and

18 (E) the location and description of all EPIC addressed
19 in construction.

20 (8) [~~(7)~~] Construction inspection and oversight.

21 (A) Unless the department agrees in writing to assume
22 responsibility for some or all of the following items, the
23 public or private entity [~~developer~~] is responsible for:

1 (ii) overseeing all construction operations, including
2 the oversight and follow through with all EPIC;

3 (ii) assessing contract revisions for potential
4 environmental impacts; and

5 (iii) obtaining any necessary EPIC required for
6 contract revisions.

7 (B) The department may inspect the construction of the
8 project at times and in a manner it deems necessary to ensure
9 compliance with this section.

10 (9) [~~8~~] Contract revisions. All revisions to the
11 construction contract shall comply with the latest version of
12 the applicable national or state administration criteria and
13 manuals, and must be submitted to the department for its
14 records. Any revision that affects prior environmental
15 approvals or significantly revises project scope or the
16 geometric design must be submitted to the executive director for
17 approval prior to beginning the revised construction work.
18 Procedures governing the executive director's approval,
19 including time limits for department review, shall be included
20 in the project agreement described in subsection (e) of this
21 section.

22 (10) [~~9~~] As-built plans. Within six months after final
23 completion of the construction project, the public or private

1 entity [~~developer~~] shall file with the department a set of the
2 as-built plans incorporating any contract revisions. These
3 plans shall be signed, sealed, and dated by a professional
4 engineer licensed in Texas certifying that the project was
5 constructed in accordance with the plans and specifications.

6 (11) [~~+10~~] Document and information exchange. The
7 public or private entity [~~developer~~] agrees to deliver to the
8 department all materials used in the development of the project
9 including [~~, but not limited to,~~] aerial photography, computer
10 files, surveying information, engineering reports, environmental
11 documentation, general notes, specifications, and contract
12 provision requirements.

13 (12) [~~+11~~] State and federal law. The public or private
14 entity [~~developer~~] shall comply with all federal and state laws
15 and regulations applicable to the project and the state highway
16 system, and shall provide or obtain all applicable permits,
17 plans, and other documentation required by a federal or state
18 entity.

19 (d) [~~+e~~] Contracts. All contracts for the development,
20 construction, or operation of a project shall be awarded in
21 compliance with applicable law.

22 (e) [~~+d~~] Federal law. If any federal funds are used in
23 the development or construction of a project under this

1 subchapter, or if the department intends to fund pass-through
2 toll payments with federal funds, the development and
3 construction of the project shall be accomplished in compliance
4 with all applicable federal requirements.

5 ~~[(e) Project development agreement. The developer and the~~
6 ~~department shall enter into an agreement governing the~~
7 ~~development of a project under this subchapter. The agreement~~
8 ~~shall, at a minimum, include:]~~

9 ~~[(1) the responsibilities of each party concerning the~~
10 ~~design and construction of the project;]~~

11 ~~[(2) procedures governing the submittal of information~~
12 ~~required by this subchapter;]~~

13 ~~[(3) timelines governing approvals of the executive~~
14 ~~director under this subchapter; and]~~

15 ~~[(4) other terms or conditions mutually agreed upon by~~
16 ~~the parties.]~~

17

18 §5.59. Operation.

19 (a) Agreement. A pass-through ~~[toll]~~ agreement may provide
20 for a public or private entity ~~[developer]~~ to operate a highway
21 or a railway.

22 (b) Responsibility. To the extent provided in the
23 agreement, a public or private entity ~~[developer]~~ shall perform

1 or cause to be performed all work required to operate the
2 highway or railway. This work includes all maintenance and
3 repair required to ensure that the highway or railway functions
4 as intended and meets the performance standards established for
5 maintenance under subsection (c) of this section.

6 (c) Maintenance of highways.

7 [~~(1) Department standards.~~] In performing work under
8 this section on a highway, the public or private entity
9 [develope~~r~~] shall meet or exceed the most current "Texas
10 Maintenance Assessment Program" minimum rating requirements for
11 non-interstate state highways as established by the commission
12 in its implementation of Government Accounting Standards Board
13 [~~Boards~~] Statement No. 34. If the highway will be tolled, the
14 public or private entity [develope~~r~~] shall meet or exceed the
15 minimum rating requirements for interstate highways.

16 (d) Maintenance of railways. In performing work under this
17 section on a railway, the public or private entity shall meet
18 all standards for safety and maintenance established by the
19 Federal Railroad Administration and the National Transportation
20 Safety Board, including all standards published in 49 CFR
21 Subtitle B, Chapters II and VIII.

22 (e) [~~(2)~~] Alternative standards. A public or private
23 entity [develope~~r~~] may request approval to use alternative

1 maintenance standards. The executive director may approve the
2 use of alternative maintenance standards if the director
3 determines that the alternative standards are sufficient to
4 protect the safety of the [~~traveling~~] public and to protect the
5 integrity of the transportation system.