DRAFT: SUBJECT TO CHANGE PRIOR TO COMMISSION ACTION

TEXAS TRANSPORTATION COMMISSION

ALL Counties

MINUTE ORDER

ALL Districts

The Texas Transportation Commission (commission) finds it necessary to propose new §27.10, relating to the formula for determining compensation upon termination for convenience, to be codified under Title 43, Texas Administrative Code, Part 1.

The preamble and the proposed new section, 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 new §27.10 is proposed for adoption and is 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

Minute Number

Date Passed

Proposed Preamble

The Texas Department of Transportation (department) proposes new §27.10, concerning the formula for determining compensation upon the department's termination for convenience of a comprehensive development agreement under which a private participant receives the right to operate and collect revenue from a toll project.

EXPLANATION OF PROPOSED NEW SECTION

Transportation Code, §371.101 requires a toll project entity having rulemaking authority by rule to develop a formula for making termination payments to terminate a comprehensive development agreement under which a private participant receives the right to operate and collect revenue from a toll project. A formula must calculate an estimated amount of loss to the private participant as a result of the termination for convenience. The formula must be based on investments, expenditures, and the internal rate of return on equity under the agreed base case financial model as projected over the original term of the comprehensive development agreement, plus the agreed percentage markup on that amount. A formula may not include any estimate of future revenue from the project that is not included in the agreed base case financial model.

New §27.10(a) describes the purpose of this section, which is to prescribe the formula required by Transportation Code, §371.101

that shall be used in comprehensive development agreements subject to that section.

New §27.10(b) defines words and terms used in the new section.

To implement Transportation Code, §371.101, new §27.10(c) prescribes the formula for making termination payments to terminate a comprehensive development agreement under which a private participant receives the right to operate and collect revenue from a toll project. New §27.10(c) requires a comprehensive development agreement under which a private participant receives the right to operate and collect revenue from a toll project to provide that, if the department chooses to exercise its option to terminate for convenience the comprehensive development agreement and lease, the compensation to the private participant respecting the termination may not exceed the amount determined under the formula prescribed in that section.

As authorized by Transportation Code, §371.101, the formula prescribed in §27.10(c) is based on (and the compensation is limited to) investments (senior debt termination amount), expenditures (demobilization costs and costs to provide training, instruction, and assistance to the department or its designees in the use and operation of project systems and

programs as part of the transition of operations resulting from the termination for convenience), and the internal rate of return on equity under the agreed base case financial model over the original term of the comprehensive development agreement, plus the agreed percentage markup on that amount (the adjusted equity IRR, as computed under §27.10, and an amount that will put the developer in the same post-tax position as it would have been had the payment under §27.10(c)(3) not been subject to tax). Cash and credit balances held by or on behalf of the developer shall be deducted to determine the compensation amount.

FISCAL NOTE

James Bass, Chief Financial Officer, has determined that for each of the first five years the new section as proposed is in effect, there will be no fiscal implications for state or local governments as a result of enforcing or administering the new section. There are no anticipated economic costs for persons required to comply with the section as proposed.

Phillip Russell, Director, Texas Turnpike Authority Division, has certified that there will be no significant impact on local economies or overall employment as a result of enforcing or administering the new section.

PUBLIC BENEFIT

Mr. Russell has also determined that for each year of the first five years the section is in effect, the public benefit anticipated as a result of enforcing or administering the new section will be to define at the beginning of the contract term the compensation amount the department must pay to a private participant because of a termination of a comprehensive development agreement for convenience. There will be no adverse economic effect on small businesses.

SUBMITTAL OF COMMENTS

Written comments on the proposed new §27.10 may be submitted to Phillip Russell, Director, Texas Turnpike Authority Division, Texas Department of Transportation, 125 East 11th Street, Austin, Texas 78701-2483. The deadline for receipt of comments is 5:00 p.m. on September 10, 2007.

STATUTORY AUTHORITY

The new section is proposed under Transportation Code, §201.101, which provides the Texas Transportation Commission (commission) with the authority to establish rules for the conduct of the work of the department, and more specifically, Transportation Code, §371.101, which requires the commission by rule to develop a formula for making termination payments to terminate a comprehensive development agreement under which a private

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participant receives the right to operate and collect revenue from a toll project.

CROSS REFERENCE TO STATUTE

Transportation Code, §371.101.

SUBCHAPTER A. COMPREHENSIVE DEVELOPMENT AGREEMENTS

§27.10. Formula for Determining Compensation upon Termination for Convenience.

(a) Purpose. Transportation Code, §371.101 requires a toll project entity having rulemaking authority by rule to develop a formula for making termination payments to terminate a comprehensive development agreement under which a private participant receives the right to operate and collect revenue from a toll project. A formula must calculate an estimated amount of loss to the private participant as a result of the termination for convenience. The formula must be based on investments, expenditures, and the internal rate of return on equity under the agreed base case financial model as projected over the original term of the comprehensive development agreement, plus the agreed percentage markup on that amount. A formula may not include any estimate of future revenue from the project that is not included in the agreed base case financial model. This section prescribes the formula required by Transportation Code, §371.101 that shall be used in comprehensive development agreements subject to that section.

(b) Definitions. The following words and terms, when used in this section, shall have the following meanings, unless the context clearly indicates otherwise.

(1) Adjusted equity IRR--The equity IRR plus a number of basis points as set forth in the comprehensive development agreement.

(2) Base case financial model--The financial model identified and agreed to by the department and the private participant under the comprehensive development agreement at or about the time the agreement is executed.

(3) Department--The Texas Department of Transportation.

(4) Equity Internal Rate of Return (Equity IRR)--A blended nominal post-tax rate of return on equity over the full term of the comprehensive development agreement equal to that projected in the base case financial model. For this purpose, equity may include unsecured capital contributions to the developer by affiliates or other equity investors in the developer, and secured project debt subordinate in priority to project debt included in the definition of senior debt termination amount.

(5) Net present value--The aggregate of the discounted values, calculated as of the valuation date, of each of the relevant projected distributions, in each case discounted using the equity IRR.

(6) Post-tax--After the payment of or provision for federal income or state margin taxes at assumed rates as

described in the comprehensive development agreement.

(7) Senior debt termination amount--The amount necessary to repay the outstanding principal, accrued unpaid interest, including any interest owed through the prepayment or redemption date, and breakage costs respecting senior lien debt and first tier, unaffiliated subordinate debt secured by the developer's interest in the project, including TIFIA financing, as may be more particularly defined and described in the comprehensive development agreement.

(8) TIFIA--The Transportation Infrastructure Finance and Innovation Act of 1998, codified at 23 U.S.C. §601, et seq.

(9) Valuation date--The date established by the comprehensive development agreement as the valuation date. The valuation date may not be earlier than the date the department gives notice of termination for convenience.

(c) Compensation amount. A comprehensive development agreement under which a private participant receives the right to operate and collect revenue from a toll project shall provide that, if the department chooses to exercise its option to terminate for convenience the comprehensive development agreement and lease, the compensation to the private participant respecting the termination may not exceed the amount determined under the following formula:

(1) the senior debt termination amount; plus

(2) the amount necessary to reimburse reasonable and documented demobilization costs (if applicable) for the developer and third party contractors, as may be more particularly defined and described in the comprehensive development agreement; plus

(3) the adjusted equity IRR, with the amount being the greater of zero or the amount computed using the formula A+B-C, where:

(A) A is the net present value of the distributions to be made over the term of the agreement (but without taking into account the effect of the termination for convenience) as projected under the base case financial model;

(B) B is an adjustment in the form of one or more special distributions that would be required to increase the equity IRR to a blended, nominal post-tax rate of return on equity equal to the adjusted equity IRR, calculated immediately prior to the valuation date; and

(C) C is the net present value of the distributions that would have been made before the valuation date under the base case financial model; plus

(4) the net increase in costs the developer will incur to provide training, instruction, and assistance to the department

or its designees in the use and operation of project systems and programs as part of the transition of operations resulting from the termination for convenience, as may be more particularly defined and described in the comprehensive development agreement; plus

(5) the amount that will put the developer in the same post-tax position as it would have been had the payment under paragraph (3) of this subsection not been subject to tax, as may be more particularly defined and described in the comprehensive development agreement; minus

(6) cash and credit balances held by or on behalf of the developer, as may be more particularly defined and described in the comprehensive development agreement.