NCSL Foundation Partnership
Public-Private Partnerships (P3s or PPPs) for Transportation

Transportation PPP Partners Project Educational Session

Hosted at the NCSL Legislative Summit

July 20, 2009

Philadelphia, PA

Meeting Summary

Compiled by NCSL
August 17, 2009

Executive Summary

The NCSL Foundation Partners Project on Public-Private Partnerships (P3s/PPPs) exists to link legislators, legislative staff and interested private entities to analyze legislators' needs and to develop nonpartisan, balanced, useful materials to aid legislators' decision-making regarding PPPs in transportation, both in their respective states and as they consider state-federal relationships.

One purpose of this 18-month Project is to develop and offer educational sessions. This session at NCSL's Legislative Summit in Philadelphia built on previous meetings of the working group, including an extensive pre-conference meeting held at NCSL's Spring Forum in April. The information gathered in these two meetings will inform the Partners Project working group in its ongoing analysis of PPPs, with the end goal of developing a "toolkit" of useful resources that legislators can use when considering PPPs as one possible transportation funding option.

After opening remarks from the project co-chairs, *Representative Terri Austin of Indiana* and *Representative Linda Harper-Brown of Texas*, *Senator Pamela Gorman of Arizona*—who presided at the April meeting in the co-chairs' absence—provided a summary of that meeting.

This was followed by presentations on a variety of United States and international PPP efforts. *Frank Rapoport (Council of Project Finance Advisors [CPFA] Working Group)* first presented on **Trends and Directions in Transportation PPPs**. He addressed the role of PPPs in various sectors, and the CPFA Working Group's advocacy for a national center of excellence and best practices to advise states and other entities about PPP business models. In the next session, **Bringing the Private Sector into the Planning and Implementation Process**, *Miller Hudson (Legislative Consultant)* reviewed the Denver, Colorado, transit model in which half the routes are run by private operators. This model achieves cost savings without cutting service. Also in this session, *Rob Henry (Greater Valley Forge Transportation Management Association [GVF])* described transportation management associations (TMAs) and reviewed some of GVF's experiences with transportation PPPs.

In the next session, **International Perspectives on PPPs: The French Model**, *John Foote (Harvard Kennedy School of Government)* presented an analysis of why the prices were so much higher for the Indiana Toll Road and Chicago Skyway concessions compared to three contemporary French deals. He pointed to how, in the U.S. deals, price was prioritized over other considerations—including some stakeholders' interests. *Nicholas Farber (National Conference of State Legislatures)* then gave a **State PPP Legislation Overview** that focused on notable enacted, failed, and pending PPP-related state legislation from 2009. This was followed by a **Legislator Roundtable** in which *Representative Austin, Representative Harper-Brown, Senator Gorman* and *Senator Scott Dibble of Minnesota* shared their experiences with PPPs in their states. The session closed with a business meeting regarding the development of the "toolkit" report and the next Project meeting, which will take place at the NCSL Fall Forum in San Diego, California, from December 9 to 12, 2009.

NCSL thanks all of the public and private sector participants in the Partnership Project for their contributions to this event and to the ongoing work of the Project.

More information about this meeting, including PowerPoints, is at http://www.ncsl.org/?tabid=18016

More information about the NCSL Foundation Partnership for PPPs for Transportation is at http://www.ncsl.org/default.aspx?tabid=17528

Information about the previous meeting, including PowerPoints, is at http://www.ncsl.org/?tabid=17216

Meeting Summary Contents

Opening Remarks, Introductions and Review of Previous Meeting

Speakers
- Representative Terri Austin, Indiana (*Project Co-chair*)
- Representative Linda Harper-Brown, Texas (*Project Co-chair*)
- Senator Pamela Gorman, Arizona

Opening Remarks by Representative Terri Austin, Indiana

In her opening remarks, Representative Austin welcomed everyone to this educational session and introduced herself as one of the co-chairs of the NCSL Transportation PPP Partners Working Group. She expressed that the robust agenda for this meeting should prove to be informative and useful as the Working Group continues work towards its end goal. That goal is to develop a "toolkit" of meaningful, balanced and absorbable resources that state legislators can employ as they consider PPPs as a possible policy choice to help solve the continuing problem of declining transportation funding in the face of ever- expanding needs. PPPs are options that states have chosen over the years to develop transportation infrastructure. Lessons have been learned from these past experiences that the Working Group hopes to consolidate into a something like a "best practices" manual.

Representative Austin reviewed the agenda for this educational session, and that the session builds on previous meetings of the working group, including the extensive educational forum that was held in Washington, D.C., on April 22 to 23. She thanked Senator Pamela Gorman of Arizona for having chaired that meeting in the absence of both co-chairs. She then introduced her co-chair, Representative Linda Harper-Brown.

Comments by Representative Linda Harper-Brown, Texas

Representative Harper-Brown thanked the sponsors of the NCSL Transportation PPP Partners Working Group: The NCSL Foundation for State Legislatures, AAA, the American Federation of State, County and Municipal Employees (AFSCME), the American Road and Transportation Builders Association (ARTBA), the American Trucking Associations (ATA), the Americans for Transportation Mobility Coalition (U.S. Chamber of Commerce), Macquarie Capital, The Reason Foundation and Transurban.

Representative Harper-Brown then recognized the Working Group's staff chair, Fred Lewis of West Virginia, and introduced Senator Pamela Gorman of Arizona, whom she also thanked for having chaired the April meeting.

Review of the Previous Meeting by Senator Pamela Gorman, Arizona

Senator Gorman began by directing meeting participants to the Executive Summary and Detailed Meeting Summary for the April meeting, which are available on the NCSL website[1]. She then confirmed that all of the meeting participants (except one) had been involved over the entire duration of the NCSL Partnership Project—which will be 18 months in total—and that they were familiar with the work that had been done so far.

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[1] The Executive Summary and Detailed Meeting Summary for the NCSL Spring Forum pre-conference meeting (Washington, D.C., April 22 – 23, 2009), are at http://www.ncsl.org/?tabid=17216

Senator Gorman expressed that this project has several goals, mostly educational. The April meeting was working towards building the "toolkit" for legislators, and was full of good information and some wonderful experts.

The first part of the April meeting was an overview of transportation funding that was not just limited to PPPs, but reviewed the financial crisis and current developments at the state and federal levels. PPPs were just one financing option that was recommended by the National Surface Transportation Infrastructure Financing Commission. The next speakers filled in some of the gaps in our understanding. For example, we talk about PPPs, but what does that term really mean?

Senator Gorman remarked that it was notable that one of the speakers for that session was Karen Hedlund, who had worked with her on the original PPP bill that she introduced in Arizona. Ms. Hedlund is now the chief counsel for the Federal Highway Administration.

The next session at the April meeting was on international perspectives on transportation PPPs. Senator Gorman remarked that it can be helpful to us in the United States if we can "get Europe to make our mistakes for us, and learn from them." She commented that we did hear about some mistakes with international PPPs, but also some wonderful successes. The next session was on state experiences with PPPs—again, the good and the bad.

Senator Gorman closed her review by facilitating introductions of all of the meeting participants, thanking NCSL staff for their work on this project and again encouraging everyone to review the detailed summary of the April meeting.

Trends and Directions in Transportation PPPs

Presentation by Frank M. Rapoport
Senior Partner and Chair, Global Infrastructure and P3 Group, McKenna, Long & Aldridge LLP
Senior Advisor, Council of Project Finance Advisors (CPFA) Working Group

Representative Terri Austin of Indiana welcomed and introduced Frank Rapoport.

Frank Rapoport began his presentation by saying that he would address the current crisis, and what we may be able to do about it. He also stated that he is a fan of PPPs, but does not believe they are right for every deal.

What is happening now is that the president is going to tell every mayor and governor in the United States that there will be no more economic stimulus money, and if there is, states will need to raise half of it; they'll have to "get some skin in the game." So it is unsurprising that states are scrambling to find the money. (And in any case, the stimulus was not about major initiatives in transportation.)

While PPPs could help states in these efforts, it is notable that, according to a recent McGraw-Hill study, 61 percent of state and local officials have had no direct PPP experience and do not fully understand its terms or benefits.[2]

[2] The McGraw-Hill Construction study, titled *Public Private Partnership: Accelerating Transportation Infrastructure Investment*, is available at http://construction.ecnext.com/coms2/summary_0249-307521_ITM_analytics

Firm Overview: McKenna, Long and Aldridge and the MLA P3 Group

McKenna, Long & Aldridge (MLA) is an international firm—the first and oldest in government contracts. It employs 450 attorneys and government affairs professionals in the areas of defense, aerospace, construction and project finance.

The MLA Global Infrastructure and P3 Group, chaired by Mr. Rapoport, has negotiated a variety of projects and works with state and local governments as well as the private sector. It involves over 30 attorneys and professionals, with former Indianapolis Mayor Stephen Goldsmith and former Vermont Governor Howard Dean serving as its strategic advisors. Recent PPP experience includes testimony before the Colorado Joint Transportation Committee in January 2009 and before the New York State Asset Management Commission in November 2008, and informal discussions with lawmakers in California and Nevada.

The firm's largest PPP deal was Balfour Beatty Communities in Newtown Square, Pennsylvania. Few people know that the largest PPP *in the country* was when the Department of Defense (DOD) turned the rebuilding of military housing over to the private sector. The private entity, Balfour, is a British company based in Philadelphia, to which DOD passes over its housing allotment.

Survey of Sectors using PPPs

Many sectors are using PPPs: traffic, administration, education, utilities, health and senior living, security and corrections, disposal, leisure and culture, and other activities such as fire stations, exhibit centers and water facilities. States want to know more about all of these PPP options.

Why PPPs?

PPPs are not *the* solution, but they are *one* solution. According to the American Society of Civil Engineers (ASCE) *Infrastructure Report Card* for 2009, **$2.2 trillion is needed in the next 5 years** for infrastructure, with a $190 billion shortfall for transit. PPPs can **expand and enhance capacity**, e.g. through HOT lanes, port and harbor redevelopment and expansion, and high-speed rail. And PPPs can help get government out from under the **ongoing costs of infrastructure facilities**. For example, if you are using traditional design-bid-build (DBB) delivery methods, for every $1 spent on design, $10 is spent on construction and $100 on operations and maintenance, repairs and refurbishment over the typical life-cycle of an infrastructure facility. This is the financial risk that the private sector needs to take on through alternative delivery methods.

PPP Trends

First, **states**—including California, Alabama, Arizona, New York, Massachusetts and Pennsylvania—**are rapidly passing or considering PPP legislation**. Second, **mayors and local officials are using Home Rule Authority** to engage in PPPs for water, utilities, energy and local transit. Third, **the federal government is signaling the need for PPPs to states and municipalities** through the end of the stimulus handout, the movement toward a National Infrastructure Bank, and the recovery-funded DOT $1.5 billion discretionary TIGER grant program. TIGER grants are for transportation and related projects where the city or state can raise most of the funds. Private developers could get involved with these projects. If there is another stimulus, or if a National Infrastructure Bank is started, states who pursue PPP options may be the big winners the next time around.

Finally, there are **vast amounts of private capital available for PPPs**. This capital comes from private equity and pension funds. In regards to pension funds, there is a shift from Wall Street to labor organizations investing in infrastructure. It wasn't the private sector that lobbied in Alabama for PPPs, but unions, who wanted to be able to invest their pension funds in infrastructure, which has performed well compared to other Wall Street investments. There is this idea that PPPs are promoted and run by these private Wall Street firms that got us into all this financial trouble. That makes PPPs a hard sell to the public. But you can instead present it as *unions* being pro-PPPs, so they can invest their pension funds and protect their jobs in these projects. This framing is a lot more politically palatable than telling the public that PPPs were Goldman Sachs' idea.

State Examples: California and New York

The California legislation allows regional transportation agencies and Caltrans (the state's department of transportation) to enter into an **unlimited number of PPP projects**. It also provides broad authority for PPP arrangements with respect to a range of transportation projects, establishes the **Public infrastructure Advisory Commission** to advise Caltrans and regional transportation agencies in developing transportation projects through performance-based infrastructure partnerships, and authorizes the contracting entity or lessee (i.e. the private concessionaire) to impose tolls and user fees for use of a facility constructed by it. Finally, the law provides for additional **transparency** with respect to tolls: proposed increases in rates *not otherwise established or identified in the lease agreement* shall first be approved by Caltrans or the regional transportation agency, after at least one public hearing.

In New York, the **State Asset Maximization Commission**[3] identified a handful of **possible pilot projects** for asset maximization in six asset classes. In the transportation asset class, it first identified a bridge improvement program to replace, rehabilitate and maintain New York's bridges using PPPs. Bridge upgrades—e.g., for the Bayonne bridge, which has limited clearance over the water—will be needed in order to accommodate the larger ships that will come to the eastern United States after the Panama Canal expands in a few years. Additional possible pilot projects are: 1) constructing the Buffalo Harbor Bridge, 2) the Tappan Zee Bridge/I-287 Corridor Project (estimated costs: $16 billion), 3) high-speed rail services on up to three designated corridors in the state, 4) operations, maintenance, and repairs for the Gowanus Expressway (I-278), and 5) transit-oriented development.

The Commission also discussed infrastructure investors in its report, highlighting the increasing validation of infrastructure assets by pension and retirement funds. The report cites a recent *Pensions and Investments* survey, in which 17 of the 200 largest pension funds reported having defined allocations for infrastructure investment.

The Council of Project Finance Advisors (CPFA) Working Group

The Council of Project Finance Advisors (CPFA) Working Group will have its inaugural meeting in September 2009. It is led by former Governor Dean and former Mayor Goldsmith, with members representing the transportation, finance, energy, water, education, environment, utilities, real estate, information technology and health care industries. It is currently called a "working group" because legislation is still needed to set up an official commission.

The CPFA Working Group believes that the President and Congress need to send a strong signal to governors and mayors that they support PPPs. They need to provide political coverage. The CPFA Working Group also advocates for a national center of excellence and best practices that will raise

[3] Information about the New York State Commission on Asset Maximization, including its *Final Report*, is available at http://nysamcommission.org/

awareness for various PPP business models. Other countries have PPP centers; in Canada, every province has one. But here, states have to go to Wall Street advisors for investment advice. In fact, Partnerships BC (British Columbia) is where Governor Schwarzenegger went for information about PPPs, because there was nobody in the United States to whom he could go *except* Wall Street. So the CPFA Working Group advises that a group of experts should be available here—not to tell mayors and governors what to do, but to give them information about PPP options.

This center would either be located within the federal government or funded by the federal government. If it were to be located within the federal government, it is unclear where to put it. For example, it should *not* be placed within the Department of Transportation, because PPPs are much broader than that. But should it be given to Mr. Foote at Harvard? Should it be placed within the Executive Office of the Vice President? This is an issue that is still being considered.

There are already private sector entities and unions that are interested in these efforts. The Working Group is also reaching out to the National League of Cities and the National Governors Association, and will be doing Congressional outreach this fall. The Working Group would appreciate your advice as it continues to work on this effort.

Bringing the Private Sector into the Planning and Implementation Process

<u>Speakers</u>

- Miller Hudson, Legislative Consultant, Colorado
- Rob Henry, Executive Director, Greater Valley Forge Transportation Management Association, Pennsylvania

Representative Linda Harper-Brown of Texas introduced the speakers for this session. Cal Marsella of the Regional Transportation District (RTD) in Denver, Colorado, was unfortunately unable to attend the meeting due to illness. Instead, Miller Hudson gave the presentation on the Denver Regional Transportation District (RTD) PPP model.

RTD: The Denver Model
Presentation by Miller Hudson
Legislative Consultant

<u>Introduction</u>

Miller Hudson began by introducing himself and his background with PPPs. He served as a Colorado legislator from 1979 to 1983, and since then, has done a lot of other government work. As one project, he ran the Colorado Intermountain Fixed Guideway Authority (CIFGA), which looked at building a transportation system from Denver International Airport to Colorado's ski resorts. The original report advised that such a system—which would have to be able to deal with the weather conditions that occur in a mountain environment—could not be steel wheels and steel track, but would require other technologies. The report also advised that the project would have to be a PPP. The state could not be expected to spend between $5 and $10 billion on a system that would be primarily for recreational use, and that was perceived as mainly benefitting the resorts.

One lesson from this experience is that some folks in the private sector are not ready to embrace PPPs, either. The rail technology companies check in with Mr. Hudson periodically about the possibility of building a MagLev or other system in Colorado. But there needs to be a financier and a system operator; somebody has to be found to put up 60 percent of the capital cost. The people who build the equipment haven't figured out how to work with the government on a PPP basis.

Mr. Hudson also has been involved with the Regional Transportation District (RTD) Union Station project in Denver. They are looking at integrating significantly more light rail into the system, and how to make all of that work in the old railyard area.

What is notable about PPPs in Denver is that half of the services in the RTD system—bus services as well as light rail—are run by private contractors who bid to operate these routes. It is possible to cut costs rather than cut service by having this mix of public and private providers within a regional transportation district. It wasn't that somebody once had a vision of doing it this way. RTD stumbled into this private-public mix, and it has worked very well. It started partly with legislation in 1988 that required that 20 percent of contracts would be bid out. RTD has been voted the outstanding transit system in the country twice by the American Public Transit Association (APTA), partly because the cost per hours of service is much lower due to the use of private contractors.

There was real concern on the part of labor that these PPPs were part of an effort to drive down their benefits. But in fact, every private contractor in Denver is a union shop. So whether you work for the public company that operates the Colfax line or you are a driver on a privately-operated line, you probably belong to ATA and have union representation.

The Regional Transportation District (RTD)

RTD was created in 1969. It covers a huge, eight-county service area that includes 40 municipalities, 2,410 square miles and 2.5 million people. To give a sense of the scale of the system, it has 1,071 buses, 91 light rail vehicles, 175 routes, 76 Park-n-Rides, 10,329 bus stops, 2,510 employees, 35 miles of light rail, 36 light rail stations, over 100 million annual boardings, six operating facilities and two administrative facilities.

RTD is governed by a 15-member elected Board of Directors, which began in 1980. The directors are elected from districts that, like any legislative districts, are equal in population. From 1960 to 1980 there was an appointed board, but there were so many problems with the appointed board that the voters decided to throw them out and have an elected board instead. In Denver, if there had not been an elected board, we would not have moved on light rail as we did.

RTD is funded through a 1 percent sales tax, of which 60 percent goes to the base system and day-to-day operations and 40 percent goes to the FasTracks initiative.

RTD's vision is to:

- Emerge as a public transit model
- Diversify market segments and transit services
- Recognize the responsibility of being a custodian of taxpayers' money
- Encourage employees to be open to new ways of doing things
- Attract customers to the transit system
- Embrace every employee
- Operate in the most efficient, cost-effective, and customer-responsive manner possible, and
- Accept and respect the authority of the board

This leads to the need for a superior product, in terms of travel time, predictability, permanence, cost and safety.

RTD Cost Model

When a private entity bids to operate an RTD route, costs retained by RTD include: general administrative costs, financial reporting and budgeting, planning and marketing, public facilities, and other costs such as dispatch, street supervision, service monitoring, and so on. There are also fixed overhead costs, such as the senior management of the Operations Department and the district shops' facility operations and maintenance costs.

Non-retained costs—those taken on by the private operator—include labor (operator, mechanic, service), consumables (fuel, repair parts), and direct support (unit/body shops, warehouse, liability, workers' compensation). In some cases, the private operator will choose to lease space in an RTD maintenance facility rather than running their own. The private company also takes on variable overhead costs that are facilities-related (management-transportation, maintenance, vault pullers, parts clerks) and related to indirect support (accounts payable, payroll).

RTD Contracting Model

The contract specifies routes, schedules, fares, performance standards, maintenance requirements and insurance. RTD provides buses, radios, fareboxes and dispatch.

Operation Costs

Before competitive contracting for RTD routes began in 1988, operation costs and service hours rose and fell together. Since then, operating costs have stayed about the same, but service has increased. The competitively contracted cost has been consistently lower than the estimated RTD in-house operating cost for the same service, resulting in a cumulative savings of $88 million from 1989 to 1998.

After 1988, only 20 percent of contracts were bid out. By 1998, the legislature said RTD should bid out 50 percent of its services. Cal Marsella thinks 50 percent is about the right balance point. Things happen—companies go bankrupt, and so on. It doesn't happen often, but it is important to have a reserve on the public side to allow for the flexibility to service routes when necessary.

Contractors have consistently lower costs than RTD. As of 2008, contractors were running routes at $65 to $70 per hour, whereas RTD was running routes at $101 per hour. Note that private contractors pay taxes and fees that RTD does not pay, while RTD costs include all variable costs, fixed costs, and depreciation on operating facilities and support equipment. Also, RTD has a statutory limitation on its insurance liability, whereas private carriers do not.

Interestingly, the biggest savings is in light rail, even though it has fewer service hours. A private operator is running one of the light rail lines, and as a result, the costs of light rail per vehicle revenue hour are half or less of what they are in other United States cities.

Performance Measurement: "If You Can't Measure It, You Can't Manage It"

Performance requirements are placed on the private operators. They must be on time over 88 percent of the time and they must reduce the number of safety-related incidents. For the most part, contractors are successful in meeting these marks, and have been for 15 years.

The RTD FasTracks Plan

The FasTracks plan will add 122 miles of new light rail and commuter rail to the system, as well as 18 miles of Bus Rapid Transit, 31 new Park-n-Rides, and enhanced bus network and transit hubs. It will also involve the redevelopment of Denver Union Station, where all of the new lines will connect. This is not without problems, given rising construction costs. The estimated cost was $7 billion, but the actual cost will now be at least $9 billion. RTD has two options: to find the extra funding to cover the capital costs, or to extend the construction period, perhaps to 2019 or 2021. Neither option is politically popular. However, recent election results showed that the majority of voters still want the system built, even though costs are going up.

Lessons Learned

First, there must be **desire and political will** to get voters behind a major project and to be a great city and region. Also, there must be a **vision** that is lofty but attainable, that captures the region's imagination and is embraced throughout the transit district.

Also, political campaigns should capture the **public imagination**. For example, in 1994, RTD wanted to de-Bruce— meaning they wanted to keep tax revenues above Colorado's TABOR (Taxpayer Bill of Rights) revenue limits, which required voter approval—but failed to do so. The next year, the Cultural Facilities District in Colorado also wanted to "de-Bruce." They used twin polar bears born at the zoo that year for their campaign. RTD rode on Klondike and Snow's coattails, and in 1995, both CFD and RTD were de-Bruced.

Other lessons learned include the need for a **policy board that sets visionary policy and musters political support**, but lets professional staff manage the operation. You also need a **solid budget and revenue plan** and a **solid existing system** that builds the public's trust. In Colorado, there is a public perception that RTD is a good bus system and a better light rail system. It is also widely known that many of these routes are actually being operated by private vendors.

Additionally, there must be an established track record of **on-time and on-budget project delivery**; **met or exceeded ridership projections on initial projects**; and a strong, proven and capable **professional staff** that leads the plan development, public education campaign and system implementation. And finally, all of this takes **strength, passion, commitment, courage and unbridled determination to deliver**.

Conclusion

Mr. Hudson concluded his presentation by commenting on two quotes.

"Many U.S. public transit operations have lost touch with the transportation marketplace. Thirty-plus years of increasingly generous and expensive contract concessions have resulted in operating costs that exceed market-based costs by very significant amounts."

Cal Marsella believes that operating costs for transit need to be in line with transportation marketplace. RTD has a margin that it wouldn't have if it weren't using the private sector. And the requirement in Colorado law for RTD to balance private concessionaires with public operation has brought the average compensation—whether you work for a private vendor or for RTD—more in line with the marketplace than they are in other private companies.

"The emergence of one-dimensional and monopolistic public transit service delivery models have resulted in unsustainable and increasingly unaffordable operating costs and the need to increase operating subsidies, reduce service levels and increase taxpayer levels of support for transit service."

If there is one closing message RTD would like to give you, it is that having this mix of service providers helps keep a more balanced system, in terms of keeping compensation in line with the transportation marketplace, and allows you to cut costs rather than cut service.

Public-Private Partnerships
Presentation by Rob Henry
Executive Director, Greater Valley Forge Transportation Management Association (GVF Transportation)

Overview of Transportation Management Associations (TMAs) and GVF Transportation

Transportation Management Associations (TMAs) were started in the early 1990s as public-private partnerships. Greater Valley Forge Transportation Management Association (GVF Transportation, or GVF) grew out of a pharmaceutical company that could not get its employees to and from work, so it formed a 501(c)(4) and became a TMA in 1990. There were about 250 to 300 TMAs in the United States in the early 1990s. Many relied on public dollars, so now there are only about 150 left. Those TMAs still operating today leverage both public and private dollars. GVF is one of nine TMAs in Pennsylvania, and as a 501(c)(4), it advocates with state and federal elected officials.

Successful PPP Projects

There is a misconception that PPPs are all mega-projects worth billions of dollars, but smaller and medium-sized projects can also leverage private dollars. Some of GVF's PPP successes are:

- Bus Shelters: The Philadelphia area transit authority does not provide bus shelters, so GVF fills this public need. GVF partners with SEPTA, municipalities and advertisers. For each advertising shelter, an advertiser such as Clear Channel pays around $100 to $150 per month directly to the municipality, which passes some of this revenue to GVF. Clear Channel also maintains those shelters. There are also some non-advertising shelters that are installed and maintained by private developers. The program has over 150 bus shelters.

- The Revolutionary Shuttle: In the spring of 2009, a free, biodiesel-powered shuttle service was launched for all visitors to Valley Forge National Historic Park. This is a PPP among GVF, the park, Ford and Krapf Coaches. Financial support is from the Department of the Interior and the Ford Foundation, and funding has already been secured for 2010.

- Bike Pottstown: The first free bike share-program in Pennsylvania is a PPP that started in 2008. It partners GVF, Pottstown Borough, the school district, the Tri County Chamber of Commerce, the Pottstown Health and Wellness Foundation and Preservation Pottstown, with financial support provided by the Health and Wellness Foundation, the Pottstown Police Officer's Association, Exelon Corporation, Tri County Bikes, Fuji (which provided the $300 bikes) and Blast from the Past. The program provides 20 free bikes to ride for anyone over 16 with a photo ID, and has had over 400 rentals in its first year. The goal was to encourage economic development in downtown Pottstown.

- The King of Prussia Mall: This mall is one of the largest in the United States, with over three million square feet of retail space. The mall has been a partner in several ways. It provided

$14,000 for a G.E.M. electric car, against only $5,000 in public money for a back-up battery. It also donates space—usually sold at $10,000 per day—for TMA events, at no cost. In addition, the mall provided 90 percent of the funding—about $25 million—for a transportation center that was built in the early 1990s. That project leveraged both public and private dollars and now serves over 1 million transit riders per year. The mall also offers a 100-percent privately-funded holiday shuttle. The next step is to expand light rail to the transit facility. This will be a $150 to $300 million project. They are also looking to be the first mall in the United States with a LEED (environmental) Certification.

Challenges

Some more challenging projects, some of which GVF has been involved with for many years:

- The Paoli Transportation Center: This project—a mixed-use development project in the suburbs—began in the 1980s. It is a PPP already, partnering two municipalities, the transit authority, multiple TMAs, developers, the businesspersons' association and Amtrak. The environmental clean-up phase was completed, and the project should have been constructed already, but the hang-up is Amtrak. These public sector delays are part of why the private sector can be reluctant to get involved. Hopefully this project will be addressed at the Amtrak board meeting in September.

- The Ardmore Transportation Center: This is another mixed-use development project in a suburban setting, partnering the municipality, the transit authority, a TMA, developers and Amtrak. Again, the hang-up is Amtrak. How do you get that federal partner to move?

- US 422 Corridor: This 23-mile facility, built in the 1980s, is congested every day. It needs significant work, with a total estimated cost of $1.2 billion for bridge repair, rehabilitation, a rail extension and capacity expansion. A Phase 1 study showed that peak volume was insufficient for HOT lanes, so GVF is working on a proposal to toll the entire facility using EZ Pass only. This would generate enough revenue to pay for road improvements and a new passenger rail line. The options would be either to create a tri-county authority, outsource management to the private sector or lease the facility. The Phase 2 study on the feasibility of tolling begins this fall.

Challenges that we all face include **declining revenues** and **increasing costs**. The traditional source of revenue—the federal gas tax—no longer provides sufficient funding. It was last raised in 1993. On the state level, the Pennsylvania state gas tax was last raised in 1997 with a 3.5-cent levy. New energy policies (such as CAFE standards and hybrid vehicles) will increase mileage but decrease gas tax revenue. Vehicle miles traveled have declined for 16 consecutive months—leading to less gas tax revenue—and the cost of highway construction materials has increased 43 percent since 2003. But one nice thing with a down economy is that project bids are much lower than usual —at least in the case of the economic recovery funds in Pennsylvania.

The Need for PPPs

Pennsylvania does not yet have enabling PPP legislation, though it has been introduced in committee. However, there are several important facilities that need work. For example, I-95 needs to be reconstructed throughout the state, which will cost over $9 billion. But the state only receives a total of $400 million per year. Without some kind of additional investment, it is unsure how Pennsylvania—or any of our states—will move forward.

Another example of the need is the congested commute to Vanguard. Vanguard is one of largest investment companies in the country, with over $1 trillion in managed assets. Yet their employees sit in traffic every day, and the concern is that they will not only leave the state, but go to another country where they *are* building infrastructure.

As another state example, according to NYMTC (the New York Metropolitan Transportation Council), New York needs $585.4 billion just to maintain the existing system, not including any expansion. That's more than the reauthorization bill would provide for all the states for 5 years.

Not All PPPs Work: The Pennsylvania Turnpike

The Turnpike was almost leased in 2008. People were against leasing the Turnpike because they were concerned that tolls would divert travelers onto local roads that were already congested. The lease would have been for 99 years for a total of $12.8 billion. This deal assumed a 12 percent return on invested lease payments. This projection was based on the state employees' retirement fund, even though that fund itself only uses a figure of 8.5 percent to forecast its future returns. If the Turnpike had been leased and the investment had received only an 8.5 percent return, the state would have had a $320 million shortfall. In fact, since 2008, the state employees' retirement fund has lost $11.5 billion, which is almost 50 percent of its value. Thankfully, the state did not lease the Turnpike and it still has that asset.

Moving Forward

- Tolling I-80: Pennsylvania enacted ACT 44, which would provide funding for highways and transit. However, it assumed revenue from tolling I-80, which would need to be approved by the Federal Highway Administration, and which was rejected in 2008. The Turnpike is considering reapplying in 2009, as tolling I-80 may be considered by the new administration. If the federal government rejects this, Pennsylvania will have a significant shortfall in a few years. This demonstrates again the need for PPP legislation, which has been introduced by Senator Rafferty, who lives along the 422 corridor and sees the need.

- Partnerships UK: Partnerships UK was lunched in 2001, and since then has done over 400 PPP projects in the United Kingdom worth almost $80 billion. These projects include transportation projects, hospitals and schools. This is a model worth looking at.

- The United States Needs to Invest in PPPs: In the United States, the recovery act (ARRA) is investing $150 billion in infrastructure and reauthorization is being pushed back 18 months. In contrast, China is investing $584 billion over the next three years and India is considering investing $500 billion by 2015. We need to leverage private dollars in every sector if we want to continue to compete in the global economy. We are not just competing amongst ourselves anymore; we are competing internationally.

The Private Sector

The private sector—not just investment firms, but large employers in corporate America—wants to be involved. But they need to see a return on investment, and they need the funds they invest to be used in the areas where their employees are living and working. We need to do a better job utilizing private sector input in the planning phases. Often, we plan our highways and transit, and then find out from the private sector what they have been planning with their companies. If we can bring in the private sector into the planning phase, they will be a key player in the implementation phase.

Let Us Help!

TMAs, ACT National, universities, and the private sector are all available resources that can be utilized, and that would like to help.

International Perspectives on PPPs: The French Model

Presentation by John Foote[4]
Senior Fellow, Harvard Kennedy School of Government, Massachusetts

Representative Terri Austin of Indiana welcomed and introduced John Foote.

Introduction: "Learning the Right Lessons"

John Foote began his presentation by applauding the NCSL Foundation Partners Project on PPPs. This is an increasingly important topic that deserves focused, objective dialogue. He then quoted a comment made at the pre-conference meeting at NCSL's Spring Forum: "The United States is now rediscovering—and can learn from–what is being done with P3s globally." While he agrees with this statement, the question is, are we learning the *right* lessons? This talk focuses on what we should be learning from other countries that have more experience with PPPs.

These comments are based on a study by Mr. Foote and a colleague at the University of Barcelona[5]. This colleague—an expert on European PPPs—had expressed surprise upon learning about the Chicago Skyway and Indiana Toll Road deals, because these two concessions, though similar to European deals, differed in one key aspect: The prices paid for the U.S. concessions were *five times* the price paid for three contemporary French toll road concessions (Autoroutes Paris-Rhin-Rhône [APRR], Société des Autoroutes du Nord et de l'Est de la France [Sanef] and Autoroutes du Sud de la France [ASF]). The prices for the French concessions (which include equity plus assumed debt) were from 12.2 to 12.5 times the concessions' net income (EBITDA). The Chicago Skyway was priced at 63.1 times net income, and the Indiana Toll Road at 60.2 times net income. So the analysis was done to determine why investors valued the U.S. and French deals so differently, and the public policy impact of this price disparity.

Similarities Among the Concessions

Similarities among the concessions included:

- All five were converted from public to private operation in 2005 to 2006.
- All five were set up as leases in which the concessionaire paid a one-time, upfront fee (i.e., price) for the right to operate the road and collect tolls.
- In most cases, the same companies were bidding for the French and U.S. concessions.
- In all five cases, a sealed bid process was used.

[4] This summary is drawn from and sometimes directly quotes John Foote's own written notes, which he kindly provided to NCSL and which are available on the NCSL website at: http://www.ncsl.org/?tabid=18016

[5] This presentation is based on the working paper titled *Comparison of Recent Toll Road Concession Transactions in the United States and France*, co-authored by Germa Bel, Professor of Economics at the University of Barcelona, and John Foote. The entire paper can be found at http://www.ub.edu/graap/Bel&Foote.pdf

Differences Among the Concessions

The Bid Process and Criteria

Although all five concessions used a sealed bid process, there was one important variant. Bids for the French roads had to be accompanied by two pieces of supporting documentation: a business plan and an "industrial" plan. The business plan detailed the assumptions for traffic, toll rates, operating and capital expenditures and financing structure. The industrial plan detailed the strategic, management, labor and operational initiatives to be implemented by the concessionaire. For the Chicago and Indiana bids and the proposed Pennsylvania Turnpike concession, bidders had no obligation to disclose how they would operate the roads.

Because these two plans—business and industrial—were evaluated by the French government as part of the bid, **price was not their sole bid award criterion**, as it was for the U.S. concessions. For the French concessions, price *and qualitative considerations* were the basis of the award. This "best bid" approach, as opposed to "high bid" approach used for the U.S. concessions, had the dual consequence of lowering the amount of the winning bid, and narrowing the spread among bids. The required transparency of the bids for the French concessions also had the likely effect of moderating and homogenizing the assumptions underlying the bids.

Structural and Procedural Differences

The underlying economic basis of concessions is that investors look at the projected annual cash flow generated by the road over the concession period, where cash flow is equal to gross toll revenue minus operating costs and capital expenditures. Thus, cash flow is a function of the term of the concession, a projection of future traffic and future tolls, and operating and capital costs. In the French and U.S. cases, each bidder was provided with bid parameters: the length of the concession, the toll adjustment formula and minimum capital investments to be made over the term of the concession. The bidders, armed with those parameters, were able to build financial models of the toll roads' future cash flows, making assumptions about CPI and GDP (to which toll increases are indexed) and traffic growth.

The next step in valuation is to discount the project cash flow over the concession term, using as the discount rate the weighted cost of the concessionaire's capital to finance the concession payment. This points to another difference between the French and U.S. deals: the French government placed a **limit on the amount of debt the concessionaire could use to finance the concession payment** to encourage a more conservative, less risky capitalization. This constraint effectively increased the amount of equity relative to debt that the concessionaires used to finance the French concessions. Since equity has a higher cost than debt, that makes the overall cost of capital higher, which (all other things being equal) means a higher discount rate, which results in a lower valuation and a lower price.

All together, the structural differences that resulted in the dramatically lower price-earnings multiples for the French concessions were: **a shorter concession length** (25 years average for the French deals, 99 and 75 years for the Skyway and Indiana Toll Road, respectively); **more moderate toll increases** (70 percent of CPI for the French deals, versus the greater of 2 percent, 100 percent of CPI, or GDP for the U.S. deals); **less aggressive assumptions regarding traffic growth** (due to the transparency of the French bids); and, as described above, a **more conservative capital structure**.

The proof of this can be seen by applying the French concession terms and assumptions to the Skyway deal. Adjusting the price for a shorter concession term (23 years), lower allowable tolls (70 percent of CPI), more modest traffic growth, and less leverage makes the Skyway concession price 12.5 times earnings—almost identical to the French prices.

Analysis

The outcomes of the two approaches show that the objective of the U.S. concessions was to *maximize the concession price*. This was done by structuring the concession to generate the highest possible discounted cash flow and then deciding the auction only on the basis of price.

Why would the French government organize its concessions so as *not* to maximize the concession price? In other words, why did the French government leave money on the table? The answer lies in the concept of "**public interest,**" or using the economists' term, "social welfare." Social welfare includes the welfare of all parties affected by a policy. These include consumers (in the context of toll roads, tollpayers), producers (the concessionaire), workers and taxpayers. To determine the net impact of these concessions on the public interest—to figure out who are the winners and losers—one measures how each stakeholder is affected.

From the perspective of the **public owners** (the French government, the city of Chicago, the state of Indiana), a larger concession price is better, regardless of the use of the proceeds. A large concession price that is unsustainable may or may not be a bad thing depending on the "take back" provisions, and a shorter concession term may or may not be better depending on how the owner assesses the risks of ownership versus the value of future operational flexibility.

Clearly, the higher prices paid for the Skyway and Indiana Toll Road concessions make the **taxpayers** of Chicago and Indiana winners relative to the French taxpayers. However, with respect to **tollpayers**, lower tolls are better and better operated and maintained roads are good. In the French model, toll increases are limited to 70 percent of CPI, which means that tolls actually decline in real terms. As a consequence, tollpayers gain purchasing power. In the U.S. deals, more importance was placed on taxpayers' welfare than on tollpayers' welfare. This, however, is a zero sum game—merely transferring cash from tollpayers to taxpayers does not increase the size of the pie.

As to why France did not try to maximize the concession price, the answer must be that the French concessions were structured to balance all stakeholders' interests, including taxpayers and tollpayers.

Conclusions

These French and US concessions illustrate how structural and procedural decisions made by the public owner affect the concession price. There is no intrinsic value that can be assigned to a particular toll road. The value, or more accurately the price, is largely a function of the characteristics of the *concession* and not the road itself. The U.S. concessions' longer lease terms, higher allowable toll rates and absence of capitalization restrictions were the major drivers of the higher prices paid by investors for those roads.

Also, the concession terms have direct consequences that are enjoyed or borne by all of stakeholders of the toll road. The higher prices paid for the U.S. concessions have the tangible effect of placing more financial pressure on the concessionaire to maximize net income—not only to service debt, but also to provide a satisfactory return to the equity investors. Although it is speculative at this point to identify the actual consequences of this, it is reasonable to expect that the Skyway and Indiana Toll Road concessionaires will operate their roads with the singular focus of maximizing profit, regardless of any external objectives or costs.

This talk has avoided the debate of whether concessions are good or bad because it isn't the right question. PPPs, if used judiciously, can play an important role in improving our transportation infrastructure. But none of us in this room have to be reminded that roads are not financial assets to be sold to the highest bidder. Figuring out how to maximize the concession price is easy. The much more difficult and important task is to balance the concession price with the public interest.

Decisions about how a concession is to be organized, both structurally and procedurally, have a direct impact on all of a toll road's stakeholders. It is these impacts and the tradeoffs inherent in these decisions—not just the dollars—that need to be central in the public debate on concessions. That's the lesson we should learn from the French.

State Legislation Overview 2009

Presentation by Nicholas Farber
Policy Associate, National Conference of State Legislatures (NCSL)

Geoff Segal of Macquarie Capital in New York introduced Nicholas Farber, who closely follows PPP legislation around the country.

<u>PPP Legislation Trends</u>

In 2009, 33 PPP bills were introduced in 18 states. Of those, seven bills were enacted and another seven are still pending. Compare this to 12 states that introduced PPP bills in 2008, and 16 states in 2007. It is an increasing trend among states to consider this kind of legislation.

<u>Enacted Bills 2009</u>

PPP bills were enacted in Alabama, Arizona, California, Colorado, Massachusetts, Missouri and North Carolina. These bills authorized, defined or expanded PPPs under current state law.

Alabama House Bill 217
- Changes the makeup of the Alabama Toll Road, Bridge and Tunnel Authority
- Requires that all bonds issued to build toll roads are payable only from the revenue generated from tolls
- Gives the Toll Road Authority the ability to enter into agreements for design-build contracts, leases, licenses, franchises, concessions or other agreements
- Increases the bond issue date from 40 years to 75 years

Arizona House Bill 2396
- Allows the use of different project delivery and procurement methods
- ADOT may include certain provisions in the PPP agreement such as allowing the private partner to collect tolls or fares and allowing ADOT to accept availability payments
- Agreements can be no more than 50 years, which may be extended
- Allows other governmental units to develop PPPs if allowed by ADOT
- Requires certification of foreign entities

California Senate Bill 4b

- Allows state and local transportation agencies, if authorized by the California Transportation Commission (CTC), to enter into PPPs and use a design-build process for contracting on transportation projects
- Limit of 15 projects (five local, 10 state)
- Provides evaluation procedures for establishing the low bid or best value, “including but not limited to price, features, functions, life cycle costs, and other criteria deemed appropriate by the transportation entity"
- Allows Caltrans to enter into lease agreements with public and private entities for projects that may charge tolls
- Eliminates the need for legislative approval; this provision expires on January 1, 2012

Colorado Senate Bill 108

- Large transportation funding bill called “FASTER,” for “Funding Advancements for Surface Transportation & Economic Recovery,” that includes PPP elements
- Creates a Statewide Bridge Enterprise that has the ability to enter into PPPs to repair bridges
- Creates the High-Performance Transportation Enterprise (HPTE) within CDOT to seek out opportunities for PPPs
- Gives the HPTE the authority to evaluate potential PPPs

Massachusetts Senate Bill 2087

- Large transportation reform bill, which creates a new state DOT and has PPP elements
- Allows the Board of Directors of the new DOT to solicit proposals for PPPs
- Creates a competitive procurement process
- Spells out the terms that must be in the PPP agreement, e.g. not to exceed 50 years
- Establishes a PPP infrastructure oversight commission to comment on and approve all requests for proposals for any design-build contract and must submit a report within 15 days after the submission of the agreement

Missouri House Bill 683

- Amends current PPP law to expand types of projects allowed
- Highway projects are not included
- Currently, the Act only allows for a bridge over the Mississippi River; the bill adds any pipeline, ferry, river port, airport, railroad, light rail, or other mass transit facility
- Requires preliminary approval of a PPP by the Joint Committee on Transportation Oversight, and final approval by a vote of the people

North Carolina Senate Bill 648

- Allows the DOT to enter into PPPs
- Puts limitations on projects; for example, the DOT may only contribute 10 percent of the engineering contract and any construction contract or $250,000; the plans must meet established procedures established by the DOT; and the project shall constructed in accordance with the plans and specifications approved by the DOT
- Requires the Secretary to report to certain legislative committees on all agreements each March 1
- Expires December 31, 2011

Failed Bills

There were 19 failed bills from Arizona, California, Hawaii, Kentucky, Maryland, New Mexico, Nevada, Rhode Island and South Carolina. Some of these states also passed PPP-related bills, for example, Arizona and California. The most notable failed bills are from Florida and Texas. Florida introduced 4 PPP bills this year. None were enacted.

Florida House Bill 1189 (not enacted)
- Requires the DOT to determine if the PPP's benefits are above the funding levels projected without the PPP
- All proceeds from the sale or lease of an asset have to be used for transportation purposes
- Requires the DOT to coordinate with affected communities, including providing details of the intended county-by-county distribution of proceeds from the lease
- The DOT must consider the transportation funding benefit to the state as compared to public ownership

Florida House Bill 1291 (not enacted)
- Allows certain agencies to receive or solicit proposals
- Provides criteria for requesting or considering projects
- Limits PPPs to 50 years, but authorizes an extension to 75 years
- PPPs can go beyond 75 years if approved by the legislature

Florida Senate Bill 2320 (not enacted)
- Amends the current PPP statute to require the DOT to find certain benefits
- Funds from leases can only be used on state highway improvements
- DOT has to coordinate with affected counties

Texas House Bill 1815 (not enacted)
- Creates the Texas Partnerships Agency
- Allows the partnership to raise revenue by tolling and other methods
- The partnership has to ensure it is providing optimal value for the state

Texas Senate Bill 1353 (not enacted)
- Prohibits concession payments or up-front payments
- Allows a toll project to enter into a revenue-sharing agreement

Texas Senate Bill 17 (not enacted)
- Repeals the market valuation process because the process was found to be unduly expensive, contentious and time-consuming
- Requires TxDOTto distribute toll revenue to the district affected by the toll road
- Requires the comprehensive development agreement (CDA) to allow the toll authority to buy back early
- Limits the term of the CDA to 30 years
- Gives public tollway authorities the right of first refusal

Texas Senate Bill 3 (special session, not enacted)

- Repeals the moratorium on TxDOT's ability to enter into PPPs (moratorium enacted in 2007)
- Streamlines the market valuation process
- Requires that the state comptroller review the CDA and certify it for approval
- Allows the tolling authority to buy back the road at certain intervals
- Gives local toll entities the right of first refusal

<u>Pending Bills</u>

Bills are still pending in California, Illinois, Massachusetts, North Carolina and Pennsylvania. These bills do not necessarily create the ability to enter into PPPs, but may restrict or affect the process in another way.

Pennsylvania Senate Bill 693 (pending)

- Allows any transportation agency to enter into a PPP for transportation-related development
- Requires review of the agreement by the Transportation Commission if the public entity is disposing of or relinquishing its control of a transportation facility, or the transportation facility receives state funds
- Sets up a competitive bidding process
- Sets out terms that must be in the agreement, e.g. user fees, agreement length (cannot exceed 50 years), liability insurance and compliance with the Pennsylvania Prevailing Wage Act
- Creates the Pennsylvania Transportation Development Trust Fund, where all funds earned from the transportation development agreement shall be deposited; the funds shall only be used for the operation and development of transportation facilities in the state, and funds can only be transferred by the Transportation Commission, and not the General Assembly or other agencies
- Only would allow leasing the Turnpike by approval of the General Assembly; the exception is that this provision does not limit the rights of the Pennsylvania Turnpike Commission or the Transportation Commission from approving partnership agreements which do not require a transfer of operational oversight from the Pennsylvania Turnpike Commission

Mr. Farber ended by directing the audience members to the NCSL Transportation Funding Legislation Database at http://www.ncsl.org/default.aspx?tabid=13597, which contains more in-depth information on all of the bills discussed here.

Legislator Roundtable

<u>Moderator</u>

- Geoff Segal, Macquarie Capital, New York

<u>Participants</u>

- Representative Terri Austin, Indiana
- Senator Scott Dibble, Minnesota
- Senator Pamela Gorman, Arizona
- Representative Linda Harper-Brown, Texas

The moderator, Geoff Segal of Macquarie Capital in New York, began by introducing the four legislators involved in this roundtable. This roundtable was suggested at the last meeting in April.

The legislators were asked to share five-minute overviews of their involvement in the PPP issues in their respective states.

Representative Terri Austin, Indiana

<u>The Impact of the Indiana Toll Road, or "Major Moves," Project</u>

Representative Austin started by giving her perspective of the Indiana Toll Road project, which eventually became known as "Major Moves." Representative Austin is the current chair of the House Standing Committee on Roads and Transportation, a position she has held since 2007. When the Major Moves legislation—House Bill 1008—was put forward to the General Assembly, she was not on the transportation committee yet. So her perspective is not from having been intimately involved at that time. However, as other issues have come forward while she *has* been chair, that deal has influenced her thinking about PPPs—particularly regarding the role of the General Assembly and the legislative process in setting up conditions and parameters for PPPs.

For years, Indiana has had a history of overpromising and underfunding road projects. The long-term and short-term plans get put together and locals anticipate a road project, and then as it gets close to implementation, the project gets pulled because there is not enough funding available.

Most people are probably familiar with the Indiana Toll Road deal. The legislation was proposed in 2005 and the deal closed in 2006. It was put forward in the first term of a new governor, Mitch Daniels. The 75-year lease with Macquarie and Cintra provided a $3.84 billion up-front payment.

<u>The Process of Approving Major Moves</u>

The process, unfortunately, became very partisan and very regional. It was the first time in Indiana that a project of this nature had been proposed. The request for proposals (RFP) had been developed and released and the final bidders selected without any legislative knowledge or involvement. The General Assembly gathered around the third week of November, and then legislators were suddenly told that there was a PPP, and that somebody would carry the legislation, and that they were expected to approve it. It's worth noting that in the time since that legislation passed, the concept of PPPs has become more familiar to legislators. But still, as Frank Rapoport pointed out, 61 percent of state and local officials haven't even really considered the term. So there is a long-term educational and outreach process that must take place.

This gets to the question about political risk. It would have been much less contentious and partisan in the end if some time had been spent up front to educate legislators and the public. Discussion was needed about what was being considered, why it might be needed, that the toll road was an underperforming asset, the role that the General Assembly might play, and what role the General Assembly itself might *want* to play in the process. None of this was done. The project was presented as "take it or leave it," and it became very contentious. Unfortunately, it also left a bad taste in many legislators' mouths about PPPs, which is unfortunate. It was a disservice to the process, to the potential of PPPs and to what this Partners Project is doing. (That was one of the primary motivations for Representative Austin to become involved in the Project, because it is important to go back and clean up some of the poor perceptions and misinformation.) While the lease did eventually receive legislative approval, the vote was largely along party lines. Some of the Governor's party also chose not to vote for it.

Problems with the Deal

There were also problems with the deal itself. There were no labor protections in the Indiana lease, and the development rights were negotiated between the state and the investors. In retrospect, more buy-in might have been possible from affected communities if the state had thought about revenue-sharing with them on an ongoing basis. Then, the non-compete clause in the lease—which requires that payments must be made to the private operator for lost revenues if a competing facility is built within 10 miles of the Toll Road—has been criticized across the board. As an example, there was severe flooding in Indiana this last spring. To manage the traffic flow, the tolls and gates needed to be lifted to keep things moving as quickly as possible. As a result, the state needed to make payments for lost revenue to the investor group.

Dealing with Concerns and Criticisms

As audience members think about going back to their states and working with investor groups and the executive branch, consider this: As criticisms are raised during the educational process, think about what happened in Indiana. In that situation, concerns and criticisms were summarily dismissed by the proponents of the legislation, and folks were characterized personally as being parochial or resistant to change. As legislators, we must go back to our states and educate people.

Estimating and Allocating the Proceeds

Another thing that happened in Indiana was related to the 10-year construction plan that was based on the proceeds. There is a need to be realistic, especially in this economy, about what the proceeds will earn and what you will be able to build. In Indiana, a 6.9 percent rate of interest was assumed on what was ultimately $2.5 billion in proceeds. The rate is nowhere near that. The Next Generation Trust Fund contains $500 million of the proceeds. About two years ago, that fund had reached around $570 million after two years. The idea was that every five years, the fund's interest could be applied to other state road projects in the 10-year plan. Again, Indiana overpromised and will not be able to deliver. In this economy, unfortunately, the investment has actually lost principal. It is down to $400 million, and no money has been taken out. And if you are going to sink some of the proceeds into funds for future projects, with a 43 percent increase in construction costs since 2003, you're losing buying power every day, too.

PPPs in Indiana Since Major Moves

A few things have happened since the Major Moves initiative. In 2007, the administration put forward a PPP proposal to create an outer beltway outside I-465, which goes around Indianapolis. This project was pitched as the Indiana Commerce Connector and required legislative approval. The bill passed the Senate, and then it came to the House. Some, including Representative Austin, thought there should be an opportunity for stakeholder involvement. The project would have gone through five or six counties and would have disrupted a lot of farmland and other land that was important to the economies of those areas. So a series of field hearings was held on a county-by-county basis that gave the public a chance to weigh in on the proposal and ask questions. Turnout was overwhelming, and very good issues were raised. Firstly, it did become a kind of not-in-my-backyard issue. But also, nobody could justify why this project was necessary. It was more of a "cash cow" approach—that there was a bunch of private capital out there, so the state should take the opportunity to build something else, turn it over to an investor group, and make a bunch of money. So ultimately the project was pulled.

So again, it is about the process. How do you bring people along? And that is part of the challenge of legislators and the folks on the Working Group. How can you help educate people, and ensure that when they are confronted with these ideas, they are not forced into a knee-jerk reaction, that their backs aren't up against a wall? A lot of information needs to be shared.

Conclusion and Next Steps

Representative Austin commented that she does not think PPPs are a bad idea. She filed legislation this year that created regional transportation districts and gave them the authority to enter into PPPs. She believes the next step in Indiana is to go back and create either a Task Force or a Joint Committee to review the language in the state PPP legislation. There is very minimal language now, and it was written into the statute that the Governor cannot go out and seek additional PPPs. There are lessons to be learned from other states about putting parameters and guidelines in place, as well as long-term protections for the public interest.

Representative Linda Harper-Brown, Texas

Representative Harper-Brown began by commenting that there is no state that has debated the use of PPPs as hotly or as long as Texas has. She also remarked that John Foote addressed Texas' whole issue in his presentation, and Representative Austin added to that. What Texas found is that the number one issue is buy-in, which echoes what Representative Austin said about education.

Texas PPP Legislation and Subsequent Problems

Several years ago, without transparency and accountability and public buy-in, Texas launched an effort through a bill that was barely seen by the Transportation Committee and even less by the full legislature. It was an omnibus bill that changed the availability of PPP opportunities for the state. After the bill passed, legislators experienced angst, because the Texas DOT started using those tools that the legislature had given it, and some felt that those tools were possibly misused. It goes back to exactly what John Foote said: the interest of the tollpayers was not kept in mind, and it was all about that up-front money.

The issues Texas had were with the balance between these contracts, and even with the ability to contract. Even the outside auditor hired by TxDOT said that nobody within the DOT who had negotiated could understand these contracts. A moratorium was placed on these contracts two years ago, and when the contracts expired, it would put the state at substantial risk. The state was hiring out and bringing in expertise to work on contracts, but the problem is that it is hard to find independent experts, because most of them work for the financing companies as well as trying to help the state. Representative Harper-Brown believes that there needs to be more independent advisors that states can trust. Texas tried to balance this by requiring the state comptroller and the Attorney General's office to review the contracts. However, after the session was over, it was revealed that the Attorney General would not sign off on any of these contracts because they were constitutionally invalid. Had this been known during the session, it might have helped inform some changes to the legislation.

In Texas, some other issues got mixed up with PPPs: the Trans-Texas Corridor, tolling and taxing. As Representative Austin said, there is a responsibility to educate the public, and these issues should have been kept separate. Now, there are groups that are so opposed to toll roads that they advocate raising the gas tax in Texas. Representative Austin heard of one state that was concerned because the toll rate may go to \$0.35 per mile. In Texas, the rate can go to \$0.75 per mile. To go just a few miles would cost the tollpayer an incredibly high amount of money.

The other problem is the use of the roads. Again, this is an issue of transparency and accountability, because TxDOT identified 500 possible toll roads in the state—19 in Representative Harper-Brown's area alone. Combined with non-compete clauses and other problems in the contracts, traffic *will* get pushed onto local roads. But a lot of people in San Antonio testified that there would be *no* free road—that they would be forced onto these toll roads to be able to move, and that was a major problem. So, again it is important to get that buy-in and that education, and also to make sure there is somebody who can contract effectively.

This all made people lose trust in TxDOT, first because of the ways the bills were passed. Also, even after the Attorney General asked them to make these contracts available and let the people see them, the then chair of the Texas Transportation Commission refused and would not release the contracts. So that lack of transparency—and the problems in the contracts by the time they were presented for review—also caused the lack of trust towards TxDOT.

2009 Texas Legislation: The TxDOT Sunset and Comprehensive Development Agreement Bills

There was so little trust in TxDOT that one of the pieces of legislation that did not pass this year was the bill to keep the DOT open and operational. There is a sunset process in Texas, and TxDOT was under sunset this session. Because of the distrust, many House members didn't mind when the sunset bill did not pass, because that meant the DOT would just go away and they could start over and have a new DOT—they were just so disappointed in how these issues and others had been handled. During special session, though, the legislature did vote to keep the DOT running for another two years. But it could not be extended beyond two years, because the House wanted to be able to come back to this and deal with some of these accountability and transparency issues. So the political ramifications are very strong.

Also, when the CDA (comprehensive development agreement) bill died in the special session, it died because that was not what legislators thought that session was for, and what they were there to do—that some balance had been lost.

Senator Scott Dibble, Minnesota

Minnesota: A Fairly Negative Environment for PPPs

Minnesota has been fairly "allergic" to the idea of PPPs, at least as they have been discussed in this forum. Minnesota has not gone down the path of finding private entities to operate facilities. Tolls in themselves have been a very unpopular idea. Minnesota does have legislation on the books that provides for all manner of tolling facilities, with quite a few criteria for that. But a few years ago, the legislature enacted an outright prohibition on tolls, especially on existing capacity. There are some exceptions for HOT lanes and so on, but those have been viewed more as congestion management techniques and taking advantage of underperforming infrastructure. It all remains within the public realm.

Part of what Minnesota is responding to is the experience of Indiana, as well as the SR-91 facility in California, the Chicago Skyway, and the like. Minnesota legislators and the public have really rejected the idea of going for the dollars, and are fearful that there are entities trying to monetize their public assets and give over control for publicly built facilities to create social inequities—this idea that Representative Harper-Brown raised, that people wouldn't have any choice except to pay tolls to get to where they needed to go. One experience in Minnesota was a proposed tolled major river crossing, which pretty much would have been the only route for people to get to a developing area in a municipality in the southwest suburbs.

There was a fairly extensive study undertaken a few years ago, at the request of then-U.S. Representative Mark Kennedy. A lot of that got caught up in intensely partisan politics. There was one idea about putting a second beltway around the metropolitan region. There was a feeling that this was being highly driven by highly capitalized interests, and that the public good and public interest was being left behind. Also, the idea of creating that level of sprawl in the outer reaches of the suburbs and making large interests really wealthy was not well-received. Interestingly, the committee came to that same conclusion by looking at experiences around the country. Congressman Oberstar has had a visceral, knee-jerk reaction to PPPs, although he's come around a bit thanks to this group and to Bob Johns, his technical advisor who is at the University of Minnesota Center for Transportation Studies. But all of this has contributed to a fairly negative environment for PPPs in the classic sense in Minnesota.

<u>Design-Build in Minnesota</u>

Minnesota, however, has had some interesting and extensive experience with design-build. The early days of design-build in Minnesota were rough, and a lot of lessons were learned. The perception about design-build, rather than distributing risk and maybe getting some time advantage and associated cost benefits, was really the opposite because of some bad experiences. One of the first design-build efforts was a light-rail line connecting downtown to the airport and the Mall of America. It felt like a lot of public responsibility was being delegated to the private contractor, and it came up against some community values and priorities. In particular, rather than putting a bridge up on piers over a large intersection, they proposed to put it up on a berm, which further cut off a fairly large, marginalized low-income community and created a lot of hostility. Local contractors were also very concerned about the implications of design-build for labor issues and disadvantaged business enterprises.

But recent experiences with design-build have been much more positive—with the caveat that "positive" is in the eye of the beholder. The replacement for the I-35W bridge that collapsed was built using a design-build process. This process gave significant weight to some factors in the proposals in a way that Senator Dibble thought added great value, but not everyone agreed. No money was saved, but the goal was to build the bridge and have it functional very quickly. Some factors that were weighted more heavily than they had been previously were timeliness of delivery and innovation in construction technique and technology. Also, interestingly, 15 percent of the weight was given for local community engagement and dealing with regulatory hurdles. Around $20 million or so was spent for that community engagement, which really rankled some legislators and local proposers, but proved extremely beneficial in the end.

Minnesota has an extensive design-build statute that provides for how public value and public interest are determined, how the decision-making process is parsed out—including a technical advisory committee—and how to deal with public disclosure. As a result of the I-35W bridge experience, locals who were unsuccessful in their proposals put together a long bill that articulated what they were unhappy about, and succeeded in getting some of that passed into law. It was a contentious and difficult battle in the legislature, and some lessons were learned that are relevant to PPPs about dealing with local concerns: specifically, how to deal with non-responsive proposals, how to disclose some non-technical elements and how to deal with dispute resolution. One major point of contention was that the response to the bidder and the contract were signed without anybody having time to raise protests, questions or objections. The state's Association of General Contractors has a seat, designated through legislation, on the technical review committee. Also, the ability is maintained for low bid even within the design-build process, to make sure all factors are considered. Minnesota has restricted design-build to 10 percent, and is very restricted on local and municipal design-build projects—localities basically need to come to the state on a project-by-project basis.

Conclusions and Next Steps

The University of Minnesota and the DOT just worked on an analysis of alternative forms of transportation finance, including examining concepts of value capture and working with contractors around development rights at transit and transportation facilities. They are looking especially hard at the Denver model of delivering multiple transit lines. Otherwise the 2030 plan for additional regional transit becomes a 2050 or 2070 plan. So Minnesota is getting there, but there are cultural, political, and perceptual issues that need to be overcome. These need to be processed with stakeholders through a Task Force and through legislator education. In a few years, Senator Dibble believes there will be some real progress.

Senator Pamela Gorman, Arizona

Arizona House Bill 2396: Background and Process

In Arizona, House Bill 2396 was just passed, which was sponsored by Representative Andy Biggs, the chair of the House Transportation Committee, under whom Senator Gorman served as vice-chair when she was in the House.

Senator Gorman's district is completely connected to I-17, which she calls the "orphan interstate." When she started as a legislator, there were two lanes in each direction. It was the only north-south thoroughfare from Phoenix to the northern communities, yet there had been no improvements since 1955, with the exception of repaving potholes and things of that nature. As a result, transportation was a key issue for Senator Gorman's voters. So she started looking for new ways to fund roads, since it was not a priority in Arizona to do anything on I-17. That is how she got into PPPs long before it was cool to talk about them. One of the first bills she ran as a freshman was an HOT lane bill. Representative Biggs used to call her a "one-note piano" because she was always talking about these partnerships. She would respond that roads need to be built. She would be sitting in traffic next to an empty HOV lane, because there were very underutilized HOV lanes in some areas. "What if we could invest in and maximize those lane miles and make a little money that could help build additional lane miles?" And he would walk away.

Representative Biggs ran House Bill 2396 after a lot of discussion with Senator Gorman, because it was largely the bill she had started running on PPPs, with a few changes that came out of discussing issues that came up with stakeholders. It was very important to have these stakeholder meetings, because if you can identify the issues, you can work around most of them and find compromises that won't kill the deal.

Biggs' bill was about 80 percent her bill and about 20 percent what came out from stakeholders. Unfortunately, an outside stakeholder group emerged and decided to hold meetings unbeknownst to Senator Gorman or Representative Biggs, and they took Senator Gorman's bill and funneled it to another senator who had never worked on this issue. So Representative Biggs and Senator Gorman decided that the best thing to do, since he was the transportation chair in the House and had worked on this issue, is that Senator Gorman would clear the way for his bill and put her bill away. Her bill was one of the failed bills in Nick Farber's presentation. Not knowing that any of this was going to take place, she had gone back to Nossaman LLP and had gotten the latest, "best and brightest" thinking and research about PPPs and had filed a kind of upgrade of her original bill. But ultimately she decided not to kill the good to preserve the perfect, and instead, to back the Biggs bill wholeheartedly. She believes this was the right thing to do, and what sometimes lawmakers have to decide to do: to get the best policy possible out the door. This is what happened in Arizona.

As a result of the nature of the Arizona session this year—they put out about four budgets, as the revenues kept going down—all non-budget bills got pushed into the last three weeks of session. So there wasn't much tinkering on bills in opposite chambers. A little tinkering might have made the bill better, but they decided to get it out this year, so they put it on the fast-track.

One thing they did not do this year in Arizona that other legislators here have talked about, and which might have been really helpful, was grassroots outreach to the public. A lot of people who come to Arizona come from other places. They have seen the ugly toll roads that exist in other parts of the country and are not really familiar with modern tolling. Also, they don't really realize that there is no such thing as a free road. If you want a road, you can either wait, or you need to pay for it either through a tax increase or through a toll. And that is an educational process that could be done through the grassroots, and that Senator Gorman would have loved to see done in Arizona. In the end, it wasn't necessary—the bill passed. And in fact, when it went through the House in March, there was only one "no" vote. It was a completely bipartisan effort: The sponsor was as far right as possible, and the most vocal supporter—Representative Farley—was as far to the left as possible. During the floor debate, everyone was laughing, and Farley couldn't believe he was supporting a Biggs bill. But he did, and he encouraged other Democrats to do so. The only "no" vote came from a Republican.

When it came over the Senate a few months later, it passed easily. It had more votes than it needed. However, it started to be along partisan lines a bit more. It's unclear why that was—sometimes, as it gets further into the session, the parties get more cranky with each other. Then, the bill had to go back to the House, and of the people who had voted yes originally—who had been very excited about it and had applauded the bipartisan effort—eleven voted no the second time around. So, sometimes you do get into the politics of things.

This bill, House Bill 2396, could be a great model if you're looking for something. The other bill that Senator Gorman ran, again, came from the Nossaman group, which is advising states on best practices. But this bill did address issues that were urgent, such as eminent domain and double taxation. On the latter issue, Biggs included the ability to apply for a refund for some taxes. In Arizona, there was also a lot of fear about foreign entities. So Representative Biggs included a piece about certifying these entities to ensure that foreign entities do have a presence and the necessarily qualifications. Most of these entities would have no problem meeting these requirements, and it made the people happy. So after working on the legislation for five years, finally under somebody else's name it came through in a clean and rapid way at the end of the session.

PPP Partners Working Group Business Meeting

Committee Discussion

The Working Group briefly brainstormed about what might be useful at the next meeting, which will be in conjunction with the NCSL Fall Forum in San Diego, California, December 9 to 12, 2009. Jim Reed from NCSL reminded session participants that the goal is also to have a draft of the "toolkit" report by that time, inviting participants to also comment on what content should be included in that report.

Ideas for the report included:

- The report must address the issue of whether PPP contracts should be subject to **final legislative approval**.
- There should be a section on **how proposals should be evaluated** and what needs to be included in a **solid project analysis**.
- Include a matrix on the **formulas used by different states** (e.g. Oregon, Indiana, Texas and Pennsylvania) and the components of those bids.
- Address how to do successful **outreach and education** of the public to achieve stakeholder buy-in and support.
- Include the issue of **social welfare and public good analysis**.
- Look at **how to use PPP proceeds**, either from an up-front payment or a revenue-sharing model.

Ideas for the next meeting included:

- A possible **tour of SR 125** (a PPP near San Diego).
- Discuss and consider the **Rapoport working group proposal**. Is this a group that can provide the kind of nuanced, balanced analysis the Partners Project advocates?
- Learn about the **southern California experience with PPPs**.

Ideas for other tasks for NCSL to do before the December meeting included:

- **Clarify the federal position on** PPPs—including funding—especially in relation to developing reauthorization legislation.
- **Post resources on the NCSL website** such as the Pew report, meeting summaries and PowerPoint presentations.
- Compile and post the **project bibliography**.

Representative Terri Austin and Jim Reed of NCSL thanked all attendees for their participation and reminded everyone again about the next meeting of the Partners Project in conjunction with the NCSL Fall Forum in San Diego in December.

Appendix A
Presenter Biographies

Nicholas (Nick) Farber is a Transportation Policy Associate with the National Conference of State Legislatures in Denver, Colorado. He works on transit, transportation finance and emergency preparedness policy. Currently, he is working with the California Department of Transportation (Caltrans) on an Interagency Coordination Project that aims to provide mobility choice options to the general public with particular emphasis on transportation services for elders, individuals with disabilities, and those with low incomes. He also has authored briefs on using school buses for paratransit trips, volunteer driver liability, and on paratransit insurance issues. He received his J.D. from the University Of Denver Sturm College Of Law in 2007, and is licensed to practice in Colorado.

John Foote is a Senior Fellow at Harvard's Kennedy School of Government where he specializes in the area of transportation funding policy, particularly privatization. Prior to coming to the Kennedy School, Mr. Foote was a co-founder and executive vice-president of TransCore, a transportation engineering company specializing in intelligent transportation systems and services, and a public finance investment banker. Mr. Foote has a Bachelor of Science degree in engineering from Cornell University and a Master of Public Administration degree from The Wharton School of the University of Pennsylvania.

Rob Henry is Executive Director of the Greater Valley Forge Transportation Management Association in King of Prussia, Pennsylvania. The mission of the Greater Valley Forge TMA is to offer a forum in which the business community and municipal, county and state officials can collectively work on transportation issues affecting the Greater Valley Forge area. Mr. Henry manages the organization's daily activities, which include over a hundred dues-paying members, four transportation coalitions, multiple shuttle routes and many other projects. He serves on the Delaware Valley Regional Planning Association's Regional Transportation Committee and several other related organizations.

Miller Hudson is a former Colorado legislator (1979 – 1983) who has remained active on public issues for the past 30 years. His consulting work has included nuclear waste management and disposal, rural economic development and transportation issues. Mr. Hudson served 5 years as the Executive Director of the Colorado Intermountain Fixed Guideway Authority, which managed a Federal Transit Administration grant studying the challenges of constructing a high-speed transit technology along the I-70 corridor between Denver International Airport and the state's mountain resorts. Most recently he has served as Executive Director of the Colorado Association of Public Employees.

Frank M. Rapoport is a Senior Advisor to the Council of Project Finance Advisors Working Group, and a partner the law firm of McKenna, Long & Aldridge LLP. Mr. Rapoport specializes in business initiatives for clients in the transportation, real estate development, construction, design and engineering, defense and government services industries. His team at McKenna includes specialists in U.S. and international government contracting, government affairs at all levels, and seasoned business and economic advisors with years of transportation, infrastructure and privatization experiences, both domestic and internationally. Mr. Rapoport served for five years as a Trial Attorney in the Civil Division of the U.S. Department of Justice in Washington, D.C., and was a litigator for government contractors.

Appendix B
Question and Answer Sessions

Trends and Directions in Transportation PPPs

Question: Do we need to set up a center of excellence at both the state and federal levels?

Frank Rapoport: Yes. For example, California has one. Every state may need one. The thing is, the federal government shouldn't be telling states what to do. There are so many states—around 20—that haven't even gotten off the ground in regards to using PPPs. Some of this is because of funding situations. At least one state—I think it is Montana—has a transportation funding surplus. But the federal government does need to be sending positive signals about using PPPs, instead of negative signals such as those that were in the Oberstar reauthorization bill.

Comment (Dennis Houlihan, AFSCME): One thing about PPPs is that they are so ill-defined. It is hard to see what is going to happen 10 to 20 years out, which is why the labor protection issue is such an important one. We would of course like to see labor protections in statute—we want more than a promise, we would like to see it in law. For those of you who haven't seen the final report of the New York State Asset Maximization Commission, it has a very interesting section on labor protections.

Frank Rapoport: Yes, wonderful. As a matter of fact, the Service Employees International Union (SEIU) will be joining the Council of Project Finance Advisors (CPFA) Working Group. Also, former Governor Dean, one of our strategic advisors, is a strong supporter of labor. Also, the contractors I work with do everything they can to make sure that labor is happy—otherwise the project won't happen. One option is the availability payment model. Instead of replacing state workers, they stay in place until the project is finished.

Comment (Senator Dennis Nolan, Nevada): It would be great if federal money could be used to match PPPs.

Frank Rapoport: Yes. Again, the federal government needs to send a positive signal by putting federal resources into supporting states in these efforts.

Question: I am struck by the low level of knowledge about PPPs in local government. Is anybody reaching out to educate localities through NACO, the National League of Cities, and so on?

Frank Rapoport: There is some outreach, but it's not getting down to the ground in the localities. On the other hand, the statistics show that 83 percent of state legislators are favorable to PPPs. And there are successes to be talking about. The Department of Defense housing is beautiful. People need to be bragging about PPPs, not just talking about the aggravations.

Bringing the Private Sector into the Planning and Implementation Process

Question: If I get what you're saying, the final point is that you have competition so it drives down labor costs. Because it seems that RTD is handling all of the costs except for labor, so is there a dual wage system? Or are the private operators providing less pension or less insurance? Otherwise, it is unclear where the cost savings are coming from.

Miller Hudson: Every one of the private vendors is represented by the same union that represents RTD drivers. Also, the private operators do their own maintenance. However, the administration of the system does stay on the public side. Contractors come in and bid at the market rate. So yes, if you work for a private vendor, you may be getting paid $3 to $4 less per hour than if you work directly for RTD. I can't speak to their benefits for you.

Question: Do the private operators cherry-pick easier or more efficient routes?

Miller Hudson: No. RTD decides which routes to bid.

Follow-up question: So in fact, RTD could be putting more difficult or costly routes out for bid?

Miller Hudson: Yes.

Question: Have there been any routes that had no takers, or no acceptable bids?

Miller Hudson: Frankly, I don't know. I know that there have been problems with on-demand transit routes. But that's true everywhere, I'm sure. I can say that there is no shortage of bidders on those routes.

Question: What about management issues for the RTD system?

Miller Hudson: As far as I can tell, it is working pretty well. Performance standards are set in the contracts. Supervision from RTD consists mostly of verifying whether the private operators are hitting the marks, regarding those performance measures.

Question: Is there a difference between the PPP model used for buses and the one used for FasTracks? It seems that FasTracks is more of a concession model—not just contracting out operation, but having private capital and long-term investment as well.

Miller Hudson: Yes, that's correct. The southeast light rail corridor was a design-build model, and the gold line to the airport will probably be a design-build-operate-maintain (DBOM).

Question: Could you say more about RTD's role in transit-oriented development?

Miller Hudson: Transit-oriented development and zoning issues have mostly remained with the local governments where the transit lines are located. RTD might handle the parking structures. For the mountain line, though, we might want to capture that, since the costs are so high.

Question: Are you still proactive in bringing a system to Colorado that will run between Denver and the ski resorts?

Miller Hudson: At the moment, there is such a severe shortage of transportation dollars in Colorado that nobody is ready to request proposals. If somebody walked through the door with a proposal, however, they might get a civil hearing. But we are having problems just patching potholes, let alone taking on a huge project. I can say that Colorado and Texas submitted a combined application for high-speed rail funds for a line from Fort Collins to El Paso, but that would probably be a conventional bullet train.

Comment (Rob Henry, Pennsylvania): It will cost $40 billion for the line in California, but they're only asking for $6 billion. Then the Florida line will cost $12 billion, but they're asking for $2 billion. So states need to find other ways to fund rail.

Comment (Fred Lewis, West Virginia): Denver's ridership numbers seem very interesting.

Miller Hudson: The Denver area has been very attractive. Our housing prices are staying up—we haven't had a collapse of our real estate market yet. As more and more light rail lines come into service, we'll see ridership continue to track upwards. All projections show that the more complete the system is, the more ridership you will attract. And then buses will be more of a feeder system than long-distance transportation provider.

Question: How do you see the tension between commuters and other modes, for example the freight issue? And is waiting in traffic really compelling employers to relocate?

Rob Henry: We do a lot with the commuter and the employer. And they are leaving—they're either going to other parts of the country, or outsourcing to educated people in Asia and Europe who are willing to do the job. So we are trying to keep them here. But we also work with truckers and freight companies. We just sent a letter of support to the House in D.C. to create a national freight bill to help freight haulers and long-haulers get additional funding. Also, we advocate just-in-time delivery. Congestion leads to billions of dollars in lost productivity, whether it's product or a salesperson just sitting there. The question is, how can we do it more efficiently?

Knowing where we are with funding, I don't see us going to a vehicle-miles traveled fee anytime soon. I don't think there is support in the United States for that. So we have to find another way to leverage funding. One concern with leasing an asset is, how do you control the toll? We work with large employers and Chambers of Commerce and others in the community who are trying to sustain growth and solve these problems.

Question: Could you explain more about the two mixed-use development projects and Amtrak being a bottleneck in the process? Who is involved in the projects, how were they put together, and what do you anticipate happening with those?

Rob Henry: The Paoli project has what is basically a municipal district that they formed. The local transit authority—in this case, SEPTA—has come to the table and put up so much for a parking garage. And the businesspersons' association and residents are on board, and the environmental clean-up is complete. They want to build a total mixed-use garage with shops. This is all in an area that is congested and does not function well today. Then there is Amtrak, who has been on board and comes to the meetings, but every time it comes to the point where we are ready to move, Amtrak keeps dragging their feet. Part of that is that under the Bush administration, Amtrak didn't have a full board. We're hoping that with the new administration's support, Amtrak may move on some of these projects. Also, part of the hang-up is that Amtrak owns part of the land, but they're not invested in what is done with it.

It is the same problem with the other project. Amtrak just doesn't have a long-term vision for what should be on the land or what they want to see at their stations—it doesn't matter to them. The private entities are on board and willing to commit their own dollars. There's been talk about the $8 billion committed to high-speed rail and possible projects in Pennsylvania, but without Amtrak, which runs a lot of the rail cars, we're stuck.

Question: Is your diagnosis of the problems with Amtrak that it has to do with finances, or culture, or political leadership, or something else? And do you think this will get better? Right now, with the high-speed rail initiatives, Amtrak is presenting itself as the operator of choice, but states are skeptical.

Rob Henry: I think Amtrak is one of those entities that over the years has been run in such a way that it has lost people. Some executives in our region left because they kept hitting a wall. So it hasn't retained the best and the brightest. Maybe it will get there again in three or four years with the coming investments. We'll see what happens in September at the Amtrak board meeting and if they're going to take up some of these projects.

On the Paoli project, we're on our second developer because the first developer walked away. And these are good developers that want to invest in old rail stations and environmental clean-ups that cost them a lot of money. They are making profits, but they are also interested in long-term success and not moving people further and further out into the suburbs.

Comment (Eric Bugaile, Pennsylvania): I disagree with the premise that the Turnpike lease would have diverted people on to other roads. The private operator would have encouraged people not to leave the road through things like lower tolls during off-peak hours. So it might have helped congestion rather than making it worse. Also, the lease would have given the state $12.8 billion in cash up front, which would have left the state debt-free. Also, you said it was a 99-year lease, but actually, it was a 75-year lease.

Rob Henry: The only thing I would say about the Turnpike is that the tolls were unpredictable.

Follow-up comment (Eric Bugaile, Pennsylvania): Actually, the tolls were specifically spelled out and capped in the lease for the entire 75 years. But now, the Turnpike Commission has total control and can raise tolls anytime, with no cap.

Comment (Representative Linda Harper-Brown, Texas): When we researched it in Texas, we found that, even if there was a cap on tolls, if a private entity wasn't making the profits it wanted, it could go back to legislators and get those caps raised. So it's unclear what caps really mean in practice.

International Perspectives on PPPs: The French Model

Question: I noticed you didn't make a judgment as to whether the U.S. deals were "better." I suppose each state is going to make those decisions based on whether they want to maximize revenue or get a shorter term on the concession, or increase capital requirements, and so on. Can you comment on how states are doing more of the "tinkering of the dials," especially on greenfield projects, to make projects more feasible?

John Foote: Your analogy of "tinkering with the dials" is an appropriate one. My view of the Skyway and Indiana deals is that the dials were turned up on "full" with the primary objective of maximizing the amount of cash to be received. I think this was also the case in Pennsylvania. In my analysis, I think—this is my personal opinion—that some of the balance was lost, that a financial problem was being solved. I don't think transportation assets should be used in that particular way. Decision-makers in city and state government have the ability to "tinker with those dials" to strike a balance that serves the public interest. For the three or four years that we've been living with brownfield as well as greenfield concessions, the debate always seems to come down to money. In this environment, where everybody is cash-strapped, that's not unnatural. But based on our analysis, that is a short-sighted approach. A more balanced approach is likely to be more effective in the long-term.

Question: Is there any difference between the U.S. and French models regarding maintenance of road surface, keeping up required throughput of traffic, and so on?

John Foote: The models had very similar requirements. There are certainly some differences, but my colleague says the three French toll roads look and drive like toll roads in the United States.

Obviously, the Chicago Skyway is a different situation than the Indiana toll road and Pennsylvania Turnpike. But in terms of operating and maintenance standards, they were more the same than different, so we determined that that was not a cause for the difference in price. We were able to isolate the difference to be almost purely due to the financial terms and not to any other drivers.

Question: Would neutralizing some of those variables on a state-by-state or federal basis have the effect of drawing more bidders to a process, or fewer?

John Foote: From the bidders' perspective, it makes no difference whether the bid has been set up to maximize revenue or not. They are going to set up their bid to maximize their return on investment, within the bid parameters. In fact, the concessionaire in France will get the same return on investment that the concessionaire in Indiana will get. Capital is local. The same companies were bidding on the roads in France and in Indiana, and they require the same return. It's just that the parameters they use to get there are different. The operating constraints are different in France, but that is reflected in the price they are willing to pay. What is implied in your question is whether the language in the proposed reauthorization bill about concessions and whether the federal government should have a hand in deciding concession terms and toll regulations—this might tie the hands of state legislators, but it probably wouldn't do anything in terms of scaring off investors. Investors will bid within the parameters they're given, and it will all be reflected in the price.

Question: One model of forcing the kind of analysis you're talking about is to put it in federal statute. Another model is the kind of independent center of excellence that Frank Rapoport was talking about. Other than your own work, do you have any thoughts about how to take this kind of analysis and make sure it gets done, maybe based on how they did it in France? Who pushes that?

John Foote: Well, a forum like this is a starting point. When Chicago started, there seemed to be one way to do it: set up the concession term to be as long as possible, allow the concessionaire to increase toll rates as high as politically feasible. Indiana in many respects followed suit, as did Pennsylvania. My belief is that Pennsylvania ran into heavy weather about getting that concession approved because some people started asking if it was structured for purely financial reasons or whether it was grounded in public interest. I would not be in favor of imposing restrictions on state legislatures for concession terms, but I would like to see concession terms open to public debate as policymakers consider these projects. In the Skyway deal, certainly, there was no public debate—that deal was handed as a *fait accompli* to the City Council along with a $1.8 billion check. They had the choice to vote it in and take the check, or vote it out and do something else. There was no public consideration of whether or not that deal was as good a deal in the public interest as it was regarding financial interest. Financially, that was a home run, no doubt about it. But there are some significant long-term issues that the City of Chicago, the metropolitan area of Chicago and the State of Illinois will need to wrestle with for years to come. I doubt that deal would be done today because debate has widened to include some of these other issues besides just the financial concerns.

Question: There are three or four bills in Congress now, including the Oberstar bill, that appear to be restricting states from the federal level. My sense is that there ought to be some role at the federal level, some at the state level, and some for localities. I think NCSL and the eventual report from this Partners Project will need to start identifying the national, state and local roles. Have you seen any research on this issue?

John Foote: Going with the international perspectives, there is an oversight body that has been formed in Canada—although it hasn't gotten too far along—that is setting certain standards for Canadian PPPs. There are similar groups in Australia, not at the federal level but at the state level in the five states, that oversee PPPs of all different types, not just transportation. That is one approach. Whether that has the weight of law, I don't know.

Comment (Geoff Segal, Macquarie Capital): In Australia, there has been a new federal infrastructure that has been created, but it does not have the weight of statute. Its sole purpose is to pull the best practices from the five state entities and to build a kind of national framework.

John Foote: My concern about having federal restrictions is that each situation is different and these deals are all so different, so specialized, that one size of regulation doesn't fit all. Though I think the U.S. concession terms were too long, there may be situations out there where a 75-year deal does make sense. I would be concerned about restricting flexibility and creativity on the part of state legislatures to proceed. I think the assurance is to put these deals up for public debate before they're signed. I think that would give a better answer than what we've had so far. Transparency and public debate are sometimes hard to come by.

Question: Do you have any idea what might happen in California? My understanding is before a local government can do a PPP, they must send it to the California Transportation Commission (CTC), but there is no veto. Do you think the process will be a rubber-stamp, or what?

John Foote: I don't know, but I think any process that encourages any type of public debate or discussion before the concession terms are set in stone is a good thing. Again, it's a way to get to a more balanced outcome.

Question: In the April meeting, the speaker from U.S. PIRG raised the issue of requiring legislative approval for the deal, which raised some interesting conversation. One option is that the legislature could set up the parameters and have people bid against them. But should the legislative body get final sign-off on the actual final deal? This seems to be a big question.

John Foote: Well, in the French model, because it was best bid and not high bid, there was some subjectivity in determining to whom to award the contract. Now, as is the case in many of these deals, the best bid was also the high bid. It can be difficult for a public official, as you well know, to walk away from the high bid. But in France, because the qualitative information was also required, the high bid was in many respects also the best bid. But in the three U.S. deals—Chicago, Indiana and Pennsylvania—the bid was literally a number in an envelope. Of course, the bidders had been pre-qualified, so they were all qualified operators, not just some Tom, Dick or Harry off the street. But all they were doing was providing a number, so you had no idea what their labor strategy, toll strategy or operating strategy away from just operating the road would be. What about service plazas or rights of way? All of that was very visible and transparent in the French projects. That didn't mean that the high bid was pushed out—in fact, the high bid won in all cases—but I think it was a better high bid.

Question: One thing I've heard from chamber of commerce members who are interested in PPPs is that in the United States, political risk is one of the biggest obstacles to overcome—that investors can get 18 months into the process and then have the rug pulled out from under them. Does France have any sort of guarantee on their processes, so that if you start the bid process, the deal will get done, or is the political risk the same as it is here?

John Foote: Well, the political risk is less in France. France has a history of doing PPPs, so they have legislation in place. In Pennsylvania and Indiana, those bids were accepted with no enabling legislation in place. The bidders walked into those processes, hopefully with their eyes wide open that there were several hurdles they had to get over. I think it was one vote in Indiana that won the day—it was touch-and-go until the last moment. And Pennsylvania obviously got mired in a lot of political issues, probably both relevant and irrelevant. I think that Pennsylvania situation left a very sour taste in a lot of investors' mouths, and it would be very difficult to do a deal that size today without having PPP enabling legislation in place.   It cost the bidders in Pennsylvania an enormous amount of money with very little to show for it in the end.

Question: Could you make your remarks available?

John Foote: Yes, I will send them to NCSL.

State PPP Legislation Overview 2009

There was no question and answer session after the State PPP Legislation Overview presentation.

Legislator Roundtable

There was no question and answer session after the Legislator Roundtable.