

# Federal Interference in State Highway Public-Private Partnerships Is Unwarranted

## A Response to Oberstar and DeFazio

by **Robert W. Poole, Jr. and Peter Samuel**

Rep. James Oberstar (D-MN) and Rep. Peter DeFazio (D-OR), chairmen of the top transportation committees of the U.S. House of Representatives, recently sent a misleading and most unhelpful letter to state governors, legislators and public officials. In their May 10 missive, Oberstar and DeFazio “strongly discourage” states from entering into public-private partnerships “that are not in the long term public interest.”

State officials do not need to be warned by U.S. congressmen against signing agreements that are not in the public interest. State officials make their own judgments of what agreements are in the best interests of their publics. In all the recent transportation public-private partnership agreements of which we are aware, the state and local officials concerned have followed a rigorous approval process and been advised by both in-house and outside experts, specialist attorneys and financial analysts.

The letter repeatedly alleges states are in a “rush” to sign public-private partnership deals. There is no rush. The states have each taken time to consider and pass public-private partnership legislation, moving carefully to make amendments where problems have arisen. For example, Texas is currently updating its public-private partnership law to address taxpayer concerns. The states that are furthest

advanced – Texas, Georgia and Virginia – now have a carefully evolved legislative and regulatory framework for PPPs and considerable expertise based on experience in handling them.

Other states like Illinois, New Jersey, and Pennsylvania are newer to the process, but they are approaching it in the same deliberative fashion, hiring expertise where it isn’t available in-house, learning from the experience of others, seeking legislative support, and analyzing how concession agreements can be detailed in order to protect the public interest.

In every state and in every project, concession companies have to pass an initial screening that weeds out those lacking adequate financial backing or experience. Unsolicited proposals are subject to competitive bids. Proposals are assessed by panels of experts, and final selections are subject to negotiation on every last detail. Agreements are only finalized after top officials have signed off.

**“The Oberstar-DeFazio letter is purely negative and completely overlooks the benefits of public-private partnership concessions.”**

The only “rush” here is Oberstar and DeFazio’s misguided rush to condemn this useful, vital infrastructure tool. States with collectively many more years of close involvement in the public-private partnership process, and far more

knowledge on this topic than resides in Congress, do not need warnings or threats from Washington, D.C.

Oberstar and DeFazio also threaten that their committee will “work to undo” any state public-private partnership agreements which they judge deficient. This is an outrageous threat and abuse of power.

Federal legislators’ role is to legislate, not to attempt to undo state contracts legitimately entered into. If there are disputes over contracts, the courts will adjudicate them, though concession contracts have carefully crafted provisions for negotiation, conciliation, and arbitration before litigation. Congressional committees have no business interfering in contracts entered into by state authorities.

The chairmen express various specific concerns about toll concessions in general, concerns that on detailed examination have little grounding in reality. One major complaint they have is that private concessions “threaten to undermine the integrity of the national (highway) system.”

Except in national parks, national forests, on Indian reservations, and on military bases, the federal government has never been directly involved in planning or managing highways. The Interstate system and the National Highway System have always been under diverse control of the 50 state DOTs, metropolitan planning organizations, counties, cities, public toll

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authorities, bi-state agencies, and a few private facilities. The federal role has been limited to overall network planning, setting standards, and providing partial funding. Interconnections between states have been managed through ad-hoc bilateral arrangements, corridor associations, and other avenues of give and take. There is no detailed central planning as assumed by the chairmen's notion of a national system under threat. Public-private partnerships fit easily into the existing ad-hoc framework, just as state toll authority roads have done for over 50 years. Concessionaires have a strong self-interest in cooperating to provide connectivity since the more connections they have with the larger road system, the more toll-paying traffic they will have.

The letter also targets so-called non-compete clauses, which it claims will prevent capacity additions and safety improvements. Only one concession agreement - for California's 91 Express Lanes (written in 1991) - banned extra capacity. That provision was drafted at a time when environmentalists wanted, and got, promises that additional roadways would not be added. The 91 Express Lanes non-compete clause was a mistake, as all subsequently realized. Since then there has never been a ban on adding capacity to parallel free routes near toll roads. Some concession agreements contain provisions for compensation for toll revenues lost if free capacity is expanded beyond an amount agreed to in the concession - and if the private companies can prove the new roads are causing financial losses. This is usually a sensible measure to reduce uncertainty in selling toll revenue bonds and to improve the value of concession bids, though obviously there are matters of judgment in the trade-offs. This much is clear: states do not need, or want, one-size-fits-all policy on non-compete compensation imposed by the federal government.

Oberstar and DeFazio also claim that only public-private partnerships that immediately provide new capacity are in the public interest. This is quite a turnaround for self-styled progressives. Not long ago their mantra was that "we can't build our way out of congestion" and should just use our existing highways more efficiently. Now they apparently dismiss the benefits of businesslike management to use the existing roadways more efficiently (e.g., with value pricing) in favor of the test of how much new capacity they add. In truth both are needed, but the mix of more efficient management and extra capacity will vary from project to project.

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Existing toll roads may not need much additional capacity at first, but concessions can still be a good idea. By keeping tolls in line with inflation, they ensure proper maintenance and repair and additions of the latest technology. Concession agreements can provide congestion trigger points that require the companies to make capacity additions. The Indiana Toll Road concession is a model in this regard. It requires immediate lane additions in the busiest stretch plus a deadline for electronic toll collection implementation, promising major improvements in travel times and safety. For the longer term it requires capacity additions so as to maintain a minimum Level of Service C in rural stretches and Level of Service D in urban stretches. It is foolish to judge concessions solely by how much extra pavement they lay down, when other measures such as removal of bottlenecks or interchange ramps or toll plaza automation may be more cost effective in the near term.

In short, the Oberstar-DeFazio let-

ter is purely negative and completely overlooks the benefits of public-private partnership concessions:

- Providing access to large new pools of capital, at a time of huge highway funding shortfalls;
- Bringing true business management into toll roads in place of political appointees;
- Making use of value pricing for traffic management to prevent overloading of facilities and a breakdown in traffic flows;
- Insulating road pricing from short-term political expediency and allowing prices to be set at realistic levels reflecting underlying costs and the value of free-flow travel.

The chairmen offer no alternative to public-private partnerships. The revenues from traditional fuel taxes, licensing, and registration fees are fully committed to maintenance and minor improvements to the existing free system. Concessions offer access to tens and ultimately hundreds of billions of dollars to finance much-needed improvements to our highway system.

The federal government should be trying to help states improve mobility for their citizens and keep local and state economies growing. Instead of threatening to "undo" much-needed state projects, Oberstar and DeFazio would be well-served to ask states, "How can we help?" Public-private partnerships certainly offer states, taxpayers, and commuters a lot more than two congressmen butting into state business.

■ **Robert Poole is director of transportation studies at Reason Foundation, where he has advised the last four presidential administrations.**

■ **Peter Samuel is a senior fellow at Reason Foundation and publisher of TollRoadsNews.com.**

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