Testimony of State Representative Terri Austin (D-Indiana)
House Subcommittee on Transportation and Infrastructure
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Thank you, Chairman Oberstar and Chairman DeFazio for the opportunity to testify before this committee. My name is Representative Terri Austin from Anderson, Indiana. For the past several months, I have served as the Chairman of the Roads and Transportation Committee in the Indiana House of Representatives.

In March 2006, the Indiana General Assembly enacted legislation that gives our state's executive branch the authority to enter into public-private partnership agreements for the financing and development of limited-access facilities, tollways, roads and bridges, and other infrastructure assets.

This same legislation, House Enrolled Act 1008, also allowed a quasi-state entity called the Indiana Finance Authority to enter into an agreement with a private consortium to lease the Indiana Toll Road. The Indiana Toll Road is a 150-mile stretch of east-to-west roadway in northern Indiana that includes Interstates I-80 and I-90 and ends at the Illinois State Line and the Chicago Skyway. The lease agreement, finalized with the multi-national firm Cintra-Maquerie, was a concessions model that gave up tolling revenue and rights to the road for a period of 75 years in exchange for a one-time upfront payment of $3.8 billion dollars.

The Indiana Toll Road Concession and Lease Agreement gave the exclusive franchise and license to operate, manage, maintain, rehabilitate and toll this thoroughfare. In addition to the toll revenue, the private entity also obtained the rights to all revenues generated by agreements with vendors providing goods or services along the Toll Road.

In order to safeguard the public interest and provide for adequate public involvement, it is crucial that the executive branch and legislative branch work in partnership to determine project priorities, development and implementation, and evaluation and reporting processes. I would like to offer for your consideration four principles that deserve consideration by this committee and any legislative body that is being asked to consider public-private partnership agreements.

1. Adequate Public Debate Regarding P3 Agreements
First and foremost, elected officials should debate whether or not public-private partnerships based upon agreements that last through two, three or four ***generations*** represent good public policy and good transportation policy.

For this to happen, the public and their duly elected representatives need more than a few short weeks to build a knowledge base about P3 agreements, examine prospectus reports and understand the unprecedented amounts of information that accompany projects of this nature. This includes an opportunity to examine the various P3 models and weigh the pros and cons of such agreements so that both legislators and the public can participate in meaningful discussions.

Indiana has a part-time citizen legislature, and the eight weeks of the 2006 legislative session did not afford enough time to consider such a complex and far-reaching proposal before we were asked to cast a vote that would effectively tie the hands of both the executive and legislative branches for decades to come.

Ultimately, the public ***should*** have some level of discomfort with elected officials who serve two-, four-, or even six-year terms when they propose to enter into 75- or 99-year ***contractual*** obligations. As legislators, we know that laws can be amended and even repealed. However, there are simply very good reasons why long-term leases of public assets deserve extra scrutiny.

Citizens deserve the right to change their minds about public policy and the courses that their leaders have charted. Even if it reduces the windfall from a long-term P3 agreement, government needs to make certain that agreements are not too difficult to extract ourselves from.

Secondly, we need to make sure we are not pursing P3s solely to avoid other policy options that may be even more complex or perhaps more politically difficult. Are the most common methods of funding transportation, like per gallon gasoline taxes, sustainable as we strive towards greater fuel efficiency? What are the alternatives? Are we neglecting mass transit options because of the lure of building roads with someone else's money?

These are difficult questions that should be pursued at the same time as we examine P3 agreements. There must be a diverse strategy for keeping our nation's infrastructure strong. We should not put all of our eggs in one basket simply because private equity firms are flush with cash and looking for roads to lease.

2. Verified Project Need and Support

Projects that are being promoted for P3 financing should be part of an established comprehensive, long-range plan for transportation infrastructure. The decision to undertake any project should not be about "following the money" or taking advantage of a newly-found "cash cow." There should be an identified need for the project that is substantiated by feasibility studies and verifiable data.

When vetting a project and an agreement, there should be strong support from local elected officials and residents, and a thorough examination and understanding of the consequences of implementation. It would desirable to have local involvement and support throughout the entire scope of the project, including the conceptualization, design, implementation and evaluation of the proposal. For projects that involve federal transportation assets, substantial involvement of federal officials should also be accommodated. Roadways, by their very nature, cross multiple jurisdictions and a systemic approach should be employed when considering changes that will be in effect for many years to come.

3. Transparency, Due Diligence, and Independent Monitoring

In the case of Indiana's P3 agreement for the lease of the toll road, it was essentially a *fait accomplit*. An RFP for the project had already been developed, disseminated and responses were received prior to any legislative knowledge or involvement. Although requests for information were submitted by both legislators and the public, answers to all requests were not provided by

parties involved in the negotiations. Specifically, prospective bidders names were not released, nor was the public and other elected officials provided opportunities to examine any additional bids prior to the final selection. Any reluctance to disclose any documentation, terms of any agreement or lease, or financial reports does little to foster confidence that such transactions are above board and in the public interest.

There must also be adequate opportunities for due diligence because of the complex nature of the proposals and the agreements. Any entity hired to negotiate, or examine and evaluate a P3 proposal should be free from any actual or perceived conflicts of interest or opportunities to profit from the proposal. Such neutral entities should also be used to evaluate the ongoing performance of P3 projects to make sure that the terms of the contract (such as service levels, required investments and repairs, etc.) are being met. Once a deal is entered into, it is incumbent upon elected officials to be vigilant and make sure that all parties live up to promises made.

The clarity of the language in the contract itself must be able to withstand years of legal challenge and interpretation. In the actual contract for Indiana's agreement, some language appeared to be in conflict with other parts of the document. In some instances, the transaction was referred to as a sale, and in other instances it was referred to as a lease. This designation (sale) was necessary to allow Cintra-Maquerie to take advantage of tax breaks as a part of the final negotiations. However, years down the road, in the event of a legal dispute, how will we be able to guarantee that courts interpret the language as intended?

4. Asset Realization and Distribution

Cash-strapped state and local governments seem to be choosing to receive the funds realized from P3 agreements as large, up-front sums of money. When this occurs, all monies should fall under the appropriation authority and oversight of the legislative branch. In Indiana's case, the bulk of the funds from the toll road lease will be reinvested in transportation infrastructure. However, in my view, the distribution of the proceeds was not based on demographics or transportation priorities.

Resources were diverted from statewide needs and allocated to specific regional areas to gain favor for the proposal. $360 million dollars was allocated among seven counties and the remaining 85 Indiana counties shared in $150 million dollars for local road and street projects. It is important to note that Indiana still has unfunded needs of over $2 billion dollars in local road, street and bridge projects that have not been addressed by the General Assembly or the executive branch.

Summary:

In closing, I want to be perfectly clear that I do not think that all public-private partnership agreements are bad and should be rejected out-of-hand. However, based on what I have witnessed in Indiana and as reported in other states, asset monetization and the long-term lease of transportation infrastructure deserves far more public discussion and debate than it has received.

As state legislators and leaders, we are very aware of the challenges faced by federal and state officials who are trying to do more with less. We are also aware of the impending crisis in the Highway Trust Fund and how it will impact revenues available to state and local governments.

Our reluctance to raise state fees for almost twenty years and your reluctance to raise the federal gasoline tax have contributed to our current dilemma. I am not convinced that more taxes are the answer to this problem, however. Nor do I believe that we can build our way out of congestion--public mass transit deserves to be a part of state and federal discussions and funding considerations.

As a state legislator, I look forward to working in partnership with you to address these challenges and identify creative solutions to transportation funding so that we can ensure sound public policy decisions are made in the interest of citizens and future generations.