U.S. Department of Transportation
Federal Highway Administration

Memorandum

Subject: **INFORMATION:** Proposed Utility Installations Within Massachusetts Turnpike Right-of-Way

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From: Dwight A. Horne
Director, Office of Program Administration

In Reply Refer To: HIPA-20

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To: Lucy Garliauskas
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In response to the Division's request for guidance regarding the Massachusetts Turnpike Authority's (MTA) proposal to install utilities within the rights-of-way of the Massachusetts Turnpike (Turnpike) which is designated as Interstate 90, we offer the following:

1. Because no Federal-aid highway funding was used in constructing or maintaining this section of the Turnpike, the FHWA does not look to the usual Federal statues and regulations in determining its jurisdictional authority to approve or reject the proposed utility installations.

2. The MTA is responsible for ensuring that all sections of the Turnpike designated as an Interstate route comply with the federal laws, FHWA regulations and policies, and national standards applicable to the Interstate System. If a section of the Interstate Highway System does not meet Interstate standards, its status as a part of that system is in question.

3. The Division, through its stewardship and oversight responsibilities, is expected to work with the appropriate State agency to encourage the MTA to develop the necessary policies and procedures and make decisions in a manner that ensures the Turnpike is being operated and maintained in compliance with these Federal requirements and national standards.

4. If the Division's partnering efforts are unsuccessful, and it is determined these sections of the Turnpike are not being operated and maintained according to these Federal requirements and national standards applicable to the Interstate Highway System, the Division has the authority to pursue a variety of legal measures to achieve compliance by the appropriate State agency.

Our final assessment containing additional guidance and background information regarding the proposed installation of utilities on the Turnpike is attached. This guidance is fundamentally built off of the principles and direction contained in the FHWA memorandum (July 12, 2004) titled "Federal Jurisdiction of the Massachusetts Turnpike". If you have any questions on this guidance, please contact Jeffrey Zaharewicz (Jeffrey.zaharewicz@dot.gov) at (202) 493-0520.

Attachments

Proposed Utility Installations within Massachusetts Turnpike Right-of-Way

Issue: The Massachusetts Turnpike Authority (MTA) is proposing wind turbine and solar panel installations within the rights-of-way of Interstate 90, the Massachusetts Turnpike (Turnpike). The Federal Highway Administration (FHWA) Massachusetts Division (Division) has requested guidance regarding relevant considerations and the FHWA's potential role and authority associated with either approving or accommodating this proposed installation.

Background and Key Points: The Division has indicated that the goal of the proposed installation of these features is to generate and enhance revenue, and not to operate Turnpike facilities or services they provide. Based on the anticipated use of the proposed turbines and solar panels, they are considered to be "private utilities" for the purposes of this assessment. The Division also indicated the section of the Turnpike which has been proposed for the installation of these features was constructed and has been maintained wholly by funds other than Federal-aid funding administered by FHWA.

Given that Federal-aid funding was not used to construct or maintain this section of the Turnpike, the FHWA does not have the jurisdictional authority to approve or reject modifications such as the proposed installation of the wind turbines and solar panels. Nevertheless, as specified in the FHWA memorandum (July 12, 2004) titled "Federal Jurisdiction on the Massachusetts Turnpike", the Massachusetts Turnpike Authority (MTA) is responsible for ensuring that all modifications to this section comply with the federal laws, FHWA regulations and policies, and national standards applicable to the Interstate System.

Decisions regarding the accommodation and possible relocation of private utilities (as specified in 23 CFR 645 Subpart B) within the right of way of the Turnpike should consider the provisions established for standards (as specified in 23 U.S.C. 109), use and access (as specified in 23 CFR 1.23 (b) and 23 U.S.C. 111) and maintenance (as specified in 23 U.S.C. 116) of the Interstate System. Other applicable laws, regulations, policies and standards that must be considered include, but are not limited to:

- AASHTO *Policy on Geometric Design of Highways and Streets;*
- AASHTO *Roadside Design Guide;*
- Manual on Uniform Traffic Control Devices (MUTCD); and
- The Highway Beautification Act (23 USC 131).

Additionally, while the MTA may operate as an entity independently from the Massachusetts Highway Department (MHD), the accommodation and possible relocation of private utilities within the Interstate System right-of- way would also need to comply with any State laws and policies which may apply to the MTA and the Turnpike, including the State's utility accommodation policies. For point of reference, the MHD is assumed to be the state agency responsible for working with the MTA to ensure that compliance with these requirements is achieved. If it is determined another agency is responsible for providing oversight to the MTA, such as the Massachusetts Executive Office of the Transportation and Public Works Department, all references to the MHD in this guidance would be substituted with that appropriate agency.

Jurisdiction and Responsibilities: The unique jurisdictional issues relative to the Turnpike make the roles and responsibilities of the MTA, MHD and Division key considerations in reviewing this proposal. The following information is provided to support the Division in defining these roles and responsibilities:

MTA – Any MTA decision regarding the proposed installation of the wind turbines and solar panels on the Turnpike shall be made in a manner that complies with all federal laws, FHWA regulations and policies, and national standards applicable to the Interstate System. If the MTA has no written policies and procedures to guide this decision in a manner that ensures compliance with these requirements, the MTA is encouraged to formally adopt the existing MHD's policies and procedures regarding utilities and the Interstate System, or work in partnership with the MHD and the Division to develop the appropriate policies and procedures. The policies and procedures the MTA must develop, implement and maintain shall ensure all portions of the Interstate System under their jurisdiction are being managed, operated and maintained in a manner that complies with the applicable Federal and national laws, regulations and standards.

MHD – The MHD should ensure the MTA considers the appropriate issues, thoroughly evaluates the impacts and makes decisions regarding the installation of the proposed wind turbines and solar panels in a manner that complies with federal laws, FHWA regulations and policies, and national standards applicable to the Interstate System. If the MTA has no written policies and procedures to guide this decision, the MHD is expected to work in partnership with the MTA and the Division to develop the appropriate policies and procedures. If appropriate, the MHD should encourage the MTA to formally adopt the MHD's existing policies and procedures to ensure all portions of the Interstate System under MTA's jurisdiction are being managed, operated and maintained in a manner that complies with the applicable Federal and national laws, regulations and standards.

Division – The Division does not have the jurisdictional authority to approve modifications on this section of the Turnpike, such as the proposed installation of the wind turbines and solar panels. The Division is expected to work in partnership with the MHD, to encourage the MTA decision making regarding this proposal is done in a manner that complies with all Federal laws, FHWA regulations and policies, and national standards applicable to the Interstate System. As stated in FHWA's July 12, 2004 memorandum, the Division is responsible for ensuring compliance with these requirements by "establishing a relationship of cooperation and coordination with the toll road authority…the best approach is for the FHWA Division to work with the toll authorities to make sure the basic design standards of the Interstate System are not compromised."

If the MTA has no written policies and procedures that assure the Turnpike is being operated and maintained in a manner consistent with the Interstate System, the Division is expected to work with the MHD and the MTA to foster their development and implementation. If the Division's efforts to partner and foster developing, implementing and maintaining these policies and procedures are unsuccessful, and if the Turnpike is not being maintained according to Interstate System standards, its designation as an Interstate Highway could be called into question. For noncompliance with certain laws, the FHWA has the ability to impose sanctions against the MHD (as specified in 23 CFR 1.36). The FHWA Administrator has the authority in the event of non-compliance by MTA to "…withhold approval of further projects in the State, and take such other actions that he deems appropriate under the circumstances, until compliance or remedial action has been accomplished by the State to the satisfaction of the Administrator".

Other Current Considerations: The following issues should be considered by the MTA in reviewing and approving their proposal:

Use of Interstate System Rights-of-Way: Temporary or permanent occupancy, use or encroachment, and use of air space for non-highway purposes are not allowed in the rights-of-way on sections of the Interstate System that have used Federal-aid funding administered by FHWA (as specified in 23 CFR 1.23 (b)). However, the FHWA (as specified in 23 CFR 1.23(c)) may approve permanent or temporary encroachments if such occupancy or use is determined to be in the public interest and will not impair the highway or interfere with the free and safe flow of traffic. The consideration and decisions associated with the permanent or temporary use of air rights of the Interstate right-of-way (as specified in 23 CFR 710.405) should follow these same requirements.

A critical consideration is determining whether the existing right-of-way is sufficient to accommodate the installation, operation and maintenance of the solar panels and wind turbines (which can reach over 100 feet in height) while not compromising the safe travel of the general public on the Turnpike. Other issues to be considered in this assessment and included in any proposal justifying this action include but are not limited to:

- Documentation and basis for the need to use airspace within the Turnpike right-of-way;
- Environmental considerations;
- Review of plans and specifications for the proposed features;
- Security analysis for compliance with AASHTO's *Guide to Highway Vulnerability for Critical Asset Identification and Protection;*
- Assessment of whether the installations conflict with future expansion of the Turnpike;
- Operations and safety analysis to assess potential impacts on traffic (e.g., ice accumulation on devices and falling on traffic); and
- Maintenance issues related to the features (e.g., how to maintain, access required through Turnpike right-of-way to perform routine maintenance or repairs).

Advertising: The Division has indicated the wind turbine proponent has expressed interest with installing acknowledgement signs and/or advertising on these proposed features. As stated in the FHWA's August 10, 2005 Memorandum addressing the use of acknowledgement signs, the use of highway right-of-way for advertising purposes is not allowed. This policy is based on current Federal law and regulations (as specified in 23 USC 109(d) and 23 USC 131). This memo distinguishes between signing intended as advertising, which generally has little if any relationship to the provision of highway services, and signing intended to acknowledge entities providing highway-related services. The intended purpose of the possible signing appears to be for advertising and is not allowed per the provisions of the August 10, 2005 memorandum. It should be noted that any signage installed outside of the MTA right-of-way may be similarly subject to control and compliance with the Highway Beautification Act to ensure the safety of motorists traveling on the adjoining Interstate System.

Utility Accommodation Policies: The State of Massachusetts' 1988 *Utility Accommodation Policy* issued by the Department of Public Works and the MHD 1992 *Policy on the Accommodation of Utilities Longitudinally, Along Controlled-Access Highways* clearly provide guidance for installations along defined Expressways and Freeways within State right-of-way. If this policy does not directly apply to the MTA, and no state statutes exist to govern this situation, the MTA should develop, implement and

maintain the necessary policies and procedures described above that would guide the decision making process regarding the proposed installations.

This policy provides well-defined criteria for granting or denying Permit Applications. These criteria should include the public's health, safety, and future use of the right-of-way. The assessment of these criteria and other influencing factors should also consider if other reasonable and feasible alternative locations are available at a reasonable cost.

Both the State and MHD policies include general considerations for accommodating or relocating utility facilities in a manner that is consistent with the provisions and conditions specified in the FHWA's regulations and policies. These State, MHD and FHWA policies place an emphasis on retaining an unobstructed clear zone and maintaining the desirable visual quality of the roadway when accommodating utilities within the right-of-way of highways. The requirement to maintain a safe clear zone and other safety-related considerations apply in assessing and making decisions regarding the accommodation of utility facilities regardless of the jurisdiction of the roadway.

Future Considerations: The above analysis is based on the current operation of the MTA and the MHD as separate public authorities. However, if a merger were to occur between these authorities, it is expected that the Division would conduct a program or process review to assess the implications of such a merger as part of their stewardship and oversight responsibilities. The proposed wind turbines and solar panels discussed in this analysis are examples of utility features that would be evaluated in this review, which should also include but not be limited to:

- Assessing the need to modify or amend the State's *Utility Accommodation Policy* and *Policy on the Accommodation of Utilities Longitudinally, Along Controlled-Access Highways*;
- Reviewing the installation, operation and occupancy agreements of utility facilities located within the Interstate System right-of-way for possible conflicts with Federal laws and regulations (e.g., revenue generation, outdoor advertising, transportation purpose) and State laws; and
- Identifying corrective actions that may be necessary to resolve any conflicts noted during the review

Supplemental Information:

-FHWA Office of Infrastructure's Memorandum titled *Federal Jurisdiction on the Massachusetts Turnpike* dated July 12, 2004 (attached); and

-*AASHTO Utility Accommodation Policy* and *AASHTO Policy on the Accommodation of Utilities Longitudinally, Along Controlled-Access Highways* (Sent to FHWA Division on July 25, 2006).

Federal Jurisdiction on the Massachusetts Turnpike

Subsequent to the inclusion of 2,100 miles of existing toll roads to the Interstate System in 1957, the Bureau Public Roads (BPR) (now Federal Highway Administration (FHWA)) issued guidance on the jurisdiction of the toll road authorities. That guidance was in the form of an Instructional Memorandum (IM) 20-5-67 titled "Jurisdiction of Toll Road Authorities to make Modifications in Toll Roads Designated as Part of the Interstate System."

The 1967 IM states that when Interstate designated toll roads are constructed wholly by funds other than Federal-aid funds administered by the BPR, such roads remain under the jurisdiction of the toll road authorities. What that meant was that the toll road authorities could make modifications to such facilities **without** approval of the BPR. Such modifications include the use of right-of-way (ROW) for non-highway purposes, use of airspace, installation of crossing by utilities, changes in access control, addition of ramps and/or interchanges or disposition of ROW.

However, the IM does state that it is expected that there will be appropriate procedures in place to assure that proposed changes or alterations of the toll road facility meet applicable AASHO (now AASHTO) policies and standards established for the Interstate System.

For the last 36 years, the principles set forth in this IM have been the basis of BPR's and the FHWA's policy for determining our authority and responsibilities on toll road projects.

There are three questions that need to be answered to clarify the Federal jurisdiction on toll roads:

1. Are all the rules, regulations, policies, and standards established for the Interstate System applicable to toll roads that have been made part of the system?

   All the geometric and design rules, regulations, policies and standards established for the Interstate System **are applicable** to toll roads on the Interstate System irrespective of how they were incorporated into the System or their Federal-aid funding status. This includes the Manual on Uniform Traffic Control Devices. Note that the outdoor advertising controls outside the ROW also apply pursuant to the Highway Beautification Act.

2. What approval authority does the FHWA have over toll roads?

   The FHWA's approval authority (as well as the application of all other FHWA rules, regulations, policies, and standards) hinges on whether or not Federal-aid funding is involved. As established in the 1967 IM and as maintained by BPR and the FHWA for the past 36 years, Interstate System

designated toll roads constructed without Federal-aid funds remain under the jurisdiction of the toll road authorities. Retention of commercial activities on toll road service plazas (rest areas) is specifically allowed by 23 U.S.C 111(a) even after a toll road on the Interstate System was converted to a freeway.

If no Federal funds are involved, the FHWA approvals are not required for modifications to the toll road. Only for those Interstate toll roads, or segments, on which Federal-aid funds have been used or a project on which Federal-aid funds will be used, are all the FHWA approval authorities, as prescribed for the Interstate System, applicable.

Exception to this generally "hands off" policy is in the FHWA policy for approval of new access points (interchanges). That policy states that if the toll road was added to the Interstate System under 23 U.S.C. 139 (now 23 U.S.C. 103(c)(4)(A)), then FHWA approval for new interchanges is required irrespective of funding.*

The FHWA Headquarters records indicate that the only portion of I-90 added to the Interstate System under former 23 U.S.C 139 [now 23 U.S.C. 103(c)(4)] is a 2.9 mile segment extending from the eastern side of the Allston/Brighton interchange (MP 131.5) to the I-90 interchange with I-93 (MP 134.4).

* *(Note: This was added to the "Interstate access policy" in 1998. It was included with the intent of protecting the safety and capacity of the newly designated segment of the Interstate and to be consistent with free roads added to the System under the same provision. It is an inconsistency in FHWA's policy on toll road Interstates in that, in all other cases, the FHWA's approval authority is applicable only when federal funds are involved. Because there are not very many sections of Interstate that, like the part of I-90 specified above, fall into this category, the issue has not come up before. For the sake of consistency in our policies, the requirement may be rescinded in the future by issuing a modified policy statement.)*

3. What sanctions does the FHWA have to compel compliance on sections of toll roads on which Federal-aid funds have not been used?

   The original Section 129 legislation stated that when incorporated into the Interstate System a toll road is expected to "...meet the standards adopted for the improvement of projects located on the Interstate System..." No specific sanctions for not meeting those standards are in the past or current law or regulations. As stated in IM 20-5-67: "However, it is expected that State highway departments will establish appropriate procedures to assure that proposed changes or alterations of the toll road facility will meet applicable AASHO policies and standards established for the Interstate System and, therefore, be within the spirit of the understanding between the State and Public Roads in approving a toll road as part of the Interstate System."

Present law, the regulations, and our past policy and actions do not support imposition of FHWA approval authority on non-federally funded toll road programs or projects. However, the absence of a project or program-based approval authority does not diminish the requirement that toll roads that are a part of the Interstate System must comply with the geometric and design rules and regulations applicable to the Interstate System.

The intent of the FHWA policy is to obtain compliance by establishing a relationship of cooperation and coordination with the toll road authority, if separate from the State department of transportation (DOT), or with the appropriate staff at the State DOT if the toll road is under its jurisdiction. Although there is some basis for sanctions in case of non-compliance, as discussed below, those sanctions can be very severe and difficult to impose. Therefore, the best approach is for the Division Office to work with the toll authorities to make sure the basic design standards of the Interstate System are not compromised.

Although we cannot ensure compliance through decision-by-decision approvals, there are provisions in the law and regulations that are available to obtain compliance. "Section 315 of 23 USC specifically gives the Secretary of Transportation authority "to prescribe and promulgate all needful rules and regulations for the carrying out of the provisions of this title." One of the regulations so promulgated under this authority is 23 C.F.R. 1.36, which provides that if the Administrator determines that a State is not in compliance with Federal laws or regulations with regard to highway projects, he may "...withhold approval of further projects in the State, and take such other actions that he deems appropriate under the circumstances, until compliance or remedial action has been accomplished by the State to the satisfaction of the Administrator." This makes available to the Administrator a wide range of possible sanctions, from very specific or "targeted" sanctions to broad statewide sanctions. Sanctions could include withholding approval of further projects, withholding of Federal funds or removal of the route from the Interstate System [23 USC 103(c)(3)].

Dwight A. Horne 7/12/04

for King W. Gee
Associate Administrator for Infrastructure