



May 16, 2022

The Honorable Stephanie Pollack
Deputy Administrator
Federal Highway Administration
Docket Management Facility
U.S. Department of Transportation
West Building Ground Floor, Room W12-140
1200 New Jersey Avenue SE
Washington, DC 20590-0001

Re: Federal Highway Administration; Docket No. FHWA-2022-0004; Agency Information Collection Activities: Request for Comments for a New Information Collection, “Innovative Finance and Equal Access for Over the Road Buses”

Dear Acting Administrator Pollack:

The American Bus Association, Inc. (ABA) provides these comments to the Federal Highway Administration’s (FHWA) new information collection request (ICR) regarding tolling equity for over-the-road buses (OTRBs). 87 Fed. Reg. 14610 (March 15, 2022).

ABA is a national trade association representing the interests of over 800 private operators of motorcoaches. ABA member companies provide several types of service as motor carriers of passengers using OTRBs, including regular route intercity service between fixed points on set schedules; charter service; tour service, which usually includes stops for sightseeing and recreational purposes; commuter bus service; and special operations, which is scheduled service to enhance public transportation systems (such as bus service from a city to an airport), or may be connected with a special event or attraction at the destination. As defined under 23 USC 129(a)(11)(C), OTRBs are allowed equal access tolling facilities under the same rates, terms, conditions as public transportation buses (codified at 23 USC 129(a)(9)(A)). Thus, ABA bus operator member companies are directly affected by the tolling equity provisions in this notice and interested in providing comments on this issue.

ABA supports approval of this information collection request.

Section 11523 of the Infrastructure Investment and Jobs Act (IIJA), Public Law 117-58 (November 15, 2021) amended 23 USC 129 to add reporting requirements to the equal access provisions for OTRBs. Specifically, not later than 90 days after the date of enactment of the Act,

a public authority that operates a toll facility was required to report to the Secretary of Transportation any rates, terms, or conditions for access to the toll facility by public transportation vehicles that differ from the rates, terms, or conditions applicable to OTRBs.

Further, a public authority that operates a toll facility shall report to the Secretary any change to the rates, terms, or conditions for access to the toll facility by public transportation vehicles that differ from the rates, terms, or conditions applicable to OTRBs by not later than 30 days after the date on which the change takes effect. This notice is the FHWA's first steps to implement those newer statutory requirements.

The IIJA provision amended the initial tolling equity provision contained in the FAST Act, Public Law 144-94 (December 4, 2015). Sec. 1411(a) of the FAST Act amended 23 USC §129 by adding a new paragraph (a)(9) that states: "An over-the-road bus that serves the public shall be provided access to a toll facility under the same rates, terms and conditions as public transportation buses."

A toll facility is defined in 23 USC §129(a)(10)(E) to mean "a toll highway, bridge, or tunnel or approach to the highway, bridge, or tunnel constructed under this subsection." Subsection (a) of 23 USC §129 sets out the terms and conditions of the basic federal grants program available to public authorities for initial construction and reconstruction, resurfacing, restoration, rehabilitation or replacement of a toll highway, bridge or tunnel or approach thereto. The federal share payable for such projects may not exceed 80 percent (23 USC §129(a)(5)).

For purposes of 23 USC §129, "public authority" means "a State, interstate compact of States, or public entity designated by a State." 23 USC §129(a)(10)(D). Thus, if a State, interstate compact of States, or public entity designated by a State, has received federal funding for a toll highway, bridge or tunnel or approach thereto, the recipient of federal funds must allow an OTRB to have access to the toll facility under the same rates, terms and conditions as public transportation buses.

FHWA issued final guidance on treatment of over-the-road buses related to tolling equity under Sec. 1411 of the FAST Act. through publication in 83 Fed. Reg. 7839 (February 22, 2018). The guidance addressed the effective date of the provision, definitions, affected facilities, grantee obligations, availability of refunds for prior payments, and FHWA's role in enforcing the tolling equity provision.

FHWA determined the tolling equity requirement became effective on December 4, 2015, the date of enactment of the FAST Act. All obligations under the provision run forward from that date.

The guidance adopted the following definitions for purposes of sec. 1411:

- "Over-the-road bus" is defined as a bus characterized by an elevated passenger deck located over a baggage compartment.

- “Public Transportation Bus” is a category of public transportation vehicle (as defined in 23 USC 166(f)(6)), consisting of a motor vehicle with motive power, except a trailer, designed for carrying more than 10 persons.
- “Public Transportation Vehicle” means a vehicle that (A) provides designated public transportation (as defined in section 221 of the Americans with Disabilities Act of 1990 (42 USC 12141) or provides public school transportation (to and from public or private primary, secondary, or tertiary schools); and (B)(i) is owned or operated by a public entity; (ii) is operated under a contract with a public entity; or (iii) is operated pursuant to a license by the Secretary or a State agency to provide motorbus or school vehicle transportation services to the public.
- “Serve/Serving the Public” means provision of service to the public, including general or special service (including charter service) on a regular and continuing basis.
- “Toll Facility” means a toll highway, bridge, or tunnel or approach to the highway, bridge, or tunnel constructed under 23 USC 129(a).

The guidance lists some 137 toll facilities (highway routes, or segments of routes, bridges and tunnels) in 30 states that are affected by the tolling equity requirements. But despite ABA’s multiple requests in meetings, emails, and in comments to the proposed guidance, the FHWA final guidance failed to include any reference to the actual tolls charged by affected facilities for public transportation buses nor even identify the operator of the toll facility. Thus, ABA and its members have no easy way to determine if a tolling facility offers a discount or exemption to public transportation buses.

FHWA has to date refused to use its annual audit process for federal grantees to determine whether tolling facilities are complying with the OTRB equal access requirements.

Regarding refunds of excess tolls, the FHWA was unable to assist OTRB operators. The guidance stated, *“If an OTRB entity believes equal access was not provided by a covered facility any time after December 4, 2015, that entity should contact the owner/operator of the facility to request a refund. The FHWA does not own, operate, or control the HOV and toll facilities subject to the OTRB requirements.”*

The FHWA guidance did state unequivocally that tolling facility operators are required to comply with the OTRB equity mandate. “The requirements of 23 USC 129(a) and 23 USC 301 apply to the use of Federal-aid funds for construction . . . on tolled highways, bridges, and tunnels, including the use of emergency relief funds for repairs to toll facilities . . . When Federal funds are used for allowable purposes under 23 USC 129, grantees are required to follow applicable statute, regulations, and policies. This includes equal access and treatment for OTRBs.” But the agency left the enforcement of the equal access requirements up to private OTRB operators.

After publication of the guidance, ABA sent letters to approximately 20 of the 137 toll facility operators listed by the FHWA guidance as receiving federal funding (https://www.fhwa.dot.gov/ipd/tolling_and_pricing/tolling_pricing/section_129.aspx). ABA explained the tolling equity requirements of the FAST Act and asked if the facility operator

offered the same rates, terms and conditions to private OTRB operators that were offered to public transportation buses.

Some toll facility operators responded to ABA's information request, but many did not. Moreover, ABA had no meaningful opportunity to confirm the accuracy or completeness of the information that was provided. Tolling facility operators rarely put complete toll rates, terms and conditions for public transportation buses on their websites or in publicly available documents. Responses to ABA's requests for clarifying information were inconsistent.

Even though this equity requirement has been law for over six years, only one toll facility operator so far has provided refunds of excess tolls that were charged to private OTRB operators in violation of the FAST Act since December 4, 2015.

In the IIJA, Congress attempted to close this enforcement gap by mandating toll facility operators receiving federal funds to report to the Secretary of Transportation any rates, terms, or conditions for access to the toll facility by public transportation vehicles that differ from the rates, terms, or conditions applicable to OTRBs. The initial reports were supposed to have been provided no later than 90 days after enactment of the IIJA, or by February 13, 2022. Any subsequent changes to rates, terms, or conditions applicable to OTRBs must be reported to the Secretary within 30 days after they take effect.

ABA requests that FHWA expedite the reporting mandate by giving the toll facility operators no more than 60 days to respond to the FHWA requirement for information on rates, terms, and conditions applicable to OTRBs. This information should be readily available to the toll facility operators, and they have been on notice since November 15, 2021 that this reporting requirement was now law.

Further, 49 USC §129(a)(9)(B)(iii) requires the Secretary to publish the information on toll rates, terms, or conditions received from the toll facility operators on a publicly available internet website. This information should be available to ABA and its members on the FHWA website on a web page that is readily accessible to private OTRB operators and searchable by jurisdiction. Private OTRB operators are the entities that know whether the public bus rates, terms, and conditions reported by the facilities are the same as those imposed on private users of the facilities. As an alternative, it would be helpful if the requested information in this ICR was integrated into the existing webpage for identifying Sec. 129 covered tolling facilities list for OTRB tolling equity (https://www.fhwa.dot.gov/ipd/tolling_and_pricing/tolling_pricing/active_agreements.aspx).

Additionally, 49 USC §129(a)(9)(C)(i) provides that a public authority with jurisdiction over a toll facility shall conduct or have an independent auditor conduct an annual audit of toll facility records to verify compliance with the toll equity provision and report the results of the audit to the Secretary of Transportation.

ABA requests that the Secretary, through FHWA, make these audit reports publicly available so that private OTRB operators can confirm compliance by the toll facility operators. In particular, if a public authority conducts an internal audit of its tolling equity compliance efforts, ABA

members will have no way of knowing whether the audit was complete or whether it accurately represented the rates, terms and conditions offered to private OTRB operators. Given the inconsistent responses from toll facility operators to ABA's prior requests for information, and the outstanding issues relating to the availability of refunds of excess tolls already collected in violation of the FAST Act, it is imperative that private OTRB operators have access to all of the information relevant to compliance with the tolling equity provision.

Finally, ABA encourages the FHWA to use its statutory authority in 49 USC §129(a)(9)(C)(iii) to enforce compliance with the tolling equity requirements. This includes a willingness to suspend a toll facility's authority to collect tolls unless it provides equal access and terms to private OTRB operators.

In closing, ABA supports the approval of this information collection request. We hope that the results of the data collected will be posted to a publicly available and searchable website, that includes the rates for tolls of OTRBs and public transportation providers as well as identifies the toll facility provider and any changes in rates for OTRBs that differ from public transportation providers. We further hope that FHWA will follow through on requiring tolling facility operators to undergo an audit and make the results of those audits publicly available. In addition, ABA hopes that FHWA will exercise its statutory authority when appropriate and enforce compliance with these tolling equity and audit reporting requirements and potentially suspend toll collection authority in cases of unreasonable or continued violations of the law by tolling facilities. We appreciate the recent steps taken by FHWA to make the existing law on tolling equity for OTRBs meaningful and look forward to the full implementation of the new law as well as additional transparency into the compliance process. We stand ready to share any additional feedback as the Agency takes steps to collect this needed information and make it public.

Respectfully submitted,

A handwritten signature in black ink, appearing to read "Brandon Buchanan". The signature is fluid and cursive, with a long horizontal stroke at the end.

Brandon Buchanan
Director of Regulatory Affairs