# U.S. 36 - What's the Deal?

## An Initial Analysis of the U.S. 36 Private Road Deal: Where are Profits Pitted Against the Public Interest and What Protections Are in Place?

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CoPIRG
Standing Up To Powerful Interests

As Colorado enters into a 50-year agreement with a private company, Plenary Roads Denver, to complete and manage U.S. 36 and part of I-25, many in the public remain confused and concerned. Most of the final details of the deal were not posted until Friday, February 14th, by the High-Performance Transportation Enterprise (HPTE), the division of the Colorado Department of Transportation (CDOT) responsible for developing this deal. Due to the short timeline between the posting of the 1,002 page document and the approval of the agreement by the HPTE Board six days later, CoPIRG was unable to complete our initial assessment in time to help the public understand and weigh the proposal before the HPTE Board's vote. However, it remains important to answer the question – what's the deal with U.S. 36 – as well as to identify next steps for potential private road deals moving forward.

**This report covers three major aspects of the U.S. 36 deal:**

1. The Infrastructure Project
2. The Financial and Management Deal with Plenary
3. The Process for Developing and Approving the Deal

## Caution: Private Road Deals Ahead

Transportation funding is a growing issue in Colorado as politicians and transportation officials grapple with funding challenges resulting from a decline in the value of the state's gas tax, uncertainty around federal transportation funds, shifting travel trends, and pressures from the state's growing population. Increasingly, state and local officials are looking at other kinds of arrangements to provide upfront financing for transportation projects, including deals with profit-seeking corporations for toll roads. Here in Colorado, transportation officials are considering private road deals not just for U.S. 36, but also I-70, I-25 and C-470.

However, private road deals can pose long-term threats to the public interest by pitting profit-making against safety and local control and the deals can ultimately be more expensive than traditional financing. The economics of these deals are such that the value of the upfront resources from the private road company may fall short of the long-term value of the higher tolls or long-term government payments that will be borne by future generations.

Therefore, whether it is toll roads or other types of PPP transportation projects, it is critical that public officials ensure that the public gets the value, transparency, efficiency and safety it deserves from potential private infrastructure deals. Government officials and the public must ask tough questions and evaluate proposals rigorously to ensure that any such deals really would benefit the public interest.

To analyze private road proposals, CoPIRG using the following principles, which are described in greater detail in our report Privatization and the Public Interest:

(1) The public should retain control over decisions that affect the broader public interest.

(2) The public must receive fair value so future revenues are not sold off at a discount.

(3) Any deal lasting longer than 30 years must be approached with additional caution due to uncertainty over future conditions and because the risks of a bad deal grow exponentially over time. Special protections must accompany such long-term deals.

(4) There must be complete transparency to ensure proper public vetting of privatization proposals.

(5) There must be full accountability in which the publicly accountable governmental body must approve both that a deal be negotiated and the terms of a final deal.

## U.S. 36 – The Infrastructure Project

Whether the U.S. 36 deal with Plenary was approved or not, U.S. 36 is already undergoing a massive transformation that has been years in the making.

For over a decade, local government and transportation officials along U.S. 36 have been exploring transportation improvements and plans for U.S. 36, which CDOT estimates is operating at 90% capacity.[i] On average 80,000 to 100,000 vehicle trips are made each day along U.S. 36 and three to four hours of severe congestion is not unusual.[ii]

Between 2003 and 2009, CDOT, RTD and numerous federal transportation agencies studied various transportation improvement options along U.S. 36 and released their findings in 2009 in the U.S. 36 Record of Decision for the completed Environmental Impact Statement. The best option, or Preferred Alternative, was identified after five years of analysis, stakeholder involvement and public hearings. The principal pieces for the best option were upgrading the current free lanes to enhance safety and quality and build a new dedicated bus lane in each direction that can decrease travel time along the corridor and according to recent estimates will carry 20,000 passenger trips a day via bus. HOV vehicles would be allowed free access as well to the new lanes to encourage carpooling. This vision provided the framework and many of the details for what became the U.S. 36 Express Lanes project.

The U.S. 36 Express Lanes project is a multi-modal project led by CDOT and the Regional Transportation District (RTD). Phase 1 is scheduled to be completed by 2015, costs an estimated $318 million, and is funded entirely by public funds from CDOT, RTD, the Denver Regional Council of Governments (DRCOG), local governments and a federal loan program known as TIFIA.[iii] The latter stands for Transportation Infrastructure Finance and Innovation Act, and is a competitive federal low-interest loan program to governments or public-private partnerships for transportation projects that must be paid back over time.[iv] Government agencies like CDOT and private companies like Plenary can apply for TIFIA loans, but are not assured of the limited funds, even if they are eligible

Phase 1 construction is well underway to rebuild the current four lanes of U.S. 36 between the Pecos Street exit and the Louisville 88th St exit and add a new lane in each direction. The current four lanes will remain free of charge for vehicles and the new lanes will be Bus/HOV/toll lanes eventually connecting to the I-25 Bus/HOV/toll lanes that currently connect U.S. 36 to Downtown Denver. In addition, interchanges along U.S. 36 will be updated and replaced, shoulders will be widened to improve safety and traffic flow, a bike path will be added along the route and numerous transportation improvements will be made along U.S. 36 to increase efficiency and safety connecting to and from the highway.

**So even without the Plenary deal, nearly two-thirds of the U.S. 36 Express Lane Project would be completed by 2015. The Plenary deal provided what CDOT and other government officials determined was the needed financial support to launch and complete Phase 2 by 2016.**

Phase 2 of the U.S. 36 Express Lanes project would complete the project from Louisville 88th St to the Boulder Table Mesa/Foothills exit. This includes rebuilding the four current free lanes, which would remain free, adding an additional Bus/HOV/Toll lane in each direction and making the numerous transportation improvements along U.S. 36 described above in the Phase 1 description. Phase 2 costs an estimated $179.5 million. CDOT, RTD, DRCOG and local governments committed $59 million to the project leaving $120 million more to be raised either through public funding or private partnerships.

Without this additional $120 million for Phase 2 the immediate future the section from Louisville to Boulder would remain two free lanes in both directions without the upgrades and there would be no additional bus/HOV/toll lane added. In addition, the other transportation improvements would mostly not be completed. According to HPTE officials, delaying implementation of Phase 2 would result in an increase in the costs for completing Phase 2 over time.

Therefore, Colorado had the following options, which we analyze in the next section on the Financial and Management Deal for U.S. 36:

1. Delay completion of Phase 2
2. Scale back Phase 2 to cut costs
3. Identify and raise $120 million more in public funding
4. Identify and raise $120 million through private partnerships
5. Some combination of the above

**CoPIRG supports the principal goals of the U.S. 36 Express Lanes project.** Rather than simply widen the highway, the project prioritizes accommodating future travel increases with bus ridership and carpools. According to a CoPIRG report, *Moving Off the Road*., vehicle miles driven per capita in Colorado dropped 11.4 percent between 2005 and 2011, the 6th largest drop in the country. Led by Millennials who are riding transit and walking and biking more and fueled by high gas prices and technology, this trend is here to stay. Transportation officials need to invest in providing more transportation options. Increased transit ridership and car pooling rather than simply widening highways is the best way to meet our growing transportation needs in the most economically and environmentally sustainable way.

For the U.S. 36 Express Lanes to be successful, buses must have priority in the new lanes to ensure they can provide the reliable, on-time service that will meet the goal of 20,000 passenger trips per day. Free access for carpools in the new lanes will also increase U.S. 36 success, however, carpool policy must be set to avoid gridlock in the new lanes. Currently, free access is granted to carpools of two or more people. If that results in too many cars using the new lanes than free access will have to be raised to carpools with three of more people.

To maximize capacity along U.S. 36, the Preferred Alternative allowed for non-carpooling vehicles to use the new Bus/HOV lanes. However, to ensure these new lanes avoid gridlock, tolls must be set in a way to push toll-paying vehicles out of the Bus/HOV lanes before traffic speeds decrease.

**<u>In conclusion:</u>**

1. U.S.36 between Pecos Street and Louisville 88th Street will be rebuilt, the current lanes will remain free, an additional lane in each direction will be dedicated for Bus/HOV/tolling, and numerous other transportation improvements will be implemented.
2. The vision for this project was developed between 2003 and 2009 when the corridor completed an Environmental Impact Statement. The best option that was then identified provides the framework and many of the details for what is being built and what appears in the Plenary deal including the Bus/HOV lane and tolling.
3. Building a dedicated Bus/HOV lane along U.S.36 and making safety improvements to the current four lanes is better transportation policy than just adding additional lanes.

# U.S. 36 Plenary Deal - The Financial and Management Proposal:

Beginning in 2009 when the vision for U.S. 36 was completed, transportation officials began efforts to identify funding to complete the Preferred Alternative. As described earlier, funding was secured for moving forward with Phase 1 and construction is underway right now.

The total cost to complete Phase 2 from Louisville 88th Street and Boulder is $179 million. CDOT, RTD, DRCOG and local governments committed $59 million to the project leaving $120 million more to be raised either through public funding or private partnerships.

**Phase 2 of the U.S. 36 Express Lanes project had five main options**:

1. **Do not complete the vision.** We have not had enough time to fully analyze whether this decision was considered and what the impact of not completing Phase 2 would be though we suspect there is information about this in previous studies or federal funding applications. In conversations with U.S. 36 stakeholders there is a strong belief that the ability of the Bus/HOV/toll lane to reach its goals will be significantly undermined if Phase 2 is not completed. It appears clear there is a strong desire to complete the vision.
2. **Cut costs by cutting parts of Phase 2.** We have found no evidence that this option was considered though there may be documentation in previous studies. The U.S. 36 Express Lanes project came out of a full EIS process and by state statute required support from every local government along the corridor to implement[v] and so it is clear that stakeholders were not interested in pursuing this option.
3. **Wait until additional funding is raised through current revenue sources.** According to transportation officials, the cost of Phase 2 would go up if delayed and if the state waited for current revenue sources to raise the $120 million plus additional costs, Phase 2 would not be completed until 2035. We have been unable to verify this date yet, but believe details are in previous planning documents that we have not had time to review. In conversations with U.S. 36 stakeholders, it appears that a delay of this length would be similar to not completing the vision and thus deemed not a justifiable alternative.
4. **Raise taxes, public tolls or other revenue.** CoPIRG has been unable to find specific estimates or proposals for raising taxes or other public revenue to reach $120 million. Some of these could be in previous planning documents we have not had time to analyze. We conclude the following:
    a. Tax increases were ruled out based on perceptions of lack of voter support.
    b. An allocation from the state's General Fund by the Legislature was also ruled out given the tight budgets of the last few years, among other factors.
    c. RTD, CDOT, DRCOG and local governments along U.S. 36 concluded that they contributed as much as they could.
    d. Public retention of the new toll revenue from the new Bus/HOV/toll lanes was considered. Tolls do not provide the upfront capital that is needed for a construction

project but could provide the revenue to help secure a loan. CDOT commissioned an Investment Grade Traffic and Revenue Study by WilburSmith Associates to quantify the potential toll revenue. However, it was concluded that there was a significant risk that the tolls would not raise enough money to pay back the loan and cover operating and maintenance costs. This combined with limits to borrowing capacity and potential impacts on other transportation projects led agencies like CDOT to not pursue additional borrowing for Phase 2.

   **e.** Bonding was also considered. A public entity can issue bonds more cheaply than a private financier. The state of Ohio last year opted to fund a number of road projects through bonding after outside study demonstrated it would be a better deal than a private concession deal.[vi] Similar public retention of toll revenue, it was concluded that there was a significant risk that the tolls would not raise enough money to pay back the bonds. This combined with limits to borrowing capacity and potential impacts on other transportation projects led agencies like CDOT to not pursue bonding for Phase 2.

5. **Public-private partnership.** In February 2012, the HPTE Board directed HPTE staff through HPTE Resolution 62 to pursue options with private companies to complete construction, finance and maintain U.S. 36. While it was concluded that toll lane revenue was not reliable enough to provide funding to complete and maintain U.S. 36, a private company or consortium might be willing to take on the risk, providing the up-front capitol to complete U.S. 36 by 2016. HPTE began this process in February 2012 and Plenary Roads Denver was selected in April 2013. This option became the proposal that HPTE approved in February 2014.

**<u>In conclusion</u>:**

1. Phase 2 required $179 million to complete. Public funds totaling $59 million was secured but the project remained $120 million short.
2. While there were at least five major options for moving forward, it is unclear to what extent each option was considered since much of this documentation is not contained in the Plenary deal and we have not had time to find and review it. This lack of clarity undermined confidence that all options were fully explored, hindered the public's ability to determine whether a public-private partnership was the best option for U.S. 36 and added to the concern and confusion that was exhibited as the final deal was approved.
3. The decision to move forward with the Plenary deal was based on assumptions that additional public funding could not be raised through tax increases or an allocation from the State Legislature and that the reliability that the toll revenue would cover construction costs and operating and maintenance were too risky to justify borrowing or bonding.

**<u>The Plenary Agreement:</u>**

Plenary Roads Denver will be tasked with completing Phase 2 of the U.S. 36 vision. In addition, they will be responsible for all general operating and maintenance of all lanes of the entire U.S. 36 as well as any major maintenance of the two new Bus/HOV/toll lanes. CDOT will pay Plenary $675,000 (indexed) annually for this maintenance. Plenary will also be responsible for all snow and ice removal for all six lanes, for which CDOT will pay them $352,470 (indexed) annually. They will manage the two U.S. 36 toll lanes and the current I-25 lanes within a set of parameters in the agreement. At the end of 50 years they will be required to return the Bus/HOV/toll lanes in good condition, known as reconstructed condition. To do this, Plenary brings $120 million dollars to the project, partly through an anticipated $60 million TIFIA loan and partly through their own equity and bonding. In addition, CDOT will transfer a $54 million loan from Phase 1 to Plenary. ,.

The initial concept of the Plenary deal is a risky one. Plenary has a clear profit-making motive to maximize toll revenue and reduce its costs. These incentives could conflict with some of the goals of the project. For example, the company's profits will be higher the more Plenary can maximize the number of toll-paying vehicles in the toll lanes and the higher the tolls. This could have an impact on the success of the bus program by potentially slowing bus speeds down and reducing reliability. This could also impact the number of carpooling vehicles allowed free access to the Bus/HOV/toll lanes. Plenary may also seek to increase profits by avoiding the costs of investment in additional safety measures, maintenance, or investing in new technologies in the coming decades. Since Plenary will hold a 50-year monopoly on the road and will have some strong incentives not to serve the public interest, it is important that the terms of the deal anticipate possible conflicts and protect the public. The details of this agreement matter.

**Construction** – Profit-motives can encourage private companies to cut costs at the expense of important construction details and so clear parameters must be in place. The details of what, when and how U.S. 36 will be built were developed during the previous years of corridor planning. As described earlier, the final project came from the U.S. 36 vision known as the Preferred Alternative. HPTE staff confirmed that construction details were developed before negotiations with Plenary began and were not subject to negotiation. They also confirm that the same standards and rules are in place for this project as are in place for other similar design build projects. **While we have found no evidence that public interest protections are inadequate for completing U.S. 36, we encourage industry experts to review the 476-page Schedule 5 which describes the construction details.**

**Maintenance** – Once built, profit-making incentives can encourage Plenary to reduce costs by limiting investments in important maintenance as a whole or letting free lanes fall into disrepair as a means to push more toll-paying vehicles into the better maintained toll lanes. Throughout the agreement there are public interest protections in place that set standards for maintenance and lay out financial punishments for failing to meet these standards. According to HPTE staff, these standards were developed after a thorough review of current CDOT maintenance practices and the standards in the agreement meet and in many cases exceed current practice. In addition, HPTE has monitoring and enforcement authority. Maintenance services are described in the 118-page Schedule 6. **We have no found any evidence that maintenance standards are inadequate or that financial penalties are insufficient to ensure Plenary properly maintains U.S. 36 and meets public expectations. Since private partnerships for maintenance is relatively new, it will be important for consistent review and public input to ensure public satisfaction.**

**Safety**- Profit-making incentives will encourage Plenary to reduce costs, which could include cutting corners on safety. As mentioned in the Construction section, Plenary did not propose the construction details, which were developed by CDOT. No evidence suggests therefore that the design or construction of U.S. 36 will not meet regular CDOT safety standards. Many of the prescribed features of the rebuilt U.S. 36 will increase safety, including the addition of wide 12-foot shoulders. Schedule 10 also lays out clear penalties for failure to meet certain safety standards. A safety plan will also need to be approved by the HPTE once the agreement is signed and HPTE will have monitoring and enforcement authority. Schedule 6 contains details on Plenary's safety responsibilities including 5 pages detailing the requirements around providing courtesy patrols that pick up debris, assist motorists in accidents or emergencies and tow vehicles to safe locations. Within a set of parameters, Plenary will receive $81 per vehicle per hour from CDOT for providing courtesy vehicles during designated hours in the morning and evening.[vii] That amount is updated periodically through an open bid process based on the current Mile High Courtesy Patrol program. **We have no found evidence that safety standards are currently inadequate or that financial penalties are insufficient to ensure Plenary manages the same level of safety as any other roads managed by CDOT but consistent review and public input will be Important moving forward.**

**Snow and Ice Removal** – To cut costs or to encourage more vehicles onto the toll lanes, Plenary might look for ways to cut corners on snow removal or skimp on services for the free lanes. Schedule 25 is entirely dedicated to snow and ice removal standards. This section details, among other things, snow removal levels, where the snow/ice must be moved to and the response time required for meeting these standards. According to HPTE staff, these standards meet or exceed current CDOT practices. The agreement holds Plenary accountable for both the free and toll lanes, providing a counter to the incentive to favor toll lanes. There are also clear penalties in Schedule 25 as well as Schedule 10 for not meeting expectations. **We have found no evidence that snow and ice removal standards are inadequate or that financial penalties are insufficient to ensure Plenary provides at least the same level of service provided by CDOT on other roads.**

**Bus/HOV/Toll Lane Management –** the new Bus/HOV/toll lanes offer an excellent opportunity to increase the efficient flow of people along the U.S. 36 corridor. Providing reliable, on-time bus travel is the key component of success. This goal is poorly aligned with Plenary's profit-maximizing incentive to boost toll revenue, which can be advanced by encouraging toll-paying vehicle use in the lanes and potentially undermining bus service. A number of stipulations in the contract, however, attempt to ensure that bus service will not be compromised. In Schedule 16 of the agreement, HPTE requires Plenary to set tolls in a way to ensure speeds in the toll lanes remain 50-55mph during Peak Periods,[viii] defined as 6:45 am – 8:45 am and 4:30pm-6:00pm during business days, as a means to avoid bus delays. In addition, Plenary must pay penalties if their tolling practices result in a set number of bus delays during Peak Periods. Furthermore, the contract stipulates that Express RTD bus fares along U.S. 36 during Peak Periods will be the cheapest option. Not only are these standards set in the agreement but they are also contained in an InterGovernmental Agreement with RTD. There is also a maximum toll of $13.91 one-way (indexed) but can be waived by HPTE. In addition, to the tolls, Plenary will be able to charge a surcharge to vehicles without proper tolling equipment, like a transponder. Finally, Plenary must provide all toll plans and schedules to HPTE for approval and HPTE has a number of broad reasons they can reject the plan such as its failure to meet the goals of the new lanes or if it endangers safety.

Outside of Peak Periods, Plenary has more flexibility. They don't pay penalties for bus delay events and can set tolls below RTD Express bus fares. Their tolling plans still must be submitted and approved by HPTE and the maximum toll is in place unless waived by HPTE. According to HPTE staff, it is anticipated that Plenary will initially begin with time of day tolling where tolls go up and down based on the time of the day according to a pre-approved plan. It is anticipated that Plenary will move to dynamic tolling which will allow Plenary to adjust tolls more rapidly based on real time information, known as dynamic tolling. Under this system, there are protections in place to ensure that if Plenary raises a toll after a motorist passes the toll information sign but before they enter the toll lane, that they will pay the initial toll.

In general, people will not pay tolls if a toll lane is going slow so one can argue that Plenary's profits will never be pitted against buses since both benefit from being able to go the speed limit. However, with real time data and dynamic tolling, it is possible scenarios exist where traffic in the free lanes is so congested that motorists would pay a toll to drive 35mph on the toll lane which results in bus delays.

**There are a number of protections in place to ensure the priority for the new Bus/HOV/toll lanes is the efficient movement of people and not toll revenue. However, it is hard to predict whether these protections will be effective throughout the 50 years of the agreement. A lot depends on the strict definitions of Peak Periods and its correlation to peak travel times in the future. Plenary's increased flexibility outside of Peak Periods and their use of dynamic tolling could allow them to identify ways to increase profits over the efficiency of the bus service, which could hinder the success of U.S. 36. Given that Plenary's profits will be impacted by any changes to these policies, it should be assumed that changes will require compensation to Plenary.**

**HOV Policy** – Allowing any cars free use of the new Bus/HOV/toll lanes directly cuts into Plenary's toll revenue and Plenary will want to limit this practice as much as they can. However, allowing cars with more than one passenger a quicker or more affordable trip along a transportation corridor is an important tool for government to encourage carpooling which can help reduce traffic and air pollution. For many years, transportation officials have allowed HOV2 – vehicles with two or more passengers – free access to bus or toll lanes. The agreement with Plenary allows free use of the Bus/HOV/toll lanes for HOV vehicles but sets the level at HOV3 – vehicles with three or more passengers – starting January 1st 2017 or even earlier if a number of triggers are reached.[ix] HOV3 is built into Plenary's financial model so changing it would require compensation to Plenary. This is an example where public decision making authority is restricted by this agreement. The consequences are unclear. At some point, if HOV2 was so successful that HOV2 vehicles clogged the new lanes, HOV policy would need to be raised to HOV3. According to CDOT staff, that point is near and CDOT will be raising free access and use by carpools to HOV3 for all of the roads it oversees. **The public has lost control over setting HOV policy along U.S. 36. The consequences are unclear. It all depends on whether travel patterns warrant a need to shift HOV policy from HOV3 to HOV2 at some point in the next 50 years.**

**Electric, Hybrid, Clean Fuel or other Future Free-Access Vehicles** – Granting free access to toll lanes for certain vehicles is a public policy tool to encourage increased use of those vehicles whether they are cleaner fuel, self-driving or electric. In Colorado, state law grants certain hybrids and electric vehicles free access to toll lanes. CDOT is responsible for determining the appropriate number to ensure they do not clog the lanes. The agreement with Plenary, specifically allows these cars in a category called ILEV, but enshrines the current CDOT number of 2,000 into the contract. Therefore, future attempts to increase the number of cleaner fuel, electric or hybrid vehicles will provide Plenary an opportunity to demand compensation. In addition, creating new categories for different technologies will also provide Plenary an opportunity for compensation if public policy makers want those vehicles to travel free on U.S. 36. **The public has lost control over setting the number of hybrid, cleaner fuel, and electric cars allowed to travel for free on the U.S. 36 toll lanes and the ability to add new categories of non-toll-paying vehicles for U.S. 36.**

**Neighboring Transportation Decisions** – A number of high-profile private road deals across the country have included policies that limit the ability for government to make decisions regarding transportation services and assets adjoining or nearby a toll road concession. Often referred to as non-compete clauses they allow a private company compensation if local communities improve transportation in a way that "competes" with the private road, such as expanding free alternatives and improving or launching new bus service. Sometimes private road deals have even mandated lower traffic speeds or increased traffic signals on neighboring streets to push cars onto the private road. Most of these sorts of non-compete clauses are not in the agreement. However, one clause does dictate that Plenary will be compensated if the state builds an "Unplanned Revenue Impacting Facility," described in the Definitions section. This restricts the state or local government's ability to build anything with in the airspace of the new U.S. 36 footprint. For example, if future traffic patterns warranted the state build a viaduct over U.S. 36 to carry more cars, Plenary could demand compensation. There are a number of exceptions put in place grandfathering in anything that is in the 2035 DRCOG Metro Vision Transportation Plan, infrastructure related to connecting the Northwest Parkway to south of U.S. 36 and new toll lanes on I-270 and I-25. **Many of the most egregious non-compete clauses are not present in this agreement and clear exceptions are in place for some future projects and for needed maintenance. However, the public is locked in to this version of U.S. 36 for the next 50 years and any unplanned additions to U.S. 36 will warrant compensation to Plenary if it negatively impacts their financial model.**

**Toll Collection and Customer Service** – In order to increase profits, Plenary might choose to cut costs associated with administering toll collections. Cost-cutting could negatively impact the public interest if protections are not in place. Schedule 5C lays out clear standards for toll collection and customer service and Schedule 10 lays out financial penalties for failing to meet these standards. Plenary must present all plans to HPTE for approval. Unless Plenary can prove a more cost effective way to administer the tolls, they must use the same systems as E-470. In the agreement, Plenary will be held to high standards for customer responsiveness and accuracy of toll administration and collection. There are additional customer satisfaction levels that they must reach as well – all of which will be monitored and enforced by HTPE. The agreement does give Plenary flexibility to create financial incentives to encourage toll paying users of the toll lanes to purchase a transponder or something similar, however there are clear expectations that any gear necessary for using U.S. 36 toll lanes must be applicable for other toll lanes in Colorado. The ability to push customers to purchase toll technologies for their car is not atypical compared to other toll roads across the country. **We have no found evidence that toll administration standards are inadequate or that financial penalties are insufficient to ensure Plenary administers tolls based on industry standards and meets expectation for customer responsiveness and satisfaction**.

**Privacy and Information Protection** – Plenary will be in a position to collect sensitive customer data including vehicle and travel pattern information and credit card or billing information. Unless they can prove a more effective way of collecting and billing customers, they will collaborate with E-470's system. While we did not have time to review the safeguards in place, the standards are dictated by law providing the opportunity for public policy to increase those safeguards in the future. **While the public retains control over setting privacy and information protection standards and Plenary will be meeting at least the E-470 system standards, there are clear challenges arising every year in this issue area and a more detailed review of these safeguards should be encouraged.**

**Future Tolling of U.S. 36's Free Lanes** – Some concerns have been raised that details in the agreement indicate Plenary or CDOT will be able to turn U.S. 36 into an entirely tolled road in the future. According to HPTE staff, the Record of Decision (ROD) for the U.S. 36 vision states that the current four lanes will remain free and the Federal Highway Administration would not allow U.S. 36 to become a toll road without going through another Environmental Impact Study because it would be outside of the ROD. **We have found no evidence U.S. 36's four free lanes will be tolled in the next 50 years.**

**Oversight** – No matter how good the terms of a private road deal are it is critical that there is vigorous public oversight of the project. The main public agency in charge of oversight is the High-Performance Transportation Enterprise (HPTE). State statute grants HPTE the authority to conduct deals like these. The HPTE is an enterprise within CDOT. The Board of Directors is made up of three Transportation Commissioners and four Governor Appointees who do not need the approval of the Legislature. Throughout the agreement with Plenary, the HPTE is actively involved in reviewing and approving plans including safety, snow removal and tolling. HPTE also has a number of monitoring and enforcement duties. In addition, a number of other agencies will be engaged in oversight because they provided funding, have an Intergovernmental Agreement, or have authority over highways including CDOT, RTD, local governments and numerous federal agencies. According to CDOT staff, HPTE is subject to all the same transparency and open record processes required by law of CDOT. Nearly all documents will be subject to open records after the deal is signed, except Plenary's base financial model. **While HPTE has broad oversight authority of Plenary and are subject to CDOT transparency requirements, the HPTE are not directly elected public officials and so public accountability can be increased.**

**Changing Terms** – There is no way to predict with absolute certainty what changes will be required to this agreement over the next 50 years. So it is critical the agreement has a reasonable process for suggesting changes to protect the public interest without incurring undue cost to the public. Schedule

21 describes the process for changing terms. Either HPTE or Plenary can propose a change in terms without an automatic penalty. The cost of the change and loss of revenue will be calculated and based on that the change will fall into one of three levels –an expensive change (high value), a medium change and a cheap change (low value). Cheaper changes can be worked out more quickly and easily. Expensive changes require a more stringent process. If there is not a resolution, Schedule 24 details the dispute resolution process which involves a three-person, independent board of experts formed for a specific dispute. **We found no evidence of any automatic fees or penalties for proposing a change in this agreement, however it should be assumed that the public will need to pay Plenary for any changes that increase costs or reduce revenue.**

**Early Termination or Bankruptcy** – Because there is no way to predict transportation 50 years into the future, it is critical that this agreement contain an ability to exit the agreement and protections in case Plenary finds itself in financial hardship or bankruptcy. Schedule 23 reviews the process for cancelling this agreement early. Any cancellation would require compensation to ensure expenses and debts are paid off. According to HPTE staff, bankruptcy protections, including requirements for a reserve fund are part of the financial documents that will be made available after the closing. **It should be assumed that any cancellation of this contract by HPTE will result in the public paying Plenary enough to cover costs to recoup expenses and pay off debt.**

**Proprietary Limitations** – It is important that road deals with private companies limit the amount of information that remains proprietary to ensure the transparency the public expects for public infrastructure. HPTE released 1,002 pages of the agreement with Plenary six days before the HPTE Board approved the final agreement. HPTE determined that some of the service plans around snow removal and traffic forecast models included proprietary information that could not be released until after the deal was signed. At this point, the only information not scheduled to be released after signing is the base level financial model. This model will be put in escrow to ensure it cannot be changed and it has been reviewed by HPTE and was part of the documentation Plenary provided to the Federal Highway Administration for their TIFIA loan. **While limits on what information remains proprietary will be strong after the deal is signed, more needs to be done to get information to the public for review before the agreement is signed.**

**Regular Review Intervals and Public Comment Processes** – In order to ensure the 50 year agreement is working as effectively as possible, there should be regular review opportunities. During these review periods and when changes are proposed, the public should not only be made aware but have opportunities to weigh in. There are a number of places where Plenary will need to submit updated plans for review by HPTE. In addition, Plenary will be providing all data to HPTE including customer satisfaction information for which they must meet certain standards. However, we found no details specifying the public involvement in any review processes. **Clear criteria and processes for the public to review the implementation of this agreement and any proposed changes should be adopted moving forward.**

**Handback Provisions** – As the end of the 50-year agreement approaches, a private company's profit-making incentives encourage them to limit additional investments in the road. Therefore, it is critical that they be required to make those investments and hand back the road in good condition. In the agreement, Schedule 20 details clear standards that U.S. 36 must meet when Plenary hands the road back. Schedule 10 details the financial punishments if they do not meet these standards. According to HPTE staff, Plenary will also be required to start placing money into a Reserve Fund as the end of the deal approaches to ensure they have enough money to make the necessary upgrades to return the road in good condition. **We have found no evidence that standards are unclear or penalties too low to ensure Plenary hands back U.S. 36 in poor condition.**

**Compensation Events** – Private road deals often include numerous compensation clauses that require the private company to be reimbursed for additional expenses. Sometimes these expenses are appropriate such as unforeseen construction cost increases. Sometimes these expenses are inappropriate and lock in compensation when the public uses its decision making authority or when unforeseen events reduce toll revenue. This agreement specifically spells out Compensation Events in the definitions section and provides a number of examples. Most of these examples are appropriate compensation events resulting from an unforeseen increase in the cost of the project that would have been an additional cost to this project whether it was a private company or CDOT implementing it. A few compensation events limit public decision-making authority including HOV and electric car policy as described earlier. Plenary can be compensated for any impact a new tax on tolls or toll revenue would have unless they have already achieved their internal rate of return. Under the definitions section, the agreement also provides an opportunity for Plenary to claim a Compensation Event for any law or rule that limits their ability to exercise their rights. In addition to Compensation Events, there is a description of Emergency Procedures that grants HPTE to ability to require toll collection to cease. Plenary can demand compensation if this happens for more than an aggregate of 12 hours for the year among other reasons.[x] We did not have enough time to analyze the likelihood that Emergency Procedures will result in financial compensation. In addition, there are specific Relief Events like a tornado or an order from a government authority. Relief events allow Plenary to request HPTE wave a penalty for failing to meet a standard laid out in the contract. **While the number of ways Plenary is allowed to claim compensation or request relief is limited, there are a set of public decisions that will come with a financial cost including decisions around HOV policy, free toll lane use by electric/hybrid/other vehicles, competing infrastructure built within or over U.S. 36, new laws or rules that impact Plenary's ability to exercise their rights with a few exceptions and emergency shut-downs of U.S. 36 in aggregate of 12 hours in a year.**

**Cost-Sharing**– Despite detailed traffic and revenue forecasts by CDOT it is impossible to predict with any certainty the potential revenue generated from a 50-year tolling project. Therefore, it is critical private companies do not get a blank check to keep all toll revenue no matter what is raised. Section 14 of the agreement requires that once Plenary covers its costs and revenue exceeds a benchmark laid out in their base financial model and agreed upon by HPTE, then some of the revenue would flow to HPTE. HPTE has an Intergovernmental Agreement to guarantee this revenue would remain in the U.S. 36 corridor and any use of the money would be developed with U.S. 36 stakeholders. The line in which cost-sharing kicks in is determined by Plenary's base financial model. That line has been reviewed by HPTE and is held in escrow, but it is our understanding that it is not publicly available. **While the agreement contains an important cost-sharing measure which requires some of the net-profit from the toll lanes to go to the public and reduces the loss of revenue if this public asset was undervalued, without knowing the exact cost-sharing line it is hard for the public to measure whether it is an appropriate level.**

## Looking at the Deal to Maximize Profits

The best private deals ensure that profit-making is in line with the public goals of the project. That does not appear to be the case with this deal. In principle this deal could pit profit-making – high toll revenue and low costs – against public interest goals of rapid bus service, increased carpooling and safe and well-maintained roads. After reviewing the agreement section by section, CoPIRG attempted to test the agreement in a different way, by asking the question – what would Plenary do to maximize profits and are their protections in place to ensure public interest is protected. To maximize profit Plenary would:

- Maximize toll revenue by maximizing the number of toll-paying vehicles and the amount they'd be willing to pay. *Public Protections – Peak Period bus travel time standards and minimum and maximum tolls.*
- Minimize cost of maintenance. *Public Protections – Benchmarks and penalties*.
- Minimize cost of snow and ice removal. *Public Protections – Benchmarks and penalties.*
- Minimize cost of toll collection/administration/customer service. *Public Protections – Benchmarks and penalties.*
- Incentivize use of toll lanes over free lanes. *Public Protections – Maintenance and snow/ice removal benchmarks identical for both free and Bus/HOV/toll lanes.*
- Market the toll lanes and sell transponders that make toll lane use easy. *Public Protections – Not Applicable*

## Is the Public Getting Fair Value?

According to HPTE staff, they and the people who have independently reviewed the deal believe the public is getting fair value in this deal. In the short period of time between the release of the details of this agreement and now, we have been unable to do an in-depth calculation and verify our conclusions with financial experts. However, we can lay-out the basic costs and revenues associated with this project to help give a framework for calculating this in the near future. In the simplest terms, to determine if the public is getting a good value we need to calculate the cost of the project if it was done publicly and the potential revenue of the project and then look at the same numbers for Plenary. We have put an "X" for numbers we are still tracking down or calculating.

Cost to Public if 100% publicly done:

- Construction and Borrowing cost – at $179.5 million
    - Of this $59 million already raised so this assumes $120 million raised through combination of public revenue or additional loans
- Operation and Maintenance of free lanes = $780,000 per year indexed
- Operation and Maintenance of Bus/HOV/toll lanes = X

- Courtesy Vehicle program to assist motorists = currently $81 per vehicle per hour
- Toll collection/administration costs = X
- Cost for Snow Removal on free lanes = $352,470 per year indexed
- Cost for Snow Removal on Bus/HOV/toll lanes = X
- Cost for Major maintenance of free lanes = X
- Cost for Major maintenance of Bus/HOV/toll lanes = X

Cost to Public through Plenary deal:

- Construction cost - $59 million (NOTE – Plenary also takes over $54 million loan from Phase 1)
- Operation and Maintenance of free lanes = $675,000 per year indexed
- Operation and Maintenance of Bus/HOV/toll lanes = none
- Toll collection/administration costs = none
- Cost for Snow Removal on free lanes = $352,470 per year indexed
- Cost for Snow Removal on Bus/HOV/toll lanes = none
- Cost for Major maintenance of free lanes = X
- Cost for Major maintenance of Bus/HOV/toll lanes = none
- Courtesy Vehicle program to assist motorists = currently $81 per vehicle per hour
- Compensation and Relief Events = X
- Cost of Monitoring, Oversight and Enforcementof Plenary = X

Cost to Plenary

- Construction and Borrowing cost – at least $174 million ($54 million loan for Phase 1 and $120 million for Phase 2)
- Operation and Maintenance of free lanes = X
- Operation and Maintenance of Bus/HOV/toll lanes = X
- Toll collection/administration costs = X
- Cost for Snow Removal on free lanes = X
- Cost for Snow Removal on Bus/HOV/toll lanes = X
- Cost for Major maintenance of free lanes = none (CDOT)
- Cost for Major maintenance of Bus/HOV/toll lanes = X to handback road in good condition.
- Courtesy Vehicle program to assist motorists = X

Revenue for Plenary for Project

- Toll revenue = X
- Payments from HPTE/CDOT
  - Operation and Maintenance of free lanes = $675,000 per year indexed
  - Cost for Snow Removal on free lanes = $352,470 per year indexed
  - Courtesy Vehicle program to assist motorists = currently $81 per vehicle per hour
  - Compensation and Relief Events = X
- Advertising revenue = X

- Other?

According to HPTE staff, one of the biggest benefits of this deal is that the public is protected if the toll revenues come in below the cost of building, operating and maintaining this project. Plenary takes the risk of low revenue. However, it has to be assumed that Plenary would not have accepted this deal if they were not reasonably certain the revenue would be enough to cover expenses. **More should be done to provide the public with clarity around the costs and potential revenue of this project. Even with that information, it will be challenging to know with any certainty whether revenue will miss projections and exceed projections, which will help answer the question – was this a good deal for the public or a bad deal.**

# U.S. 36 - The Process for Developing and Approving the Deal

The response over the last few weeks to the final announcements around the Plenary/U.S. 36 deal indicates that many in the public were unaware of the pending private road deal and in some cases unaware of the details of the transportation project developed before Plenary was awarded the bid. However, many local elected officials and some stakeholders indicated that public involvement throughout this process was appropriate and many steps were taken to educate the public along the way including public meetings and media coverage.

From 2003-2009, the U.S. 36 corridor developed an Environmental Impact Statement looking at transportation options along the corridor. An EIS offers many opportunities for public engagement as the EIS process moves forward including during the Scoping and Notice stages, and after the Draft EIS is released.

From 2009-2013, local elected decision makers and transportation officials pursued various funding options and during this time $377 million was raised often through public agencies like RTD, CDOT and local cities and counties, which operate publicly.

In February 2012, HPTE began the process of identifying a potential private partner for U.S. 36. The Request for Qualifications was released providing an overview of the project and subsequent steps in the process that led to the selection of Plenary Roads Denver released more and more details until the final release of most of the details of the agreement on February 14th, 2014.

Reviewing the documentation provided by CDOT around public outreach efforts over the last few years it seems clear that while there was outreach, the outreach was mainly focused on elected officials, transportation planning organizations and higher-level stakeholders. One moment in the timeline where feedback was noticeably lacking was on the final decision to approve the Plenary deal. HPTE's main response to requests for a public review and comment period after the final details were released was that there was a lack of time so it appears they did not adequately plan for public feedback opportunities on the final deal. While public involvement and support early in a process to help inform the parameters and weigh initial responses should make final approval easier, it cannot replace the opportunity to comment on the final agreement. **More should be done to provide the public with clarity around the costs and potential revenue of this project. Even with that information, it will be challenging to know with any certainty whether revenue will miss projections or exceed projections, but knowing the assumptions can helps answer the question – was this a good deal for the public or a bad deal.**

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## Overall Conclusions:

The initial set-up of this agreement creates a dynamic where the public goals of the U.S. 36 vision – moving people efficiently and safely by prioritizing bus and carpooling in a new lane and maintaining all lanes at a high standard of quality and safety – could conflict with the profit-making motives of Plenary to maximize toll revenue and cut costs. Government officials and the public must ask tough questions and evaluate proposals rigorously to ensure that any such deals benefit the public interest. In reviewing the three pieces of the U.S. 36 private road deal with Plenary we conclude:

**Building a dedicated Bus/HOV lane along U.S. 36 and making safety improvements to the current four lanes is a good transportation project**. The vision for this project was developed between 2003 and 2009 when the corridor completed an Environmental Impact Statement. Phase 1 is already under construction between Pecos Street and Louisville 88th Street. The current lanes will be rebuilt and remain free, an additional lane in each direction will be built and dedicated for Bus/HOV/tolling, and numerous other transportation efficiencies will be implemented.

**There are a number of parameters in the agreement that reduce the risk that profit motives will undermine the public interest.** These protections seem strongest when it comes to construction, maintenance, safety, toll administration and ice and snow removal. All plans including toll plans must be approved by HPTE. Some of the most egregious examples of non-compete clauses that undermine future transportation decisions are not present but some decision making authority is lost. The success of the project depends heavily on peak travel times coinciding with the defined Peak Period times in the agreement where standards are highest.

**The public does cede decision making authority.** HOV policy and policies to allow certain vehicles free access to toll lanes, such as cleaner fuel and electric vehicles, are severely limited though the impact depends on whether travel patterns warrant a change in the future. The agreement does limit the public's ability to make major additions to U.S. 36 over the next 50 years with a few notable exceptions. Plenary will be eligible for compensation if future public policies increase costs or reduce their revenue.

**HPTE has broad oversight authority for the project but accountability to the public could be increased and public involvement in future decisions needs to be added.** HPTE is appointed and not elected and therefore public accountability can be increased. Plenary will have to meet customer service benchmarks but there are no clear requirements for public involvement in toll-setting or potential changes that might be proposed or in periodic review.

**Some protections are in place to reduce problems with a longer-term deal.** Specifically, there are cost-sharing requirements which will help allow the public to recoup some money if revenue is much higher than anticipated. In addition, clear standards are in place to ensure U.S. 36 is handed back in good shape. However, it should be assumed changes that impact Plenary's financial bottomline will require compensation and over 50 years there will be need for changes.

**Public involvement could be improved moving forward at every step of the process but especially around the final details.** Too often public education and input was limited to local elected officials and transportation planning organizations and periodic media coverage. Information needs to get more deeply disseminated to the public. Public input opportunities were inadequate at the end of the process after the final details were released.

**Plenary's involvement provided an opportunity to build Phase 2 now without additional public funds and transferred risk to Plenary. Plenary believes revenue will exceed costs, which actually supports argument for public funding.** The decision to move forward with the Plenary deal was based on assumptions that additional public funding could not be raised through tax increases or an allocation from the State Legislature, and that the reliability that the toll revenue would cover construction costs and operating and maintenance were too risky to justify borrowing or bonding. So Plenary offered an opportunity to build Phase 2 now. In addition, Plenary took over an additional $54 million TIFIA loan from Phase 1, which freed up CDOT resources, is maintaining U.S. 36 for 85 percent of the cost of what it would cost CDOT and if toll revenue does not meet expectations, Plenary holds most of the risk. We have to assume that Plenary is confident they can cover their costs and then some over the next 50 years through toll revenue, payments from CDOT/HPTE and other ventures or they would not have agreed to this deal. Unless Colorado is betting on Plenary's poor judgment, it seems fair to assume that Plenary will raise enough revenue to pay back their initial investments plus the cost of maintaining the Bus/HOV/toll lanes and the costs of returning the road in good condition. If that is the case, then that supports arguments that it would have been better to fully fund this project publicly since publicly-funded projects will be better long-term deals because the government can borrow at lower rates and the public can maintain complete control of assets. If Plenary miscalculated and revenues come in below expectations, Plenary will mainly be on the hook not the public.

# Recommendations

As the first of potentially many private roads deals in Colorado, it is critical that we increase protections for the public interest to avoid problems with future agreements. The following are a set of recommendations for action by decision makers like CDOT, HPTE and the State Legislature.

1. **Continue to prioritize transportation projects that increase alternatives for Coloradans.** Coloradans are driving less and walking, biking and taking transit more. As last year was the ninth in a row that Americans reduced their per-capita driving, this trend appears here to stay[xi]. As Colorado is set to add a million more people in the next couple decades, transportation officials should prioritize keeping our transportation infrastructure in good, safe condition and providing alternatives that give people transportation options. U.S. 36's primary focus is upgrading current highway capacity and maximizing moving people efficiently by adding new lanes meant primarily for bus and carpool.
2. **Improve documentation of decision making process and ensure the public can clearly weigh final agreements against alternatives, even if those alternatives are no longer under consideration.** The public will enter into transportation discussions at different stages of the process. It is critical that background information is included to ensure they understand what decisions have been made and the rationale behind those decisions. A final agreement should always be presented in relation to the alternatives, even if those alternatives were determined to be problematic or politically infeasible such as pursuing additional federal loans and new public revenues as a way to fully fund the project.
3. **Increase public oversight so that the highest level of oversight is done by the most publicly accountable officials.** Big decisions need to be made by the most publicly accountable officials so the public has confidence that their voice will be heard. HPTE is a relatively unknown agency and public accountability is lower. Public confidence will be higher if the CDOT Board, which is the traditional decision making body for all statewide transportation projects, was the lead group for private road deals and elected officials like the State Legislature were more actively involved.
4. **Private road proposals should typically be no longer than 30 years and any proposal for an exception should come with a clear rationale.** Problems with long-term deals get exponentially worse the longer the deal. So it is critical to balance opportunities to raise upfront private funds for large infrastructure projects with the inability to predict transportation policy 50 years out. 30 years is a standard borrowing period. No private road deals should exceed 30 years unless there is a special circumstance which the public should be able to weigh in on.
5. **Final details and agreement documents should be made public well before a final deal is approved.** While parameters for private road deals are developed years in advance and details emerge through the bidding process, it is critical the public be able to view the final agreement details well before a deal is approved. Details matter and without an opportunity to view the final documents, the public will lose confidence and struggle to provide input. If it is going to be released, it should be released quickly.
6. **Public involvement and comments should be increased throughout the process and there should be a mandatory public comment period of at least 30 days between the release of the final details and the final vote on an agreement.** Learning from the U.S. 36 process, CDOT should assemble a committee to make recommendations for increasing public involvement and comments throughout. In addition, there should be a mandatory comment period of at least 30 days for the public to review and weigh in on the final details. As demonstrated during the Plenary deal, the public will be most engaged around specific details and an impending decision.

7. **CDOT/HPTE online information for private road deals should be more centralized including background documents like EIS's and RFQ's and timelines should be more clearly laid out so the public can better review.** The public does not understand the differences between bidding, background information, traffic and revenue studies and EIS's and should not be expected to find different pages on CDOT's website to gather these different pieces of information. All the information should be centralized to one page for each project associated with a specific piece of transportation infrastructure – U.S. 36 for example.
8. **CDOT/HPTE should create a robust public review and comment process for the Plenary deal moving forward including a timeline for periodic review and for any proposed changes to the agreement or approval of Plenary plans.** Many in the public remained confused and concerned about the U.S. 36 deal with Plenary. Therefore, HPTE should ensure ample opportunities for the public to join HPTE in periodically reviewing Plenary performance and participate in approval of plans and any changes to the agreements. This involvement will not only improve understanding and confidence but provide valuable feedback for HPTE as they oversee Plenary.
9. **CDOT/HPTE should do more to help the public understand the value of private road deals including a document that breaks down different scenarios based on differing toll revenue and cost estimates.** Calculating the financial value of a project is extremely challenging and hard to predict. However, it is critical the public understand the likely scenarios that could result in a toll road being more or less valuable and the assumptions CDOT used in determining the value they negotiated for. A simple formula that the public can use will help them test assumptions and understand the scenarios in which a private road deal is a good deal or a bad deal.
10. **Any future private deal should ensure profit-making is in line with the public goals of the project.** The best private road deals create financial incentives that get the private company in line with the public's interest – for example, pay based on bus on-time rates. This is challenging to balance when project toll revenue is needed to pay for the project. But HPTE should begin every process by identifying ways profit-motives can coincide with public interest goals.
11. **Do not just "settle" for private deals.** Funding challenges for transportation are well documented, but elected officials should not accept less-than optimal arrangements simply out of fear of suggesting an increase in public funds. Generally, publicly-funded projects will be better long-term deals because the government can borrow at lower rates and the public can maintain complete control of assets. Clear options should be presented to the public in the future and it should not be assumed private deals are our only option.

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[i] Colorado Department of Transportation, Project Report: Achieving Value for Money, 12 February 2014, page 3
[ii] Colorado Department of Transportation, Project Report: Achieving Value for Money, 12 February 2014, page 3
[iii] Colorado Department of Transportation, Project Report: Achieving Value for Money, 12 February 2014, page 6
[iv] http://www.fhwa.dot.gov/ipd/tifia/
[v] FASTER
[vi] http://www.cleveland.com/metro/index.ssf/2012/12/post_77.html
[vii] Schedule 6 4.4.1 – page 29-33 and Appendix 6, Section 5, page 74-74
[viii] Peak Periods are 6:45am-8:45am and 4:30pm-6pm business days

[ix] which are described in Schedule 16 section 7 – HOV Change Event
[x]Summary of Certain Provisions of the Concession Agreement, 24 January 2014, Section 11.14, page 27
[xi] http://uspirg.org/news/usp/new-federal-highway-figures-reveal-ninth-consecutive-year-americans-driving-less