TOLL BRIDGE REGULATION: A METHOD OF MASS TRANSIT FINANCING AND AIR QUALITY CONTROL

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The practice of charging tolls on bridges began before the reign of Charlemagne.[1] As the era of private enterprise flourished in Great Britain and the United States, tolls for travelling on roads and bridges became the rule rather than the exception.[2] At one time almost all the bridges in Great Britain charged tolls for passage,[3] and many well-known bridges in the United States, built with private financing, charged tolls to provide a fair return on the construction investment.[4]

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1. W. WATSON & S. WATSON, BRIDGES IN HISTORY AND LEGEND (1937) [hereinafter cited as WATSON].

2. *See generally* M. SEARLE, TURNPIKE AND TOLL-BARS (1937) [hereinafter cited as SEARLE]; F. WOOD, THE TURNPIKES OF NEW ENGLAND (1919).

3. 1 SEARLE, *supra* note 2, at 62-68.

4. WATSON, *supra* note 1, at 175-76. The Brooklyn Bridge, for example, was originally constructed as a private enterprise although it was later taken over by the separate cities of New York and Brooklyn. The following tolls were in effect in 1885.

Each foot passenger	1¢
Each rail passenger	3¢
One horse and one man	3¢

Increased mobility, spurred by the development of a new means of transportation, brought natural opposition to paying tolls for crossing bridges or using roads. Throughout the United States many people fought for legislation to free the toll facilities.[5] In response to this demand,[6] local and federal governmental policy began to view roadways not as private property but as facilities that should be open to the general public.[7]

With regard to bridges, Congress moved at a slightly different pace,[8] although a free bridge policy eventually prevailed. Both before and after the General Bridge Act of 1906[9] public and private bridges were permitted to charge tolls, limited only by the requirement that the charge remain "reasonable and just."[10] Later, in granting approval for the construction of each new bridge, Congress added the restriction that tolls could not exceed an amount necessary to repay the cost of construction.[11] The General Bridge Act of 1946[12] limited this "no-profit" restriction to publicly-owned bridges, while

One horse and one vehicle	5¢
Two horses and one vehicle	10¢
Each additional horse	3¢
Neat cattle	5¢
Sheeps and hogs	2¢

Id.

5. 2 SEARLE, *supra* note 2, at 631-62.

6. *See* U.S. DEP'T OF TRANSPORTATION, FEDERAL HIGHWAY ADMINISTRATION, A HISTORY OF THE FEDERAL AID PROGRAM 14, 16 & 253 (1976) [hereinafter cited as AMERICA'S HIGHWAYS].

7. Congressional sanction of such policy is clearly stated in the Federal-Aid Highway Act: "Except as provided in section 129 of this title with respect to certain toll bridges and toll tunnels, all highways constructed under the provisions of this title shall be free from tolls of all kinds." 23 U.S.C. § 301 (1970).

8. Congress derives its power to regulate bridges from the Commerce Clause, U.S. CONST. art. I, § 8, cl. 3. Congressional regulation of bridges was upheld in Gilman v. Philadelphia, 70 U.S. (3 Wall.) 713 (1865).

9. 33 U.S.C. §§ 491-498 (1970).

10. *Id.* at § 494. See discussion of "reasonable and just" toll rates at notes 79 to 89 and accompanying text *infra*. Many bridges were sponsored by stock promotion projects. For example, in 1928 Congress granted 75 franchises for private toll bridges. AMERICA'S HIGHWAYS, *supra* note 6, at 116.

11. The 1906 Act provided a mechanism for granting permits for construction but left it to Congress to approve each particular bridge on an individual basis. 33 U.S.C. § 491 (1970). It was not until the 1946 Act that Congress gave blanket approval to bridges as long as the permit was acquired in the prescribed manner. 33 U.S.C. § 525 (1970).

12. 33 U.S.C. §§ 525-533 (1970).

privately-owned structures remained subject only to the "reasonable and just" standard.[13]

I. HISTORY OF REGULATION

The proliferation of private bridges within the public road network, on which the nation's commerce depended, prompted Congress to enact the General Bridge Act of 1906.[14] One of the primary purposes of this legislation was to protect the public from exorbitant charges being levied by private bridge owners.[15] By establishing federal controls, Congress reacted to a contemporaneous Supreme Court decision, *Covington & Burlington Turnpike Road Company v. Sandford*,[16] which addressed the reasonableness of toll charges. In *Covington*, the Court upheld a state statute that reduced the toll rate charged by a state-created private turnpike corporation, in effect drastically reducing the ratemaking ability of the private operators.

Although the original legislation was directed toward private bridge owners, the same restrictions were often applied to publicly-owned bridges as well. For example, Congress authorized the construction of four interstate bridges for New York City, to be built by the New York Port Authority,[17] but conditioned its approval by mak-

13. *Id.* at §§ 526, 529 (1970).

14. 33 U.S.C. §§ 491-498 (1970). *See* notes 44-46 and accompanying text *infra*.

15. H.R. REP. NO. 182, 59th Cong., 1st Sess. 2 (1906). *See generally* 40 CONG. REC. 1602-03, 1656, 1715-20 (1906). Several Congressmen evinced concern about high tolls levied by bridge owners. Mr. Clark, of Missouri, noted that it cost more to transport coal across the St. Louis-East St. Louis Bridge than it cost to transport the coal from central Illinois to St. Louis. The 1906 Act authorizes the Secretary of War to fix the rates of tolls and grants bridge owners the right to change those tolls. Congress insured against bridge owners abusing this right by authorizing the Secretary of War to bring a mandamus or injunctive action against the owner. Additionally, the Secretary could levy prescribed fines against the owner if the owner violated the Act. The Interstate Commerce and Foreign Trade Committee, which sponsored the bill, intended to levy an onerous but not unbearable fine on owners for violating the Act. Congressional approval, in the form of a special bill, was required prior to the construction of a bridge over interstate waters. A second purpose of the bill, in addition to protecting travelers against exorbitant tolls, was to minimize the time Congress spent considering each special bill. Previously, lengthy passages in each bill required extended debate and occupied a large part of the statutes. Under the 1906 Act, Congress could quickly pass a relatively short bill of a prescribed form. The new short form provided the further advantage of insuring uniform legislation.

16. 164 U.S. 578 (1889) (a court, in determining whether a toll is unreasonable or unjust, must consider the facts of each case. Factors the court weighs are the interests of the owner and the public and construction and maintenance costs).

17. N.Y. UNCONSOL. LAWS §§ 6401-6423 (65 McKinney's 1961) (created the New

ing each bridge subject to the restrictions of the 1906 Act.[18] Thus, for a short period of time, federal rate control extended theoretically to many bridges. In the 1946 Act, however, Congress returned to distinguishing between publicly and privately-owned bridges, establishing separate standards for determining tolls on public and private bridges.[19]

A. *Importance of Toll Regulation*

With overcrowded urban roadways, decreasing energy resources, and increasing pollution problems during the last ten years, the pendulum has swung away from the free road and bridge policy. Control of traffic flow has frequently been suggested as a means of addressing such problems.[20] Implementation of another possible solution, the urban mass transit system, has been hampered by a need for large capital outlays and by high operating expenses.[21] Although federal programs provide some financial support for mass transit sys-

York Port Authority for the purpose of improving co-ordination of commerce facilities in the port of New York City and facilitating the cooperation of New York and New Jersey to encourage financial investment in future commercial developments).

18. *See* Act of August 23, 1921, ch. 77, at 174; and Act of March 2, 1925, Pub. L. No. 520-22, 43 Stat. 389-91. The Act of March 2, 1925 specifies the dates for commencement and completion of four bridges between New York and New Jersey. The Act also specifies the sites of the bridges and provides that the bridges are to be operated in accordance with the General Bridge Act of 1906. *Id.*

19. 33 U.S.C. §§ 526, 529 (1970): The Secretary of War was authorized to prescribe reasonable tolls for privately-owned bridges, determined by the "reasonable and just" standard. Tolls for government-owned bridges were set according to the goal of providing an amortization fund for the construction, operation, and maintenance of the bridge. After the fund is established tolls are to terminate.

20. Planning guidelines jointly issued by the U.S. Environmental Protection Agency and the U.S. Department of Transportation for the attainment of air quality standards under the Clean Air Act require the planning agency to analyze certain traffic control measures. 42 U.S.C.A. § 7408(e) (1977). The guidelines suggest the following traffic control measures: private car restrictions, road pricing to discourage single occupancy auto trips, controls on extended vehicle idling, and traffic flow improvements. U.S. ENVT'L PROTECTION AGENCY & U.S. DEP'T OF TRANSP., TRANSPORTATION AIR QUALITY PLANNING GUIDELINES (1978).

21. The total operating assistance provided for public transit operators by local, state, and federal assistance programs has risen from $1,407.8 million in 1975 to $1,904.1 million in 1977. Total transit expenses increased from $2,241.6 million to $2,304.8 million in the years 1972 to 1977. AMERICAN PUBLIC TRANSIT ASSN, TRANSIT FACT BOOK, tables 3, 4 (1978). The average cost of a motor bus increased from $40,522 to $69,921 between 1972 and 1976. AMERICAN PUBLIC TRANSIT ASSN, UNITED STATES TRANSIT *Industry* Market Forecast (1977).

tems, funds are limited and frequently require matching amounts from local sources.[22] Financing the construction of a mass transit system is beyond the reach of most urban centers, many of which have already been forced to cut back on services to maintain solvency.[23] Therefore, new financial resources must be developed if mass transit systems are to be a viable method of solving urban transportation problems.

Bridge tolls are one possible solution for many of the financing barriers. Tolls may be used to subsidize mass transit operations. They may be manipulated to encourage or discourage use of bridges, and thus are an attractive method of managing or reducing traffic congestion and heavy accumulation of vehicle emissions. The possibility of using tolls in this manner, however, is restricted by two types of regulation. One type concerns the diversion of toll revenue from direct support of bridges to support of governmental services such as police and fire departments, and mass transit systems. The other type includes restrictions in the Federal-Air Highway Act[24] that conflict with Clear Air Act[25] requirements. Future developments under both of the General Bridge Acts and the Federal-Aid Highway Act are likely to involve issues arising under both of these regulations. This Article will explain how these issues arose and predict what effect judicially advanced policies will have on the use of publicly-owned bridges for either mass transit support or as mechanisms for ensuring compliance with standards set forth in the Clean Air Act.

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22. *See, e.g.*, 49 U.S.C.A. §§ 1601-1614 (West Supp. 1977) (federal financial assistance to reimburse state and local governments for operating expenses and to correct deferred maintenance cannot exceed the funds provided by the grantee. *Id.* at § 1614 (d)).

23. *See* Muller, Service Costs in the Declining City in Subcomm. on the City of the House Comm. on Banking, Finance and Urban Affairs, 95th Cong., 1st Sess. How Cities Can Grow Gracefully 119 (1977).

24. 23 U.S.C.A. §§ 101-136 (West Supp. 1978). For a background and discussion of the Federal-Aid Highways Act, see Schwartz, *Urban Freeways and the Interstate System*, 8 TRANSP. L.J. 167 (1976).

25. 42 U.S.C.A. §§ 7401-7642 (West Supp. 1978). For a background of the Clean Air Act Amendments of 1970, see Kramer, *Economics Technology, and the Clean Air Act Amendments of 1970: The First Six Years*, 6 ECOLOGY L.Q. 161 (1976). For a discussion of the impact of the Clean Air Act on transportation see Bracken, *Transportation Controls Under the Clean Air Act: A Legal Analysis*, 15 B.C. IND. & COM. L. REV. 749 (1973); Marcus, *Clean Air in Search of a Comprehensive National Plan: An Urban View*, 8 URB. LAW. 307 (1976).

B. *Regulation Under the General Bridge Acts*

The Federal Highway Administration (FHWA)[26] has adopted uniform procedures for determining whether toll rates for the seventy-two bridges subject to FHWA control[27] are "reasonable and just."[28] These procedures allow the bridge owner to increase rates without prior federal approval. Only if a complaint about a toll is received, or if the Administrator decides to look into the matter on his own motion, is a proceeding commenced.[29] At that point all public complaints are transmitted to the bridge owner, who is required to submit detailed answers with an explanation of why the tolls should be considered reasonable.[30] At the same time, an investigation team appointed by the Administrator issues interrogatories and prepares a report, recommending whether the Administrator should take any further action.[31] After reviewing the recommendation, the Adminis-

26. 49 U.S.C.A. § 1652(e)(1) (West 1976) (creating the FHWA).

27. U.S. DEP'T OF TRANSPORTATION, A STUDY OF FEDERAL STATUTES AND REGULATIONS GOVERNING TOLL BRIDGES (TOLL STUDY) app. 2, at 5-6 (1974) [hereinafter cited as TOLL STUDY]. Many bridges are not subject to FHWA regulations. For example, bridges built under the authority of state legislatures across rivers the navigable portions of which lie wholly within a state and bridges built prior to 1946 are among those excepted from regulation. 33 U.S.C. §§ 503, 530. As a result, cities with many bridges often have a mixture of federally regulated and non-regulated bridges.

All bridges owned by the Port Authority of New York and New Jersey are covered by federal regulations. These are the Bayonne, George Washington and Goethals bridges and the Outerbridge Crossing. Other toll bridges in and around New York City are free from federal regulations. The FHWA regulates tolls on the San Francisco-Oakland Bay Bridge but not on the Golden Gate Bridge which is subject to state control.

28. 49 C.F.R. § 310 (1977). The Federal Highway Administrator (1) determines whether there are sufficient grounds to initiate adjudication proceedings on the question of the reasonableness of a toll; (2) determines whether a toll rate is "reasonable and just"; and (3) prescribes the toll rates if he determines that existing rates are unreasonable and unjust. *Id.* at Subpost A.

29. 49 C.F.R. § 310 (1977). "Any person" may file a written complaint with the Administrator. A brief statement of the nature of the complainant's interest in the "reasonableness and justness" of tolls; the reasons the complainant feels the tools are "unreasonable and unjust"; and a statement of any prior action the complainant has taken to obtain a change in tolls are among the required provisions of a complaint.

30. 49 C.F.R. § 310.4 (1977). The respondent, defined as the person or agency responsible for establishing or collecting a toll, must file a written response with the Administrator within 30 days after the respondent receives the complaint. The answer should contain detailed statements of toll revenues and information about the intended and prior disposition of toll revenues. *Id.*

31. 44 C.F.R. § 310.5 (1977). The Administrator may conduct the investigation

trator either orders a hearing or makes a decision on the data as submitted.[32] Once a toll decision is reached, that rate remains in effect for the term of the order[33] unless a petition for modification is submitted.[34]

One of the most important elements of the entire process is the requirement of a formal Administrative Procedure Act (APA)[35] hearing if the Administrator finds there are factual issues in dispute.[36] Without the APA hearing, most decisions of the Administrator would be subject to *de novo* review in the courts, thereby greatly increasing

himself or he may appoint representatives of the Administrator to direct a formal adjudicatory proceeding; those representatives may participate as representatives of the public interest. The investigation is to be concluded within 90 days after the Administrator receives a response from the respondent. That deadline may be extended 45 days to allow the complainant to respond to inquiries made by the investigators if the investigators request the information within 60 days after the Administrator received the respondent's answer to the complaint. *Id.*

32. 49 C.F.R. § 310.7 (1977). Within 30 days after the conclusion of the investigation the Administrator determines whether there are sufficient grounds for an adjudication. After the termination of the investigation the Administrator may hold informal conferences with the complainant or respondent to simplify or resolve the issues. If such a conference is held, the Administrator must make his determination within 30 days after he receives the transcript of the last informal conference. *Id.* at §§ 310.6, 310.7.

33. 49 C.F.R. § 310.16 (1977). An order setting the "reasonable" rates cannot be for less than two or more than three years in duration. When the order terminates the bridge owner is free to raise the rates. If someone complains about the new rates the entire procedure for reviewing the reasonableness of the rates begins anew. *Id.*

34. 49 C.F.R. § 310.4a (1977). A respondent may petition for modification of the Administrator's order setting new toll rates. The respondent must publish a notice of the petition to modify that includes a proposed toll rate. When he receives the petition the Administrator publishes a notice in the Federal Register. The administrator will not consider a petition to modify an order for at least six months after the order was issued, unless the order specifically provides otherwise. Unless the Administrator orders otherwise or additional complaints are submitted under § 310.3, the toll rate proposed by the respondent will take effect 10 days after notice publication in the Federal Register. If a complaint is received or if the proposed toll rate is stayed, the Administrator investigates and determines the petition for modification in accordance with the other provisions of the regulation. *Id.*

35. Administrative Procedure Act, 5 U.S.C. § 556 (1970) (provides for administrative hearings by a government agency to decide issues of fact arising between parties).

36. *See* Citizens for Allegan County, Inc. v. FPC, 414 F.2d 1125 (D.C. Cir. 1969) (a citizen's group was entitled to have a meaningful opportunity for hearing in order to oppose an electric company's acquisition of their city's power plant and for the transfer to the company of a dam and power house license). *See, e.g.*, United States v. Consolidated Mines and Smelting Co., 455 F.2d 432 (9th Cir. 1971) (where no facts are at issue there should be no adversary hearing even though the statute so provides).

the amount of time necessary to reach a decision and decreasing the influence the Administrator's expertise would play in the decision-making process.

Although the Administrator's authority involves a ratemaking function, it is not the type of ratemaking that can be handled through rulemaking on an industry-wide or area-wide basis.[37] Rather, even though the authority to set rates is primarily legislative in character, the type of proceeding at which the reasonableness of the rate is determined is actually quasi-judicial.[37a] This was first determined by the Supreme Court in *Interstate Commerce Commission v. Louisville & Nashville Rail-Road Company*,[38] many years prior to the adoption of the APA. The case involved an analogous Interstate Commerce Commission (ICC) ratemaking proceeding in which railroad class and commodity rates were reviewed by the ICC upon receipt of complaints. The Court found such proceedings quasi-judicial in nature and determined that all parties had the right to fully appraise the evidence submitted, cross-examine witnesses, inspect documents, and offer evidence in explanation or rebuttal.[39] More recent cases have reinforced the full hearing requirement when the question of reasonableness of an individual rate is examined.[40]

37. *See* United States v. Allegheny-Ludlum Steel, 406 U.S. 742 (1972) (ICC rule regulating the movement of railway cars was found constitutional because reasonably based on the Esch Car Service Act of 1917, 49 U.S.C. § 1(14) (1970)); Permian Basin Area Rate Cases, 390 U.S. 747 (1968) (area maximum rates for natural gas were held to be constitutional due to their conformity with the Natural Gas Act, 15 U.S.C. § 717d(a) (1970)).

37a. The recent decision of the Court of Appeals in Automobile Club of New York v. Cox, No. 78-6054 (2d Cir. Jan. 12, 1979) decided that for the purpose of standard of review toll rate proceedings should be treated as rulemaking actions. Slip op. at 10, 11. The accuracy of such a finding is questionable because it is contrary to a number of Supreme Court decisions. *See* note 40 *infra*.

38. 227 U.S. 88 (1913) (New Orleans Board of Trade brought three separate proceedings against defendant asking the Commission to set aside as unreasonable and discriminatory certain class and commodity rates on local and thoroughfare routes).

39. *Id.* at 97.

40. *See* United States v. Florida East Coast Ry. Co., 410 U.S. 224 (1973) (citing *Louisville & Nashville* to distinguish an adjudicatory proceeding from quasi-legislative action); Ohio Bell Tel. Co. v. Pub. Utilities Comm'n, 301 U.S. 292; 300 (1937) (denial by Commission of company's request to analyze, explain and rebut evidence used to order a refund of rates previously collected, held to deny company's right to a fair hearing essential to due process); Morgan v. United States, 298 U.S. 468, 479-80 (1936) (requiring a full hearing when Secretary of Agriculture fixes rates of market agencies); Clarksburg-Columbus Short Route Bridge Co. v. Woodring, 89 F.2d 788 (D.C. Cir. 1937), *rev'd and remanded for dismissal as moot*, 302 U.S. 658 (1937) (where

Providing a full APA hearing in toll cases is particularly important insofar as rate regulation is not the primary function of the FHWA.[41] Unlike the independent regulatory agencies such as the ICC or the Civil Aeronautics Board,[42] the FHWA does not have a permanent staff primarily responsible for rate regulation activities or a commission or board to make the final decision on such matters. The use of the APA procedure, therefore, provides fairness to all parties and guarantees that decisions will be reached in a fair and just manner.

C. *The Use of Toll Revenue to Support Municipal Services*

Early federal legislation prohibited the construction of bridges over waterways of the United States without congressional consent.[43] Thereafter, Congress had to pass a separate bill for every proposed bridge. After years of passing redundant, time-consuming bills, the General Bridge Act of 1906 was created as a means of eliminating duplicious work and establishing uniformity in bridge regulations.[44] Included among its provisions was the restriction that tolls charged for passage should be "reasonable and just,"[45] although the legislative history provides little indication of what the term meant or how

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plaintiff initially sought to restrain Secretary of War from continuing in force an order setting bridge tolls charged by defendant bridge company, court held that there is an imperative right in a judicial or quasi-judicial proceeding to a hearing even though not specifically authorized by statute, there being a constitutional right).

41. The primary responsibility of the FHWA is administration of the multi-billion dollar Federal-Aid Highway Construction Program. 23 U.S.C. § 101 (1970).

42. The Civil Aeronautics Board was created by Section 201 of the Civil Aeronautics Act of 1938, 52 Stat. 973. The Board is an agency of the United States and is composed of five members appointed by the President with the advice and consent of the Senate. Each member serves a six-year term. 49 U.S.C. § 1321(a)(1) (1970). The Board was terminated effective January 1, 1985, by the Airline Deregulation Act of Oct. 24, 1978, Pub. L. No. 95-504, Tit. XVI, 11A U.S. CODE CONG. & AD. NEWS (1978) (to be codified in 42 U.S.C. § 1301).

43. *See, e.g.*, 33 U.S.C. § 401 (1970). In addition to Congressional consent, the statute requires that plans be submitted to and approved by the Chief of Engineers and Secretary of War. This approval is adequate without Congressional consent for bridges authorized by a state and constructed over waterways the navigable portions of which are wholly within that state. *Id.*

44. *See generally* H.R. REP. No. 182, 59th Cong., 1st Sess. 1 (1906). The report submitted by Rep. Wagner, a member of the Committee on Interstate and Foreign Commerce, cited the need for uniformity of regulation in the construction and operation of bridges spanning navigable waters as the objective behind the act. Such a statute would eliminate the need for "cumbering up of the statute books by repeating in each bridge bill the same provision." *Id.*

45. 33 U.S.C. § 494 (1970).

it was to be defined.[46] Congress, in imposing the reasonableness requirement, was surely aware of the recent Supreme Court opinion in *Covington*,[47] where the term was discussed in connection with a privately-owned toll road. In *Covington* the Court made it clear that the right of the public to use a highway without being charged an exorbitant price could not be subordinated to the interests of the road company's stockholders in earning a dividend.[48] This balancing of interests between the tollpayers and the bridge owners has continued to play an important role in virtually every subsequent proceeding under the Act.[49]

Another factor in determining reasonableness is the rate charged by competing facilities. A 1935 decision by the Secretary of War lowered the tolls on a bridge across the Ohio River owned by the Parkersburg Community Bridge Company.[50] The owners of a competing bridge appealed to a federal court on due process grounds, arguing that they had not been given the opportunity to present evidence regarding the effect that a reduction in tolls would have in di-

46. *See* H.R. REP. No. 182, 59th Cong. 1st Sess. 2 (1906). The phrase "such tolls shall be reasonable and just" appears only in the first paragraph of the committee's suggested amendments to the bill as approved by the Secretary of War and the Chief of Engineers, but no accompanying explanation of the term is contained in the report.

47. 164 U.S. 578 (1896). The Kentucky Legislature created the turnpike company in 1834 for the purpose of constructing a road from Covington to Lexington. The act also regulated toll rates. Later, two new corporations were formed to control parts of the road. After two subsequent acts, in 1865 and 1890, reducing the rates, one of the companies chose to disregard the regulations and raised the toll rates. Users living on or near the turnpike road then brought suit for an injunction restraining the company from exacting higher tolls than prescribed by the legislature. *Id.* at 580. The injunction was granted and judgment was affirmed by the state court of appeals. On appeal to the United States Supreme Court the company argued that it was denied due process of law in violation of the Fourteenth Amendment, because the lower rates allowed by the legislature amount to a deprivation of the company's property. *Id.*

48. In holding that the company had presented a prima facie case of the validity of the 1890 statute, the Supreme Court set down criteria to be followed on remand, one of which was that the public interest, in addition to the interest of the stockholders, was to be considered in assessing a reasonable and just rate. *Id.* at 595-96.

49. *See* City of Burlington v. Turner, 336 F. Supp. 594, 608 (S.D. Ia. 1972), *rev'd on other grounds*, 471 F.2d 120 (1973) (administrator must consider the impact of the toll rate on each user class to avoid having toll structure deemed arbitrary and capricious); Clarksburg-Columbus Short Route Bridge Co. v. Woodring, 89 F.2d 788 (D.C. Cir. 1937), *rev'd and remanded for dismissal as moot*, 302 U.S. 658 (1937) (the existence of competing bridges and their effect on toll payers must be considered).

50. *See* Clarksburg-Columbus Short Route Bridge Co. v. Woodring, 89 F.2d 788, 789 (D.C. Cir. 1937), *rev'd and remanded per curiam for dismissal as moot*, 302 U.S. 658 (1937).

verting traffic away from their facility.[51] The court agreed that both the competing bridges and the diversion of traffic were factors that should be considered.[52] Since that time, these two elements have played an essential role in toll regulation decisions.

The next case under the 1906 Act, *City of Burlington v. Turner*,[53] arose in 1970 when a large number of complaints charged that tolls for passage over the MacArthur Bridge, which spanned the Mississippi River from Burlington, Iowa, to Henderson County, Illinois, were not just and reasonable. The bridge owner, the City of Burlington, cancelled a "free return" privilege, in effect enforcing a one-hundred percent increase in the toll.

Evidence introduced at the administrative hearing proved that the toll revenue, even before the increase, exceeded an amount necessary to pay for operational and maintenance expenses as well as amortization of the bond debt that had been incurred to pay for the bridge construction. The "excess" revenue was intended for general municipal expenses such as street maintenance, sanitation, airport construction and operation, and police and fire protection. While bridge revenue had long been diverted for these other uses, Burlington sought increased toll revenues to pay higher salaries to its police and fire departments.[54]

Although a hearing examiner upheld the tolls based on a comparison to other Mississippi River bridges,[55] the Administrator reversed, citing a congressional policy that had evolved since the 1906 Act was passed.[56] He found that, since 1926, each Act authorizing the construction of a bridge restricted all tolls to an amount sufficient to "pay for the cost of maintaining, repairing, and operating the bridge and its approaches and to provide a sinking fund sufficient to amortize the cost of such bridge and its approaches as soon as possible under reasonable charges."[57] This language, indicative of the "free roads

51. 89 F.2d at 789.

52. 89 F.2d at 793.

53. 336 F. Supp. 594 (S.D. Ia. 1972), *aff'd as modified*, 471 F.2d 120 (8th Cir. 1973).

54. In the Matter of MacArthur Bridge Tolls, (Administrator's Decision, Burlington, Iowa, April 30, 1971).

55. In the Matter of MacArthur Bridge Tolls, (Hearing Examiner's Decision, Burlington, Iowa, September 10, 1971).

56. In the Matter of MacArthur Bridge Tolls, (Administrator's Decision, Burlington, Iowa, April 30, 1971).

57. *See* FORMS FOR BRIDGES BILLS, S. DOC. NO . 103, 69th Cong., 1st Sess. 6

and bridges" movement,[58] prompted the Administrator to deny bridge tolls intended to pay for general municipal services.

The district court, on review, found that the Administrator was in error when he restricted revenues to an amount sufficient to pay for the cost and maintenance of the bridge.[59] In place of that test, the court suggested a very broad standard that would consider other similar tolls, physical characteristics of the bridge, the amount and nature of traffic, other transportation conditions, traffic origins and destinations, effect of the tolls on particular classes of users, external costs, and benefits to local users.[60] With regard to the last consideration, the court found it proper to consider how the bridge-owning community would otherwise pay for such things as streets and police protection.[61]

The Eighth Circuit upheld the conclusion of the district court that the Administrator had been in error, but did not endorse the reasonableness test suggested by the lower court. Finding that consideration of a multiplicity of factors was too broad, the court suggested a test based on allowing the bridge owner a fair return on invested capital.[62] The court made it clear that the methods of setting rates used by Burlington, the Administrator, and the district court, were equally unacceptable since none of the three were intended to establish just and reasonable rates.[63]

(1926). Form 7, providing for the construction and regulation of municipally owned toll bridges, further states that once a sufficient sinking fund has been established to pay the cost of the bridge, the bridge is to be operated toll free, or at a rate no higher than to provide for care and maintenance. Section 4 continues by requiring that a record of collections and expenditures be maintained and be made available to all interested parties. *Id.* This latter provision indicates that the public interest in the matter of rate collections is to be considered.

58. *See* 67 CONG. REC. 8528 (1926). As the Senate record pointed out, the movement by the federal government toward free bridges was apparent in the policy of the Bureau of Roads of the Department of Agriculture to recommend that Congress withhold federal aid to bridges and highways not operated toll free. Congress adopted this policy by refusing to grant expenditures for non-toll free bridges linking federal-aid highways. *Id.* at 8531.

59. City of Burlington v. Turner, 336 F. Supp. 594 (S.D. Iowa 1972), *aff'd as modified*, 471 F.2d 120 (8th Cir. 1973).

60. 336 F.2d at 607.

61. *Id.*

62. 471 F.2d at 123.

63. "The method Burlington used in setting tolls was based primarily on its financial needs, unrelated to the bridge, and is no more reasonable or just than the determination made by the Administrator." *Id.*

The judicial and administrative decisions concerning the MacArthur Bridge[64] established two of the major criteria for making decisions under the General Bridge Act of 1906: the rate of return on investment and the consideration of related facilities. It was not until later, however, that these concepts were refined into workable standards for determining whether the toll revenue could be used for other purposes such as subsidizing mass transit. One definite conclusion that can be drawn from the *Burlington* decisions is that people who pay tolls on a municipally-owned bridge will not be required to support general governmental services that are unrelated to any benefit they receive from the use of the bridge.

II. DELAWARE RIVER PORT AUTHORITY V. TIEMANN[65]

While *Burlington* was on appeal, the Delaware River Port Authority (DRPA)[66] increased the tolls on its two bridges.[67] Complaints were filed soon thereafter and a long line of administrative hearings and court proceedings began. DRPA, which owned the bridges, subsidized the Port Authority Transit Company, which operated a commuter rail line between suburban New Jersey and downtown Philadelphia. It also operated a World Trade Division whose purpose was to promote commercial activities within the Port of Philadelphia.

The DRPA-owned bridges were constructed under the authority of the General Bridge Act of 1946.[68] Under the Act, the reasonableness

64. After *Burlington* was remanded to the Administrator for a finding consistent with the appellate court's decision, another administrative hearing was held at which Burlington introduced evidence of its investment in the bridge. The Administrative Law Judge computed the depreciated investment in the facility and concluded that the city should be able to receive a rate of return of 8%. The 8% figure was based on testimony that the city would have been able to receive an 8% return had it invested its money in triple A corporate bonds. In the Matter of MacArthur Bridge Tolls, (Administrator's Decision, Burlington, Iowa, April 19, 1974).

65. 403 F. Supp. 1117 (D.N.J. 1975), *vacated and remanded on other grounds*, 531 F.2d 699 (3d Cir. 1976), *on remand*, 421 F. Supp. 142 (D.N.J. 1976).

66. DRPA is a bi-state public authority created by compact between Pennsylvania and New Jersey. 47 Stat. 308 (1932), *as amended*, 66 Stat. 738 (1952); N.J. STAT. ANN. §§ 32:3-1 to 3-18 (1963); PA. STAT. ANN. tit. 36, §§ 3503-3505 (Purdon 1961).

67. The increases were on the Ben Franklin and Walt Whitman bridges. Subsequently, DRPA has opened two new bridges connecting New Jersey and Philadolphia, the Betsy Ross and the Commodore Barry bridges.

68. 33 U.S.C. §§ 525-533 (1970). This Act gives congressional approval to the construction of all future bridges which comply with its requirements, eliminating the necessity for separate approval of each proposed bridge. *Id.* at § 525 (a).

of toll rates would ordinarily be easy to determine because publicly-owned bridges are restricted to charging tolls that provide maintenance costs and a sinking fund to pay off, within thirty years, all construction costs.[69] After building debts are satisfied, the bridge must become toll free.[70] Not so with the DRPA: In approving an amendment to the Delaware River Port Authority Compact that allowed the DRPA to conduct and operate a mass transit line, Congress altered the standard under which these particular toll rates were judged. This alteration reflected the desire of both New Jersey and Pennsylvania to use toll bridge revenues to fund a proposed high speed rail commuter line.[71] Congressional approval of the compact left the DRPA free from the 1946 Act's restrictions, but imposed one specific control:

> That, as a specific exemption from the provisions of Section 506 of the General Bridge Act of 1946, as amended, the collection of tolls for the use of any bridge hereafter constructed or acquired by the commission, in excess of amounts reasonably required for the operation and maintenance thereof under economical management, shall cease at the expiration of fifty years from the date [the bridge is open to traffic], and the rate of such tolls shall be subject to the provisions of Section 503 of the General Bridge Act of 1946, as amended.[72]

Section 503 of the 1946 Act[73] establishes the same reasonable and just standard as the 1906 General Bridge Act;[74] thus it seemed that the DRPA was restricted only to the reasonable and just standard that had governed toll rates since the 1906 Act rather than the newer toll rate "formula" applicable to publicly-owned facilities found in the 1946 legislation.

After a series of administrative hearings, necessitated in part by the energy crisis,[75] the Administrator issued an order lowering the tolls to

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69. *Id.* at § 529.

70. *Id.*

71. *See* H.R. REP. No. 2293, 82d Cong., 2d Sess. 2, 3 (1952) (recommending that bridge tolls also be used to support non-bridge facilities which would tend to develop a more comprehensive rapid transportation system designed to aid local users).

72. H.R. REP. No. 8315, 82d Cong., 2d Sess., 3 *reprinted in* [1952] U.S. CODE CONG. & AD. NEWS 700, 709.

73. Currently codified at 33 U.S.C. § 526 (1970).

74. *Compare* 33 U.S.C. § 526 *with* 33 U.S.C. § 494.

75. *See* In the Matter of Bridge Tolls on Bridges Operated by the Delaware River Port Auth. (Administrator's Order and Decision, May 19, 1975). An original round of hearings held in 1972 resulted in a decision by the Administrator that the toll increase

a level below those initially set by the DRPA.[76] The DRPA immediately appealed to the district court, asking for a stay of the new rates until the appeal could be heard on the merits.[77] On appeal the DRPA alleged that the Administrator had acted illegally by setting a toll rate that would yield an insufficient return in relation to pledges made to bondholders.[78]

A. *The "Reasonable and Just Standard"*

The court, in addressing the meaning of "reasonable and just" as used in the 1946 Act,[79] was faced with two ratemaking standards. The first involved the *Burlington* test, which looked to see whether the DRPA was realizing a fair return on its original investment. The second approach involved deference to the Administrator, who set the toll rate after balancing a number of conflicting interests.

The Administrator had considered the DRPA's financial position, the effect of an increased toll on tollpayers, and the public interest to be served by the toll increase.[80] This latter category included the effect a toll increase might have on discouraging auto use during the energy crisis and the ability of utilizing the toll system to encourage the use of carpools.

The court took this broader approach, finding that the Administra-

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should be rolled back. (Administrator's Decision June 1, 1972). The basis for the decision was the DRPA had underestimated traffic projections and had not considered other sources of revenue. While an appeal of this decision was pending, the oil embargo occurred resulting in a sharp decline in the number of vehicles using the bridges. Because of this and in order to consider a new carpool rate proposed by the DRPA, the Administrator ordered a completely new round of hearings. These new hearings were held in 1974.

76. *Id.* (Administrator's Order and Decision 7, May 19, 1978). For a discussion of the rate reductions see Delaware River Port Auth. v. Tiemann, 403 F. Supp. 1117, 1120-21 (D. N.J. 1975).

77. DRPA's request for a stay was granted. Delaware River Port Auth. v. Tiemann, No. 75-1219 (D. N.J. July 23, 1975).

78. *See* Delaware River Port Auth. v. Tiemann, 403 F. Supp. 1117 (D. N.J. 1975), *vacated and remanded on other grounds*, 531 F.2d 699 (3d Cir. 1976), *on remand*, 421 F. Supp. 142 (D. N.J. 1976). Other allegations on appeal were that the Administrator had denied DRPA due process of law by reopening the administrative record after the hearings were concluded, and had violated the National Environmental Policy Act, 42 U.S.C. §§ 4332-4334 (1970), by failing to file an environmental impact statement. 403 F. Supp. at 1142.

79. 33 U.S.C. § 526 (1970).

80. In the Matter of Bridge Tolls on Bridges Operated by the Delaware River Port Auth. (Administrator's Order and Decision May 19, 1978).

tor had successfully balanced various conflicting interests of higher tolls, needed revenue, and traffic reduction against lower tolls, less revenue, and increased traffic.[81] The decision concluded that rate regulation of an entity providing a necessary public service is an activity that frequently involves the weighing of many subtle, intangible qualitative factors.[82] Supporting this approach are examples of rate regulation from other industries.[83] Perhaps the most important support came from the Supreme Court decision of *Federal Power Commission v. Hope Natural Gas Company*,[84] which held that a court, in reviewing an administrative rate regulation decision, should look at the result reached rather than the particular path chosen.

By allowing the Administrator to both balance intangible and tangible factors and to consider public needs, as well as those of the bridge owner and the individual tollpayers, the scope of administrative inquiry is flexible, and permits the consideration of national transportation policy as an influencing factor.

The court rejected DRPA's argument that *Burlington* established the principle that a bridge owner is entitled to a fair rate of return. Instead of adopting the *Burlington* approach, the court found that DRPA, as a quasi-governmental entity, had no right to profit from public use of its facilities.[85]

The court's rationale for distinguishing the *Burlington* standard of "reasonable and just" is the major weakness of the opinion. The owner of the bridge in *Burlington* was a city, not a private company. Certainly if the DRPA as a quasi-governmental agency is not entitled to profit from the operation of its public facilities, the same rationale

81. 403 F. Supp. 1130.

82. *Id.* at 1128. *See also* SEC v. New England System, 390 U.S. 207, 211 (1968) (upheld SEC order based upon assessment of a variety of subtle and intangible factors).

83. Atcheson, Topeka & Santa Fe Ry. v. Board of Trade, 412 U.S. 800 (1973) (ICC's ratemaking authority is broad but not unlimited). *See* Board of Trade v. United States, 314 U.S. 534 (1942) (upholding enforcement of an ICC order affecting transportation rates for grain).

84. 320 U.S. 591 (1944), *cited in* Delaware River Port Auth. v. Tiemann, 403 F. Supp. 1117, 1127 (D. N.J. 1975). In *Hope* the Supreme Court upheld an FPC order reducing gas rates on the ground that the rate reduction still provided a "just and reasonable" return. *Id.* at 605. The Court focused on the impact of the ratemaking order upon the company rather than the specific formula employed in establishing rates. *Id.* at 602. *See also* FPC v. Natural Gas Pipeline Co., 315 U.S. 575, 586 (1942) (ratemaking agencies not required to utilize a single method for determining rates).

85. 403 F. Supp. at 1123-24.

can also be applied to the city. Therefore, the first distinction mentioned by the court is not convincing. The second distinction, that *Burlington* was decided under the 1906 Act whereas *DRPA* fell under the 1946 Act, is similarly unconvincing. The 1906 Act applied a plain "reasonable and just" standard to all bridges subject to its jurisdiction.[86] The 1946 Act also applied a "reasonable and just" standard to all bridges,[87] with the added restriction for publicly owned bridges that the tolls be limited to pay reasonable maintenance and operation expenses and enough to repay the original investment within thirty years.[88] Since the DRPA was exempt from this latter restriction,[89] it was subject to toll regulation under the same "reasonable and just" language used in *Burlington*.

B. *The Standard of Review*

Another aspect of the decision was most certainly correct. The standard of review in toll cases was identified as the substantial evidence test as set out in the APA.[90] The *DRPA* Court defined this to mean that the agency's decision must be supported by such relevant evidence as a reasonable mind might accept as adequate to support a conclusion.[91] In applying this test, the court concluded that deference must be given to the decisions of an agency with expertise in a particular area.[92] The court noted that the FHWA had acquired expertise in toll cases through its involvement in *Burlington* and several prior cases, and that the lack of expertise specifically mentioned by the *Burlington* court no longer existed.[93]

C. *Contractual Rights of Bondholders*

The DRPA raises capital to finance its projects through the sale of

86. 33 U.S.C. § 494 (1970).

87. 33 U.S.C. § 526 (1970).

88. 33 U.S.C. § 529 (1970).

89. *See* note 72 and accompanying text *supra*.

90. 5 U.S.C. § 706 (1970).

91. 403 F. Supp. at 1126, *relying on* Consolidated Edison Co. v. NLRB, 305 U.S. 197, 229 (1938).

92. 403 F. Supp. at 1127, *relying on* Consolo v. Federal Maritime Comm'n, 383 U.S. 607, 620 (1966) (upholding finding of Federal Maritime Comm'n that reparations should be paid by a shipping company that violated the Shipping Act to a competitor).

93. 403 F. Supp. at 1127.

revenue bonds. In order to market its bonds at a fair price and still assure stability of the bonds in the market, the DRPA has entered into a number of covenants designed to protect the bondholders' investments. Two of the covenants at issue in the toll case were contracts whereby DRPA agreed to pursue varying policies that were hinged upon the amount of revenue received in relation to bond commitments. For example, one of these covenants provided that the DRPA would not lower the tolls unless the ratio of net revenues available to meet bond service obligations was at least 1.60 (160%) in the preceding calendar year and would be, among other requirements, 1.40 (140%) in each of the two succeeding years.[94] The second covenant required that revenues be equal to 120% of bond service requirements for each calendar year.[95]

Although the Administrator's toll schedule permitted the DRPA to meet the 120% requirement, it did not allow enough revenue to meet the 160% test. Because of this the DRPA claimed that the Administrator's decision violated the contract clause of the Constitution and should therefore be set aside.[96]

The court rejected DRPA's argument. First, it pointed out that DRPA's bondholder purchases bonds with the understanding that toll rates were subject to federal control under the 1946 General Bridge Act. DRPA's prospectus on the sale of the bonds specifically mentioned the power of the Federal Highway Administrator to adjust toll rates. Second, in approving the 1952 amendment to the Interstate Compact, Congress included a provision stating that nothing in the compact could be construed as affecting or impairing the power or jurisdiction of any department, board, bureau, or officer of the United States.[97] In further support of this position, the court cited cases from other fields upholding the authority of regulatory agencies to make decisions abrogating existing contracts[98] and mentioned that the contract clause of the Constitution applies to state

94. *Id.* at 1132.

95. *Id.* at 1135.

96. *Id.* at 1138. *See* U.S. CONST. Art. 1, § 10.

97. 66 Stat. 738 (1952). *See generally* H.R. REP. No. 2293, 82d Cong., 2d Sess. 3 (1952).

98. *See* Colorado Interstate Gas Co. v. FPC, 142 F.2d 943 (10th Cir. 1944), *aff'd*, 324 U.S. 581 (1945) (FPC orders requiring gas companies to reduce excessive rates challenged as abrogating prior contracts but upheld by imputing to contracting parties knowledge of Congress' plenary power to regulate interstate commerce).

rather than federal action.[99]

Following the district court decision, the Third Circuit vacated the decision, remanding the case for further consideration of whether the record supported the Administrator's conclusion that revenues available under the new toll schedule would be sufficient to support DRPA's "total activities."[100]

On remand the Administrator reasserted his findings that the record supported his original conclusion. The matter was again appealed to the district court, which upheld the Administrator's decision a second time.[101] The DRPA withdrew its appeal to the Third Circuit when the Administrator amended his toll order so that it expired on November 30, 1977.[102] The DRPA was then free to raise its tolls without prior approval from the Administrator.[103]

The *DRPA* decision is important because of the Third Circuit's sanction of the Administrator's broad discretionary power to decide toll cases. The Administrator can freely consider a wide range of factors, including national transportation and environmental policies. In *DPRA* this discretion is exemplified by the importance attached to energy conservation. The goal of discouraging gasoline waste justified adopting a special carpool rate as part of the toll structure. Similarly, concern for contemporary mass transit strategy supported the conclusion allowing DRPA to use toll revenues to offset a reasonable deficit on its high speed commuter line (PATCO).

III. THE NEW YORK TOLL CASE—AUTOMOBILE CLUB OF NEW YORK V. COX[104]

In April 1975 the Port Authority of New York and New Jersey

99. 403 F. Supp. at 1138 n.63.

100. Delaware River Port Auth. v. Tiemann, 531 F.2d 699, 702 (3rd Cir. 1976).

101. Delaware River Port Auth. v. Tiemann, 421 F. Supp. 142 (D. N.J. 1976).

102. *See* 42 Fed. Reg. 37892-93 (July 25, 1977).

103. On February 1, 1978, DRPA again raised its toll for cars. Commuter and truck rates were also increased, but bus fares and carpool rates remained the same. Soon after the toll increase four individuals and one organization, the Automobile Clubs of Southern New Jersey, filed complaints with the Federal Highway Administrator. The investigation that was ordered by the Administrator set in motion the latest in this long line of Philadelphia bridge toll cases. *See* In the Matter of Tolls on Bridges Owned by the Delaware River Port Authority, FHWA Docket No. 78-15T (filed Feb. 28, 1978).

104. 444 F. Supp. 174 (S.D.N.Y. 1978).

(PONY)[105] increased the tolls on its bridges for the first time in fifty-four years of operation.[106] The Federal Highway Administration received a number of complaints asking that the increase be found unreasonable under the General Bridge Act of 1906.[107]

The stated purpose of the toll increase, according to PONY, was to provide additional revenues necessary to finance construction of new mass transit projects.[108] PONY took the position that its interstate compact permitted it to subsidize these new mass transit projects from toll revenue. The lead complainant in the case, the Automobile Club of New York, argued that PONY was not permitted to provide an unlimited subsidy to its other projects by charging high bridge tolls, but was restricted by the decision in *Burlington* to receiving an amount of toll revenue that would provide a fair return on its bridge investment alone.

At the hearing to decide the reasonableness of rates in relation to the "need" to subsidize other facilities, the Administrator determined that economic reasonableness should be measured by whether PONY received a fair return on its investment in the facilities.[109] This ap-

105. The Port Authority of New York and New Jersey (PONY) was created by Interstate Compact in 1921 and given the authority to develop public transportation, terminals and other facilities of commerce within the port district. S.J. Res. 88, 42 Stat. 174 (1921); N.J. REV. STAT. §§ 32:1-1 to 1-174 (1963); N.Y. UNCONSOL. LAWS §§ 6401-6423, 7002 (65 McKinney 1961). The authority owns or operates four bridges, two tunnels, one rapid rail line (PATH), two bus terminals, seven marine terminals, four airports including Newark, LaGuardia and Kennedy, two heliports and the World Trade Center.

106. The bridges owned by PONY are the Bayonne, Goethals, George Washington, and Outerbridge Crossing. At the same time the tolls were also increased on PONY's two trans-Hudson vehicular tunnels, the Lincoln and Holland Tunnels. All bridges owned by PONY are subject to regulation under the 1906 General Bridge Act. 33 U.S.C. §§ 525-533 (1970).

107. Eventually, there were 33 parties to the proceeding. Included were Congressmen Gilman, Peyser and Murphy opposing the increase and the Citizens for Clean Air, Environmental Defense Fund and City of New York supporting the increase.

108. The toll increase raised the automobile charge from $1 to $1.50 round-trip on all crossings, the commuter rate to $1 from $.50, and the truck rates by 50%. At the same time PONY initiated a special carpool discount for vehicles carrying three or more. The projects to be financed from the toll increase were: expansion by 50% of PONY's downtown bus terminal; extension of the Port Authority Trans-Hudson (PATH) rapid rail line to Plainfield, N.J.; the direct rail link to New York's Penn Station for New Jersey rail commuters; and a rail link to Kennedy International Airport. Minutes, Port Authority of New York and New Jersey, Board of Commissioners, April 10, 1975.

109. In the Matter of the Bayonne Bridge, Goethals Bridge, George Washington

proach was used to avoid waste, cover expenses, and allow PONY to attract further capital in the market place. It was suggested that a six to eight percent rate of return was "reasonable."[110]

A. *Formulation of a Rate Base*

Because there was little dispute among the parties regarding the economic test to be applied and no dispute about the financial data provided by PONY, the economic aspect of the case turned on which facilities should be included in the rate base. That is, the key decision was whether facilities *other than the bridges*, especially the rapid transit line, PATH, should be included. If PATH were included, virtually any toll increase would be reasonable from a purely economic standpoint since PATH generated a large deficit. Charging the PATH deficit against the bridge toll revenue would reduce the net revenue level to a rate of return well within the reasonable range.

The three major parties advanced different arguments on these issues. The Auto Club took the position that *Burlington* prevented inclusion of non-bridge related facilities in calculating the rate of return. Under this theory, the rate of return on investment in the George Washington Bridge must be computed on the basis of cost, depreciation, and expenses of that facility alone.

Public Counsel and PONY disagreed with the Auto Club. They argued that the Administrator should include in the rate base all facilities that are *functionally related* to the bridges, with functional relationship determined by the substitutability among the facilities. Because the users of the regulated bridge receive a definite benefit from the other facility, they should help pay the costs of keeping that other facility in operation.

The Administrator accepted the functional relation theory advanced by Public Counsel and PONY.[111] There is a firm legal basis to this approach since courts have recognized that a regulatory agency, in exercising rulemaking authority, can consider nonjurisdictional matters in computing rate of return.[112] In so doing, the agency

Bridge, and Outerbridge Crossing, No. 76-9, Public Counsel Exhibit 7 (transcript November 8, 1976, at 7).

110. *Id.* Administrator's Decision (August 9, 1977).

111. *Id.* at 14.

112. *See* FPC v. Conway Corp., 426 U.S. 271, 279-82 (1976) (although FPC has no jurisdiction over retail rates, it may take those rates into account when setting interstate wholesale rates.)

may determine whether certain facilities or groups of facilities provide a significant benefit to the users of the regulated facility.[113] In analyzing the facts presented at the hearing, the Administrator determined that all surface transportation facilities owned by PONY were functionally related.[114] Each of the surface facilities contributed to a system of traffic flow, and were interrelated to the extent that should any of the facilities cease to function, congestion would have increased on the others.[115] In this way the toll payers on the bridges received a benefit from the existence of other facilities in the rate base.

The Administrator found legal justification for this approach in the authority granted to PONY in its interstate compact. That compact gave PONY the power to purchase, construct, lease, and/or operate any terminal or transportation facility within its jurisdiction in order to coordinate terminal transportation and other facilities.[116] Prior authorization by Congress allowed PONY to exercise such additional powers and duties as may be conferred on it by the concurrent legislation of both New York and New Jersey.[117] Among the additional powers specifically granted by the states were authorization to pool all revenues to subsidize deficit-producing activities,[118] and the authority to take over and operate the PATH mass transit system.[119]

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113. *See* Interstate Power Co. v. FPC, 236 F.2d 372 (8th Cir. 1956), *cert. denied*, 352 U.S. 967 (1957) (considering, among other factors, relative benefit to users of natural gas of power company's uniform rates).

114. The facilities found to be functionally related to the bridges were the two tunnels, the bus terminals and PATH. All other facilities were excluded including the deficit-producing World Trade Center.

115. In the Matter of the Bayonne Bridge, Goethals Bridge, George Washington Bridge, and Outerbridge Crossing, No. 76-9, Administrator's Decision (August 9, 1977).

116. S.J. Res. 88, 42 Stat. 174, 177 (1921); N.J. REV. STAT. § 32:1-7 (1963). N.Y. UNCONSOL. LAWS § 6407 (65 McKinney 1961).

117. *Id.*

118. N.J. REV. STAT. § 32:1-142 (1963); N.Y. UNCONSOL. LAWS § 7002 (65 McKinney 1961).

119. N.J. REV. STAT. §§ 32.1, 35.52 (Supp. 1977); N.Y. UNCONSOL. LAWS § 6603 (65 McKinney Supp. 1977). The authority to enter into such activities without subsequent explicit approval from Congress was upheld in a series of cases. Courtesy Sandwich Shop, Inc. v. Port Auth. Trans-Hudson Corp., 12 N.Y.2d 379, 190 N.E.2d 402, 240 N.Y.S.2d 1 (1963), *appeal dismissed for lack of a substantial federal question*, 375 U.S. 78 (1963) (prior congressional approval was not required before PONY could take over the PATH system). *See also* Port Auth. Bondholder Protective Comm. v. Port Auth., 387 F.2d 259, 261-62 (2d Cir. 1967); Kheel v. Port Auth., 331 F.

B. *Consideration of Transportation Policy*

The Administrator was careful to state that several other considerations existed beyond just the financial element, and mentioned as examples the effect on tollpayers, comparative tolls on other bridges, any history of toll increases, and the presence of legitimate federal interests.[120] The latter is the most important, since consideration of federal interests allows the Administrator to evaulate toll rate increases in light of stated national tranportation policy.

The National Environmental Policy Act of 1969 (NEPA),[121] which requires all federal agencies to consider the environmental effects of their decisions,[122] is one specific statement of a legitimate federal interest capable of consideration as an influencing factor. NEPA's environmental requirement applies in adjudicatory matters including ratemaking,[123] and in situations where the effect of the action may be beneficial rather than detrimental to environmental quality.[124] Based on the requirements of this Act, the Administrator gave full consideration to environmental factors in reaching the PONY rate decision. Foremost among these factors was the potential impact on air quality caused by any changes in traffic patterns.[125]

Supp. 118, 120-21 (S.D.N.Y. 1971), *aff'd on other grounds*, 457 F.2d 46, *cert. denied*, 409 U.S. 983 (1972).

120. In the Matter of The Bayonne Bridge, Goethals Bridge, George Washington Bridge, and Outerbridge Crossing, No. 76-9 Administrator's Decision (August 9, 1977).

121. 42 U.S.C. §§ 4321-4347 (1970 & Supp. V 1975).

122. *Id.* at § 4332.

123. United States v. Students Challenging Regulatory Agency Procedures (SCRAP), 422 U.S. 289, 318-19 (1975) (a proceeding before the ICC is a "major federal action" within NEPA and requires an environmental impact statement if the proceeding has a substantial effect on the environment).

124. *See* Hiram Clarke Civic Club, Inc. v. Lynn, 476 F.2d 421, 427 (5th Cir. 1973) (a close reading of NEPA discloses that Congress was concerned with *all* potential environmental effects [both adverse and beneficial] on the quality of the human environment); Natural Resources Defense Council, Inc. v. Grant, 341 F. Supp. 356, 367 (E.D.N.C. 1972) (a "major federal action" that "substantially affects, beneficially or detrimentally," the quality of the environment requires an environmental impact statement).

125. In the Matter of the Bayonne Bridge, Goethals Bridge, George Washington Bridge, and Outerbridge Crossing, No. 76-9 Administrator's Opinion (November 7, 1977). Public Counsel introduced at the hearing a draft environmental assessment prepared by the FHWA. Public Counsel Exhibits 3, 3a. This assessment became a negative declaration of the Administrator when he adopted it in the final decision. *Id.* The parties to the proceeding who were interested in the environmental aspect of

The requirement that environmental effects be considered also allowed the Administrator to address other national policy issues. Parties to the case had introduced evidence about the effects a toll increase would have on reducing traffic congestion, encouraging car pooling, and the general availability of mass transit. The Administrator weighed this evidence, finding that the toll schedule helped promote mass transit in two ways. First, it provided sufficient funding to develop new mass transit facilities while subsidizing the old; second, it encouraged people to use mass transit.[126]

An important part of the Administrator's decision addressed the issue of peak-hour pricing. Economists testified that since the bridge was designed and constructed to meet the demands of peak-hour use, the peak-hour users should be charged a greater portion of the "reasonable and just" toll because it was their demand that made necessary the initial capital investment in the structure. The environmental groups testified that, as a method of reducing congestion and air pollution, the peak-hour users had to be charged a toll high enough to discourage use. Both groups agreed that PONY should consider some form of peak-hour pricing strategy. The Administrator agreed with the experts, ordering PONY to submit a feasibility study on peak-hour pricing to provide sufficient data to support a final decision. Consideration of the peak-hour pricing was a breakthrough in the consideration of national transportation policy matters.

The Administrator's authority to consider national transportation policy is also supported by prior court decisions concerning toll rates and other areas of administrative determinations. The *DRPA* case, for instance, emphasized the federal interest in gasoline conservation.[127] The case of *Clarksburg-Columbus Short Route Bridge Co. v. Woodring*,[128] considered the federal interest in operating all area bridges, including those not regulated by the FHWA, in an efficient

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the case, the Citizens for Clean Air and the Environmental Defense Fund, accepted without question the assessment prepared by the FHWA.

126. *Id.*

127. Delaware River Port Auth. v. Tiemann, 403 F. Supp. 1117, 1129 (D. N.J. 1975), *vacated and remanded on other grounds*, 531 F.2d 699 (3d Cir. 1976), *on remand*, 421 F. Supp. 142 (D. N.J. 1976).

128. 89 F.2d 788, 793 (D.C. Cir.), *rev'd and remanded per curiam for dismissal as moot*, 302 U.S. 658 (1937) (when reducing toll rates on regulated bridges consideration must be given to the competitive effect on all area toll bridges to assure efficient distribution of traffic).

manner to meet the demands of traffic. Additionally, Congress has specifically required consideration of national transporation policy by some agencies during the decisionmaking process.[129]

C. *Court Decision in the PONY case*

Following the Administrator's decision to allow the increased tolls, the Automobile Club of New York appealed to the district court.[130] The sole issue raised for judicial review was whether the Administrator acted within his competence and legal authority in permitting PONY to use bridge tolls in subsidizing interestate facilities "related to" the bridges. The court in *Automobile Club of New York v. Cox*,[131] granted dismissal basing its decision on the legislative history of the 1952 Delaware River Port Authority Compact, which reveals a congressional intention to allow PONY to apply toll revenues to related non-bridge facilities.[132] The court also referred to *Burlington*, holding that use of bridge revenues for related non-bridge purposes is not per se unreasonable.[133]

On appeal, the Court of Appeals affirmed the lower court's opinion, but raised certain questions about the accuracy of a number of findings of the District Court and the Administrator.[134] The Court of Appeals' disagreement with the lower court and the Administrator centered on the treatment of PATH, the Port Authority's mass transit line.

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129. *See* 49 U.S.C. § 1 (1970) (requring the ICC to consider federal transportation policy in its decisionmaking process). *See also* Schaffer Transp. Co. v. United States, 355 U.S. 83 (1957) ("The National Transportation Policy, formulated by Congress, specifies in its terms that it is to govern the [Interstate Commerce] Commission in the administration and enforcement of all provisions of the [Interstate Commerce] Act." *Id.* at 87-88). *Accord*, Arrow Transp. Co. v. United States, 176 F. Supp. 411 (N.D. Ala. 1959), *aff'd per curiam sub nom.* State Corp. Comm'n. v. Arrow Transp. Co., 361 U.S. 353 (1960) (To eliminate any question on whether the National Transportation Policy prescribed standards to which the courts would require the Commission to adhere, Congress enacted the Whittington Amendment. "Congress thus made it clear that it was imposing on the Commission a positive and active duty to administer each provision of the Act in such a way as to preserve the inherent advantages of each mode of transportation." 176 F. Supp. at 416).

130. Automobile Club of N.Y. v. Cox, 444 F. Supp. 174 (S.D.N.Y. 1978).

131. *Id.* at 178.

132. *Id.* at 177. *See* H.R. REP. 2293, 82d Cong., 2d Sess. 2-8 (1952).

133. 444 F. Supp. at 177. *See* discussion in City of Burlington v. Turner, 336 F. Supp. 594, 607 (S.D. Iowa 1972), *aff'd as modified*, 471 F.2d 120 (8th Cir. 1973).

134. *Automobile Club of New York* v. *Cox*, No. 78-6054 (2d Cir. Jan. 12, 1979).

The Court of Appeals was critical of the handling of PATH by the Administrator and the District Court in two areas. First, the Court of Appeals found it difficult to agree with the lower court and the Administrator that the record supported a conclusion that PATH was functionally related to all other facilities in the rate base, especially the Staten Island bridges. Second, and more importantly, the Court of Appeals criticized the Administrator for failing to take into account the reasonableness of the PATH fare in determining whether to include the PATH deficit as a charge against revenues in computing the rate of return.[134a] With regard to this, the court noted that the 30-cent fare results in a deficit ratio of $3.00 expense to every $1.00 of revenue. Inflation and the history of fares on similar facilities, said the court, make such a fare prima facie unreasonably low.[134b]

As a result of the Court of Appeals' decision, any future toll proceeding involving PONY will have to address the question of whether the tollpayer can reasonably be asked to subsidize increasing mass transit deficits. In deciding this question, the Administrator will have to issue a finding on the reasonableness of the fares on PATH. Although the Administrator does not have the statutory authority to order PONY to raise the charges on PATH, he may exclude from his rate of return calculations certain expenses attributable to any unreasonably high PATH deficit.

D. *Impact of the Pony Proceeding*

The PONY decision clearly establishes a standard for determining the reasonableness of future toll raises under the 1906 Bridge Act. The Administrator now considers three primary elements: the financial position of the bridge owner, the impact on the tollpayers, and relevant legitimate federal interests. The financial position of the bridge owner will be based on a reasonable return on the investment in the facilities.[135] The rate base will include all bridges involved

134a. This point was first raised by Public Counsel in the testimony of its traffic experts and the briefs filed with the Administrative Law Judge and the Administrator. Brief, Reply Brief, and Exceptions of Public Counsel, No. 76-9. Federal Highway Administration, Public Counsel argued that the Administrator should only consider a portion of the PATH deficit in computing the rate of return.

134b. Automobile Club of New York v. Cox, No. 78-6054, slip op. at 18 (2d Cir. Jan. 12, 1979). The Court of Appeals pointed out that this language predated PONY's acquisition of PATH by 10 years so that no conclusion as to Congress' opinion on PONY's authority could be deduced.

135. For a criticism of the use of the rate of return concept in toll rate regulation, see Morris, *Retention of a Reasonable and Just Bridge Toll*, 30 AD. L.R. 409 (1978).

plus other "functionally related" facilities operated by the bridge authority. Functional relationship depends on the "substitutability" between the bridge and the other facilities. Contractual commitment to bondholders also forms part of the financial test. A contract with a bondholder, however, will not bar the Administrator from lowering an unjust toll when other factors in the case so warrant.

The interests of tollpayers are protected by the concept of substitutability in determining the rate base. This test assures tollpayers that they will not be forced to pay for facilities from which they receive no direct benefit. Instead, toll revenues provide financial support for alternate transportation services, which help reduce the amount of congestion on the facilities.

The third factor taken into consideration is potentially the most important. By recognizing that toll increases may reflect legitimate federal interests, the Administrator has developed a test that might justify an excess return on investment provided the excess revenue will be used to further legitimate federal interests.[136]

IV. Unanswered Questions

The decision in *Automobile Club of New York v. Cox* leaves a number of questions unresolved. PONY had not raised its toll rates in fifty-four years, and thus the three-pronged test may have no application in an instance of frequent toll increases. For example, if PONY were to raise its toll another fifty percent within a few years of the first increase, its action may not be justified by merely pointing to a larger deficit caused by PATH. Because the rapid transit line is included in the rate base, increased deficits caused by its operation would only serve to reduce the rate of return from the bridge revenue. Likewise, an increased toll would benefit the bondholders as it would assure PONY's ability to comply with the convenants of the bonds. Even if this satisfies the first two elements of the test, however, the toll increase may still be unreasonable since potentially not in furtherance of federal interests. Moreover, even if federal transportation policy continues to favor the promotion of mass transporation and energy conservation, the decision in *Automobile Club of New*

136. Although this test was developed in a case arising under the 1906 Act, it would also apply to future toll increases by DRPA or other bridge owners who are allowed to operate free of the toll rate restrictions of the 1946 Act. *See* discussion of DRPA's exemption at note 72 and accompanying text *supra*.

York has not provided guidance as to the weight accorded these interests.

To protect tollpayers from new increases every few years due to continuing mass transit deficit or expansion costs, the Administrator may want to adopt a limitation on the amount of mass transit loss includable as an expense in the rate of return on investment. The formula for determining the appropriate limitation could reflect the degree of benefit provided to users of toll facilities or the average percentage of subsidy provided to similar mass transit operations.[137] This concept, rejected by the Administrator in *Automobile Club of New York v. Cox*, has been applied in other ratemaking areas[138] and was endorsed by the Second Circuit in *Automobile Club of New York v. Cox*.

V. Toll Structuring Under the Clean Air Act

The Clean Air Act[139] provides comprehensive legislation and regulatory standards for improving air quality throughout the country. States are required to prepare State Implementation Plans (SIP) and strategies that will meet the established air quality standards.[140] Plans are submitted to the Environmental Protection Agency (EPA)[141] and, upon EPA approval, create an obligation on the part of the state to commence enforcement. If the plan is disapproved, the EPA prepares a plan for the state.[142]

137. For example, the loss includable as an expense could be limited to an amount necessary to pay for the mass transit facility's share of capital expenses. Another possibility is to allow a loss equivalent to the national average for subsidy of mass transit. Under this test, if the national average showed that fare revenue equalled 45% of mass transit expenses, the Administrator would allow the amount that would result had the mass transit entity charged a fare equal to 45% of costs.

138. *See, e.g.*, FPC v. Conway Corp., 426 U.S. 271 (1976) (FPC may apportion total expenses between retail and interstate wholesale classes of business and find interstate wholesale rates excessive if they exceed the costs allocable to that portion of the business. *Id.* at 280).

139. 42 U.S.C. §§ 1857-1857(1) (Supp. V 1975). Pub. L. No. 95-95, 91 Stat. 685 reclassified the Act to 42 U.S.C.A. §§ 7401-7642 (1977 Pamphlet).

140. *Id.* at §§ 1857C-5(a)(3)(A). State standards are adopted following reasonable notice and public hearings. If the administrator of EPA finds the standards unacceptable, the State may revise its plan whenever feasible. *Id.* at § 1857C-5(a)(3)(B).

141. *Id.* at § 1857C-5(a)(3)(A).

142. *Id.* at § 1857C-5(c)(1)(A). Additionally, the EPA will implement its own plan in cases where the State fails to submit a plan or where a State fails to revise its plan as instructed.

One required aspect of the SIP is a transportation element.[143] At least one state, New York, as part of the transportation section of its control plan, proposed implementing tolls on certain of its bridges in an effort to reduce congestion and pollution.[144] The imposition of bridge tolls in furtherance of national transporation policy is consistent with the recommendations of the Department of Transportation contained in a 1974 study.[145] That study proposed legislation which would permit tolls on all bridges in urban areas as part of a strategy designed to increase mass transit usage.[146] The New York SIP included a provision calling for tolls on all East River and Harlem River bridges. Four of these bridges had been constructed or repaired with funds provided under the Federal-Aid Highway Act.[147] The plan received EPA approval without consideration of the statutory prohibition against imposing tolls on bridges constructed with federal funds.[148]

Only after a series of cases, which ultimately resulted in the approval of the entire plan,[149] did the legality of imposing tolls on federally-aided bridges receive any consideration. Even then, the

143. 42 U.S.C.A. §§ 7501-7508 (West Supp. 1977). The EPA may establish guidelines for attainment of air quality standards. *Id.* at § 7508. Such guidelines include the requirements for transportation control measures. 43 Fed. Reg. 21673, 21676-77 (1978).

144. New York State Dep't of Envir. Conserv., New York City Metropolitan Area Air Quality Implementation Plan, Transportation Controls (April 1973) at Strategy B-7. *See id.*, at 5-5 to 5-6, 7-23 for a discussion of the strategy.

145. *See* TOLL STUDY, note 27 *supra.*

146. *Id.*

147. The four bridges in which federal funds were invested are:

Manhattan	$70,000,000
Washington	300,000
Alexander Hamilton	6,800,000
Williamsburg	1,300,000

148. 23 U.S.C. § 301 (Supp. VI 1976).

149. *See* Friends of the Earth v. Carey, 535 F.2d 165, 177-178, (2d Cir. 1976), *cert. denied*, 434 U.S. 920 (1977) (an enforcement order could be issued where a citizen presented sufficient evidence that New York State had not implemented its Transportation Control Plan which had received approval by the EPA); Friends of the Earth v. EPA, 499 F.2d 1118, 1125 (2d Cir. 1974) (state implementation plan designed to compel drivers to use alternative modes of transportation to automobiles by reducing the number of available parking spaces was reasonable. The State was not required to create a plan that would attract riders to mass transit); Friends of the Earth v. Carey, 422 F. Supp. 638, 646 (S.D.N.Y. 1976) (state must act to enforce its Transportation Control Plan approved by EPA so as not to interfere with federal regulations and federal affirmative action).

question was only addressed in a footnote to the court's opinion.[150] In upholding the tolls, the court relied on a letter opinion of the General Counsel of the Department of Transporatation, which was characterized as stating that "there is no federal bar to tolling the four bridges as part of a traffic control program pursuant to the Clean Air Act."[151]

Subsequent to these decisions, Congress amended the Clean Air Act to allow a state which had adopted a toll strategy in its SIP to rescind that strategy.[152] This amendment eliminated the conflict caused by a state's obligation to enforce its SIP by imposing tolls on bridges which were required by federal statute to remain free. It allowed the Governor to eliminate the toll strategy on intrastate bridges upon a showing that other measures would assure a like reduction in pollution.[153]

The legal difficulty with a toll strategy under the Clean Air Act involves a possible conflict with the Federal-Aid Highway Act section 301[154] prohibition against tolls on roads or bridges constructed with federal funds. Cases interpreting section 301 clearly establish that it was designed to prevent the imposition of any kind of charge for the use of federally funded facilities.[155] The clear legislative history of the Highway Act makes it questionable whether a toll implementation strategy under the Clean Air Act would be invalid if not rescinded.

Fortunately, there is an approach open to states who desire to utilize a toll strategy on roads or bridges constructed or repaired with

150. Friends of the Earth v. Carey, 535 F.2d at 177 n.18.

151. Letter to Peter R. Taft, Assistant Attorney General, Land & Natural Resources Division, U.S. Dept. of Justice from John Hart Eby, General Counsel, U.S. Dept. of Trans. (June 26, 1976).

152. 42 U.S.C.A. §§ 7401-7642 (1977 Pamphlet).

153. *Id.* at § 7410(c)(5)(A).

154. 23 U.S.C. § 301.

155. *See* Williams v. Riley, 280 U.S. 78, 80 (1929). (although California exacted tolls for the use of its highways built with federal funds, by imposition of a tax, the Court refused to review or annul the acts of the state legislature. Conflict alone, without a showing of direct injury does not provide sufficient basis for review); Sanger v. Lukens, 24 F.2d 226, 229 (S.D. Idaho 1927) (Federal Highway Act does not prohibit states from regulating highways through privilege taxes or license fees since they are not classified as tolls); County of Los Angeles v. Southern Cal. Gas Co., 184 Cal. App. 2d 169, 180-81 Cal. Rptr. 471, 478-79 (1960) (county is not prohibited by 23 U.S.C. § 301 from requiring utilities to pay rent for use of bridges built with federal funds where the rent is for use of bridge as support to pipelines).

federal highway funds. Administrative precedent exists for the repayment, with congressional approval, of all federal money in order to escape the toll prohibition, in effect "buying out" the federal government to get a potentially large long-term return. One case, referred to the Comptroller General for interpretation, decided that no legal authority exists for the refund or transfer of federal-aid highway funds unless Congress authorizes repayment.[156] A number of states have taken advantage of the congressionally approved payback approach, placing tolls on roads wholly within their boundaries.[157]

During the pendency of the New York litigation, the Department of Transportation responded to an inquiry of the Justice Department by issuing a slightly modified interpretation of the section 301 prohibition. In the letter referred to in the court's decision, the General Counsel stated that it would not be a violation of section 301 for the State of New York to repay the federal funds invested in the bridges.[158] This interpretation differs from the earlier Comptroller General's opinion[159] in its conclusion that congressional approval of the payback is not required where the federal contribution constitutes only a small portion of the total construction cost of the facility,[160] the proposed toll charges are intended for traffic control rather than financing, and the proposed toll is part of an implementation strategy under the Clean Air Act.

As a followup to the litigation, the Regional Administrator advised New York that FHWA interpreted the court's opinion as holding that there was no prohibition to establishing tolls on the bridges as long as

156. *See* 38 Comp. Gen. 266, 267-68 (1958). The New Jersey Turnpike authority, which charges tolls refunded federal-aid funds for use on another toll-free route. Pub. L. No. 81-646, 64 Stat. 403 (1950).

157. *E.g.*, New Jersey-Garden State Pkwy., Pub. L. No. 90-495 § 20(a), 82 Stat. 825 (1968); Delaware and Maryland-Interstate 95, Pub. L. No. 86-657 § 6(a), 74 Stat. 522 (1960).

158. Letter to Peter R. Taft, Assistant Attorney General, Land and Natural Resources Division, U.S. Dept. of Justice from John Hart Ely, General Counsel, U.S. Dept. of Transportation (June 26, 1976).

159. 38 Comp. Gen. 266 (1958). *See* discussion at note 153 *supra.*

160. In the New York situation, it was determined that "small" federal contributions were made to three of the four bridges in question: the Manhattan, Washington and Williamsburg. The amounts contributed ranged from $721,360 to $1,369,600. The fourth bridge, the Alexander Hamilton, had received what the General Counsel considered a "large" contribution of $27,013,773. By including size of the federal contribution as a factor, the General Counsel failed to deal with the difficult problem of line drawing to be determined on a case by case basis as a question of fact.

the General Counsel's conditions were met.[161] FHWA's present position is clear: Section 301 applies unless the three conditions in the General Counsel's memorandum are met. If the conditions are not met and a state nevertheless decides to impose tolls on federally-aided facilities, the Administrator will take action to set aside the toll imposition.

CONCLUSION

The Administrator's decisions in the most recent toll bridge cases, and the position taken by the Department of Transportation during the apparent conflict between the free-road provision of the Federal-Aid Highway Act and the toll imposition strategy of the Clean Air Act, evidence a policy in favor of mass transit support. Subsidization of mass transit will be a major factor when the Administrator weighs the reasonableness of future toll increases under the General Bridge Acts. It will be considered as part of the base in determining the reasonable rate of return, and independently in determining whether the toll increase promotes the public interest. The Department's policy on payback without congressional approval to free facilities from "non-profit" restrictions when the payback furthers a viable goal under the Clean Air Act shows a much broader statutory construction of the toll prohibition.

As a result of the *DRPA* and *Automobile Club of New York* decisions there is now a well-established set of criteria for determining the reasonableness of toll rates. Both public and private bridge owners may include in their considerations to increase toll rates all of the factors which may later be examined by the Administrator. Additionally, states now have clear guidelines from the Administrator for utilizing road and bridge tolls to achieve air quality goals. The development of these criteria gives planners extremely useful tools to use in structuring the financial support for mass transit systems and in solving one urban environmental problem.

161. Memorandum from William M. Cox, Federal Highway Administrator for Region One to Robert E. Kirby (April 18, 1977).