

**Amended and Restated Memorandum of Understanding
By and Between
Southern California Association of Governments and
Foothill/Eastern Transportation Corridor Agency
Regarding Implementation of Toll Facility Pricing Policy**

This Amended and Restated Memorandum of Understanding (MOU) is entered into effective as of April 5, 2001, by and between the Southern California Association of Governments (SCAG) and Foothill/Eastern Transportation Corridor Agency (Agency) in consideration of the following facts.

1.0 RECITALS

1.1 SCAG, the metropolitan planning organization for the Southern California region, has adopted a Regional Transportation Plan (RTP) which is a long-term plan for transportation improvements in Southern California. The RTP is a component of the 1994 Air Quality Management Plan (AQMP) approved by SCAG, the South Coast Air Quality Management District (District), the California Air Resources Board, and the U.S. Environmental Protection Agency.

1.2 The RTP and the 1994 AQMP include the Project (as defined in 1.3 below) as a transportation project that is necessary to achieve emission reductions required to meet the federal National Ambient Air Quality Standards in a timely manner. The 1994 AQMP deleted Measure 2.f of the 1991 Air Quality Management Plan, which had established Average Vehicle Occupancy performance standards for the Project, and replaced Measure 2.f with Measure 1.

1.3 The RTP includes the Foothill and Eastern Transportation Corridors (collectively, "Project"). The Foothill Transportation Corridor is included in the RTP as a facility with both open segments and segments to be constructed. The Eastern Transportation Corridor is included in the RTP as a new facility. The analysis conducted with regard to the RTP assumed that the Eastern Transportation Corridor will be constructed and operated as a toll facility between State Route 91 and Interstate 5 in Irvine, and with an additional leg connecting with State Route 133, and assumed that the Foothill Transportation Corridor will be constructed and operated as a toll facility connecting the Eastern Transportation Corridor with Interstate 5 south of the City of San Clemente. The RTP assumed that the Project would eventually include eight lanes as per the RTP, but no later than the date that the facility is turned over to Caltrans, of which two lanes shall be HOV lanes. The RTP establishes the framework for implementing the transportation strategy for the SCAG region. The Foothill and Eastern Transportation Corridors are listed in Table 7 as a toll lane project.

Pricing and marketing programs are the best way to increase Average Vehicle Occupancy (AVO) on a toll facility.

1.4 In June 1998, SCAG approved the Fiscal Year 1998-2005 Transportation Improvement Program (1998 TIP). The 1998 TIP includes the Project and assumes that the included Project will be operated as a six-lane toll facility in the year 2000.

1.5 The Federal Highway Administration has determined that the RTP and the 1998 TIP complied with the transportation conformity provisions of the federal Clean Air Act.

1.6 The parties entered into an earlier MOU Regarding Toll Facility Pricing Policy (1997 MOU). This Amended and Restated MOU now amends and restates the 1997 MOU in order to make it consistent with the approved SIP and 1998 RTP, and to increase AVO. —

1.7 Revisions to the MOU are also required to allow testing, implementation and evaluation of innovative pricing alternatives and incentives on the Project, to demonstrate which methods most improve AVO, and to fulfill the value pricing objectives of TEA-21.

2.0 DEFINITIONS

Unless the context otherwise specifies or requires an alternate meaning, for the purposes of this MOU the following terms shall have the meanings set forth in this Section 2:

2.1 1998 TIP. The terms 1998 "TIP", "RTIP" and "Regional Transportation Improvement Program" are interchangeable and shall each mean the 1998-2005 Transportation Improvement Program, as approved by SCAG.

2.2 Act. The term "Act" shall mean the federal Clean Air Act.

2.3 Automatic Vehicle Identification System. The terms "Automatic Vehicle Identification System" and "AVI" are interchangeable and shall each mean a system for automatically identifying transponder-equipped vehicles as they pass through a lane of roadway.

2.4 Authorized HOV. The term "Authorized HOV" shall mean an HOV equipped with an AVI transponder or other similar devices, means or methods capable of identifying the HOV.

2.5 Average Vehicle Occupancy. The terms "Average Vehicle Occupancy" and "AVO" are interchangeable and shall each mean an estimate by the Agency, based on generally accepted traffic engineering principles and annual survey

counts, of the average number of persons per Vehicle during the Peak Period in one specified direction on the Project.

2.6 AVO Goal. The term "AVO Goal" shall have the meaning set forth in Section 3 of this MOU.

2.7 Comparable AVO. The term "Comparable AVO" shall mean the AVO experienced in any year on comparable free corridors with free HOV lanes in Orange County including, but not limited to, Interstate 405 and Interstate 5, and shall be calculated taking into consideration the factors listed in Section 3.0. The Comparable AVO shall be calculated in a manner consistent with the calculation of AVO on the Project.

2.8 High Occupancy Vehicle. The terms "High Occupancy Vehicle" and "HOV" are interchangeable and shall each mean any Vehicle carrying a sufficient number of occupants or otherwise qualified by state law to make that Vehicle eligible to use High Occupancy Vehicle lanes on the State transportation facilities connecting to the Project.

2.9 MOU. The term "MOU" shall mean this Memorandum of Understanding as it may from time to time be amended.

2.10 Peak Period. The term "Peak Period" shall mean a continuous 60 minute period designated by the Agency during a morning weekday commute hour other than Monday, Friday or a public holiday. With the concurrence of the SCAG Executive Director, which shall not be unreasonably withheld, Agency may vary the Peak Period from time to time to adjust for seasonal fluctuations, changes in travel patterns or other factors beyond Agency's control.

2.11 Opening. The term "Opening" shall mean the opening of a contiguous segment of the Project to traffic which is greater than fifty-percent of the total length of the Project.

2.12 RTP. The term "RTP" shall mean the 1998 Regional Mobility Plan (also known as CommunityLink 21), a long-term plan developed and administered by SCAG to support transportation improvements in Southern California.

2.13 SCAQMD. The term "SCAQMD" or "District" shall mean the South Coast Air Quality Management District.

2.14 Vehicle. The term "Vehicle" shall mean any passenger vehicle, including autos, light duty trucks, passenger vans, buses and motorcycles.

NOW THEREFORE, the parties to this Memorandum of Understanding agree as follows:

3.0 IDENTIFICATION OF ANNUAL AVERAGE VEHICLE OCCUPANCY GOAL

Annually, the Chief Executive Officer of the Agency and the Executive Director of SCAG shall jointly establish a goal (AVO Goal) concerning Average Vehicle Occupancy on the Project during peak commute periods. The AVO Goal shall be a numeric value expressing the objective for AVO for the next applicable year and shall be expressed as a positive value (e.g., "1.3 occupants per vehicle"). The AVO Goal shall be established no later than sixty days after the end of the previous calendar year and shall be no less than the AVO Goal for the preceding year unless Comparable AVO decreases are noted on other freeways within Orange County. The AVO Goal shall be calculated by the Agency based on generally accepted traffic engineering principles. The AVO Goal shall be established after taking into consideration the following factors:

- (1) Existing Project AVO;
- (2) The background AVO on freeways within the Southern California region and within Orange County;
- (3) The most recent estimate of the AVO that would have been attained with the construction of two HOV lanes as part of the initial construction phase of the Project;
- (4) The type of vehicle trips projected to use the Project during the year following the establishment of the AVO Goal; and
- (5) Other factors determined to be appropriate by the Agency and SCAG.

4.0 IMPLEMENTATION OF AVO POLICY

4.1 Monitoring of Average Vehicle Occupancy

The Agency shall implement a program (Monitoring Program) to monitor AVO on the Project in such a manner so as to document the progress of the Agency in achieving the AVO Goal established pursuant to Section 3.0 and to allow comparison of AVO on the Project with (i) the estimated AVO that would have been attained in the event that the two planned HOV lanes had been built at the same time as the initial six lanes of the Project were constructed, and (ii) with the Comparable AVO. The Monitoring Program may be revised by the Agency from time to time. Any proposed modification to the Monitoring Program is submitted to SCAG for review and comment.

4.2 Elements of Monitoring Program

The elements of the Monitoring Program shall include the following:

- (1) The Agency shall monitor Project AVO during the Peak Period in a manner consistent with Caltrans' standard monitoring procedures to generate the estimate of AVO on the Project;
- (2) The Agency shall obtain available information compiled by Caltrans regarding Comparable AVO;
- (3) Beginning two years after the Opening, and annually each year thereafter, the Agency shall submit a report (Monitoring Report) to SCAG and SCAQMD that documents the Project AVO, the actions taken by the Agency to achieve the AVO Goal, and compares the Project AVO with the AVO Goal established pursuant to Section 3.0 of this Agreement.
- (4) The frequency of monitoring to be conducted by the Agency at least yearly and the locations of monitoring stations; and —
- (5) In the event that the Agency is required to implement Remedial Measures pursuant to Section 5.3 of this MOU, the Agency shall conduct semi-annual monitoring. After the Agency substantially achieves the AVO Goal for the Project, monitoring may be conducted yearly.

5.0 PROGRAM TO ENCOURAGE HIGH OCCUPANCY VEHICLE USAGE AND ACHIEVEMENT OF AVO GOAL

5.1 Adoption of Mechanisms to Encourage HOV Usage

In the event that the Agency fails to achieve an AVO Goal established pursuant to Section 3.0, the Agency shall adopt one or more of the mechanisms identified in this Section which it determines to be necessary to achieve the AVO Goal or to otherwise encourage HOV usage. The mechanisms available to the Agency include, but are not limited to, the following:

- (1) Reduced toll prices for HOV users during Peak Periods;
- (2) Increased toll prices on single occupant vehicles during Peak Periods;
- (3) Reduced toll prices for Authorized HOV users;
- (4) Group discounts or other marketing programs intended to encourage employers and others to reimburse or subsidize the HOV tolls paid by employees and other drivers; and

- (5) Any other mechanism to increase high occupancy vehicle and/or to decrease single occupant vehicle usage on the Project during Peak Periods.

5.2 Implementation of High Occupancy Vehicle Lanes or Pricing Alternatives

In order to improve and maintain AVO, the Agency shall proceed to undertake at its option either 1) the necessary actions to initiate design and construction of two HOV lanes (one lane northbound and one lane southbound) on the Project or 2) pricing alternatives designed to optimize AVO. This responsibility shall extend until such time as the construction bonds are repaid and Caltrans operates the F/ETC as a free facility. TCA shall deliver the Project to Caltrans with a striped HOV lane in each direction ready for use. Caltrans shall dedicate that single lane in each direction as an HOV lane to the extent consistent with the RTP and state law in place at that time.

5.3 Remedial Measures

(1) In the event that any Monitoring Program indicates that the Agency has not substantially achieved the AVO Goal established for the preceding year, then, in its sole discretion, the Agency shall adopt one or more of the mechanisms described in Section 5.1 or take other remedial measures (collectively, "Remedial Measures") reasonably calculated by the Agency to achieve the AVO Goal established for the then current year with the condition that remedial measures shall not impair the Agency's ability to meet the covenants contained in the Project financing documents. Remedial measures shall remain in place until TCA demonstrates that the AVO goal has been achieved.

(2) If the Project has not yet achieved the AVO goal by 2010, TCA shall institute a 25% discount per vehicle for 3+ HOVs at all mainline toll plazas during the Peak Period, provided that this action does not impair the Agency's ability to meet the financing document covenants.

(3) In the event that the 3+ HOV discount does not achieve the AVO goal within one year, all signatory and consultative parties to this MOU shall come together to recommend further remedial measures capable of increasing AVO which will not impair the Agency's ability to meet the financing document covenants.

6.0 ADMINISTRATIVE DISPUTE RESOLUTION MECHANISM

6.1 In General

In the event that SCAG and the Agency are unable to agree with regard to the administration or implementation of this MOU, either SCAG or the Agency may initiate the resolution of the disagreement pursuant to this Section 6.0. The dispute

resolution process shall be a mandatory precondition to the initiation of any judicial proceeding to resolve any such disagreement between the parties or to otherwise seek to enforce the provisions of this MOU.

6.2 Initiation of Dispute Resolution Procedures

Any party to this MOU may initiate the dispute resolution process by written notice to the other two parties. Within fifteen days of the receipt of such written notice (Notice Date) the parties shall meet and confer and attempt to resolve the disagreement.

6.3 Mediation Panel

In the event that the parties are unable to resolve the disagreement through the meet and conferral process, within forty-five days of the Notice Date each party to this MOU shall appoint an individual to serve on a mediation panel. The mediation panel shall consider any evidence provided by the parties and make a recommendation regarding the matter subject to mediation. To the extent practicable, the proceedings of the mediation panel shall be governed by the rules of the American Arbitration Association.

6.4 Non-Binding Recommendations

Within one hundred and twenty days of the Notice Date, the Mediation Panel shall make non-binding recommendations to the parties to resolve the matter subject to the dispute resolution process. If either party determines that any such recommendation is unacceptable, it may initiate a judicial proceeding in a court of competent jurisdiction.

7.0 MISCELLANEOUS

7.1 Integration

This MOU embodies the entire and integrated understanding between the parties to this MOU regarding the matters contemplated herein and supersedes all prior negotiations, representations, proposals or understandings, either oral or written. This MOU may only be amended by a written instrument executed by all of the parties. A copy of any proposed amendment shall be provided to the SCAQMD.

7.2 Multiple Originals

Multiple copies of this MOU may be executed, and any such executed copy shall be deemed an original for all purposes.

7.3 Limitations

Nothing in this MOU requires the Agency to (i) achieve or maintain any AVO which exceeds any AVO Goal established pursuant to this MOU, (ii) achieve or maintain any AVO if an exclusive HOV lane in each direction is dedicated or constructed on the Project, or (iii) make payments of any type to encourage or subsidize the use of the Project by HOVs.

7.4 Effective Date

This MOU shall become effective upon its execution by the Agency and SCAG.

7.5 Enforceability

(1) This MOU shall be enforceable by SCAG and the Agency. In addition, in the event that SCAG and the Agency abuse their discretion in establishing any AVO Goal as required by Section 3.0, or the Agency fails to implement Remedial Measures as required by Section 5.3, and if SCAG has not initiated the dispute resolution process or is not diligently seeking to enforce the terms of this MOU, then the SCAQMD may initiate appropriate action to enforce the requirements of this MOU in accordance with this Section 7.5.

(2) In the event that the SCAQMD intends to seek the enforcement of this MOU, it shall first give written notice to SCAG and the Agency and request the initiation of the dispute resolution process pursuant to Section 6.0 of this MOU. In such event, the SCAQMD may appear as an interested party in the dispute resolution process with the same rights as the parties except that the SCAQMD shall not have the right to appoint a mediator. In addition, SCAQMD may at its option participate as *amicus curiae* in any dispute resolution process initiated by SCAG. Nothing in this MOU is intended to confer or deny standing to other third parties to seek to enforce this MOU or the 1994 AQMP or applicable SIP under applicable law.

7.6 Force Majeure

In the event that the Agency's performance under this MOU is interrupted or delayed by acts of God, acts of war, labor disputes or delays in the Opening as a result of the acts of third parties (collectively, "Occurrences"), then the Agency's performance shall be excused from any further performance for whatever period of time after the Occurrences is reasonably necessary to remedy the effects of the Occurrences.

7.7 Existing Law

Nothing in this MOU is intended to amend, supersede or modify any provisions of state or federal law or the 1994 AQMP or applicable SIP.

7.8 Public Transit Buses

The Agency will provide free access to the Project for buses operated by public transit agencies, provided that such buses are equipped with AVI devices as specified from time to time by the Agency. The Agency reserves the right to rescind the provision of free access if at any time the Agency determines in its sole discretion that the provision of such free access will adversely affect the Agency's ability to adequately meet operation and maintenance costs or comply with commitments related to the financing of the Project.

7.9 Termination: Authority of Agency to Build HOV Lanes At Any Time

Nothing in this MOU precludes the Agency at any time, in its sole discretion, from electing to proceed to design and construct HOV lanes in lieu of the requirements of this MOU. In the event the Agency makes such election, it shall so notify the parties to this MOU. Upon the HOV lane project achieving environmental clearance for construction and the Agency committing funding for such construction, this MOU shall terminate and be of no further force or effect and the Agency shall be relieved of any obligations or responsibility to implement this MOU or the measures undertaken pursuant to this MOU.

In the event that the HOV system in the SCAG region is discontinued through state legislation or other administrative action, then the Agency may give notice to terminate this MOU.

Dated: March 15, 2001

Foothill/Eastern Transportation Corridor
Agency

By: Walter D. Kreutzen
Walter D. Kreutzen
Chief Executive Officer

Dated: April 5, 2001

Southern California Association of
Governments

By: Ron Bates
Ron Bates, President, SCAG
Councilmember, City of Los Alamitos