



STATE OF MAINE  
DEPARTMENT OF ENVIRONMENTAL PROTECTION



PAUL R. LEPAGE  
GOVERNOR

PAUL MERCER  
COMMISSIONER

**MEMORANDUM**

TO: Parties in the licensing proceeding on the Maine Turnpike Authority Natural Resources Protection Act Application, DEP #L-27241-TG-A-N

FROM: Marybeth Richardson, Presiding Officer *MR*

DATE: May 12, 2017

RE: Third Procedural Order

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Enclosed please find the Third Procedural Order, which addresses issues regarding witnesses to testify at the hearing, witness qualifications, the request for an updated traffic model, and the schedule for the hearing. The times listed in the schedule are for planning purposes and may be adjusted during the hearing.

The Coalition's request to subpoena Elizabeth Roberts is being considered and a decision will be provided to the parties as soon as possible.

I have determined that a second pre-hearing conference is not necessary. In lieu of that, please plan to arrive at the meeting venue promptly at 8:30 so that we can have a short conference prior to the opening of the hearing.

There are no food vendors on site, so the parties will need to either leave the venue for meals or arrange to have meals delivered to the venue. Please plan accordingly so that we can adhere to the schedule as much as possible.

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IN THE MATTER OF

MAINE TURNPIKE AUTHORITY	) APPLICATION FOR NATURAL RESOURCES
YORK TOLL PLAZA	) PROTECTION ACT PERMIT AND
YORK, YORK COUNTY	) WATER QUALITY CERTIFICATION
L-27241-TG-A-N	) PUBLIC HEARING
	) THIRD PROCEDURAL ORDER

On March 14, 2017, the Presiding Officer issued a Second Procedural Order which required the parties to submit pre-filed testimony with any exhibits by April 7, 2017. The applicant, Maine Turnpike Authority (MTA), and the intervenor, Coalition for Responsible Toll Collection (Coalition), submitted pre-filed testimony. Any objections to other parties' pre-filed testimony and exhibits were due April 14, 2017.

**A. Hearing Reconsideration Request**

On April 14, MTA submitted a letter outlining its objections to the Coalition's testimony. MTA argued that the Coalition's conclusion that All Electronic Tolling (AET) is a reasonable alternative to the proposed project is based on a report prepared by the eTrans Group, and because this report was not included in the Coalition's pre-filed testimony, the record is lacking credible conflicting technical information and the hearing process cannot serve the purpose for which it was established by the Commissioner of the Department. For this reason, MTA requested that the Commissioner reconsider the decision to hold a hearing in this matter.

In a letter dated April 19, 2017, the Commissioner responded to the MTA request to reconsider holding a hearing. The commissioner stated that the record contains conflicting credible evidence and the eTrans report was previously submitted and is part of the record. The Commissioner determined that the hearing will go forward.

**B. MTA Witness Objections**

In its April 14, 2017 letter, MTA objected to the Coalition's inclusion of the testimony of two witnesses in its filing, Marshall Jarvis and Peter Smith, arguing that the two witnesses do not have the educational background, technical training, or practical experience to qualify as an "expert" or to provide a credible analysis of the proposal.

The issue of a witness's qualifications and experience is considered by the permitting authority in the determination of the weight given to the testimony, and is not a basis to disqualify a witness from testifying at the hearing. Consequently, testimony from these two witnesses will be allowed.

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### **C. Coalition Request for Updated CDM Model**

In a letter dated May 2, 2017, the Coalition requested that the Department require the MTA to submit an updated version of the model originally prepared by MTA's consultant, CDM, estimating the amount of surcharge necessary for an AET facility to maintain net revenue neutrality in contrast to an ORT facility in a similar location. The Coalition argued that this updated information is necessary for the Department to accurately evaluate the financial impacts of an AET facility versus an ORT facility because the data relied upon in the 2014 CDM report is now outdated.

Regarding the Coalition's request that an updated model be submitted, Chapter 3 §16(A)(1) of the Department's Rules states: The Presiding Officer may at any time prior to the hearing request that the applicant submit to the Department additional information necessary to evaluate the license application. A party may ask the Presiding Officer to make such a request. A party asking the Presiding Officer to make such a request must explain why the additional information sought is relevant and necessary for an analysis of the materials submitted in support of the application and why the additional information is not otherwise readily available.

In its response to the Coalition's request, MTA submitted a letter dated May 8, 2017 stating that MTA is unwilling to undertake new AET modeling for several reasons, including that acquiring the new data would delay the processing of the application and would cost in excess of \$100,000 and significant staff time. Moreover, MTA stated that the record already contains evidence indicating that AET would cause a loss of approximately 40% of cash receipts, which renders the AET option cost-prohibitive.

The Coalition filed a letter of clarification dated May 9, 2017, stating that it is requesting that MTA recalculate the financial impacts of AET and ORT facilities using the existing model with existing data for the 10-year time period beginning in 2019. MTA responded, on May 12, 2017, that the data that built the submitted model was collected through 2013, and that the data are now 7 to 17 years older than the period for which the Coalition is requesting predictions, which would result in greater uncertainty in the model output. MTA argues that altering one input, as the Coalition is requesting, would provide distorted results that would result in an unreliable predictor of future outcomes.

The Department is considering the parties' contentions and will inform the parties as soon as a determination is made on the Coalition's request.

### **D. Conduct of Public Hearing**

The schedule for the public hearing on May 22 establishes time allotments for the parties' presentations summarizing their direct testimony, cross-examination, redirect, and questions by the Presiding Officer, Department staff, and counsel to the Department. This schedule was prepared based on information submitted by the parties on May 5, 2017.

1. Direct Testimony. The parties pre-filed all direct and rebuttal testimony in accordance with the Second Procedural Order. A person will not be allowed to testify at the public hearing for a party unless he or she submitted pre-filed direct or rebuttal testimony.
2. Cross-examination. Any cross-examination will generally occur after the direct testimony of each witness. In some cases cross-examination may be conducted of a panel as a whole. New exhibits may be used to impeach on cross-examination.
3. Redirect and re-cross. In accordance with Chapter 3, § 19(B)(5), parties will have the right to conduct redirect and re-cross-examination of witnesses, although the time for these will be limited. Re-examination questions are limited to matters brought out in the last round of questioning, except by leave of the Presiding Officer. Redirect testimony is an opportunity to explain, clarify, or otherwise respond to matters brought out during cross-examination. Specific time limits for re-direct and re-cross are not provided in this Order, as such questioning is expected to be very brief, if necessary at all.
4. Allotted time. The time for summarizing direct testimony and cross-examination will be limited as set forth below. Please note that this Order sets forth each party's allotted time for each witness.
5. Opening statement. A party is expected to include its opening statement as well as a summary of direct and rebuttal testimony within the total time allotment for summary of testimony.
6. Questions from the public. In accordance with Chapter 3, § 19 (C), "[i]f a member of the public in attendance at the hearing wishes to pose a question to a witness, that person is required to submit the proposed question in writing to the Presiding Officer. If the Presiding Officer determines that the question is relevant and not repetitive, the Presiding Officer may pose the question to the witness as time permits." Paper will be provided at the back of the hearing room for the public's convenience. Any proposed questions will be conveyed to the Presiding Officer by the Department's project manager, Robert Green.
7. Post-hearing briefs. The issue of whether post-hearing briefs or written closing arguments may be submitted, and a schedule for such submissions, will be determined at the close of the public hearing.
8. Hearing schedule. The schedule is set forth below. Parties are reminded that any overlap between witnesses must be avoided as much as possible in the interest of the most efficient use of time. The Presiding Officer retains the right to modify this schedule as she deems necessary during the public hearing.

**Hearing Schedule**  
**May 22, 2017 – Kittery Community Center Star Theatre**

9:00-9:15 Opening statement by Presiding Officer, swearing in of witnesses, and incorporation of application file into the hearing record (15 minutes)

**Maine Turnpike Authority (MTA) Witnesses**

9:15-9:35 Peter Mills (20 minutes)

9:35-10:15 Intervenor Coalition for Responsible Toll Collection's (Coalition) cross-examination of Peter Mills (30 minutes); Department staff questions (10 minutes)

*10:15-10:30 Break (15 minutes)*

10:30-11:00 Panel: Richard Gobeille, Roland Lavalley, Gary Quinlan (30 minutes)

11:00-12:45 Coalition's cross-examination of MTA panel (90 minutes); Department staff questions (15 minutes)

*12:45-1:45 Lunch (60 minutes)*

1:45-2:00 Douglas Davidson (15 minutes)

2:00-2:15 Coalition's cross-examination of Douglas Davidson (10 minutes); DEP staff questions (5 minutes)

**Coalition Witnesses**

2:15-3:15 Panel: Marshall Jarvis, Peter Smith, John Adams, David Sullivan (60 minutes)

*3:15-3:30 Break (15 minutes)*

3:30-4:45 MTA's cross-examination of Coalition panel (60 minutes); Department staff questions (15 minutes)

4:45-5:00 Closing statement by Presiding Officer (15 minutes)

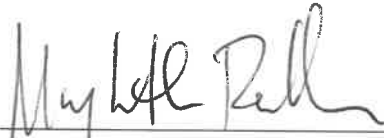
*5:00-6:00 Dinner (60 minutes)*

6:00-8:00 Testimony from the general public

**E. Written Public Comments**

The Department's statutes and regulations encourage public participation in licensing processes and, as such, under the Department's *Rule Concerning the Processing of Applications* (Chapter 2), "public comment on applications is allowed during the course of processing the application." To facilitate public access to documents submitted pertaining to this application, the Department has placed the application, the parties' submissions, and all written public comments it has received in this licensing matter on its website. The Department does not return or redact public comments submitted that contain irrelevant evidence; however, such evidence cannot be relied upon in the analysis of whether the applicant has met its burden of proving that its proposed project meets the licensing criteria. Written comments from members of the public will be accepted into the record until the close of the public hearing on May 22, 2017.

Dated: 5.12.17

  
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Marybeth Richardson, Presiding Officer