



Recent Developments on the Constitutionality of Toll Discount Programs

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Transportation agencies throughout the U.S. currently implement a variety of toll discount programs. These discount programs typically respond to organized opposition to tolling from residents in the region of the tolled facility. Providing discount programs is one way to reduce this opposition.

The constitutionality of discount programs has been challenged under the Equal Protection Clause, Commerce Clause, and Privileges and Immunities Clause. Pending litigation before the U.S. District Court, Second Circuit raises serious questions whether discount programs patently based on residency requirements are constitutionally valid. Some argue that these programs do not violate the Equal Protection Clause or Commerce Clause because they equalize an unfair burden that tolls can place on residents or commuters. A bill passed by the U.S. House of Representatives and now before the U.S. Senate adopts this view and would specifically authorize discounted toll rates for residents and regular commuters.

Discount programs sometimes are based on an indirect means to benefit residents and commuters without relying on a blatant residency requirement. In one recent appellate court decision, *Yerger v. Massachusetts Turnpike Authority*[1], a discount program where eligibility is based on use of the particular transponder offered by the tolling authority survived constitutional challenge, even though the program disproportionately favors local residents and commuters and hinders interoperability among tolling authorities. Pursuant to this holding, transportation agencies may provide toll discounts to their own transponder customers as long as the transponder discount program is available to all users.

Some tolling authorities are basing discount programs on frequent usage rather than directly on residency. Whether this basis for discounting is sufficiently "decoupled" from residency in order to survive a constitutional challenge is an open question.

Discounts Related to Residency

New York's Metropolitan Transportation Authority (Bridges and Tunnels) offers discounts to residents of Staten Island on the Verrazano-Narrows Bridge and to residents of Rockaway/Broad Channel on the Marine Parkway and Cross Bay Bridge. The Port Authority of New York & New Jersey has a frequent user discount plan for residents of Staten Island and the New Jersey Turnpike Authority offers discounts to residents of Florence and Roebling. The Rhode Island Turnpike and Bridge Authority provides discounts to Rhode Island residents for the Newport Pell Bridge. The New York State Thruway Authority has a local resident discount program for residents of Grand Island in upstate New York.[2]

In October 2009 the U.S. Court of Appeals, Second Circuit reinstated a case, *Selevan v. New York Thruway Authority*, that was originally dismissed for lack of standing and failure to state a claim upon which relief can be granted. Selevan challenges the constitutionality of toll discounts for local residents of Grand Island under the dormant Commerce Clause[3], Equal Protection Clause and the Privileges and Immunities Clause [4]. That case is currently pending in the U.S. District Court in the Northern District of New York.[5]

The case of *Surprenant v. Massachusetts Turnpike Authority* challenges the constitutionality of the discount tolls that the MTA and Massachusetts Port Authority offer to residents living near the Tobin Bridge or the Ted Williams or Sumner Tunnels. The court dismissed Surprenant's Privileges and Immunities Clause claim and ordered further discovery and briefing with regard to the dormant Commerce Clause claim. This case is currently pending before the U.S. District Court in the District of Massachusetts.[6]

Legislation currently pending before the U.S. Senate would allow toll discounts based upon residency. On September 28, 2010 the United States House of Representatives passed H.R. 3960, the Residential and Commuter Toll Fairness Act of 2010, which would provide express authorization for public authorities to offer toll discounts to "captive tollpayers". The legislation defines "captive tollpayer" as an "individual subject to a transportation toll who is a resident or regular commuter to an area where transportation access is geographically constrained." [7] H.R. 3960 is currently before the Senate.[8]

The pending case law and legislation will likely decide the future of toll discount programs based on residency. If HR 3960 is adopted into law, it would probably eliminate any Commerce Clause and Equal Protection Clause challenge to residency-based discount programs, but may not eliminate a Privileges and Immunities challenge in circumstances where citizens of other states not benefitted by the residency preference use the tolled facility on a consistent basis. If residency-based discount programs are found to be unconstitutional, toll agencies will likely shift the focus of their discount programs to users of the toll agency's transponder or to frequent users (irrespective of residence).

Discounts Based On Transponder

The *Yerger* case dealt with the following fact situation. The Massachusetts Turnpike Authority (MTA) provides discounts to those drivers using MTA's Fast Lane transponders. Transponders allow tolls to be collected electronically from a driver's prepaid account without the need for the driver to stop at a toll booth on the toll road. MTA administers its Fast Lane Discount Program (FLDP) through the use of Fast Lane transponders, while 9 other states in the Mid-Atlantic and New England region use the E-ZPass system. The two systems operate interchangeably so that drivers holding either type of transponder may travel the same routes without having to use the toll booths. Drivers are also free to participate in both programs.[9] However, MTA's FLDP provides discounts to users of Fast Lane, but not users of E-ZPass, so drivers would

need to have both an E-ZPass transponder and a Fast Lane transponder in order to benefit from the discount rates for both programs. There are no residency requirements on subscriptions to either system.

Appellants, who subscribe to E-ZPass, claimed that their constitutional rights were violated when they were charged a higher toll amount on the Massachusetts Turnpike than Fast Lane users. Specifically, appellants claimed that the FLDP: (1) was an undue burden on interstate commerce in violation of the Commerce Clause, (2) was a violation of the Equal Protection Clause, and (3) discriminated against out-of-state citizens in violation of the Privileges and Immunities Clause.

On September 30, 2010 the Court of Appeals, Third Circuit upheld MTA's discount program, rejecting each of these arguments. The court reasoned that the FLDP does not discriminate against interstate commerce because the benefit is open to everyone and simply offers discounted toll rates to individuals, from any state, who choose to enroll in Fast Lane. The fact that the incentive to participate in the program may vary across drivers does not make it discriminatory in the opinion of the court. Further, the court found no violation of the Equal Protection Clause because there was no fundamental constitutional right at issue, no suspect class, and the FLDP has legitimate goals (i.e. improving traffic flow, facilitating funding for highway improvements, and benefiting commuters). Lastly, because the FLDP does not exclude or discriminate against non-resident drivers, there could be no claim under the Privileges and Immunities Clause.

MTA's FLDP was previously challenged in 2003. The Court of Appeals for the First Circuit similarly held that the program did not discriminate against out-of-state residents and did not excessively burden interstate commerce.[10]

While tying discounts to particular brands of transponders may be constitutional, it has drawn criticism for its hindrance of interoperability and reciprocity. Such programs require that drivers purchase multiple transponders in order to benefit from each of the programs' discounts. In 2007 the Indiana Toll Road concessionaire originally planned to offer discounts to holders of Indiana i-Zoom accounts and not to drivers with the I-Pass or E-ZPass.[11] The Illinois Tollway argued that juggling two transponders is both inconvenient for travelers and causes problems for electronic tolling systems (including false reads and billing errors). The controversy was resolved by charging the same rate for each type of transponder. Today, drivers may travel on the Indiana Toll Road with i-Zoom, I-Pass or E-ZPass transponder and all pay the same rate.[12] With the decision in *Yerger*, weighing the benefits of a transponder-based discount program to residents and commuters against the problems such a program creates for interoperability is now a pure policy issue.

Discounts for Frequent Users (Without Regard to Residency)

Other transportation agencies provide deeply discounted frequent user plans without any direct link to residency. These include the Delaware River Bay Authority, Delaware River Joint Toll Bridge Commission, New York State Bridge Authority, Maryland Transportation Authority, New Hampshire DOT Bureau of Turnpikes, and the Main Turnpike. Frequent user discount programs are technically open to anyone regardless of residency. Because frequent users are most likely to be residents and commuters, this may be a solution for transportation agencies wishing to implement a discount program for these customers without running afoul of the Constitution or interoperability efforts.

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1 *Yerger v. Massachusetts Turnpike Authority*, (3rd Circuit, September 30, 2010, No. 09-4083).

2 For more information, see <http://www.tollroadsnews.com/node/4074>.

3 The dormant Commerce Clause is the federal power to restrict state power inherent in the Commerce Clause and the Supremacy Clause of the U.S. Constitution. The Supreme Court has repeatedly held that the power to restrict state action is inferred from the Commerce Clause. Federal restrictions can take the form of express preemption – prohibitions on state regulation of an activity subject to federal law – or implied preemption – where state law is void because it conflicts with a federal law or impedes the objective of federal law.

4 U.S. Const. Art. IV. § 2 (Citizens of each State shall be entitled to all Privileges and Immunities of Citizens in the several States).

5 See <http://caselaw.findlaw.com/us-2nd-circuit/1499269.html>.

6 *Surprenant v. Massachusetts Turnpike Authority*, (D. Mass., March 4, 2010, 09-CV-10428-RGS)

7 For the text of H.R. 3960, see <http://thomas.loc.gov/cgi-bin/query/z?c111:H.R.3960>.

8 *Ibid.*

9 While there may be various E-ZPass programs, each with their own terms and conditions, the relevant point is that they are open to all drivers. Toll transponder discounts not 'discriminatory' – US Court of Appeals 3rd Circuit, [Tollroadsnews.com](http://www.tollroadsnews.com) (Oct. 2, 2010).

10 *Doran v. Massachusetts Turnpike Authority* (1st Cir. 2003) 348 F.3d 315.

11 See <http://www.tollroadsnews.com/node/72>.

12 See <https://www.getizoom.com/faqs.do#FAQ3>.