BRENT SPENCE
BRIDGE CORRIDOR

BI-STATE AGREEMENTS

Findings and Recommendations

Frost Brown Todd LLC
ATTORNEYS

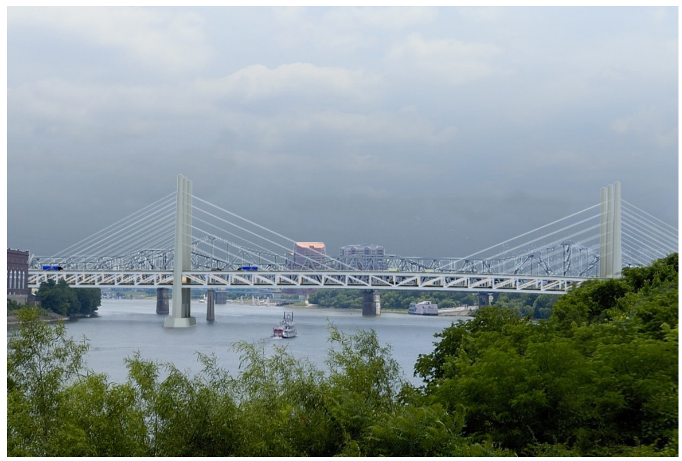
"Working together, our two states have made excellent progress toward a long-awaited solution for the commercial and commuter bottleneck that the Brent Spence Bridge has become…"

Steve Beshear, Governor of Kentucky

"The business and citizens that use the bridge every day need relief from gridlock today - not 30 years from now…I look forward to working closely with Gov. Beshear to make a real change and deliver the Brent Spence Bridge quickly."

John Kasich, Governor of Ohio

December 12, 2012



Photographs from top to bottom: Existing Brent Spence Bridge; Rendering of proposed cable-stay span adjacent to existing Brent Spence Bridge; Congressman Brent Spence on his name-sake bridge after construction.

EXECUTIVE SUMMARY

Kentucky and Ohio anticipate entering into a joint agreement to coordinate the rehabilitation of the existing Brent Spence Bridge, construction of a new span across the Ohio River, and the expansion and modernization of the adjacent I-71/75 corridor. This document reviews the current status of this critical infrastructure project and provides recommendations with respect to the nature of an agreement between the states.

A formal Interstate Compact to memorialize the terms of cooperation between the two states is the "best practices" approach to bi-state agreements. The compact is negotiated in full and then ratified by the legislatures of the member states. Once the states receive Congressional consent for the compact, the agreement will have the character of federal law. These compacts have the following characteristics:

- Compact will have superior enforceability under Supreme Court jurisdiction.
- Deal-specific legal powers can be negotiated and authorized in one instrument, including project scope, method of procurement delivery (design/build or P3), tolling, funding, financing, management, revenue allocation and dispute resolution.
- Bi-state authority may be created to implement the agreement on behalf of member states.

As the two states move forward with the project, several weaknesses in the current approach have become apparent. Although both Governors and the state transportation agencies have worked well together to advance the Project to date, legislative and funding hurdles have limited progress toward procurement and construction. Furthermore, the current approach has certain disadvantages, including:

- Greater uncertainty of enforceability and availability of remedies for nonperformance.
- Increased commercial and political risks from inconsistencies in P3 procurement, tolling, and debt provisions between states.
- Additional complexity and limited cost and schedule efficiencies due to multiple procurements.

In determining an appropriate framework, Ohio and Kentucky's primary goal should be to ensure the agreement is enforceable, with clear terms and conditions setting forth project scope, funding, financing, procurement delivery method, each state's respective obligations, and the manner in which the project will be operated and maintained. In addition, the terms of the agreement should designate a single procurement entity to centralize decision-making for development and implementation. These principles should be reflected in an Interstate Compact that will be comprehensive and enforceable to provide the best possible outcomes for the project.

OVERVIEW

Originally opened in 1963, the Brent Spence Bridge ("*BSB*") has become one of the busiest corridors in the United States, carrying $417 billion in freight annually and 175,000 vehicles daily through the Greater Cincinnati and Northern Kentucky region ("*Project Corridor*"). The Commonwealth of Kentucky ("*Kentucky*") and the State of Ohio ("*Ohio*") have recognized that the BSB is functionally obsolete and the Project Corridor should be modified significantly to manage current and future needs. The project includes the rehabilitation of the existing span, construction of a new bridge and reconstruction of 7.8 miles of I-75/71 corridor (the "*Project*"). Kentucky and Ohio ("*BSB States*"), in conjunction with FHWA, have been developing an overall strategy for the development, funding, financing, procurement and delivery of the Project. The findings and recommendations in this document address the most optimal way to structure an agreement between the BSB States as part of the overall strategic development of the Project Corridor.

INTERSTATE COOPERATION

Agreements between states have been used throughout the history of the United States to accomplish a number of purposes, from setting state boundaries to implementing common laws or exchanging information about similar projects. Where circumstances prevent the federal government from playing the lead role in interstate infrastructure development, the states have developed several strategies to negotiate joint agreements to fulfill their development needs independently.

Interstate Compacts

Traditionally, states needing to cooperate across state lines have entered into interstate compacts ("*Interstate Compacts*") that enable them to act jointly on matters that are beyond the authority of the individual state but are not within the specific purview of the federal government. To form such an Interstate Compact, two or more states typically negotiate an agreement, and each state legislature enacts a law that is identical to the agreement reached. Interstate Compacts are particularly useful in multi-state agreements where cooperation is required on regional or national issues.[1] They have been used to address a variety of concerns including resolving border disputes, allocating interstate water resources, enhancing law enforcement, disposing of radioactive waste, and developing regional transportation systems. Major infrastructure projects also benefit significantly from such an approach because an Interstate Compact can document the entirety of the accord between the member states.

In general, Congress must consent before states enter into Interstate Compacts that affect the balance of power between the federal government and the states, or affect a power constitutionally assigned to the federal government, such as the power to regulate interstate commerce.[2] Congress has granted its consent to a multitude of transportation-related interstate compacts to manage toll bridges or tunnels crossing state boundaries. Compacts that are currently administered by bi-state tolling authorities include: the Delaware River and Bay Authority, the Delaware River Joint Toll Bridge Commission, the Delaware River Port Authority, and the Port Authority of New York and New Jersey.[3] The bi-state tolling authorities are primarily funded through toll collections or from revenues generated by other activities – such as fees and rents from airports, maritime ports, or other assets they may own or manage – and generally do not receive state funds. These authorities operate with Congressional consent but are neither federal in nature nor state in scope; they occupy what has been referred to as the "third tier" of government.[4]

Cooperative Contracts

In recent years, some states have taken an ad hoc approach to interstate cooperation. In order to support collaboration and efficiency across state borders, state legislatures have empowered administrative agencies within the state government to execute contracts outlining the terms of cooperating with a neighboring state or its agencies ("*Cooperative Contracts*"). For example, two bordering states with independent pre-existing transit or water banking authorities might benefit from aligning their interests. These cooperative agreements are feasible primarily because of the very specific nature of their authority and the expertise and operative power already resident within the existing administrative bodies.

Two recent transportation infrastructure projects in the Midwest have taken this approach. The Louisville-Southern Indiana Ohio River Bridges Project ("*Bridges Project*") defers the construction and implementation of two bridge crossings to the individual transportation agencies of Indiana and Kentucky. The states utilized a Bi-State Development Agreement and an Inter-Local Agreement to empower existing agencies to operate under respective state law and implement different aspects of the project unilaterally. Originally anticipated to be a single integrated project, the Bridges Project was eventually split into two separate procurements for each of the Downtown Crossing and East End Crossing.[5] Each state is individually responsible for procurement, construction, financing, and related costs for one of the two spans.[6] Both crossings are tolled uniformly and the proceeds of those tolls are allocated equally between the two states.[7]

Similarly, Indiana and Illinois recently executed a Bi-State Development Agreement with respect to the Illiana Corridor Project ("*Illiana Project*"), under which the two states agreed to construct an at-grade highway that will cross state lines. Subject to the development agreement, each state is responsible for procurement of the project up to the state border, pursuant to a DBFOM availability payment method.[8] A Bi-State Management Team was established to coordinate the parallel procurements and facilitate communication between the two states as the respective projects move forward.

Contrasting Approaches

For complex projects that require the active cooperation of multiple states, jointly crafting and approving an Interstate Compact is the "best practice" approach. These compacts originated from a need for states to operate outside of traditional constraints, and correspondingly, the resulting agreements offer flexibility and a level of comprehensiveness that is tailored specifically to the subject of the cooperation. In addition, an Interstate Compact is necessary if the participating states are exploring the use of a "third tier" independent authority that will take on some or all of the project responsibilities.

A Cooperative Contract approach has primarily been used when a) only simple coordination or permission from the various parties is required; b) the project does not have multiple interrelated segments, interface points, funding, and financing sources; or c) necessary legislative authority to procure and deliver the project among the states is generally aligned. The states may act under internal state statutory and constitutional powers to contract with other parties, provided that the cooperative agreements will not infringe on federal power such that it would require Congressional consent. This should not, however, be viewed as a replacement for an Interstate Compact, particularly in situations where new powers and bi-state structures should be created to foster true collaboration and enforceable action. The efficacy of a Cooperative Contract is limited to situations where a partner state is leveraging existing governmental powers in coordination with other states.

Enforceability and Jurisdiction

While the U.S. Supreme Court has original jurisdiction over disputes between states, there is no overarching Constitutional provision or law that governs the process. This has resulted in a patchwork of court cases that approximate an interstate common law consisting of equitable and practical remedies. As a result, there is a general lack of certainty regarding the outcome of a bi-state contract dispute. In fact, the Supreme Court is not required to accept jurisdiction over these matters, and has on occasion stated a preference that the states negotiate a resolution on their own terms.[9]

With respect to Interstate Compacts, however, the Supreme Court has firmly established that congressional consent "transforms an interstate compact within [the Compact] Clause into a law of the United States,"[10] which results in the Supreme Court reviewing disputes under such a compact in the same fashion as adjudicating a federal statute. The "first and last order of business of a court addressing an approved interstate compact is interpreting the compact,"[11] and "unless the compact to which Congress has consented is somehow unconstitutional, no court may order relief inconsistent with its express terms."[12] Ultimately, forming an Interstate Compact with the consent of Congress provides certainty that no other agreement structure between states can provide, particularly if the compact provides an internal process for remedies and dispute resolution.[13]

COMMON OBJECTIVES

The Project features multiple components that must be integrated, including rehabilitation of the existing span, construction of a new bridge, reconfiguration of bridge approaches and reconstruction of 7.8 miles of adjacent highway in Kentucky and Ohio. The BSB States have taken several steps to proceed cooperatively with the Project, including executing several Memoranda of Understanding, undertaking an Options Analysis and issuing a Request for Information to potential partners on the Project. During this time, the BSB States have discussed several objectives for the Project, which include the following:

- Reconstruct the Project Corridor to provide safe and convenient travel to meet current and future demand.
- Develop the Project in the most cost effective and efficient manner.
- Obtain alternative funding sources to minimize toll revenues necessary to construct the Project.
- Pursue alternative financing sources to mitigate upfront capital dollars necessary to advance construction of the project in the near term.
- Provide structure for the BSB States to work collaboratively together to develop the Project.
- Establish respective obligations between the BSB States in a cooperative agreement.
- Create a bi-state agreement between the BSB States that is enforceable and marketable.
- Procure the Project with the most cost effective and timely delivery method.

In order to achieve these objectives, an agreement must be established to clearly outline the responsibilities of each state, including the respective allocation of each state's resources, security for each state's performance, and dispute resolution. Given the various challenges associated with procuring, financing and managing a multi-billion dollar cross-border infrastructure project, a robust and definitive agreement is critical to successfully achieving the Project outcome both BSB States envision.

DEVELOPMENT OF COOPERATIVE PROCESS

The BSB States have entered into a variety of Project-related agreements that have allowed progress to be made on engineering, design, environmental, analysis of delivery options, development of a financial plan and the provision of authority to create a bi-state management team to guide the development process. There has also been significant political activity relating to various proposals to advance the development and completion of the Project.

The two states have independently pursued different types of authorizing legislation necessary for the Project, but a comprehensive, cohesive plan between the BSB States has not yet been formulated. In addition, the nearly 30 responses to the Request For Information Regarding Development and Procurement Process ("*RFI*") relating to the Project made it clear that there is significant private interest in partnering with the BSB States on this Project, but the lack of (1) an enforceable agreement and (2) a single procurement or contracting partner for the public sector are major risk factors that can severely diminish the chances of both securing a willing partner and completing the Project.

Ultimately, the scale, level of integration, and objectives of the Project make it significantly different from projects like the Bridges Project or the Illiana Project and their respective execution strategies. The lack of uniformity and alignment of certain critical statutory elements (e.g. authority to enter into a bi-state agreement, design-build or P3 procurement, tolling) of the BSB States also adversely impacts the ability to efficiently and cost-effectively develop a project of such complexity.

The practical result of these concerns is that if the Project is to be successful, the BSB States must pursue an Interstate Compact that can legitimately delegate power, outline Project responsibilities, and create certainty of enforceability. This is uniquely possible under such an agreement because each issue will receive the exact same treatment, single-handedly eliminating a major market risk concern by unifying policies. Legal authority to enter into a P3, toll the Project, and delegate authority to the appropriate partners and parties will all be explicitly addressed. In addition, logistical and operational concerns like cost overruns, distribution of risk, and dispute resolution will also be structured.

Since the compact is adopted uniformly by its member states and as a whole, the potential for governance and management of the entire Project is much more flexible. Various legal structures have been used across the dozens of similar interstate compacts and include the creation of regulatory bodies, management teams, bi- or multi-state authorities, or full delegation to one or multiple parties to the compact. The Interstate Compact structure gives members the ultimate flexibility in structuring an agreement that is tailored to the unique needs of the project.

There are also some unique opportunities associated with obtaining the consent of Congress. Congressional consent allows member states to create an entity that may function as a separate and independent body. This type of bi-state entity allows the member states to centralize decision-making authority with respect to tolling, debt issuance, and P3 contracting and will significantly mitigate the market risk associated with multiple public partners.[14]

Several factors that must be addressed in a cooperative agreement between the BSB States are described in the sections below.

Delegation of Power

The BSB States currently envision the use of a single procurement for the Project. This will require delegating power to a single procurement entity to assume responsibility for delivery of the Project, analogous to the development plan for each individual crossing of the Bridges Project. This is a critical point because without a full grant of power, there may be conflicting public law that cannot be reconciled without the superseding control of an Interstate Compact. In addition, from a practical perspective, all contracting and procurement with a developer should reside with a single public party to ensure continuity and clarity for the private sector partner. The prospect of negotiating multiple agreements with two public parties jointly and facing the potential lack of enforceability of a bi-state contract will have a chilling effect on market participation in the Project. This concern was recently confirmed in the vendor responses to the Project RFI.

One unique aspect of an Interstate Compact is that, with the appropriate cooperation of Congress, it permits the creation of a third-party entity which centralizes decision-making across the two states. This structure can be implemented in a variety of ways, as described below, but the primary effect will be to provide a single point of contact for contractors, concessionaires and operating partners. If a "third tier" entity is not developed, in favor of delegating power to one of the BSB States, joint decision-making would be limited to a bi-state board or management team that provides advice and direction with little direct power.[15]

Project Sponsors and Procurement Entities

A critical element of the overall framework should be the determination of a project sponsor and procurement entity ("*Sponsor*") and empowerment of that entity to enter into contracts in connection with the Project. Procurement authority may follow many forms, including, but not limited to (1) a bi-state authority created pursuant to an Interstate Compact or (2) the delegation of authority to one of the cooperating states as the Sponsor on behalf of both states.

The optimal Sponsor entity is determined based on political and economic factors resident in each state and the potential for acceptance of such procurement structure by the commercial markets.

Major factors to be considered when determining the optimal Sponsor for the Project include the following:

- Ability of the Sponsor to efficiently and effectively manage the procurement, delivery and operation of a project.
- Acceptance and credibility of the Sponsor in the commercial market.
- Extent of power/authority delegated to the Sponsor.
- Available collateral/security of the Sponsor.
- Ability of the Sponsor to receive and manage revenue sources.
- Ability of the Sponsor to issue debt.
- Mitigation/elimination of sovereign state appropriation risk.
- Ability to manage risk for long term project benefits.
- Expertise in developing complex projects.

As noted above, the selection of a Sponsor model should be made concurrently with crafting an agreement for the Project. Careful consideration and analysis of the various criteria described here in the context of that framework must be made to ensure the best outcomes for both the Project and the BSB States.

Project Procurement

In addition to practical limitations associated with multiple procurements on project elements as interrelated as the various components of the Project, the BSB States would face significant other disadvantages without a single procurement. Development of the project, timing, delivery, and the associated cost would all suffer. A single procurement provides the greatest potential for capturing cost savings, compressing the project delivery schedule, mitigating multiple project risks and ultimately enhancing the Project's viability in the commercial market.

Given the interdependent nature of the Project, any delay in one portion of the procurement could have catastrophic implications for the entire project, with little to no recourse by the other public party. Without a uniform bidding procedure and agreed-upon performance metrics, each element of the project would need to follow the public bidding rules and specification requirements associated with the responsible state. This can introduce major adverse impacts with regard to cost, schedule, overall execution of management and delivery of the Project.

Public-Private Partnerships (P3)

P3 procurements have the potential to deliver high-value, technically complex projects more quickly or in a different manner than would otherwise occur under traditional procurement and financing mechanisms. The bi-state management team for the Project is currently exploring P3 structures for their potential to accelerate the delivery of the Project by leveraging private sector resources and expertise, while mitigating construction and operations risk for the public sector. The structure of the cooperative agreement between the BSB States will have an enormous impact on the resulting effectiveness of P3, primarily through the type of procurement selected. A single procurement will offer the most benefit because all elements of the Project may be evaluated in their entirety, which provides a greater number of options for leveraging the private sector. The single procurement model also eliminates the inefficiencies associated with traditional procurement methods.

Regardless of the form of the procurement, any public party that desires to directly participate must have valid statutory authority to enter into a P3 agreement with a concessionaire or similar private partner. In order to fully maximize the utilization of a P3 structure, legislation would need to grant the ability to proceed with such delivery models that would be well-received by the commercial markets (e.g. no unusual limitations or exceptions that will cause extra analysis or friction with potential concessionaires). This authority would be clearly authorized under a comprehensive Interstate Compact between the parties, and the rules and limits for its implementation would be fully outlined therein.

Tolling Authority

Without a significant change in the current status of federal funding for the Project, tolling of the Project Corridor will be necessary for the public parties to provide sufficient funding sources for the Project. Consequently, it is critical that the BSB States develop a mutually satisfactory approach to granting tolling authority. This process will need to be structured under the Interstate Compact and will reconcile the current state statutes, under which there are differences between Kentucky's and Ohio's tolling approach and structure.

The procedural differences between Kentucky and Ohio relating to tolling infrastructure will provide a starting point for the ultimate authority implemented in an Interstate Compact. The two existing approaches will inform the process and provide elements that should result in a mutually agreeable solution for the unified Project.

Toll Revenue Allocation

Once tolling procedures have been settled, the matter of allocating those revenues will need to be resolved in the cooperative agreement. One potential solution would be in a form similar to that used by the Bridges Project, where a single contracted operator tolls the bridge spans and distributes proceeds evenly to the two states to support debt service.[16] Another option made possible by the Interstate Compact is the implementation of a single tolling authority that would operate across both states. Ultimately, the goal would be to have all tolling revenues directly pledged to the repayment of debt associated with the construction, management, and maintenance of the Project to maximize savings and mitigate appropriation risk inherent in the BSB State's respective constitutions.

Allocation of State Funds

Several approaches have been discussed to ensure that funds are made available to fulfill the obligations undertaken by each BSB State, including but not limited to payment of debt service on Project bonds, whether they are Project related revenues or appropriations from the states' biennial budgets. As addressed above in *Delegation of Power,* financing responsibilities will need to parallel the procurement strategy. Failure to isolate tolling revenues or a decision to pass them through state budgets will ultimately diminish the security backing the Project debt, so an approach inclusive to the structure of the Interstate Compact is preferable. If tolling funds enter the state treasury, the legislature must then appropriate those funds to make debt service payments. Expanding a state's biennial appropriation burden will have a direct negative effect on the security of the debt and the corresponding marketability.

Security of Performance and Dispute Resolution

There is significant risk associated with a sovereign state filing suit in the Supreme Court to enforce contract provisions against another sovereign state. As addressed in *Enforceability and Jurisdiction*, the lack of certainty in whether the Supreme Court will accept jurisdiction over disputes or what remedies it might apply makes it an absolute necessity to provide for clear and robust procedures in an Interstate Compact.[17]

The reorientation of the Project around an Interstate Compact will provide the security and certainty necessary to handle the level of complexity associated with a major cross-border infrastructure project. Such a compact will fully address the fact that financing, construction, tolling, and related issues are all intertwined and support a single integrated project. During the planning phases necessary to establish the Interstate Compact between the BSB States, the parties will determine which remedies and performance guarantees fit the Project and the needs of both public and private sectors partners. The ability to deeply integrate all of these solutions into a single bi-state agreement will ensure the best possible outcomes for a successful Project.

Commercial Market Risk

Assuming Congressional consent to the ultimate agreement, an Interstate Compact is the most market-accessible way to address a complex, multi-party infrastructure development. The Project will be evaluated on the structure and funding/financing package offered, not on perceived inconsistencies or potential disputes between the two states. Further benefits can be obtained by centralizing decision-making and contracting with a single entity. This reduces friction during negotiations and performance which will lead to direct reductions in cost. Depending on how the Interstate Compact is structured, this single responsible party can be a state agency or an extra-governmental entity that has been empowered by the parties and Congress to act.

In addition, there are major credit risk benefits to creating and empowering either a single state or a bi-state authority to manage debt, tolling, and administration of the project. Credit-rating agency officials report that the ability of a single authority to set toll rates independently to cover debt obligations is the most important factor considered in assigning a credit rating, which will have a direct impact on debt interest rates.

Mismanagement of the tolling components of the Project has the potential to open the BSB States to political and litigation risk, particularly if there is still public dissension regarding its use on the Project Corridor. Using a third party to implement tolling under the structure of the Interstate Compact will significantly reduce these concerns. Further risk is introduced with the prospect of having multiple public parties involved in different aspects of the process (i.e. no centralized authority). A single responsible administrative entity is a far more reliable partner than multiple governmental entities with their related multi-level decision-making processes.

Finally, optics will play a significant role in the private sector's perception of risk associated with the Project, which will have an immediate and tangible effect on the marketability of the Project and the associated debt. If the two public parties do not have a holistic, comprehensive, and enforceable agreement in place, there will be a greater perception of dissension that introduces risk to the private partners.

Political Risk

One significant risk factor for Interstate Compacts is that it can be challenging to overcome the original hurdle of establishing the compact itself. This is largely because the compact must be approved, in its entirety, by both legislative bodies. There is no opportunity for amendment or modification once the compact has been negotiated, and the entire process can be immediately derailed by a decision not to ratify the compact. It is, essentially, an all-or-nothing proposition. Both BSB States have to consider and assess whether the agreement negotiated by their respective administrative agencies will be accepted by the state legislatures for ultimate approval.

One of the strengths of this approach, though, is that legislators can make their decisions solely on the merits of the Project without implicating general state policy. For example, state legislators may be apprehensive about changing state policy on P3's, tolling, dispute resolution or public bidding, but may be willing to make exceptions for a unique or pivotal project. Approval of the terms and conditions in an Interstate Compact does not impact "business as usual" in the state, but simply creates a construct specifically for the Project.

CONCLUSION

In order to successfully advance the development of the Project, a comprehensive and enforceable agreement between the BSB States must be established. Key elements of such a comprehensive agreement include project scope, funding, financing, procurement delivery method, each state's respective obligations, the manner in which the project will be operated and maintained, designation of project Sponsor, and dispute resolution.

Understanding that the Project will need to be implemented uniformly, the BSB States cannot ignore the fact that major elements such as tolling and Project delivery methods need to be addressed openly, and clear agreement on the part of both parties will ultimately be required. The question of structure primarily concerns the enforceability of those decisions, which is a point that will be recognized by the commercial markets. Kentucky and Ohio will need to further explore the relative advantages and disadvantages of the different frameworks and assess the feasibility of each in context of the factors outlined.

Advancing the negotiations for the Project with a more comprehensive approach will have a long-lasting and positive effect on the outlook for the Project Corridor. The Interstate Compact approach necessitates uniform consent from both states and approval from Congress, but will provide the parties with a clarity of purpose in making the Project both successful and cost-effective. Given the complex and integrated nature of the Project, an Interstate Compact should be pursued by the BSB States.

Table 1

Facilities Managed by the Four Bi-State Tolling Authorities with Interstate Compacts

Authority and Location	States and Year	Transportation Facilities/Properties Operated
Port Authority of New York and New Jersey (PANYNJ) New York Metropolitan Area	New Jersey; New York 1921	• 4 toll bridges and 2 toll tunnels: George Washington, Bayonne, and Goethals Bridges and the Outerbridge Crossing; Holland and Lincoln Tunnels • 188 non-toll highway bridges: 109 bridges in New York and 79 bridges in New Jersey • 5 airports: John F. Kennedy International, LaGuardia, Newark Liberty International, Stewart International, and Teterboro Airports • 7 port terminals: Brooklyn-Port Authority, Elizabeth- Port Authority, Greenville Yard-Port Authority, Howland Hook, and Port Jersey-Port Authority Marine Terminals; Port Newark and Red Hook Container Terminal • Transit and ferry assets: Port Authority Trans-Hudson (PATH) Rail Transit System, Journal Square Transportation Center, Port Authority Bus Terminal, George Washington Bridge Bus Station, World Trade Center Transportation Hub, New York Harbor Commuter Ferry system • Other properties: World Trade Center, Waterfront Development in Queens and Hoboken, and several industrial parks and real estate developments in the New York metropolitan area
Delaware River Port Authority (DRPA) Philadelphia, PA & Camden, NJ	New Jersey; Pennsylvania 1931	• 4 toll bridges: Ben Franklin, Betsy Ross, Walt Whitman, and Commodore Barry Bridges • Transit system and ferry assets: Port Authority Transit Corporation (PATCO), RiverLink Ferry • Other properties: Various real estate investments in the Delaware River Port District
Delaware River Joint Toll Bridge Commission (DRJTBC) Philadelphia/ Bucks Counties & NJ/NY State Line	New Jersey; Pennsylvania 1935	• 7 toll bridges: I-78, Milford-Montague, Delaware Water Gap, Portland-Columbia, Easton-Phillipsburg, New Hope-Lambertville, Morrisville-Trenton Toll Bridges • 13 non-toll bridges supported by revenues from 7 toll bridges
Delaware River and Bay Authority (DRBA) Delaware & Gloucester/Salem/ Cumberland/Cape May Counties, NJ	New Jersey; Delaware 1962	• 1 toll bridge: Delaware Memorial Bridge • 5 airports: New Castle Airport, Cape May Airport, Millville Airport, Civil Air Terminal at Dover AFB, Delaware Airpark • 2 ferries: Cape May-Lewes Ferry, Three Forts Ferry Crossing • Other properties: Salem County Business Park, located in Carney's Point Township, New Jersey; Riverfront Marketplace, Wilmington, Delaware

Table 2

Infrastructure and Transportation Related Compacts

Interstate Compact Title	Type	Date of Formation
Arkansas-Mississippi Great River Bridge Construction Compact	Infrastructure	
Bi-State Development Agency Compact	Transportation; Planning	1949
Buffalo and Fort Erie Bridge Compact	Infrastructure	1994
Delaware River Joint Toll Bridge Compact	Infrastructure	1935
Delaware River and Bay Authority Compact	Transportation	1962
Delaware River Port Authority Compact	Infrastructure	
Interstate High Speed Intercity Rail Passenger Network Compact	Transportation; Infrastructure	
Interstate Rail Passenger Network Compact	Infrastructure	
Kansas City Area Transportation Compact	Transportation	1965
Midwest Interstate Passenger Rail Compact	Transportation	2000
Mississippi - Alabana Railroad Authority Compact	Transportation	
Mississippi - Louisiana Rapid Rail Transit Compact	Transportation	1981
Missouri River Toll Bridge Compact	Infrastructure	1933
Multistate Highway Transportation Agreement	Transportation	1978
New Jersey - Pennsylvania Turnpike Bridge Compact	Infrastructure	
New York - New Jersey Port Authority Compact of 1921	Transportation	1921
Northeast Mississippi - Northwest Alabama Railroad Authority Compact	Transportation	
Ogdensburg Bridge and Port Authority Compact	Transportation	
Potomac Highlands Airport Authority Compact	Transportation	1976
Potomac River Bridges Towing Compact	Infrastructure	
Portsmouth - Kittery Bridge Compact	Infrastructure	
Railroad Passenger Transportation Compact	Transportation	
Washington Metropolitan Area Transit Authority Compact	Transportation	1960
Woodrow Wilson Bridge and Tunnel Compact	Infrastructure	1995

[1] See GAO, Interstate Compacts: An Overview of the Structure and Governance of Environmental and Natural Resource Compacts, GAO-07-519 (Washington, D.C.: Apr. 3, 2007).

[2] The concept of an "interstate compact" is derived from the Compact Clause of the U.S. Constitution, which states that "[n]o State shall, without the Consent of Congress enter into any Agreement or Compact with another State." Despite the language of the Compact Clause, the Supreme Court has adjudicated a number of cases to determine what constitutes a compact that requires Congressional consent. The Court has held that not all agreements entered into by states require such approval. For those instances where consent is required though, Congressional consent has been implied in some scenarios. As addressed elsewhere in this Memorandum, explicit Congressional consent should not necessarily be viewed as a hurdle, but as a positive, as it makes the language of the compact equivalent to federal law and confers certainty in the resolution of disputes.

[3] In 1921, the states of New York and New Jersey received consent from Congress to jointly manage the port district centered around New York Harbor with an interstate agency, which set the precedent for the management of interstate transportation projects. Over 200 other interstate compacts exist today for purposes other than managing interstate transportation.

[4] GAO-07-519.

[5] The Downtown Crossing connects downtown Louisville and Jeffersonville, Indiana, running parallel to the existing Kennedy Bridge. The East End Crossing is located eight miles upstream and connects Prospect, Kentucky and Utica, Indiana.

[6] Indiana is solely responsible for the East End Crossing and Kentucky is solely responsible for the Downtown Crossing.

[7] The states contracted with each other to apply a uniform toll and to hire the same third party, private sector tolling provider to operate both bridges toll facilities.

[8] The Design-Build-Finance-Operate-Maintain model is the most comprehensive form of P3, wherein a public entity utilizes the private sector to provide each major element of project management. There are a number of varieties of P3, where the private sector might be engaged for only a subset of those functions. Within the Finance component of P3, risk can be allocated between the public and private sectors. Originally, a concessionaire model required the private sector partner to manage all of the cash flow for the project. More recently, the availability payment model shifts some of the financing risk back to the public sector, which receives all project revenues and makes contracted for scheduled payments from those revenues or budget appropriations.

[9] California v. Latimer, 1938, 59 S.Ct. 166, 305 U.S. 255, 83 L.Ed. 159; Georgia v. Chattanooga, 1924, 44 S.Ct. 369, 371, 264 U.S. 472, 483–484, 68 L.Ed. 796.

[10] Cuyler v. Adams, 449 U.S. 433, 438, 101 S.Ct. 703, 706, 66 L.Ed.2d 641 (1981).

[11] Texas v. New Mexico, 462 U.S. 554, 567-568, 103 S.Ct. 2558, 2566-2567, 77 L.Ed.2d 1 (1983).

[12] Id. At 564, 103 S.Ct. at 2565.

[13] "[C]ourts have no power to substitute their own notions of an 'equitable apportionment' for the apportionment chosen by Congress." Arizona v. California, 373 U.S. 546, 565-566, 83 S.Ct. 1468, 1480-1481, 10 L.Ed.2d 542 (1963).

The Supreme Court has on other occasions looked first to the compact for a resolution to the dispute and only provided an equitable remedy when it concluded that the compact did not provide adequate means for resolving a deadlock. Texas v. New Mexico (1983).

[14] The Port Authority of New York and New Jersey is a seminal example of a bi-state authority created by interstate compact and empowered by an Act of Congress in 1921.

[15] The Illiana Corridor Project utilizes an Executive Committee and Bi-State Management Team for oversight and monitoring functions.

[16] The broad strokes of this plan were outlined in the Bridges Project Bi-State Development Agreement (calling for the engagement of a Toll System Integrator) and were implemented by the Joint Board and the Tolling Body (created pursuant to the Inter-Local Agreement), composed of the Joint Board and two other representatives, one each from Indiana and Kentucky.

[17] The Supreme Court has specifically ruled that simply adopting "reciprocal" legislation between two states does not automatically confer powers of a compact or an enforceable agreement, and in such situations, the court may decline to hear the dispute in its entirety. An Interstate Compact that contains dispute resolution procedures will eliminate this risk factor and provide for appropriate judicial deference to the terms of the agreement. Commonwealth of Massachusetts v. State of Missouri, 308 U.S. 1, 15, 60 S. Ct. 39, 42, 84 L. Ed. 3 (1939).