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**Testimony of New York Civil Liberties Union
Executive Director Donna Lieberman**

before

**The New York City Council
Committee on State and Federal Legislation**

regarding

**Recommendations of the NYC Traffic Congestion Mitigation
Commission and Draft State Legislation**

March 24, 2008

I present testimony today urging the members of the City Council to consider the important civil liberties issues that are implicated by the creation of a traffic congestion mitigation plan for 60th Street and below—Manhattan’s central business district (“CBD”).

The proposed legislation would involve the installation of a video surveillance network ringing the traffic mitigation zone. The video cameras would read, and record in a database, the license plates of every vehicle entering the zone. The recorded information would be used to ensure payment is made for entering the restricted area. Through the operation of this video infrastructure, the city would compile a massive database that includes information regarding the movement of hundreds of thousands of identified individuals.

The NYCLU has taken no position on the concept of a congestion pricing plan for Manhattan’s CBD. However, in public testimony presented before the New York City Traffic Congestion Mitigation Commission (the “Commission”) the NYCLU has stated that absent constraints upon the scope and operation of the video surveillance system, it could significantly undermine the personal privacy rights of New Yorkers.

The Commission has concluded the NYCLU's concerns have merit – that the proposed congestion pricing scheme does in fact implicate fundamental privacy rights – and has therefore recommended the adoption of specific policies and practices to protect the privacy of individuals who enter and travel within the congestion pricing zone.

The NYCLU commends the Commission for proposing explicit privacy protections in its proposed congestion pricing plan. However, the Commission's recommendations fail to include certain protective measures without which the Commission's asserted commitment to protecting personal privacy may be rendered meaningless. The harmful consequences of these shortcomings would be exacerbated by the proposed draft legislation that will reportedly be introduced before the state legislature.

In my remarks I will present the NYCLU's criticism of both the Commission's recommendations and the draft state legislation.

As a preliminary matter, I must express great concern as to how this hearing came about and as to the City Council's role in reviewing and evaluating the proposed traffic congestion mitigation plan.

The NYCLU's concerns regarding the City Council's oversight and review of proposed congestion pricing plan

With little notice and extraordinary haste the City Council has convened today's public hearing for the stated purpose of reviewing the Recommendation of the Traffic Congestion Mitigation Commission, issued January 31, 2008.¹

The frantic pace of this proceeding appears to be driven by an April 7 deadline, by which date the city's congestion pricing plan must be enacted as state law so that the city is eligible to receive federal monies. Just last week the state's Legislative Bill Drafting Commission published a draft bill – the Traffic Mitigation Act. News accounts indicate that the draft bill is the mayor's proposal.²

Why, then, is the Council conducting a hearing on the Commission's recommendations when its proposal has already been reduced to draft legislation whose formal introduction is imminent? Legislative personnel in state and city government offer this explanation: in order to meet the April 7 deadline, the state will adopt the legislation and issue a Home Rule request to the City Council. That is, the Council will be asked to rubber stamp the state legislation, with little, if any, opportunity for comment and review, never mind

¹ See NYC Traffic Congestion Mitigation Commission, *Report to the Traffic Congestion Mitigation Commission & Recommended Implementation Plan*, January 31, 2008 (Hereafter "Report to the Traffic Congestion Commission").

² See Diane Cardwell. "Paterson Adds Support To Bloomberg's Plan For Congestion Pricing," *New York Times*, March 22, 2008, p. B3; Joe Mahoney and Kathleen Lucadamo, "Gov gives boost to congest plan," *New York Daily News*, p. 2.

hearings. (The state legislature will, of course, hold no public hearings on the congestion pricing legislation.)

Home rule, indeed.

What appears to be going on in this chamber today is this: the City Council is presenting the semblance of oversight regarding the creation of a congestion pricing plan, but in the absence of an actual plan.

City Council members and state legislators should resist the rush to pass a congestion pricing plan – and should demand a meaningful opportunity for public review of and comment upon the actual legislation.

Recommendation of the Traffic Congestion Mitigation Commission

The Commission's traffic congestion mitigation plan would require the installation of a vast network of video surveillance cameras that would feed information and images into a database that could be used to track the movements of tens of thousands of persons who drive in Manhattan's CBD.³

The Commission's recommendations, which were based upon ten criteria clearly express recognition that as a matter of sound public policy the city's congestion pricing plan must include protections of personal privacy. These recommendations call for deletion of data and LPR photos once billing and payment issues are resolved; the removal of information that could identify the owner or operator of a vehicle from data maintained for research purposes; and procedures for making anonymous payment – for instance, through a pre-paid E-Z Pass account – of the toll required to enter the congestion pricing zone.⁴

These are important, and commendable, recommendations. However, these recommendations, when converted into legislation, must be made sufficiently explicit to truly protect New Yorkers' personal privacy. As discussed below, any draft legislation must provide, with specificity, clear directives for protecting our privacy during the implementation of a congestion pricing plan.

Also, the Commission's recommendations omit several critical privacy protections, including measures that --

- Prohibit the city from capturing images or information except as is necessary to collect payment of the toll for entering the congestion pricing zone. This proscription would help to ensure that video technology utilized by the congestion pricing system is not used to capture images of persons traveling in vehicles, images of the content of vehicles, or images of nearby pedestrians or residences.

³ *Report to the Traffic Congestion Mitigation Commission.*

⁴ *Id.* See *Recommended Implementation Plan* ("Implementation Principles") p. 72.

- Restrict access to vehicle information to those individuals responsible for administering billing and payment; and prohibit dissemination of such vehicle information to other individuals and entities pending the resolution of payment.
- Establish an oversight entity and procedures to ensure the aforementioned privacy protection measures are rigorously implemented and enforced. Oversight procedures must provide for public disclosure as to the nature of information collected through the congestion pricing system; training of personnel regarding compliance with privacy-protection procedures; and procedures by which individuals may file a complaint and seek redress regarding the unauthorized release of private information.

Absent the inclusion of these additional measures, the objectives and intent of the Commission's privacy-protection measures may be easily subverted.

Draft state legislation: the Traffic Mitigation Act

News accounts indicate that the draft state legislation establishing a New York City congestion pricing plan will be introduced at the request of Mayor Bloomberg.⁵ The state's Legislative Bill Drafting Committee has prepared a bill, the Traffic Mitigation Act, whose legislative findings state that the proposed law establishes a congestion pricing plan "as recommended by the New York City traffic congestion mitigation commission."⁶

The legislation includes a provision that seems intended to import the privacy-protections provisions from the Commission's recommendations (as set out above). This provision in the state bill includes three important privacy protections: (1) deletion of a vehicle's identifying information once payment has been resolved, (2) establishment of procedures by which one could enter the congestion pricing zone by making an anonymous payment, and (3) deletion of vehicles' identifying information from data used for research related to the congestion pricing system.⁷

However the principal statutory directive requiring the city to protect the privacy of persons who travel in vehicles that enter the congestion pricing zone employs vague and imprecise language:

The city shall: (a) take appropriate steps to address privacy concerns of drivers entering the congestion pricing zone and to mitigate such concerns by establishing controls in storage and sharing of vehicle data.⁸

⁵ See *supra*, note 2.

⁶ Legislative Bill Drafting Commission, "Traffic Mitigation Act," Section 1700 ("Legislative findings and declaration").

⁷ *Id.*, Section 1703, subparagraph 8.

⁸ *Id.*

This language—written in proposed legislation, not just recommendations—weakens and obscures the Commission’s directive that the protection of personal privacy must be an important policy objective in the design and implementation a congestion pricing plan. Rather than direct the city to adopt and enforce effective, objective measures to protect the privacy of drivers and their passengers entering the congestion pricing zone, the bill predicates the need for protective measures upon an inquiry as to drivers’ subjective views on privacy. What’s more, the bill contemplates the “mitigation” of harm caused by invasion of privacy; not its prevention. As a practical matter, this language will undermine the creation and implementation of effective privacy protections pursuant to the proposed Traffic Mitigation Act, as well as rules and regulations promulgated pursuant to that law.

This privacy-protection provision of the Traffic Mitigation Act also adopts, nearly verbatim, the following guidelines recommended by the Commission:

[Privacy protection measures] shall include complying with privacy standards of the E-Z Pass Interagency Group, E-Z Pass customer service centers, applicable city and state laws regarding sharing of vehicle and private information with third parties and additional measures to protect privacy . . .

This reference to existing privacy protections and to the need for further protections offers little authority or guidance in enforcing protections of personal privacy when implanting the city’s congestion plan. Current law provides few clearly applicable privacy protections. For example, the NYCLU has been unable to locate or obtain privacy standards that apply to personal information obtained through the E-Z Pass system. In seeking this information, we have had to resort to a Freedom of Information Law request.

Finally, the bill shares with the Commission’s plan the omission of certain key provisions that are necessary to ensure that one may enter and travel within the congestion pricing zone without having personal images or license plate numbers and other personal identifiers stored or disseminated by agents of city government. To protect against the unauthorized retention or release of sensitive private information, the city’s congestion pricing plan must include prohibitions (which I have elaborated upon in addressing the Commission’s recommendations) that --

- Prohibit the city from capturing images or information except as is necessary to collect payment of the toll for entering the congestion pricing zone.
- Restrict access to vehicle information to those individuals responsible for administering billing and payment; and prohibit dissemination of such vehicle information to other individuals and entities pending the resolution of payment.
- Establish an oversight entity and procedures to ensure the aforementioned privacy protection measures are rigorously implemented and enforced.