

COMMONWEALTH OF VIRGINIA  
STATE CORPORATION COMMISSION  
AT RICHMOND, SEPTEMBER 4, 2015

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COMMONWEALTH OF VIRGINIA, *ex rel.*

STATE CORPORATION COMMISSION

CASE NO. PUE-2013-00011

*Ex Parte:* In the matter of investigating the toll rates of Toll Road Investors Partnership II, L.P., under § 56-542 D of the Code of Virginia

ORDER CONCLUDING INVESTIGATION

On January 30, 2013, in response to complaint letters filed by the Honorable David I. Ramadan, Member, Virginia House of Delegates ("Delegate Ramadan"), the State Corporation Commission ("Commission") issued an Order Initiating Investigation, which docketed this proceeding for the purpose of investigating the toll rates of Toll Road Investors Partnership II, L.P. ("TRIP II" or "Company"), the operator of the Dulles Greenway ("Greenway"). The Order Initiating Investigation, among other things, assigned the investigation to a Hearing Examiner for further proceedings.

In addition, the Order Initiating Investigation stated as follows:

By way of inclusion but not limitation, the participants in this case, including the Commission's Staff ("Staff"), are requested to address and define with specificity the standards that the Commission should apply for each of these three requirements [in § 56-542 D of the Code of Virginia ("Code")]. For example, what must be established for each requirement – both legally and factually – for the Commission to find that these three concurrent criteria have been fulfilled such that the Commission may substitute toll rates in accordance with § 56-542 D of the Code. In addition, as part of addressing with specificity each of the three listed criteria in § 56-542 D, the participants (including Staff) are requested to explain, based on a detailed analysis of the law and the facts, why the current toll rates do or do not meet such criteria.<sup>1</sup>

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<sup>1</sup> Order Initiating Investigation at 3.

Pursuant to several Rulings of the Hearing Examiner, local hearings were held in Purcellville and Sterling, Virginia, on April 9 and June 6, 2013, respectively, and in the Commission's Courtroom in Richmond, Virginia, on July 18 and September 24, 2013, to receive testimony from public witnesses. The evidentiary hearing in this investigation, during which the testimony and exhibits of the parties and Staff were introduced and received into the record, was held on November 12 through 15, and December 19, 2013, in the Commission's Courtroom.

On January 30, 2014, the Hearing Examiner issued her report ("Report"), which contained findings and recommendations regarding this investigation. On April 2, 2014, Delegate Ramadan filed a Motion for Continuance ("2014 Motion") pursuant to § 30-5 of the Code,<sup>2</sup> requesting "a continuance of the briefing schedule in [this]...matter" and requesting "that the deadline be set not less than thirty days after the end of the 2014 General Assembly Special Session...."<sup>3</sup> In his 2014 Motion, Delegate Ramadan noted that the Special Session of the General Assembly began on March 24, 2014, and that the Special Session was scheduled to

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<sup>2</sup> Section 30-5 of the Code states, in part:

Any party to an action or proceeding in any court . . . who is an officer, employee or member or member-elect of the General Assembly . . . or who has, prior to or during the session of the General Assembly, employed or retained to represent him in such action or proceeding an attorney who is or becomes an officer, employee or member or member-elect of the General Assembly or employee of the Division of Legislative Services, shall be entitled to a continuance as a matter of right (i) during the period beginning 30 days prior to the commencement of the session and ending 30 days after the adjournment thereof . . .

Any pleading or the performance of any act relating thereto required to be filed or performed by any statute or rule during the period beginning 30 days prior to the commencement of the session and ending 30 days after the adjournment of the session shall be extended until not less than 30 days after any such session.

<sup>3</sup> 2014 Motion at 2. Delegate Ramadan's counsel of record, William M. Stanley, is a member of the Senate of Virginia. Senator Stanley's partner, Aaron B. Houchens, also counsel of record for Delegate Ramadan, is an employee of the General Assembly as Senator Stanley's legislative aide. *Id.* at 1.

reconvene on April 7, 2014.<sup>4</sup> On April 4, 2014, the Commission issued an Order Granting Motion, continuing the deadline for filing written comments to the Hearing Examiner's Report for thirty (30) days from the adjournment of the 2014 Special Session of the General Assembly ("2014 Special Session"). The 2014 Special Session adjourned on January 14, 2015. As a result, the deadline for filing written comments to the Hearing Examiner's Report was February 13, 2015.

On February 10, 2015, Delegate Ramadan filed a Motion for Continuance ("2015 Motion") pursuant to § 30-5 of the Code, again requesting a continuance of the briefing schedule in this matter and requesting "that the deadline be set not less than thirty days after the end of the 2015 General Assembly Regular Session...."<sup>5</sup> In his 2015 Motion, Delegate Ramadan noted that the 2015 General Assembly Session began on January 14, 2015, and was expected to adjourn on March 1, 2015.<sup>6</sup> On February 11, 2015, the Commission issued an order granting the 2015 Motion.

On March 30, 2015, the following participants filed comments on the Hearing Examiner's Report: Delegate Ramadan; TRIP II; Board of Supervisors of Loudoun County; and Staff.

NOW THE COMMISSION, upon consideration of this matter, is of the opinion and finds as follows. The Commission has fully considered the arguments and evidence presented in this case.<sup>7</sup> The Commission finds that the proposed new tolls are not required to be substituted for

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<sup>4</sup> *Id.* at 1-2.

<sup>5</sup> 2015 Motion at 2.

<sup>6</sup> *Id.* at 1.

<sup>7</sup> The Order Initiating Investigation did not impose a burden of proof on any participant for purposes of this proceeding. Accordingly, the Commission has made its findings herein based on its consideration of the evidence and arguments in the record, and has not placed a threshold burden on any participant.

existing tolls as a result of the instant investigation, and that the investigation shall be concluded.<sup>8</sup>

The Commission initiated this investigation under § 56-542 D of the Code, which provides as follows:

D. The Commission also shall have the duty and authority to approve or revise the toll rates charged by the operator. Initial rates shall be approved if they appear reasonable to the user in relation to the benefit obtained, not likely to materially discourage use of the roadway and provide the operator no more than a reasonable rate of return as determined by the Commission. Thereafter, the Commission, upon application, complaint or its own initiative, and after investigation, may order substituted for any toll being charged by the operator, a toll which is set at a level which is reasonable to the user in relation to the benefit obtained and which will not materially discourage use of the roadway by the public and which will provide the operator no more than a reasonable return as determined by the Commission.

The Commission most recently substituted new tolls pursuant to the requirements of § 56-542 D in 2007.<sup>9</sup>

In addition, § 56-542 I of the Code further directs as follows:

I. Effective January 1, 2013, through January 1, 2020, and notwithstanding any other provision of law:

1. Upon application of and public notification by the operator, filed not more often than once within any 12-month period, the Commission shall approve to become effective within 45 days any request to increase tolls by a percentage that (i) is equal to the increase in the CPI, as defined in subsection A, from the date the Commission last approved a toll increase, plus one percent, (ii) is equal to the increase in the real GDP, as defined in subsection A,

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<sup>8</sup> The Commission's findings are based on the record developed in this proceeding (the evidentiary portion of which was closed at the conclusion of the hearing in December 2013), which was suspended for over a year as a result of statutorily-required delays. Since the Commission has decided to close this investigation without substituting new tolls, we do not reach questions touching on the continuing efficacy of the evidentiary record for purposes of supporting a Commission-mandated substitution of new tolls at this date.

<sup>9</sup> *Application of Toll Road Investors Partnership II, L.P., Application For an Increase in the Maximum Authorized Level of Tolls*, Case No. PUE-2006-00081, 2007 S.C.C. Ann. Rept. 346, Final Order (Sept. 11, 2007).

from the date the Commission last approved a toll increase, or (iii) 2.8 percent, whichever is greatest, which increase in the tolls approved by the Commission is hereafter referred to as the "annual percentage increase."

2. The operator additionally may request in an application made pursuant to subdivision I 1, and the Commission shall further approve, an addition to the toll increase to allow the operator to include, in its tolls, the amount by which its local property taxes paid in the immediately preceding calendar year increased by more than the annual percentage increase above such payments for the previous calendar year.

3. Any request by the operator for an increase in the toll rates by a greater percentage than as provided in subdivision I 1 shall be considered for approval by the Commission only upon presentation of an independent grade traffic and revenue study and a finding by the Commission that (a) toll rates subject to the preceding paragraph will not be sufficient to permit the operator to maintain the minimum coverage ratio set forth in the rate covenant provisions of its bond indenture or similar credit agreement, (b) such greater proposed tolls are reasonable to the user in relation to the benefit obtained and will not materially discourage use of the roadway by the public, and (c) such greater proposed tolls provide the operator no more than a reasonable rate of return as determined by the Commission; however, the Commission shall not approve an increase in the toll rates pursuant to this subdivision that exceeds the percentage increase necessary to permit the operator to maintain the minimum coverage ratio described in clause (a). Such request by an operator shall not be made as a result of a change in control of the operator or the project roadway. As used herein, a "change in control of the operator" means the sale or transfer of 25 percent or more of the assets of the operator or the acquisition or disposal of 25 percent or more of the outstanding shares of stock of the operator, if it is a corporation, or analogous interest if the operator is another form of entity.<sup>10</sup>

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<sup>10</sup> Since the Commission finds that the proposed new tolls are not required to be substituted for existing tolls as a result of this investigation, we do not reach the question of whether § 56-542 I prohibits the Commission from substituting new tolls under § 56-542 D until after January 1, 2020.

The Commission approved increased tolls in 2013, 2014, and 2015 as required by the formula set forth in § 56-542 I.<sup>11</sup> This Code section does not provide the Commission with the discretion to deny toll rate increases that comport with the statutory formula.

The Order Initiating Investigation asked the participants "to address and define with specificity the standards that the Commission should apply for each of these three requirements [in § 56-542 D]."<sup>12</sup> After consideration of the record, the Commission finds that it is reasonable not to define further the three requirements in § 56-542 D. The record shows that application of each of the three requirements may include a fact-intensive analysis. We conclude that further defining the standards for each of the requirements is unnecessary and may unreasonably limit the relevant facts that interested parties may present – now or in future proceedings – for consideration under the three statutorily-mandated criteria.

Pursuant to the Order Initiating Investigation, we have investigated whether the current tolls are "reasonable to the user in relation to the benefit obtained." We have considered all of the evidence, including Delegate Ramadan's evidence and his objections to the evidence presented by the Company and Staff. We conclude that the benefits reflected in the AECOM Report proffered by TRIP II, as well as Mr. Goldfarb's peer review analysis and the testimony of Mr. Yelds, are sufficient to support a finding that the Company's tolls are reasonable to the user

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<sup>11</sup> *Application of Toll Road Investors Partnership II, L.P., For an increase in tolls pursuant to § 56-542 I of the Code of Virginia*, Case No. PUE-2012-00136, 2013 S.C.C. Ann. Rept. 334, Final Order (Jan. 16, 2013); *Application of Toll Road Investors Partnership II, L.P., For an increase in tolls pursuant to § 56-542 I of the Code of Virginia*, Case No. PUE-2013-00139, 2014 S.C.C. Ann. Rept. 362, Final Order (Apr. 8, 2014); *Application of Toll Road Investors Partnership II, L.P., For an increase in tolls pursuant to § 56-542 I of the Code of Virginia*, Case. No. PUE-2014-00129, Doc. Con. Cen. No. 150220297, Final Order (Feb. 25, 2015).

<sup>12</sup> Order Initiating Investigation at 3. Delegate Ramadan, in his comments on the Hearing Examiner's Report, asserts that the Hearing Examiner failed to recommend specific standards for each requirement. *See, e.g.*, Response of David I. Ramadan to the Report of Hearing Examiner Berkebile ("Ramadan Response") at 41, 50, 85.

in relation to the benefit obtained.<sup>13</sup> In addition, the Company's AECOM Report and econometrics are further supported by Staff's testimony that "[i]n general, the cost/benefit methodology employed by AECOM conforms to industry practices, and its results are reasonable," and that "[s]imilarly, the estimation of the Greenway demand elasticities was conducted using well known econometric methods."<sup>14</sup>

The Commission also finds that an analysis of benefits under this statute need not be limited to a calculation dependent upon the miles travelled. There will be different benefits to different users at different times of the day. For example, when looking specifically at the eastern portion of the Greenway that is adjacent to the Dulles Toll Road (which Delegate Ramadan does in much of his analysis), there is evidence that this portion of the Greenway is already near maximum capacity during peak periods.<sup>15</sup>

In addition, contrary to Delegate Ramadan's request, the statute does not require the Commission to perform a regulatory cost causation analysis. Section 56-542 D is not the typical public utility ratemaking statute under which the Commission is required to regulate monopoly rates. The Greenway is not a public utility, does not have an exclusive territory or the power of eminent domain,<sup>16</sup> does not have a monopoly with respect to the transportation routes used by motorists, and is subject to competitive pressures.<sup>17</sup> The criteria in § 56-542 D are unique to the

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<sup>13</sup> See, e.g., Report at 56-58; Ex. 16 (Yelds Direct); AECOM Report (attached to Ex. 16); Ex. 31 (Goldfarb Rebuttal).

<sup>14</sup> Ex. 3 (Carsley) at 25.

<sup>15</sup> See, e.g., Ex. 5 (Sines Direct) at 7; AECOM Report (attached to Ex. 16) at 3; Ex. 24 (Sines Rebuttal) at 6-7; Tr. 1009-1015.

<sup>16</sup> Section 56-541 of the Code.

<sup>17</sup> See, e.g., Report at 61 n.146, 65 n.177; Ex. 5 (Sines Direct) at 3-4, 6; Ex. 3 (Carsley) at 11-12; Ex. 20 (TRIP II Travel Time Surveys).

Greenway, and the plain language thereof does not require tolls to be set based on a cost causation standard.

Furthermore, we agree with TRIP II that the statute does not require an absolute pass-fail test, where the toll must show some type of *quantifiable* cost-effective benefit. The statutory term "reasonable to the user in relation to the benefit obtained" is broader than that, and it may reasonably include any number of difficult-to-quantify benefits (including reliability and "peace of mind from driving on a well-maintained, limited access highway").<sup>18</sup> Based on the evidence presented by TRIP II (both quantitative and qualitative), we have concluded that the tolls – individually and collectively – meet the statutory requirements under § 56-542 D.<sup>19</sup>

Pursuant to the Order Initiating Investigation, we have also investigated whether the Company's current tolls "will not materially discourage use of the roadway by the public." In this context, the plain meaning of "materially" is "3: to a significant extent or degree."<sup>20</sup> Based on the evidence submitted by TRIP II (including the regression analysis in the AECOM Report) and Staff (performing its own elasticity study/regression analysis using Company data), the Commission further finds that the Company's tolls will not materially discourage use of the roadway by the public within the meaning of the statute.<sup>21</sup> Moreover, evidence showing that the

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<sup>18</sup> *See, e.g.*, Comments and Limited Exceptions of Toll Road Investors Partnership II, L.P. to the Report of A. Ann Berkebile, Hearing Examiner ("TRIP II Comments") at 10-13. Further in this regard, and consistent with our finding that § 56-542 D does not require an absolute pass-fail test, we conclude that there is evidence to support a finding, contrary to the Hearing Examiner's conclusion, that off-peak tolls for multi-axle vehicles are reasonable to the user in relation to the benefit obtained. *See, e.g., id.* at 11-12.

<sup>19</sup> Accordingly, we reject Delegate Ramadan's arguments, including those regarding § 56-543 B; the instant case is not an investigation under that statutory provision, nor do we find that such provision has been violated.

<sup>20</sup> Webster's Third New International Dictionary 1393 (2002).

<sup>21</sup> *See, e.g.*, Report at 60-63.

Greenway is operating within its designed capacity during peak hours further supports this finding.<sup>22</sup>

Pursuant to the Order Initiating Investigation, we have also examined whether the Company's current tolls "will provide the operator no more than a reasonable return as determined by the Commission." Both TRIP II and Staff submitted evidence showing that the Company's partners have never received *any* return on their investment in the Greenway.<sup>23</sup> Based on these facts, we conclude that that the Company's tolls will provide TRIP II no more than a reasonable return as determined by the Commission.<sup>24</sup>

Next, Staff asserts that tolls that are too *low* may also be unlawful. For example, Staff stated that the lower tolls proposed in this investigation raise constitutional issues. Specifically, although § 56-542 D includes a ceiling for the Company's return on investment (*i.e.*, "provide the operator *no more* than a reasonable return as determined by the Commission" (emphasis added)), Staff argued that there is also a constitutional return floor (*i.e.*, the Commission cannot simply

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<sup>22</sup> See, e.g., Ex. 3 (Carsley) at 37-43; Ex. 5 (Sines Direct) at 7; AECOM Report (attached to Ex. 16) at 3. Although not necessary in order to reach our conclusion herein, we further conclude (unlike the Hearing Examiner) that Staff's "level of service" ("LOS") analysis further supports this finding. Ex. 3 (Carsley) at 37-43. In addition, also unlike the Hearing Examiner, the Commission: (1) has not placed a burden of proof on Delegate Ramadan in this investigation; and (2) finds that TRIP II's analysis supports our findings as to the Company's tolls. Furthermore, we conclude that Delegate Ramadan's screenline/market share analyses do not adequately consider alternative causes for traffic migration and/or do not show that the Company's tolls will materially discourage use of the roadway. See, e.g., Report at 62-63.

<sup>23</sup> See, e.g., Report at 63-65; Ex. 2 (Oliver) at 9-11; Ex. 10 (McKean Direct) at 8; Ex. 26 (McKean Rebuttal) at 4.

<sup>24</sup> Although not necessary in order to reach our conclusion herein, we believe that Delegate Ramadan's proposal would not provide sufficient revenues for the Company to meet its debt obligations and could jeopardize TRIP II's overall financial integrity. See, e.g., Report at 63-64; Ex. 2 (Oliver) at 14-16, 18; Tr. 468-70; October 15, 2013 Pre-Hearing Brief of Toll Road Investors Partnership II, L.P. ("TRIP II Pre-Hearing Brief") at 17-19; July 9, 2013 Legal Memorandum of the State Corporation Commission Staff ("Staff Legal Memorandum") at 15-18. Moreover, we find that § 56-542 D does not mandate cost-of-service regulation as proposed by Delegate Ramadan but, rather, provides for no more than a reasonable return "as determined by the Commission." See, e.g., Report at 63-65. In addition, we reject Delegate Ramadan's assertion that TRIP II has previously engaged in "imprudent" actions that must alter our findings herein. See, e.g., Report at 64 n. 176; Ex. 2 (Oliver) at 15-16.

lower tolls and conclude that all legal requirements have been met).<sup>25</sup> In this regard, Staff asserts that the Company's financing and debt obligations were previously approved by the Commission, and that constitutional issues arise if tolls are lowered (as requested by Delegate Ramadan) in a manner that prohibits the Company from recovering its prudently incurred operating costs and debt obligations.<sup>26</sup>

Further in this regard, we reject the Hearing Examiner's recommendation to initiate a proceeding on the continued use of the Company's Reinvested Earnings Account ("REA") for return-related purposes. We conclude that such a proceeding is not necessary at this time. We agree with Staff that the REA has been calculated in compliance with Commission orders and as originally envisioned, and has had no impact on current toll rates.<sup>27</sup> We also find that the Hearing Examiner properly rejected Delegate Ramadan's recalculation of the REA balance, finding that, "[a]mong other things, the record reflects that [Delegate Ramadan's] removal of \$80 million from the Company's REA balance (resulting in an overall reduction of \$1.275 billion to the REA calculation) was based upon his mischaracterization of an equity contribution as a debt repayment."<sup>28</sup> As explained by the Company, "TRIP II has never applied to the Commission for a rate increase where any portion of that increase was designed to draw down the REA," and "[i]f a time ever comes when the Company seeks rates that would begin to draw

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<sup>25</sup> See, e.g., Staff Legal Memorandum at 14-19.

<sup>26</sup> Staff Legal Memorandum at 17-19; Commission Staff Prehearing Brief on Legal Issues at 3; Ex. 2 (Oliver) at 14-15. As discussed in Staff's Comments to the Hearing Examiner's Report, Delegate Ramadan's proposed annual revenue requirement of \$57.142 million would fall approximately \$4.352 million short of meeting TRIP II's 2015 debt service obligation (approximately \$61.5 million), and would not allow TRIP II to recover any of its operational and maintenance costs (which, at the time of the hearing, were expected to be approximately \$15.8 million in 2013, up from \$14.7 million in 2012). See Staff Comments at 10-11.

<sup>27</sup> See, e.g., Tr. 480-81; Tr. 1592-96; Ex. 2 (Oliver) at 8; Staff Legal Memorandum at 12-14.

<sup>28</sup> Report at 65 n.179.

down the balance of the REA, then the Commission may seek to review the REA if it believes it is warranted, but that certainly is not the situation now."<sup>29</sup>

Consistent with the Commission's prior orders, we also will not direct TRIP II to perform a detailed feasibility study of distance-based tolls at this time.<sup>30</sup> We note that such a study (which is not required by statute) involves issues that extend beyond the Commission's investigation herein. TRIP II asserts that "distance-based tolls are untenable on the Greenway."<sup>31</sup> The Company also states that distance-based tolls "would only further clog the already congested eastern end of the road," and "tolls would need to go up on the western end of the road."<sup>32</sup> Moreover, the implementation of distance-based tolls may significantly impact matters involving the Virginia Department of Transportation ("VDOT") and issues related to the Comprehensive Agreement with VDOT, design capacity and LOS, as well as the Greenway's relation to the operation of the Dulles Toll Road.<sup>33</sup> Accordingly, as an initial step in this regard, we direct the Company to confer with VDOT on the efficacy of performing detailed feasibility studies of distance-based pricing for the Greenway. On or before 180 days from the date of this Order, the Company shall file a report in this matter on the results of its discussions with VDOT.

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<sup>29</sup> TRIP II Comments at 19, 21.

<sup>30</sup> *Application of Toll Road Investors Partnership II, L.P., Application For an Increase in the Maximum Authorized Level of Tolls*, Case No. PUE-2006-00081, 2007 S.C.C. Ann. Rept. 346, Final Order (Sept. 11, 2007); *Application of Toll Road Investors Partnership II, L.P., Application to Revise Tolls*, Case No. PUE-2003-00230, 2004 S.C.C. Ann. Rept. 357, 358, Final Order (July 6, 2004).

<sup>31</sup> TRIP II Comments at 15.

<sup>32</sup> *Id.* at 15-16.

<sup>33</sup> *See, e.g.*, Ex. 3 (Carsley) at 44-45; Ex. 5 (Sines direct) at 7, 14-15; Tr. 516-520, 597-602, 629-30, 1012-13. We also note that there is evidence in this record that the toll structure for the Dulles Toll Road has similarities to that of the Greenway, and that the VDOT-approved design of the Greenway did not anticipate a distance-based toll system. *See, e.g.*, Ex. 24 (Sines rebuttal) at 4-5.

TRIP II "urges the Commission, upon the termination of this proceeding, to remind the parties to this proceeding in possession of any confidential information produced in this proceeding that they are required to destroy the confidential documents and all notes and other documents containing confidential information, or, at the request of TRIP II, return the confidential documents to TRIP II."<sup>34</sup> Now that this investigation has concluded, the parties shall comply with the provisions of the Hearing Examiner's Protective Ruling related thereto.

Finally, as reflected by the caption of this matter, the instant proceeding was formally initiated by the Commission on its own motion. There is not a formal petition for the Commission to grant or deny. As a result, the Commission hereby orders that the investigation initiated herein is concluded, and that this matter shall remain open to receive the report from the Company as directed above.

Accordingly, IT IS ORDERED THAT the investigation initiated by the Commission in this proceeding is concluded, and this matter shall remain open pending further order of the Commission.

CHRISTIE, Commissioner, Concurs:

I concur with the Order of the Commission concluding this investigation and the findings set forth therein.

I would also find that § 56-542 I ("Subsection I") sets forth the General Assembly's chosen policy regarding any toll changes that are to take place between 2013 and 2020.<sup>35</sup> Since Delegate Ramadan has asked us to substitute new tolls pursuant to § 56-542 D ("Subsection D"), the relation of Subsection D to Subsection I may be properly considered. In my view,

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<sup>34</sup> TRIP II Comments at 22-23.

<sup>35</sup> The Commission chose not to address this legal question.

Subsection I does not authorize the Commission to order toll changes on the Greenway between the years 2013 and 2020, except as prescribed by Subsection I.

This conclusion is based on both the plain meaning and the legislative intent of the pertinent statutory provisions.

First, consider the plain language of the statute. Subsection I begins with the language "Effective January 1, 2013, through January 1, 2020, and notwithstanding any other provision of law...." Following the "notwithstanding" clause, Subsection I describes with extreme specificity how rates may be changed during that seven-year period. The "notwithstanding" clause is, by its terms, sweeping and unequivocal. It subordinates "any other provision of law" – clearly including Subsection D – to its prescriptive guidelines governing toll rate changes during this limited time period. Subsection I represents a temporary carve-out from the rest of the Code for a limited number of years after which its provisions automatically terminate. After 2020, Subsection D is no longer affected by Subsection I. Before 2020, it is.

In reference to Subsection I's "notwithstanding" clause, Delegate Ramadan argues that "[t]here is no basis for any assertion that this language suspends or overrides the provisions of § 56-542 D related to the Commission's authority to set lawful rates on its own initiative."<sup>36</sup> Subsection I, however, states plainly, "notwithstanding *any other provision of law...*" (emphasis added), and "any other provision of law" can only be read to include Subsection D. Delegate Ramadan's interpretation effectively moves the "notwithstanding" clause from the beginning of Subsection I to the beginning of Subsection D, because he urges us to subordinate Subsection I's prescribed toll increases to the potential *decreases* and other rate restructuring that he urges us to make pursuant to Subsection D. The plain language is, however, that the "notwithstanding"

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<sup>36</sup> Ramadan Response at 9.

clause with its subordination of *any* other provision of law introduces and is part of Subsection I, not Subsection D.

Second, even if one believes the "notwithstanding" language of Subsection I to be ambiguous or confusing in its relation to Subsection D, the legislative history demonstrates that the General Assembly's intent leads to the same outcome.

Shortly after our 2007 rate order was issued, in which this Commission set toll rates that we found to be lawful, the 2008 Regular Session of the General Assembly convened and considered two bills, Senate Bill 778, introduced by Sen. Herring, and House Bill 1140, introduced by Del. May, both related to the Greenway. As the Hearing Examiner correctly pointed out, it can be presumed that the 2008 General Assembly was aware that the Commission had issued our 2007 rate order and that the toll structure approved therein had been found to be in compliance with law, including the criteria of current Subsection D.<sup>37</sup> It is undeniable that if the General Assembly had chosen, it had the power (consistent with constitutional standards) to modify or nullify our rate order. It did neither. Rather, the 2008 General Assembly adopted a classic legislative compromise, the major components of which are visible. First, the rate structure approved in our 2007 rate order was left in place. Second, a new provision, Subsection I, was enacted that authorized the operator to seek automatic annual rate increases that were limited both in amount and to the time period of 2013-20.

The practical effect of Delegate Ramadan's interpretation is to nullify the 2008 legislative compromise. It is hard to believe that the General Assembly in 2008 – aware of our 2007 toll order and its rates – left those toll rates intact when it could have changed them, and enacted

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<sup>37</sup> Report at 55. See also *Christian v. SCC*, 282 Va. 392, 401, 718 S.E.2d 767, 772 (2011) ("The General Assembly is presumed to be aware of the decisions of the Court when enacting legislation."), citing *Andrews v. Commonwealth*, 280 Va. 231, 286, 699 S.E.2d 237, 269 (2010); *Dodson v. Potomac Mack Sales & Serv., Inc.*, 241 Va. 89, 94, 400 S.E.2d 178, 180-181 (1991).

Subsection I's toll increases, but intended Subsection I to be effectively nullified by toll rate decreases to be ordered under Subsection D. That is, under Delegate Ramadan's reading of the statute, the Commission could – each year until 2020 – both issue (i) an order increasing tolls as required by Subsection I, and (ii) an order decreasing tolls under Subsection D, effectively nullifying Subsection I's statutorily-mandated toll rate increases.

Neither the plain language of the statute, nor the legislative history, allow the Commission to use Subsection D to reverse the mandatory toll rate increases required by Subsection I "notwithstanding any other provision of law." The fact that Subsection D was not repealed in 2008 does not alter this result. To the contrary, by not repealing Subsection D, the General Assembly effectuated the plain language of Subsection I that limits its effectiveness until 2020; when Subsection I expires, the rate-changing mechanism of Subsection D is in place to become effective again.

Further, if the General Assembly did really intend that Subsection D could be used to nullify or restructure the rates approved in our 2007 rate order or increased as prescribed in Subsection I, the General Assembly has had ample opportunity since 2008 to direct such actions. Yet there have been no such legislative enactments changing tolls on the Greenway since 2008, even after the automatic toll increases prescribed by Subsection I began in 2013 and re-occurred in 2014 and 2015.<sup>38</sup>

The 2008 legislation was a compromise that the General Assembly has chosen to maintain in the years since. The policy adopted by the General Assembly with regard to rate

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<sup>38</sup> In the 2015 Session of the General Assembly, Delegate Ramadan introduced legislation that, in addition to making substantive amendments to Subsection D, amended Subsection I by, among other things, adding after the "notwithstanding" clause the following language: "...to the extent that tolls resulting from application of this section do not violate the provisions of subsection D...." H.B. 2344 (2015). That legislation was defeated in the House Commerce & Labor Committee by a vote of 8-14. *See* H.B. 2344 (2015) (legislation failing to report from the House Commerce and Labor Committee, by 8 to 14 vote), available at <http://lis.virginia.gov/cgi-bin/legp604.exe?151+sum+HB2344>.

changes during the years 2013-20 is embodied in Subsection I, unless and until the General Assembly chooses to change it.

AN ATTESTED COPY hereof shall be sent by the Clerk of the Commission to all persons on the official Service List in this matter. The Service List is available from the Clerk of the State Corporation Commission, c/o Document Control Center, 1300 East Main Street, First Floor, Tyler Building, Richmond, Virginia 23219. A copy shall also be sent to the Commission's Office of General Counsel and Divisions of Energy Regulation and Utility Accounting and Finance.