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STATE CORPORATION COMMISSION
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APPLICATION OF

TOLL ROAD INVESTORS
PARTNERSHIP II, L.P.

CASE NO. PUR-2023-00089

For authorization for an increase in the
maximum level of tolls

FINAL ORDER

On July 11, 2023, Toll Road Investors Partnership II, L.P. ("TRIP II" or "Company"), the owner and operator of the Dulles Greenway ("Greenway"), filed an application ("Application") with the State Corporation Commission ("Commission") for an increase in the maximum level of tolls pursuant to the Virginia Highway Corporation Act of 1988 ("Act"), § 56-535 *et seq.* of the Code of Virginia ("Code").

Through its Application, TRIP II requested approval of increases in the maximum peak (or Congestion Pricing) and off-peak tolls to be effective January 1, 2024, or upon issuance of a final order in this case, as follows (collectively, "Proposed Tolls"):¹

Maximum Peak Tolls					Off-Peak, Maximum Base Toll				
Hours 6:30 AM – 9:00 AM Eastbound									
4:00 PM – 6:30 PM Westbound									
2-Axle	3-Axle	4-Axle	5-Axle	6-Axle or More	2-Axle	3-Axle	4-Axle	5-Axle	6-Axle or More
\$8.10	\$16.20	\$20.25	\$24.30	\$24.30	\$6.40	\$12.80	\$16.00	\$19.20	\$19.20

¹ Ex. 2 (Application) at 8, 16.

TRIP II also requested that the Commission specifically authorize a streamlined process to consider and to approve future increases under Code § 56-542 D to reduce the lag between increases in the tolls on the Dulles Greenway.²

On August 7, 2023, the Commission issued an Order for Notice and Hearing that, among other things, directed the Company to provide public notice of its Application; established a procedural schedule; directed the Staff of the Commission ("Staff") to investigate the Application and file testimony and exhibits containing Staff's findings and recommendations; permitted interested persons to comment on the Application or to participate in this proceeding as a respondent; established a date for the Virginia Department of Transportation ("VDOT") to file its comments on TRIP II's forward-looking analysis as required by Code § 56-542 D; and appointed a Hearing Examiner to conduct all further proceedings on behalf of the Commission, including filing a report containing the Hearing Examiner's findings and recommendations.

On September 20, 2023, the Board of Supervisors of Loudoun County, Virginia ("County"), filed a notice of participation. On September 29, 2023, the Office of the Attorney General's Division of Consumer Counsel ("Consumer Counsel") filed a notice of participation.

On September 29, 2023, the County filed a Motion for an Extension of Time to File Direct Testimony, to Amend the Procedural Schedule, and for Expedited Consideration ("Motion"). Through its Motion, the County sought an expedited ruling modifying the procedural schedule, including requesting the addition of a local public witness hearing.³ After responses by TRIP II and Consumer Counsel and a reply by the County, the Senior Hearing Examiner granted the Motion, in part, extending the deadlines for VDOT's comments on

² *Id.* at 16.

³ Motion at 7.

TRIP II's forward-looking analysis, respondent testimony, Staff testimony, and rebuttal testimony.⁴ The Senior Hearing Examiner also rescheduled the evidentiary hearing and granted the County's request for a local public witness hearing.⁵ By Ruling issued November 21, 2023, the Senior Hearing Examiner scheduled a local public witness hearing to convene in Chantilly, Virginia, on January 9, 2024.⁶

On November 30, 2023, VDOT filed its comments on TRIP II's forward-looking analysis. The Senior Hearing Examiner convened a local public witness hearing in Chantilly, Virginia, on January 9, 2024. The County filed testimony on January 12, 2024. Staff filed testimony on January 26, 2024. The Senior Hearing Examiner convened a telephonic public witness hearing, as originally scheduled, on January 30, 2024. TRIP II filed rebuttal testimony on February 16, 2024. The Senior Hearing Examiner convened the evidentiary hearing on February 28, 2024. TRIP II, the County, Consumer Counsel, and Staff participated in the evidentiary hearing. On April 5, 2024, TRIP II, the County, Consumer Counsel, and Staff filed post-hearing briefs.

The Report of Michael D. Thomas, Senior Hearing Examiner ("Report"), was issued on May 15, 2024. In his Report, the Senior Hearing Examiner summarized the record, analyzed and discussed issues presented in this matter, and made the following findings and recommendations:

- (1) TRIP II failed to prove by a preponderance of the evidence that its proposed toll increases are reasonable to the user in relation to the benefit obtained, as required by Code § 56-542 D;
- (2) Staff's adjustments to TRIP II's [Benefit-Cost Analysis] are reasonable and are supported by the evidence;

⁴ October 18, 2023 Hearing Examiner's Ruling at 4-5.

⁵ *Id.* at 5.

⁶ November 21, 2023 Hearing Examiner's Ruling at 2.

- (3) There has been no showing in this case that the qualitative benefits outweigh the qualitative costs of using the Greenway;
- (4) The proper material discouragement analysis should compare forecasted 2024 traffic, which includes population growth and other socio-economic factors, with and without the proposed toll increases, which results in a decrease in traffic of 6.3% and a failure of the material[ly] discourage use criterion in Code § 56-542;
- (5) The Proposed Tolls will provide TRIP II with no more than a reasonable return;
- (6) Since TRIP II has rejected the Alternate Tolls as confiscatory, the Commission should not exercise its discretion to establish toll rates that comply with the Act;
- (7) Staff's average allowed return methodology will permit the Commission to continue to track returns that were authorized to investors versus returns that have been realized by those investors, and at the same time, determine whether future proposed toll rates allow TRIP II no more than a reasonable return;
- (8) The Commission should consider the establishment of a working group of interested parties to look at ways to streamline the process before the Commission, in particular the use of the Steer Model, and report back to the Commission the earlier of one year or the Company's next rate case; and
- (9) The Commission should adopt Staff's average allowed return methodology for use with the [Reinvested Earnings Account ("REA")].⁷

Accordingly, the Senior Hearing Examiner recommended that the Commission (1) adopt the findings and recommendations contained in the Report, (2) deny TRIP II's Application for an increase in toll rates on the Greenway, and (3) dismiss this case from the Commission's docket of active cases.⁸

⁷ Report at 157-158.

⁸ *Id.* at 158.

NOW THE COMMISSION, upon consideration of this matter, is of the opinion and finds as follows.⁹

Code

The instant proceeding is governed by Code § 56-542, which provides in part as follows (emphases added):

D. The Commission also shall have the duty and authority to approve or revise the toll rates charged by the operator. ... [T]he 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 [1] *which is reasonable to the user in relation to the benefit obtained* and [2] *which will not materially discourage use of the roadway by the public* and [3] *which will provide the operator no more than a reasonable return as determined by the Commission*. Any proposed toll rates that fail to meet these criteria as determined by the Commission are contrary to the public interest, and the Commission shall not approve such toll rates.

Any application to increase toll rates shall include a forward-looking analysis that demonstrates that the proposed toll rates will be 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 return. Such forward-looking analysis shall include reasonable projections of anticipated traffic levels, including the impact of social and economic conditions anticipated during the time period that the proposed toll rates would be in effect. [VDOT] shall review and provide comments upon the analysis to the Commission. Notwithstanding any other provision of law, the Commission shall not approve more than one year of toll rate increases proposed by the operator.

In addition, for purposes of this proceeding:

"Materially discourage use" means to cause a decrease in traffic of three or more percentage points based on either a change in potential toll road users or a change in traffic attributable to the toll rate charged as validated

⁹ The Commission has fully considered the record in this proceeding, including the Senior Hearing Examiner's detailed and thorough analysis of the evidence and the issues presented herein. Indeed, the Commission has considered the evidence and arguments in the record supporting and opposing the positions of all participants. *See also Board of Supervisors of Loudoun County v. State Corp. Comm'n*, 292 Va. 444, 454 n.10 (2016) ("We note that even in the absence of this representation by the Commission, pursuant to our governing standard of review, the Commission's decision comes to us with a presumption that it considered all of the evidence of record.") (citation omitted).

by (i) an investment-grade travel demand model that takes population growth into consideration or (ii) in the case of an investigation into current toll rates, an actual traffic study that takes population growth into consideration.¹⁰

Proposed Tolls

As held by the Supreme Court of Virginia, in applying the above statute the Commission "is entitled to interpret [the] conflicting evidence and to decide the weight to afford it."¹¹ In so doing, the Commission has afforded more weight to, and been persuaded by, the evidence and related arguments supporting findings that the Company failed to establish that the Proposed Tolls (1) will be reasonable to the user in relation to the benefit obtained,¹² and (2) will not materially discourage (as that term is defined in the statute) use of the roadway by the public,¹³ both as similarly found by the Senior Hearing Examiner. As to the third criteria, the Commission also agrees with the Senior Hearing Examiner's finding that the Proposed Tolls will provide the operator no more than a reasonable return.¹⁴

¹⁰ Code § 56-542 A.

¹¹ *Board of Supervisors of Loudoun County*, 292 Va. at 458 (citations omitted). This also includes evaluating which evidence is more "persuasive." *Id.*

¹² *See, e.g.*, Report at 140-145.

¹³ *See, e.g., id.* at 145-150.

¹⁴ *See, e.g., id.* at 151-152. In addition, the Commission does not herein adopt the County's request to discontinue using the REA as one of the means to analyze "reasonable return" under the statute. *See, e.g.*, County's Comments on the Senior Hearing Examiner's Report at 12-13. The County, however, correctly notes some of the limitations of the REA; for example, the County's witness testified that consideration of the REA when calculating toll rates would "imply a 2023 toll of \$105 assuming, contrary to all economic theory, that this toll would have no impact on traffic." Ex. 10 (Webb) at 45-46. The Commission agrees with the Senior Hearing Examiner that while the REA should not be abandoned, the Commission should also permit other methods to be employed for such purpose, such as Staff's average allowed and actual internal rate of return methodology. *See, e.g.*, Report at 155-157; Staff's Comments on Senior Hearing Examiner's Report at 1.

Code § 56-542 D mandates that if the Proposed Tolls fail to meet any of the criteria therein, then they are "contrary to the public interest, and the Commission shall not approve such toll rates." Accordingly, the Commission does not approve the Proposed Tolls.¹⁵

Next, in its comments on the Senior Hearing Examiner's Report, TRIP II argues that if the Proposed Tolls do not satisfy the criteria in Code § 56-542 D, "then the Commission should find [Code § 56-542 D] unconstitutional as applied to TRIP II."¹⁶ While Consumer Counsel and Staff agree that constitutional protections may apply to TRIP II's toll rates under certain circumstances, neither conclude that the Proposed Tolls are necessary at this time to maintain financial integrity.¹⁷ In addition, the County further asserts that TRIP II "cannot satisfy the heavy burden to show that [Code § 56-542 D] is unconstitutional," has not established that its financial integrity is at risk, and is not constitutionally guaranteed solvency under the particular facts and circumstances herein.¹⁸

For the remedy to its alleged constitutional violation, the Company states that it "has proposed a sensible course by which the Commission can approve the Proposed Tolls...."¹⁹ TRIP II, however, contemporaneously argues that such course would *not* remedy its claimed constitutional infirmities, because, according to the Company, the Proposed Tolls will *not* result

¹⁵ Having denied the Company's Proposed Tolls under the statute, the Commission does not reach (on a factual or legal basis) TRIP II's subsequent proposal, introduced for the first time during the evidentiary hearing, to implement the Proposed Tolls by increasing toll rates via three separate rate increases over a span of twelve months. *See, e.g.*, Tr. 587-591; Ex. 24.

¹⁶ TRIP II's Comments on Senior Hearing Examiner's Report at 54.

¹⁷ *See, e.g.*, Consumer Counsel's Post-Hearing Brief at 15-17; Staff's Post-Hearing Brief at 14-16.

¹⁸ *See, e.g.*, County's Post-Hearing Brief at 39-48 (typeface and case modified).

¹⁹ TRIP II's Comments on Senior Hearing Examiner's Report at 54.

in toll rates that give it an opportunity to earn a reasonable return.²⁰ Thus, if the Proposed Tolls are unlawful under Code § 56-542 D, TRIP II in essence asks the Commission to contravene the statute and nevertheless approve such tolls in order to render the statute *less* unconstitutional from the Company's viewpoint.

The Commission has never held that proposed toll rate *increases* prohibited under Code § 56-542 D are unconstitutional as applied to the unique statutory scheme established and modified by the General Assembly over decades for the sole purpose of the Greenway. The Commission concludes that constitutional considerations, as addressed in the instant record, do not necessitate approval – in violation of the statute – of the specific Proposed Tolls that have been requested in this proceeding.

Sample or Alternate Tolls

The Commission also does not herein approve what TRIP II has referred to as its Sample or Alternate Tolls.²¹ In its Application, TRIP II solely requested the Commission to approve the Proposed Tolls.²² In its testimony accompanying the Application, TRIP II presented what it referred to as Sample Tolls, which reflected an alternative method to calculate material discouragement under the statute.²³ The Company, however, expressly limited the purpose of these Sample Tolls and unequivocally did *not* seek approval thereof in this proceeding: "[T]he Sample Tolls are simply provided for illustration," and "TRIP II only supports and asks for approval of the Proposed Tolls or equivalent tolls that will generate the same or higher revenue

²⁰ See, e.g., *id.* at 53-54.

²¹ See, e.g., Report at 42 n.190.

²² Ex. 2 (Application) at 16.

²³ Ex. 4 (Hamilton Direct) at 28.

for TRIP II."²⁴ Accordingly, the Commission finds that approval of the Sample Tolls shall not be ruled on for purposes of the instant Application.²⁵

Rate Cases under Code § 56-542

TRIP II proposed alternative procedures designed to streamline rate cases for applications filed under Code § 56-542; these procedures involve, among other things, assigning certain responsibilities to Staff and VDOT. The Commission shares the goal of limiting the burden of all interested persons participating in Commission proceedings. The Commission, however, agrees with the Senior Hearing Examiner and Consumer Counsel that the Commission cannot delegate regulatory responsibilities under this statute to Staff or VDOT.²⁶ In addition, the complexities associated with toll rate proceedings under Code § 56-542 are necessarily tied to the unique legal structure of TRIP II and the statutory framework developed by the General Assembly attendant thereto. Thus, the Commission also concludes that the current procedures employed to develop a full record upon which to implement Code § 56-542 continue to be necessary.

Working Group

The Commission agrees with the Senior Hearing Examiner that the regulatory process for implementing proposed rate changes under Code § 56-542 may benefit from the establishment of

²⁴ *Id.*

²⁵ See also *Wal-Mart Stores East, LP v. State Corp. Comm'n*, 299 Va. 57, 76-77 (2020) (holding that the Commission did not abuse its discretion by denying a request for relief that was not included in the Application or as part of an approved amendment thereto). Similarly, the Commission would herein exercise its "may" discretion under Code § 56-542 *not* to approve a toll rate request that was expressly *excluded* from the Company's Application. Finally in this regard, if the Commission was required to rule on a subsequent request for relief expressly excluded from the Application, we would deny the Sample Tolls based on evidence cited to by the County. See, e.g., County's Comments on Senior Hearing Examiner's Report at 10-11.

²⁶ See, e.g., Report at 152-155; Consumer Counsel's Post-Hearing Brief at 13-15.

a working group designed to "reach a consensus on the basic parameters of the forward-looking analysis and the basic inputs used in the Steer Model" as applied to this statute.²⁷ Both the County and Consumer Counsel did not object to the establishment of such working group.²⁸ In addition, TRIP II asserted that "this is an issue the Commission must address," and that "[t]o the extent the Commission believes a working group process may be appropriate, TRIP II is willing to participate in such a working group with the Commission Staff and any other entity that is willing to engage in constructive dialogue."²⁹ Accordingly, TRIP II may initiate a stakeholder working group, among the participants to this proceeding desiring to be included therein, for such purpose.

Accordingly, IT IS SO ORDERED, and this matter is DISMISSED.

A COPY hereof shall be sent electronically 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 Commission.

²⁷ Report at 154.

²⁸ *See, e.g.*, County's Comments on the Senior Hearing Examiner's Report at 11-12; Consumer Counsel's Comments on the Senior Hearing Examiner's Report at 3.

²⁹ TRIP II's Comments on Senior Hearing Examiner's Report at 47.