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SENATE BILL NO. 611

Offered January 10, 2024

Prefiled January 10, 2024

A BILL to amend and reenact § 56-542 of the Code of Virginia, relating to Virginia Highway Corporation Act of 1988.

Patron—Subramanyam

Referred to Committee on Finance and Appropriations

Be it enacted by the General Assembly of Virginia:

1. That § 56-542 of the Code of Virginia is amended and reenacted as follows:

§ 56-542. Powers of the Commission.

A. As used in this section:

"CPI" means the Consumer Price Index — U.S. City Averages for All Urban Consumers, All Items (not seasonally adjusted) as reported by the U.S. Department of Labor, Bureau of Labor Statistics; however, if the CPI is modified such that the base year of the CPI changes, the CPI shall be converted in accordance with the conversion factor published by the U.S. Department of Labor, Bureau of Labor Statistics, and if the CPI is discontinued or revised, such other historical index or computation approved by the Commission shall be used for purposes of this section that would obtain substantially the same result as would have been obtained if the CPI had not been discontinued or revised.

"Depreciated original cost" means original cost less depreciation reflected on the operator's books. Depreciation shall be calculated on a straight-line basis over the physical life of the asset or the entire term of the concession, whichever is less, unless the operator obtains specific approval from the Commission to calculate depreciation on a different basis.

"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 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.

"Original cost" means the actual capital investment in toll road infrastructure to the first party that committed or placed these facilities in the regulated service. "Original cost" does not include revenues or deferred earnings that were accrued but unearned in prior periods.

"Real GDP" means the Annual Real Gross Domestic Product as reported by the U.S. Department of Commerce, Bureau of Economic Analysis.

"Reasonable return" means the return calculated on the basis of the depreciated original cost of the facilities actually invested in toll road infrastructure and currently in service. In calculating a reasonable return, the Commission shall allow the operator to charge toll rates that allow the operator the opportunity to recover all prudently incurred operating expenses. Costs related to imprudent operating expenses or capital expenditures shall not be included in the tolls charged by the operator. Imprudent operating expenses shall include any costs that are not reasonable or any costs that are not directly related to and necessary for providing toll road service. Any debt service costs, including transactions-related costs, relating to debt in excess of the original cost of facilities shall not be included as part of the calculation of reasonable return. The reasonable return calculated shall provide the operator with an opportunity to earn a return commensurate with the returns available for investments of similar risk as determined based on comparable market data.

"Reasonable to the user in relation to the benefit obtained" means that rates shall be set reflecting the regulatory principle of cost causation wherein the operator's actual costs, including a reasonable return as defined in this section, will be allocated across all users' toll route equitably on a distance basis. This allocation will establish a maximum toll for each route. The operator will be allowed to discount tolls below this level, provided that it does so in an equitable and nondiscriminatory manner across all users.

"Related party transaction" means a transaction with a person, natural or otherwise, that has ownership in the toll road. "Related party transaction" includes a transaction with a relative of a person who is employed in a managerial capacity with the toll road.

B. The Commission shall have the power to regulate the operator under this title as a public service corporation. The Commission shall also have the power, and be charged with the duties of reviewing and approving or denying the application, of supervising and controlling the operator in the performance of its duties under this chapter and title, and of correcting any abuse in the performance of the operator's

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59 public duties.

60 C. Pursuant to § 56-36, the Commission shall require annually from the operator a verified report  
61 describing the nature of its contractual and other relationships with individuals or entities contracting  
62 with the operator for the provision of significant financial, construction, or maintenance services. The  
63 Commission shall review the report and such other materials as it shall deem necessary for the purpose  
64 of determining improper or excessive costs, and shall exclude from the operator's costs any amounts  
65 which it finds are improper or excessive. Included in such review shall be consideration of contractual  
66 relationships between the operator and individuals or entities that are closely associated or affiliated with  
67 the operator to assure that the terms of such contractual relationships are no less favorable or  
68 unfavorable to the operator than what it could obtain in an arm's-length transaction.

69 D. The Commission also shall have the duty and authority to approve or revise the toll rates charged  
70 by the operator. Initial rates shall be approved if they appear reasonable to the user in relation to the  
71 benefit obtained, not likely to materially discourage use of the roadway, and provide the operator no  
72 more than a reasonable return as determined by the Commission. Thereafter, the Commission, upon  
73 application, complaint or its own initiative, and after investigation, may order substituted for any toll  
74 being charged by the operator, a toll which is set at a level which is reasonable to the user in relation to  
75 the benefit obtained and which will not materially discourage use of the roadway by the public and  
76 which will provide the operator no more than a reasonable return as determined by the Commission.  
77 Any proposed toll rates that fail to meet these criteria as determined by the Commission are contrary to  
78 the public interest, and the Commission shall not approve such toll rates. *Toll rates shall not materially  
79 discourage the public's use of the toll road, and the cost of operating the toll road shall be reasonably  
80 apportioned across all toll road users based on the relative distance each class of user travels on the  
81 toll road, such that the toll rates are established in a reasonable and nondiscriminatory manner in  
82 relation to the benefit obtained, and toll rates shall provide the operator with no more than a  
83 reasonable return.*

84 Any application to increase toll rates shall include a forward-looking analysis that demonstrates that  
85 the proposed toll rates will be reasonable to the user in relation to the benefit obtained, not likely to  
86 materially discourage use of the roadway, and provide the operator no more than a reasonable return.  
87 Such forward-looking analysis shall include reasonable projections of anticipated traffic levels, including  
88 the impact of social and economic conditions anticipated during the time period that the proposed toll  
89 rates would be in effect. The Department shall review and provide comments upon the analysis to the  
90 Commission. Notwithstanding any other provision of law, the Commission shall not approve more than  
91 one year of toll rate increases proposed by the operator.

92 E. If a change in the ownership of the facility or change in control of an operator occurs, whether or  
93 not accompanied by the issuance of securities as defined in subsection A of § 56-57 and § 56-65.1, the  
94 Commission, in any subsequent proceeding to set the level of a toll charged by the operator, shall  
95 ensure that the price paid in connection with the change in ownership or control, and any costs and  
96 other factors attributable to or resulting from the change in ownership or control, if they would  
97 contribute to an increase in the level of the toll, are excluded from the Commission's determination of  
98 the operator's reasonable return, in order to ensure that a change in ownership or control does not  
99 increase the level of the toll above that level that would otherwise have been required under subsection  
100 D if the change in ownership or control had not occurred. As used in this subsection, "control" has the  
101 same meaning as provided in § 56-88.1.

102 F. Pursuant to § 56-36, the Commission shall require an operator to provide copies of annual audited  
103 financial statements for the operator, together with a statement of the operator's ownership. The operator  
104 shall file such statement within four months from the end of the operator's fiscal year.

105 G. The proceeds and funding provided to the operator from any future bond indenture or similar  
106 credit agreement must be used for the purpose of refinancing existing debt, acquiring, designing,  
107 permitting, building, constructing, improving, equipping, modifying, maintaining, reconstructing,  
108 restoring, rehabilitating, or renewing the roadway property, and for the purpose of paying reasonable  
109 arm's-length fees, development costs, and expenses incurred by the operator or a related individual or  
110 entity in executing such financial transaction, unless otherwise authorized by the Commission.

111 H. The Commission may charge a reasonable annual fee to cover the costs of supervision and  
112 controlling the operator in the performance of its duties under this chapter and pursuant to this section.

113 I. Any agreement between the operator and the Department made pursuant to this chapter shall not  
114 be construed to alter the duties, obligations, or powers of the Commission set forth in this chapter.

115 J. Prior to refinancing existing debt, an operator shall petition the Commission for approval to  
116 refinance such debt. The Commission may approve such petition only if the operator demonstrates (i)  
117 that it has the financial capability to pay off the debt incurred in the refinancing over the term of the  
118 bond, loan, or similar instrument; (ii) that the term of the bond, loan, or similar instrument does not  
119 extend beyond the expiration of the operator's current certificate of authority; (iii) that such refinancing  
120 will not increase toll rates; and (iv) that such refinancing is in the public interest.

121 *K. The details of any related party transactions shall be fully disclosed in public financial reports to*  
122 *the Commission. This disclosure shall specifically describe the nature of the services provided and*  
123 *contain information showing at least three separate competitive bids demonstrating that the operator*  
124 *could not have achieved better contract terms from a third party. Absent such a showing, any related*  
125 *party transactions shall be presumed to be imprudent and excluded from costs used for any purpose,*  
126 *including the costs of lobbyists, excessive compensation, and entertainment expenses, and shall be*  
127 *excluded from any calculation of a reasonable return.*  
128 *L. The Commission may allow for lower toll rates for a toll road if it finds in its analysis that an*  
129 *operator is overcharging users and materially discouraging use of the road due to its current toll rates.*  
130 *M. The Commission may implement tolling based on the distance that a user has traveled if it*  
131 *determines it is in the best interest of toll road users.*

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