Public Private Partnerships: The Future for Infrastructure?

P3 Panel Discussion Outline

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1. Introductory Remarks and Introduction of the Panel
2. Overview of the Dulles Greenway
3. Overview of Midtown Tunnel Project
4. The Virginia DOT’s P3 Procurement Program
5. Benefits and Downsides of the P3 Transaction Structure
6. Recent Legislative Reforms to the Commonwealth’s P3 Legislation
7. Tolling and Toll Violations Enforcement (Policy and Legal Considerations)
8. P3 Market Outlook

Materials – Table of Contents

2. Public-Private Transportation Act of 1995
3. Excerpt of the Comprehensive Agreement Relating to the Downtown Tunnel/Midtown Tunnel/Martin Luther King Freeway Extension Project and Exhibit J (December 2011)
4. Downtown Tunnel/Midtown Tunnel/Martin Luther King Freeway Extension Project Comprehensive Agreement
6. Bacon’s Rebellion postings
   a) Lessons from the Pocahontas Parkway Fiasco (June 2012)
   b) Picking up the Pieces of the U.S. 460 Fiasco (March 2014)
   c) The Great U.S. 460 Swamp (July 2014)
   d) Closing the Books on the U.S. 460 Fiasco (July 2015)
7. Dead end for the new Route 460? Virginia Business (June 2014)
Code of Virginia
Title 56. Public Service Companies


§ 56-535. Title.
This chapter may be cited as the "Virginia Highway Corporation Act of 1988."
1988, c. 649.

§ 56-536. Definitions.
As used in this chapter, unless the context requires a different meaning:

"Board" means the Commonwealth Transportation Board.

"Certificate" means the certificate of authority awarded pursuant to this chapter which allows operation of a roadway.

"Commission" means the State Corporation Commission.

"Department" means the Virginia Department of Transportation.

"Highway" means the entire width between the boundary lines of every way or place of whatever nature open to the use of the public under the provisions of this chapter for purposes of vehicular travel in this Commonwealth.

"Operation" means all functions and pursuits of the operator of any roadway under this chapter which are directly or indirectly related to acquisition, approval, construction, enlargement, maintenance, patrolling, toll collections, or connections of the roadway or highway with any other highway or with any street, road or alley. This term shall also include, without limitation, management and administrative functions attendant to actual physical operation of the roadway and management of the affairs of the operator.

"Operator" means the person who submits to the Commission an application for authority to construct, operate or enlarge a roadway, and which, after issuance of a certificate of authority, is responsible for operation of any roadway under the provisions of this chapter.

"Person" includes any natural person, corporation, partnership, joint venture, and any other business entity; however, "person" shall not include the state or any local government or agency thereof, or any municipal corporation or other corporate body.

"Roadway" means that portion of a highway improved, designed or ordinarily used for vehicular travel, exclusive of the shoulder. A highway may include two or more roadways if divided by a physical barrier or barriers or unpaved areas. "Roadway," as used in this chapter, shall include only privately owned or operated highways for use of which a toll or similar single-use charge is imposed.

"Toll" means the fee charged by the operator for a single use of all or a portion of the roadway.

§ 56-537. Policy [Not set out].
Not set out. (1988, c. 649; 1993, c. 732.)
§ 56-538. Prerequisite for construction and operation.
No person may construct, operate or enlarge any roadway, as defined in § 56-536, within the Commonwealth without first having obtained a certificate of authority from the Commission authorizing such construction, operation or enlargement.

1988, c. 649.

Any person may apply to the Commission for a certificate of authority to construct or operate a roadway, or to extend or enlarge a roadway for which a certificate has been issued under this chapter. If the Commission determines in writing, after notice and opportunity for a hearing, that the application is complete, that approval of the application is in the public interest, and that the applicant has complied with the provisions of this chapter, it shall approve the application, with or without modification, unless it receives a duly adopted resolution of the governing body of any jurisdiction through which the roadway passes, which requests that the Commission deny the application, in which case the Commission shall do so. If the application is approved the operator shall construct the roadway. Upon completion of construction and the opening of the roadway to the public, the roadway shall be kept at all times open for use by the public and made accessible to the public, upon payment of the toll established by the operator; provided that the roadway may be partially or completely closed, temporarily, with the concurrence of the Department, to protect the public safety or for reasonable construction or maintenance procedures. The certificate of authority may be transferred with the approval of the Commission if the Commission finds the transfer to be in the public interest after consultation with the Board and notice to the governing body of any jurisdiction through which the roadway passes.


§ 56-540. Application.
The Commission may charge a reasonable application fee to cover the costs of processing, reviewing, and approving or denying the application. The application for a certificate of authority shall contain the following material and information:

1. The geographic area to be served by the roadway and a topographic map indicating the route of the roadway;

2. A list of the property owners through whose property the roadway or highway will pass or whose property will abut the roadway or highway;

3. The method by which the operator will secure all right-of-way required for the roadway, including a description of the nature of the interest in the lands to be acquired, which shall provide, at a minimum, for permanent dedication for transportation purposes, except that in cases in which the Department would not have authority to condemn land because of the identity of the owner, the interest to be acquired shall be of the same type and duration as that which the Department would obtain under the circumstances;

4. The comprehensive plan or plans for all counties, cities, and towns through which the roadway will pass and an analysis which shows that the roadway conforms to these comprehensive plans. To the extent that the roadway conforms to such plans, the fact that the operator is not the Commonwealth shall not affect the construction and operation of the roadway;
5. The operator's plan for financing the proposed construction or enlargement of the roadway, including proposed tolls to be charged for use of the roadway, projected amounts to be collected from such tolls and anticipated traffic volume and detailed plans for distribution of funds, including the priority in which necessary expenditures will be made. The plan for financing may be structured to include, without limitation, provisions for the issuance of debt, equity, or other securities, lease financing, the pledge of revenues or other assets or rights of the operator, or any combination thereof;

6. The operator's plan for operation of the proposed roadway or enlargement thereof;

7. A list of all permits and approvals required for construction of the roadway from local, state, or federal agencies and a schedule for securing such approvals;

8. An overall description of the project, the project design, and all proposed interconnections with the state highway system, including any interstate highway, or secondary system of highways or the streets or roads of any county, city, or town not within the state highway system, accompanied by a copy of the approval of the project, the roadway design and interconnections from the Board, as well as the county, city, or town for connection with a street or road not under state control;

9. A list of public utility facilities to be crossed and plans for such crossings or relocations of such facilities;

10. A certificate of the operator that the roadway will be designed and constructed to meet Department standards, and substantially in accordance with a proposed timetable which is agreeable to the Department, and that the operator will provide a design, review, and inspection agreement with the Department which shall provide that the Department shall authorize construction upon review and approval of the plans and specifications for the roadway and its interconnection with other roads, and that it shall inspect periodically the progress of the construction work to ensure its compliance with the Department standards; and

11. Completion and performance bonds in form and amount satisfactory to the Commission, which amounts shall be set after consultation with the Department.


§ 56-541. Eminent domain.
The power of eminent domain shall not be exercised by the operator for the purpose of acquiring any lands or estates or interests therein, nor any other property used by the operator for the construction or enlargement of a roadway pursuant to this chapter.


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.

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

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 public duties.

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

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.

E. If a change in the ownership of the facility or change in control of an operator occurs, whether or not accompanied by the issuance of securities as defined in subsection A of § 56-57 and § 56-65.1, the Commission, in any subsequent proceeding to set the level of a toll charged by the operator, shall ensure that the price paid in connection with the change in ownership or control, and any costs and other factors attributable to or resulting from the change in ownership or control, if they would contribute to an increase in the level of the toll, are excluded from the Commission's determination of the operator's reasonable return. In order to ensure that a change in ownership or control does not increase the level of the toll above that level that would otherwise have been required under subsection D or subdivision I3 if the change in ownership or control had not occurred. As used in this subsection, "control" has the same meaning as provided in § 56-88.1.

F. Pursuant to § 56-36, the Commission shall require an operator to provide copies of annual audited financial statements for the operator, together with a statement of the operator's ownership. The operator shall file such statement within four months from the end of the operator's fiscal year.
G. The proceeds and funding provided to the operator from any future bond indenture or similar credit agreement must be used for the purpose of refinancing existing debt, acquiring, designing, permitting, building, constructing, improving, equipping, modifying, maintaining, reconstructing, restoring, rehabilitating, or renewing the roadway property, and for the purpose of paying reasonable arm’s-length fees, development costs, and expenses incurred by the operator or a related individual or entity in executing such financial transaction, unless otherwise authorized by the Commission.

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

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, 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.


§ 56-543. Powers and duties of roadway operator.
A. The operator shall have all power allowed by law generally to persons having the same form of organization as the operator, including, without limitation, the authority to operate the roadway and charge tolls for the use thereof, and may pledge any revenue net of operational expenses realized from tolls charged for the use of the roadway in order to secure repayment of any obligations incurred for the construction, enlargement or operation of such roadway. Any financing of the acquisition, construction, enlargement, or operation of the roadway may be in such amounts and upon such terms and conditions as may be deemed necessary or appropriate by the operator to provide for the acquisition, construction, enlargement, and operation of the roadway, issuance costs, other financing obligations, and reasonable reserves. The Commonwealth shall not obligate its full faith and credit on any financing of the operator. Assumption of operation of the project shall not obligate the Commonwealth to pay any obligation of the operator whether secured or otherwise, from sources other than toll revenue. Subject to applicable permit requirements, the operator shall have the authority to cross any canal or navigable watercourse so long as the crossing does not unreasonably interfere with navigation and use of the waterway. In operating the roadway, the operator may:

1. Classify traffic according to reasonable categories for assessment of tolls; and

2. With the consent of the Department, make and enforce reasonable regulations, including regulations:

   a. Which set maximum and minimum speeds that shall conform to Department and state practices;

   b. Which exclude undesirable vehicles or cargoes or materials from the use of the roadway; or

   c. Which establish commuter lanes for use during all or any part of a day and limit the use of such lanes to certain traffic.

3. The enumeration of powers in this subsection shall not limit the power of the operator to do anything it deems necessary and appropriate in the operation of the roadway, provided that the practice is reasonable and nondiscriminatory. The powers granted to the operator in this subsection shall not be deemed to limit the authority of the Commission to regulate the operator under this title.

B. The operator shall have the following duties:

1. It shall file and maintain at all times with the Commission an accurate schedule of rates charged to the public for use of all or any portion of the roadway and it shall also file and maintain a statement that such rates will apply uniformly to all users within any such reasonable classification as the operator may elect to implement. These rates shall be neither applied nor collected in a discriminatory fashion, and free vehicular passage shall be permitted to those persons referred to in subsection A of § 55.2-615.

2. It shall construct and maintain the roadway for anticipated use according to appropriate standards of the Department for public highways operated and maintained by the Department, and enlarge or expand the road when unsatisfied demand for use of the roadway makes it economically feasible to do so. The operator shall agree with the Department for inspection of construction work by the Department at appropriate times during any construction or enlargement. In addition, it shall cooperate fully with the Department in establishing any interconnection with the roadway that the Department may make.
3. It shall contract with the Commonwealth for enforcement of the traffic and public safety laws by state authorities, and may similarly contract with appropriate local authorities for those portions of the roadway within the local jurisdiction.


§ 56-544. Board approval; inspection agreement with Department.
A. The applicant for a certificate of authority to construct or enlarge a roadway pursuant to this chapter shall first secure the approval of the Board for the project, the project construction costs, the location and design of the roadway, and its connection with any road under the jurisdiction of the Board, at proper and convenient places, in order to provide for the convenience of the public. The Board shall approve or deny approval by the later to occur of (i) sixty days following receipt of a description of the proposed location and design of the roadway and its connection with all other roads, or (ii) forty-five days following the conduct of a hearing contemplated by subsection B of § 33.2-208, if such a hearing is held and provided that the notice requirements of that section are fulfilled by the Department within thirty days of receipt of the application, a project design, and a description of the project and the public need for the project. The Board shall approve the project and its interconnections with other roads if there is a public need for a road project of the type proposed and the project and its interconnections are compatible with the existing road network. It shall approve the project construction costs if they are reasonable. If interconnections with an interstate highway or other federal facility are contemplated, the Board's approval shall be conditioned upon ultimate approval of any interconnection if such federal approvals are required and have not been obtained by the time the Board acts. Approval of the roadway design shall not be withheld if it conforms materially with Department practices for toll facilities of similar size and with similar usage patterns. In making its determinations, the Board shall keep in mind the public interest, which may include, without limitation, such considerations as the relative speed of the construction of the project and the allocation of the technical, financial and human resources of the Department. The approval granted by the Board shall be conditioned upon subsequent compliance by the applicant with the agreement contemplated by subsection B of this section. If the roadway is to be built partially or completely along existing state highway right-of-way, the Board shall grant the applicant authority to use such right-of-way only after approval of this use of the right-of-way by the General Assembly.

B. If approval of the project, project design, and connections of the roadway is granted by the Board, the Department shall thereafter enter into a comprehensive agreement with the operator which provides, inter alia, that the Department shall review and approve plans and specifications for the roadway if they conform to state practices; that the Department will inspect and approve construction of the roadway if it conforms to the plans and specifications or state construction and engineering standards; that the Department will, throughout the life of the roadway project, monitor the maintenance practices of the operator and take such actions as are appropriate to ensure the performance of maintenance obligations; and that the Department shall be reimbursed its direct project costs, by the operator, for the services performed by the Department. The agreement shall also provide, inter alia, that the operator will establish and fund accounts which shall ensure that funds are available to meet the obligations of the operator; including reasonable reserves for contingencies and maintenance replacement activities. The approval of plans and specifications, and construction may be undertaken in phases, but no construction may commence until approval of plans including that phase of construction. The services for which the Department shall be reimbursed include project development costs, such as those attendant to preparation of environmental impact statements, which are necessary for
the construction of the roadway by a private operator but have been performed by the
Department. The agreement may include a provision that the Department will perform services
necessary for project development on behalf of the operator, and in such a case, the Department
shall be fully reimbursed by the operator for its direct costs.


§ 56-545. Insurance; sovereign immunity.
Any operator who constructs, operates or enlarges a roadway pursuant to this chapter shall
secure and maintain a policy or policies of public liability insurance in form and amount
satisfactory to the Commission and sufficient to insure coverage of tort liability to the public and
employees, and to enable the continued operation of the roadway. Proofs of coverage and copies
of policies shall be filed with the Commission. Nothing in this chapter shall be construed as or
deemed a waiver of the sovereign immunity of the Commonwealth with respect to its
participation or approval of all or any part of the roadway application or operation, including but
not limited to interconnection of the roadway with the state highway system. Counties, cities and
towns through which a roadway passes shall possess sovereign immunity with respect to roadway
construction and operation.

1988, c. 649.

§ 56-546. Local approvals.
A. Prior to the issuance of a certificate of authority by the Commission and contemporaneously
with the filing of any application materials with the Commission, the applicant shall provide the
local governing body of each jurisdiction through which any part of the roadway passes with the
application information and materials required by § 56-540 and an overall description of the
project and its benefits. The governing body may participate in procedures conducted by the
Board or the Commission concerning the application.

B. When the operator wishes to occupy lands owned by any county, city, town, or any agency or
instrumentality of the federal government, including the streets or alleys of a city or town, or the
roads of any county, it shall first obtain a franchise allowing such occupancy or it may obtain the
necessary interests through grant or other appropriate conveyance to the operator for a period of
time, in the case of a franchise, not to exceed the term of the certificate.

C. Where the applicant wishes to interconnect with the streets of any city or town, or the road
system of any county, and the locality is willing to allow the interconnection, it shall submit
appropriate plans for the connection to the governing body, which shall approve the connection
if it determines that the connection meets all appropriate engineering requirements.

D. The operator and the county, city, or town may also agree on any supplemental or related
matters in addition to the matters specified in § 15.2-2026, according to such terms and
conditions as are reasonable, appropriate, and in the public interest, and any such county, city, or
town is hereby enabled to enter into such an agreement.

E. Prior to commencement of construction, the operator shall survey and plat the right-of-way in
accordance with local requirements.


§ 56-547. Utility crossings.
The applicant shall include in the application a list of public utility facilities and rights-of-way to be crossed or otherwise affected in the construction of the roadway and a plan and schedule for such crossings. The operator and each public utility whose works are to be crossed or affected shall each have the duty to cooperate fully with the other in planning and arranging of the manner of the crossing or relocation of the facilities. Any public service corporation possessing the powers of eminent domain is hereby expressly granted such powers in connection with the moving or relocation of facilities to be crossed by the roadway or which must be relocated to the extent that such moving or relocation is made necessary by construction of the roadway, which shall be construed to include construction of temporary facilities for the purpose of providing service during the period of construction. Should the applicant or operator and the public utility whose facilities are to be crossed or relocated not be able to agree upon a plan for such crossing or any necessary relocation, either party may request the Commission to inquire into the need for the crossing or relocation and to decide whether such crossing or relocation should be compelled, and if so, the manner in which such crossing or relocation is to be accomplished and any damages due either party arising out of the crossing or relocation. The Commission may in its discretion employ expert engineers who shall examine the location and plans for such crossing or relocation, hear any objections and consider modifications, and make a recommendation to the Commission. In such a case, the cost of the experts is to be borne equally by the applicant and the public utility, unless the Commission determines that it would be unjust, in which case the cost shall be borne as the Commission decides. Railroads shall be included within the scope of the term "public utility" for purposes of this section.

1988, c. 649.

§ 56-548. Highway and roadway crossings.
No crossing of a railway, highway, street, road or alley shall be at grade, but shall pass above or below the railway, highway, street, road, or alley, and such crossings are hereby permitted, subject to the provisions of this chapter.

1988, c. 649.

§ 56-549. Default.
In the event of material and continuing default in the performance of the operator's construction or operation duties or failure of the operator to comply with the terms of its agreement with the Department, in either case, after notice thereof and an opportunity to cure, or in the event that construction has not begun within two years of the issuance of a certificate, the Commission, after a hearing in which the applicant or operator has notice and opportunity to participate, may revoke the certificate of authority for the roadway, declare a default in the construction or operation of the roadway, and make or cause to be made the appropriate claim or claims under any completion or performance bonds, or take such other action as it may deem appropriate under the circumstances. The Department may participate in or initiate such proceedings. In case of revocation of a certificate, the applicant or operator shall thereafter be without any authority to construct or operate the roadway, and the Department may take over construction and operation of the roadway, and may proceed thereafter to take any steps which are in the public interest, including completion of construction or additions to the roadway, closing the roadway, or any intermediate step. The Department shall receive the full proceeds of any payments due to claims against bonding companies or sureties for this purpose. In addition, in such event, the operator shall grant to the Department all of its right, title and interest in the assets of the operator. Nothing herein shall be construed to limit the Department's exercise of the power of
eminent domain. In either case, the operator may obtain compensation from the Department for such assets, except that the Department shall first deduct from the value of such assets all of its costs incurred in connection with completion or fulfillment of the unperformed obligations of the operator including the payment of any obligations assumed by the Department, and any other costs associated with the events contemplated in this section. The Department shall take into account moneys received from the proceeds of any payment or completion bond in calculating the amount due the operator.


§ 56-550. Police powers; violations of law.
A. The roadways and highways constructed or operated under this chapter may be policed in whole or in part by officers of the Department of State Police, even though all or some portion of any such projects lie within the corporate limits of a municipality or other political subdivision, and just as if the roadway and highway were a part of the state highway system. The operator and the Department of State Police shall agree upon reasonable terms and conditions pursuant to which the activities contemplated in this section may take place. Such officers shall be under the exclusive control and direction of the Superintendent of State Police and shall be responsible for the preservation of public peace, prevention of crime, apprehension of criminals, protection of the rights of persons and property, and enforcement of the laws of the Commonwealth, within the limits of any highway and roadway. All other police officers of the Commonwealth and of each county, city, town or other political subdivision of the Commonwealth through which any roadway, or portion thereof, extends shall have the same powers and jurisdiction within the limits of such roadways and highways as they have beyond such limits and shall have access to the highway and roadway at any time for the purpose of exercising such powers and jurisdiction. This authority does not extend to the private offices, buildings, garages and other improvements of the operator to any greater degree than the police power extends to any other private buildings and improvements.

B. The traffic and motor vehicle laws of the Commonwealth shall apply to persons and motor vehicles on the roadway or highway, as shall Chapter 8 (§ 35.2-800 et seq.) of Title 35.2, and the powers of arrest of police officers shall be the same as those applying to conduct on the state highway system. Punishment for offenses shall be as prescribed by law for conduct occurring on the state highway system.

1988, c. 649.

§ 56-551. Termination of certificate; dedication of assets.
Within ninety days of the completion and closing of the original permanent financing, the operator shall provide full details of the financing, including the terms of all bonds, to the Commission; and shall certify the term of the original permanent financing and its termination date. The Commission may require that the operator provide copies of any relevant documents, and shall review the financing and determine the date of termination of the original permanent financing. After establishing this date, the Commission shall enter an order terminating the operator's authority pursuant to the certificate of authority on a date which shall be ten years from the end of the term of the original permanent financing. At the request of the operator or the Department, or on its own initiative, the Commission may revise its order to modify the date for termination of the certificate of authority in order to take into account any refinancing of the original permanent financing, where the refinancing or modification is in the public interest, or
any refinancing for the purpose of expansion, or early termination of the original permanent financing. Upon the termination of the certificate of authority, the authority and duties of the operator under this chapter shall cease, and the highway assets and improvements of the operator shall be dedicated to the Commonwealth for highway purposes.


§ 56-552. Improvement Fund.
There shall be a fund established by the Commonwealth Transportation Board, from the toll revenues described in this section, for the purpose of funding transportation improvements which are related to or affected by the toll road. Toll rates shall be set in multiples of five cents; however, the Commission shall order that that percentage of each toll by which the toll established exceeds that necessary to provide the operator with an amount necessary to meet the operator's obligations under § 56-543 and earn a reasonable return shall be committed to the fund. In addition the operator, the Board, and the local governments through which the road passes may jointly petition the Commission to establish an additional toll amount to be committed to this fund.

1988, c. 649.
Code of Virginia
Title 33.2. Highways and Other Surface Transportation Systems


§ 33.2-1800. Definitions.
As used in this chapter, unless the context requires a different meaning:

"Affected locality or public entity" means any county, city, or town in which all or a portion of a qualifying transportation facility is located and any other responsible public entity directly affected by the qualifying transportation facility.

"Commission" means the State Corporation Commission.

"Comprehensive agreement" means the comprehensive agreement between the private entity and the responsible public entity required by § 33.2-1808.

"Concession" means any lease, license, franchise, easement, or other binding agreement transferring rights for the use or control, in whole or in part, of a qualifying transportation facility by a responsible public entity to a private entity for a definite term during which the private entity will provide transportation-related services, including operations and maintenance, revenue collection, toll-collection enforcement, design, construction, and other activities that enhance throughput, reduce congestion, or otherwise manage the facility, in return for the right to receive all or a portion of the revenues of the qualifying transportation facility.

"Concession payment" means a payment from a private entity to a responsible public entity in connection with the development and/or operation of a qualifying transportation facility pursuant to a concession.

"Develop" or "development" means to plan, design, develop, finance, lease, acquire, install, construct, or expand.

"Interim agreement" means an agreement, including a memorandum of understanding or binding preliminary agreement, between the private entity and the responsible public entity that provides for completion of studies and any other activities to advance the development and/or operation of a qualifying transportation facility.

"Material default" means any default by the private entity in the performance of its duties under subsection E of § 33.2-1807 that jeopardizes adequate service to the public from a qualifying transportation facility and remains unremedied after the responsible public entity has provided notice to the private entity and a reasonable cure period has elapsed.

"Multimodal transportation facility" means a transportation facility consisting of multiple modes of transportation.

"Operate" or "operation" means to finance, maintain, improve, equip, modify, repair, or operate.

"Private entity" means any natural person, corporation, general partnership, limited liability company, limited partnership, joint venture, business trust, public benefit corporation, nonprofit entity, or other business entity.

"Public entity" means the Commonwealth and any agency or authority thereof; any county, city,
or town; and any other political subdivision of any of the foregoing, but does not include any public service company.

"Qualifying transportation facility" means one or more transportation facilities developed and/or operated by a private entity pursuant to this chapter.

"Responsible public entity" means a public entity, including local governments and regional authorities, that has the power to develop and/or operate the qualifying transportation facility.

"Revenues" means all revenues, including income; earnings; user fees; lease payments; allocations; federal, state, regional, and local appropriations or the appropriations or other funds available to any political subdivision, authority, or instrumentality thereof; bond proceeds; equity investments, service payments, or any combination thereof arising out of or in connection with supporting the development and/or operation of a qualifying transportation facility, including money received as grants or otherwise from the United States of America, from any public entity, or from any agency or instrumentality of the foregoing in aid of such facility.

"Service contract" means a contract entered into between a public entity and the private entity pursuant to § 33.2-1804.

"Service payments" means payments to the private entity in connection with the development and/or operation of a qualifying transportation facility pursuant to a service contract.

"State" means the Commonwealth of Virginia.

"Transportation facility" means any road, bridge, tunnel, overpass, ferry, airport, mass transit facility, vehicle parking facility, port facility, or similar commercial facility used for the transportation of persons or goods, together with any buildings, structures, parking areas, appurtenances, and other property needed to operate such facility; however, "transportation facility" does not include a commercial or retail use or enterprise not essential to the transportation of persons or goods.

"User fees" mean the rates, tolls, fees, or other charges imposed by the private entity for use of all or a portion of a qualifying transportation facility pursuant to the interim or comprehensive agreement.


§ 33.2-1801. Policy.
A. The General Assembly finds that:

1. There is a public need for timely development and/or operation of transportation facilities within the Commonwealth that address the needs identified by the appropriate state, regional, or local transportation plan by improving safety, reducing congestion, increasing capacity, enhancing economic efficiency, or any combination thereof and that such public need may not be wholly satisfied by existing methods of procurement in which qualifying transportation facilities are developed and/or operated;

2. Such public need may not be wholly satisfied by existing ways in which transportation facilities are developed and/or operated; and

3. Authorizing private entities to develop and/or operate one or more transportation facilities
may result in the development and/or operation of such transportation facilities to the public in a more timely, more efficient, or less costly fashion, thereby serving the public safety and welfare.

B. A public-private partnership may be in the best interest of the public only if the requirements of subdivisions C 1 through 5 of § 33.2-1803 have been met.

C. It is the intent of this chapter, among other things, to encourage investment in the Commonwealth by private entities that facilitates the development and/or operation of transportation facilities when such investment is in the best interest of the public. Accordingly, public and private entities may have the greatest possible flexibility in contracting with each other for the provision of the public services that are the subject of this chapter.

D. This chapter shall be liberally construed in conformity with the purposes hereof.


§ 33.2-1802. Prerequisite for operation.
A. Any private entity seeking authorization under this chapter to develop and/or operate a transportation facility shall first obtain approval of the responsible public entity under § 33.2-1803. Such private entity may initiate the approval process by requesting approval pursuant to subsection A of § 33.2-1803 or the responsible public entity may request proposals pursuant to subsection B of § 33.2-1803.

B. Any responsible public entity that is an agency or institution of the Commonwealth receiving a detailed proposal from a private entity for a qualifying transportation facility that is a port facility as defined in § 62.1-140 shall provide notice of the receipt of such proposal to the Public-Private Partnership Advisory Commission established in § 30-279.


§ 33.2-1803. Approval by the responsible public entity.
A. The private entity may request approval by the responsible public entity. Any such request shall be accompanied by the following material and information unless waived by the responsible public entity in its guidelines or other instructions given, in writing, to the private entity with respect to the transportation facility or facilities that the private entity proposes to develop and/or operate as a qualifying transportation facility:

1. A topographic map (1:2,000 or other appropriate scale) indicating the location of the transportation facility or facilities;

2. A description of the transportation facility or facilities, including the conceptual design of such facility or facilities and all proposed interconnections with other transportation facilities;

3. The proposed date for development and/or operation of the transportation facility or facilities along with an estimate of the life-cycle cost of the transportation facility as proposed;

4. A statement setting forth the method by which the private entity proposes to secure any property interests required for the transportation facility or facilities;

5. Information relating to the current transportation plans, if any, of each affected locality or public entity;

6. A list of all permits and approvals required for developing and/or operating improvements to
the transportation facility or facilities from local, state, or federal agencies and a projected schedule for obtaining such permits and approvals;

7. A list of public utility's, locality's, or political subdivision's facilities, if any, that will be crossed by the transportation facility or facilities and a statement of the plans of the private entity to accommodate such crossings;

8. A statement setting forth the private entity's general plans for developing and/or operating the transportation facility or facilities, including identification of any revenue, public or private, or proposed debt or equity investment or concession proposed by the private entity;

9. The names and addresses of the persons who may be contacted for further information concerning the request;

10. Information on how the private entity's proposal will address the needs identified in the appropriate state, regional, or local transportation plan by improving safety, reducing congestion, increasing capacity, enhancing economic efficiency, or any combination thereof;

11. A statement of the risks, liabilities, and responsibilities to be transferred, assigned, or assumed by the private entity for the development and/or operation of the transportation facility, including revenue risk and operations and maintenance; and

12. Such additional material and information as the responsible public entity may reasonably request pursuant to its guidelines or other written instructions.

B. The responsible public entity may request proposals from private entities for the development and/or operation of transportation facilities subject to the following:

1. For transportation facilities where the Department of Transportation or the Department of Rail and Public Transportation is the responsible public entity, the Transportation Public-Private Partnership Steering Committee established pursuant to § 33.2-1803.2 has determined that moving forward with the development and/or operation of the facility pursuant to this article serves the best interest of the public.

2. A finding of public interest pursuant to § 33.2-1803.1 has been issued by the responsible public entity.

3. The responsible public entity shall not charge a fee to cover the costs of processing, reviewing, and evaluating proposals received in response to such requests.

C. The responsible public entity may grant approval of the development and/or operation of the transportation facility or facilities as a qualifying transportation facility if the responsible public entity determines that it is in the best interest of the public. The responsible public entity may determine that the development and/or operation of the transportation facility or facilities as a qualifying transportation facility serves the best interest of the public if:

1. The private entity can develop and/or operate the transportation facility or facilities with a public contribution amount that is less than the maximum public contribution determined pursuant to subsection A of § 33.2-1803.1:1 for transportation facilities where the Department of Transportation or the Department of Rail and Public Transportation is the responsible public entity;

2. There is a public need for the transportation facility or facilities the private entity proposes to
develop and/or operate as a qualifying transportation facility and for transportation facilities where the Department of Transportation or the Department of Rail and Public Transportation is the responsible public entity, such facility or facilities meet a need included in the plan developed pursuant to § 33.2-353;

3. The plan for the development and/or operation of the transportation facility or facilities is anticipated to have significant benefits as determined pursuant to subdivision B 1 of § 33.2-1803.1;

4. The private entity's plans will result in the timely development and/or operation of the transportation facility or facilities or their more efficient operation; and

5. The risks, liabilities, and responsibilities transferred, assigned, or assumed by the private entity provide sufficient benefits to the public to not proceed with the development and/or operation of the transportation facility through other means of procurement available to the responsible public entity.

In evaluating any request, the responsible public entity may rely upon internal staff reports prepared by personnel familiar with the operation of similar facilities or the advice of outside advisors or consultants having relevant experience.

D. The responsible public entity shall not enter into a comprehensive agreement unless the chief executive officer of the responsible public entity certifies in writing to the Governor and the General Assembly that:

1. The finding of public interest issued pursuant to § 33.2-1803.1 is still valid;

2. The transfer, assignment, and assumption of risks, liabilities, and permitting responsibilities and the mitigation of revenue risk by the private sector have not materially changed since the finding of public interest was issued pursuant to § 33.2-1803.1; and

3. The public contribution requested by the private entity does not exceed the maximum public contribution determined pursuant to subsection A of § 33.2-1803.1.

Changes to the project scope that do not impact the assignment of risks or liabilities or the mitigation of revenue risk shall not be considered material changes to the finding of public interest, provided that such changes were presented in a public meeting to the Commonwealth Transportation Board, other state board, or the governing body of a locality, as appropriate.

E. The responsible public entity may charge a reasonable fee to cover the costs of processing, reviewing, and evaluating the request submitted by a private entity pursuant to subsection A, including reasonable attorney fees and fees for financial and other necessary advisors or consultants. The responsible public entity shall also develop guidelines that establish the process for the acceptance and review of a proposal from a private entity pursuant to subsections A, B, C, and D. Such guidelines shall establish a specific schedule for review of the proposal by the responsible public entity, a process for alteration of that schedule by the responsible public entity if it deems that changes are necessary because of the scope or complexity of proposals it receives, the process for receipt and review of competing proposals, and the type and amount of information that is necessary for adequate review of proposals in each stage of review. For qualifying transportation facilities that have approved or pending state and federal environmental clearances, have secured significant right-of-way, have previously allocated significant state or federal funding, or exhibit other circumstances that could reasonably reduce
the amount of time to develop and/or operate the qualifying transportation facility in accordance with the purpose of this chapter, the guidelines shall provide for a prioritized documentation, review, and selection process.

F. The approval of the responsible public entity shall be subject to the private entity's entering into an interim agreement or a comprehensive agreement with the responsible public entity. For any project with an estimated construction cost of over $50 million, the responsible public entity also shall require the private entity to pay the costs for an independent audit of any and all traffic and cost estimates associated with the private entity's proposal, as well as a review of all public costs and potential liabilities to which taxpayers could be exposed (including improvements to other transportation facilities that may be needed as a result of the proposal, failure by the private entity to reimburse the responsible public entity for services provided, and potential risk and liability in the event the private entity defaults on the comprehensive agreement or on bonds issued for the project). This independent audit shall be conducted by an independent consultant selected by the responsible public entity, and all such information from such review shall be fully disclosed.

G. In connection with its approval of the development and/or operation of the transportation facility or facilities as a qualifying transportation facility, the responsible public entity shall establish a date for the acquisition of or the beginning of construction of or improvements to the qualifying transportation facility. The responsible public entity may extend such date.

H. The responsible public entity shall take appropriate action, as more specifically set forth in its guidelines, to protect confidential and proprietary information provided by the private entity pursuant to an agreement under subdivision 11 of § 2.2-3705.6.

I. The responsible public entity may also apply for, execute, and/or endorse applications submitted by private entities to obtain federal credit assistance for qualifying projects developed and/or operated pursuant to this chapter.


§ 33.2-1803.1. Finding of public interest.
A. Prior to the meeting of the Committee pursuant to subsection C of § 33.2-1805.2, the chief executive officer of the responsible public entity shall make a finding of public interest. Such finding shall include information set forth in subsection B. For transportation facilities where the Department of Transportation or the Department of Rail and Public Transportation is the responsible public entity, the Secretary of Transportation, in his role as chairman of the Board, must concur with the finding of public interest.

B. At a minimum, a finding of public interest shall contain the following information:

1. A description of the benefits expected to be realized by the responsible public entity through the development and/or operation of the transportation facility, including person throughput, congestion mitigation, safety, economic development, environmental quality, and land use.

2. An analysis of the public contribution necessary for the development and/or operation of the facility or facilities pursuant to subsection A of § 33.2-1803.1:1, including a maximum public contribution that will be allowed under the procurement.
3. A description of the benefits expected to be realized by the responsible public entity through the use of this chapter compared with the development and/or operation of the transportation facility through other options available to the responsible public entity.

4. A statement of the risks, liabilities, and responsibilities to be transferred, assigned, or assumed by the private entity, which shall include the following:
   a. A discussion of whether revenue risk will be transferred to the private entity and the degree to which any such transfer may be mitigated through other provisions in the interim or comprehensive agreements;
   b. A description of the risks, liabilities, and responsibilities to be retained by the responsible public entity; and
   c. Other items determined appropriate by the responsible public entity in the guidelines for this chapter.

5. The determination of whether the project has a high, medium, or low level of project delivery risk and a description of how such determination was made. If the qualifying transportation facility is determined to contain high risk, a description of how the public’s interest will be protected through the transfer, assignment, or assumption of risks or responsibilities by the private entity in the event that issues arise with the development and/or operation of the qualifying transportation facility.

6. If the responsible public entity proposes to enter into an interim or comprehensive agreement pursuant to subdivision 2 of § 33.2-1819, information and the rationale demonstrating that proceeding in this manner is more beneficial than proceeding pursuant to subdivision 1 of § 33.2-1819.

2015, c. 612; 2017, cc. 539, 551.

§ 33.2-1803.1:1. Public sector analysis and competition.
A. For any transportation facility under consideration for development and/or operation under this chapter by the Department of Transportation or the Department of Rail and Public Transportation, the responsible public entity shall ensure competition throughout the procurement process by developing a public sector option based on the analysis conducted in subsection B. The public sector option shall identify a maximum public contribution.

B. The responsible public entity shall undertake, in cooperation with the Secretary of Transportation and the Secretary of Finance, a public sector analysis of the cost for the responsible entity to develop and/or operate the transportation facility or facilities being considered for development and/or operation pursuant to this chapter. At a minimum, such analysis shall contain the following information:
   1. Any mitigation of risk of user-fee financing through assumptions related to competing facilities, compensation for high usage of the facility by high-occupancy vehicles, or other considerations that may mitigate the risk of user-fee financing.
   2. Whether the Department of Transportation or the Department of Rail and Public Transportation intends to maintain and operate the facility, or if the public sector option is based on the transfer of such responsibilities to the private sector.
3. Public contribution, if any, that would still be required to cover all costs necessary for the development and/or operation of the transportation facility in excess of financing available should the General Assembly authorize the use of debt secured by a pledge of net revenues derived from rates, fees, or other charges and the full faith and credit of the Commonwealth pursuant to Article X, Section 9 (c) of the Constitution of Virginia.

4. Funds provided to support nonuser fee generating components of the project that contribute to the benefits expected to be realized from the transportation facility pursuant to subdivision B 1 of § 33.2-1803.1.

2017, cc. 539, 551.

§ 33.2-1803.2. Transportation Public-Private Partnership Steering Committee.
A. There is hereby established the Transportation Public-Private Partnership Steering Committee (the Committee) to evaluate and review financing options for the development and/or operation of transportation facility or facilities.

The Committee shall consist of the following members:

1. Two members of the Commonwealth Transportation Board;

2. The staff director of the House Committee on Appropriations, or his designee, and the staff director of the Senate Committee on Finance, or his designee;

3. A Deputy Secretary of Transportation who shall serve as the chairman;

4. The chief financial officer of either the Department of Transportation or the Department of Rail and Public Transportation, as appropriate; and

5. A nonagency public financial expert, as selected by the Secretary of Transportation.

B. Prior to the initiation of any procurement pursuant to § 33.2-1803 by the Department of Transportation or the Department of Rail and Public Transportation, the Committee shall meet to review the public sector analysis and competition developed pursuant to § 33.2-1803.1:1 and concur that:

1. The assumptions regarding the project scope, benefits, and costs of the public sector option developed pursuant to § 33.2-1803.1:1 were fully and reasonably developed;

2. The assumed financing costs and valuation of both financial and construction risk mitigation included in the public sector option are financially sound and reflect the best interest of the public; and

3. The terms sheet developed for the proposed procurement contains all necessary elements.

C. After receipt of responses to the request for qualifications, but prior to the issuance of the first draft request for proposals, the Committee shall meet to determine that the development and/or operation of the transportation facility or facilities as a qualifying transportation facility serves the public interest pursuant to § 33.2-1803.1. If the Committee makes an affirmative determination, as evidenced by an affirmative vote of a majority of the members of the Committee, the Department of Transportation or the Department of Rail and Public Transportation may proceed with the procurement pursuant to § 33.2-1803.
D. Meetings of the Committee shall be open to the public, and meetings will be scheduled on an as-needed basis. However, the Committee may convene a closed session pursuant to the provisions of subdivisions A 6 and 29 of § 2.2-3711 to allow the Committee to review the public sector analysis and competition and to review proposals received pursuant to a request for qualifications.

E. The Committee shall, within 10 business days of any meeting, report on the findings of such meeting. Such report shall be made to the Chairmen of the House and Senate Committees on Transportation, the House Committee on Appropriations, and the Senate Committee on Finance.

F. Within 60 days of the execution of a comprehensive agreement pursuant to § 33.2-1803, the Department of Transportation or the Department of Rail and Public Transportation, as appropriate, shall, in closed session, brief the Committee on the details of the final bids received and the details of the evaluation of such bids.

2015, c. 612; 2017, cc. 539, 551.

§ 33.2-1804. Service contracts.
In addition to any authority otherwise conferred by law, any public entity may contract with a private entity for transportation services to be provided by a qualifying transportation facility in exchange for such service payments and other consideration as such public entity may deem appropriate.


§ 33.2-1805. Affected localities or public entities.
A. Any private entity requesting approval from, or submitting a proposal to, a responsible public entity under § 33.2-1803 shall notify each affected locality or public entity by furnishing a copy of its request or proposal to each affected locality or public entity.

B. Each affected locality or public entity that is not a responsible public entity for the respective qualifying transportation facility shall, within 60 days after receiving a request for comments from the responsible public entity, submit in writing any comments it may have on the proposed qualifying transportation facility to the responsible public entity and indicate whether the facility will address the needs identified in the appropriate state, regional, or local transportation plan by improving safety, reducing congestion, increasing capacity, enhancing economic efficiency, or any combination thereof.

C. Any qualifying transportation facility, title or easement to which is held by the Commonwealth or an agency or authority therefor and the rights to develop or operate which have been granted to the private entity through a concession as defined in § 33.2-1800, shall be subject to the provisions of Title 15.2 in the same manner as a facility of the Commonwealth, mutatis mutandis, except that such private entity shall comply with the provisions of subsections B and C of § 15.2-2202 as they relate to the affected locality's or public entity's comprehensive plan.


§ 33.2-1806. Dedication of public property.
Any public entity may dedicate any property interest that it has for public use as a qualified transportation facility if it finds that so doing will serve the public purpose of this chapter.
connection with such dedication, a public entity may convey any property interest that it has, subject to the conditions imposed by general law governing such conveyances, to the private entity, subject to the provisions of this chapter, for such consideration as such public entity may determine. The aforementioned consideration may include the agreement of the private entity to develop and/or operate the qualifying transportation facility. The property interests that the public entity may convey to the private entity in connection with a dedication under this section may include licenses, franchises, easements, concessions, or any other right or interest the public entity deems appropriate. Such property interest including a leasehold interest in and/or rights to use real property constituting a qualifying transportation facility shall be considered property indirectly owned by a government if described in § 58.1-3606.1.


§ 33.2-1807. Powers and duties of the private entity.
A. The private entity shall have all power allowed by law generally to a private entity having the same form of organization as the private entity and shall have the power to develop and/or operate the qualifying transportation facility and impose user fees and/or enter into service contracts in connection with the use thereof. However, no tolls or user fees may be imposed by the private entity on Interstate 81 without the prior approval of the General Assembly. Prior approval of the General Assembly shall also be required prior to the imposition or collection of any toll for use of Interstate 95 south of Fredericksburg pursuant to the Interstate System Reconstruction or Rehabilitation Pilot Program.

B. The private entity may own, lease, or acquire any other right to use or develop and/or operate the qualifying transportation facility.

C. Subject to applicable permit requirements, the private entity shall have the authority to cross any canal or navigable watercourse so long as the crossing does not unreasonably interfere with then current navigation and use of the waterway.

D. In operating the qualifying transportation facility, the private entity may:

1. Make classifications according to reasonable categories for assessment of user fees; and

2. With the consent of the responsible public entity, make and enforce reasonable rules to the same extent that the responsible public entity may make and enforce rules with respect to a similar transportation facility.

E. The private entity shall:

1. Develop and/or operate the qualifying transportation facility in a manner that meets the standards of the responsible public entity for transportation facilities operated and maintained by such responsible public entity, all in accordance with the provisions of the interim agreement or the comprehensive agreement;

2. Keep the qualifying transportation facility open for use by the members of the public in accordance with the terms and conditions of the interim or comprehensive agreement after its initial opening upon payment of the applicable user fees and/or service payments, provided that the qualifying transportation facility may be temporarily closed because of emergencies or, with the consent of the responsible public entity, to protect the safety of the public or for reasonable construction or maintenance procedures;
3. Maintain, or provide by contract for the maintenance of, the qualifying transportation facility;

4. Cooperate with the responsible public entity in establishing any interconnection with the qualifying transportation facility requested by the responsible public entity; and

5. Comply with the provisions of the interim or comprehensive agreement and any service contract.


§ 33.2-1808. Comprehensive agreement.
A. Prior to developing and/or operating the qualifying transportation facility, the private entity shall enter into a comprehensive agreement with the responsible public entity. The comprehensive agreement shall, as appropriate, provide for:

1. Delivery of performance and payment bonds in connection with the development and/or operation of the qualifying transportation facility, in the forms and amounts satisfactory to the responsible public entity;

2. Review of plans for the development and/or operation of the qualifying transportation facility by the responsible public entity and approval by the responsible public entity if the plans conform to standards acceptable to the responsible public entity;

3. Inspection of construction or improvements to the qualifying transportation facility by the responsible public entity to ensure that such construction or improvements conform to the standards acceptable to the responsible public entity;

4. Maintenance of a policy or policies of public liability insurance (copies of which shall be filed with the responsible public entity accompanied by proofs of coverage) or self-insurance, each in form and amount satisfactory to the responsible public entity and reasonably sufficient to insure coverage of tort liability to the public and employees and to enable the continued operation of the qualifying transportation facility;

5. Monitoring of the maintenance practices of the private entity by the responsible public entity and the taking of such actions as the responsible public entity finds appropriate to ensure that the qualifying transportation facility is properly maintained;

6. Reimbursement to be paid to the responsible public entity for services provided by the responsible public entity;

7. Filing of appropriate financial statements in a form acceptable to the responsible public entity on a periodic basis;

8. Compensation to the private entity that may include a reasonable development fee, a reasonable maximum rate of return on investment, and/or reimbursement of development expenses in the event of termination for convenience by the responsible public entity as agreed upon between the responsible public entity and the private entity;

9. The date of termination of the private entity’s authority and duties under this chapter and dedication to the appropriate public entity; and

10. Guaranteed cost and completion guarantees related to the development and/or operation of
the qualified transportation facility and payment of damages for failure to meet the completion guarantee.

B. The comprehensive agreement shall provide for such user fees as may be established by agreement of the parties. Any user fees shall be set at a level that takes into account any lease payments, service payments, and compensation to the private entity or as specified in the comprehensive agreement. A copy of any service contract shall be filed with the responsible public entity. A schedule of the current user fees shall be made available by the private entity to any member of the public on request. In negotiating user fees under this section, the parties shall establish fees that are the same for persons using the facility under like conditions except as required by agreement between the parties to preserve capacity and prevent congestion on the qualifying transportation facility. The execution of the comprehensive agreement or any amendment thereto shall constitute conclusive evidence that the user fees provided for therein comply with this chapter. User fees established in the comprehensive agreement as a source of revenues may be in addition to or in lieu of service payments.

C. In the comprehensive agreement, the responsible public entity may agree to make grants or loans for the development and/or operation of the qualifying transportation facility from amounts received from the federal government or any agency or instrumentality thereof.

D. The comprehensive agreement shall incorporate the duties of the private entity under this chapter and may contain such other terms and conditions that the responsible public entity determines serve the public purpose of this chapter. Without limitation, the comprehensive agreement may contain provisions under which the responsible public entity agrees to provide notice of default and cure rights for the benefit of the private entity and the persons specified therein as providing financing for the qualifying transportation facility. The comprehensive agreement may contain such other lawful terms and conditions to which the private entity and the responsible public entity mutually agree, including provisions regarding unavoidable delays or provisions providing for a loan of public funds for the development and/or operation of one or more qualifying transportation facilities.

E. The comprehensive agreement shall provide for the distribution of any earnings in excess of the maximum rate of return as negotiated in the comprehensive agreement. Without limitation, excess earnings may be distributed to the Transportation Trust Fund, to the responsible public entity, or to the private entity for debt reduction or they may be shared with appropriate public entities. Any payments under a concession arrangement for which the Commonwealth is the responsible public entity shall be paid into the Transportation Trust Fund.

F. Any changes in the terms of the comprehensive agreement, as may be agreed upon by the parties, shall be added to the comprehensive agreement by written amendment.

G. Notwithstanding any contrary provision of this chapter, a responsible public entity may enter into a comprehensive agreement with multiple private entities if the responsible public entity determines in writing that it is in the public interest to do so.

H. The comprehensive agreement may provide for the development and/or operation of phases or segments of the qualifying transportation facility.

I. Any comprehensive agreement originally entered into on or after July 1, 2017, shall include, in consultation with the Virginia State Police, a provision requiring funding for adequate staffing by the Virginia State Police for general law enforcement services during both development and
operation of the qualifying transportation facility. As used in this subsection, "adequate staffing" means a level of staffing in accordance with the September 2003 report, "A Review of the Patrol Staffing Formula" as developed pursuant to Item 459(g) of Chapter 1042 of the Acts of Assembly of 2003.


§ 33.2-1809. Interim agreement.
A. Prior to or in connection with the negotiation of the comprehensive agreement, the responsible public entity may enter into an interim agreement with the private entity proposing the development and/or operation of the facility or facilities. Such interim agreement may (i) permit the private entity to commence activities for which it may be compensated relating to the proposed qualifying transportation facility, including project planning and development, advance right-of-way acquisition, design and engineering, environmental analysis and mitigation, survey, conducting transportation and revenue studies, and ascertaining the availability of financing for the proposed facility or facilities; (ii) establish the process and timing of the negotiation of the comprehensive agreement; and (iii) contain any other provisions related to any aspect of the development and/or operation of a qualifying transportation facility that the parties may deem appropriate.

B. Notwithstanding any provision of this chapter to the contrary, a responsible public entity may enter into an interim agreement with multiple private entities if the responsible public entity determines in writing that it is in the public interest to do so.

C. The Department of Transportation and the Department of Rail and Public Transportation shall not enter into an interim agreement for the development of a transportation facility under this chapter that either (i) establishes a process and timing of the negotiations of the comprehensive agreement or (ii) allows for competitive negotiations as set forth in § 2.2-4302.2.


§ 33.2-1810. Multiple public entities.
A. If a private entity submits a proposal pursuant to subsection A of § 33.2-1803 to develop and/or operate a qualifying transportation facility or a multimodal transportation facility that may require approval by more than one public entity, representatives of each of the affected public entities shall, prior to acceptance of such proposal, convene and determine which public entity shall serve as the coordinating responsible public entity. Such determination shall occur within 60 days of the receipt of a proposal by the respective public entities.

B. If public entities request proposals from private entities for the development and/or operation of a qualifying transportation facility or a multimodal transportation facility pursuant to subsection B of § 33.2-1803, the determination of which public entity shall serve as the coordinating responsible public entity shall be made prior to any request for proposals.

C. Once a determination has been made in accordance with subsection A or B, the coordinating responsible public entity and the private entity shall proceed in accordance with this chapter.

2005, cc. 504, 562, § 56-566.2; 2014, c. 805.

§ 33.2-1811. Federal, state, and local assistance.
A. The responsible public entity may take any action to obtain federal, state, or local assistance
for a qualifying transportation facility that serves the public purpose of this chapter and may enter into any contracts required to receive such federal assistance. If the responsible public entity is a state agency, any funds received from the state or federal government or any agency or instrumentality thereof shall be subject to appropriation by the General Assembly. The responsible public entity may determine that it serves the public purpose of this chapter for all or any portion of the costs of a qualifying transportation facility to be paid, directly or indirectly, from the proceeds of a grant or loan made by the federal, state, or local government or any agency or instrumentality thereof.

B. The responsible public entity may agree to make grants or loans for the development and/or operation of the qualifying transportation facility from amounts received from the federal, state, or local government or any agency or instrumentality thereof.

C. Nothing in this chapter or in an interim or comprehensive agreement entered into pursuant to this chapter shall be deemed to enlarge, diminish, or affect the authority, if any, otherwise possessed by the responsible public entity to take action that would impact the debt capacity of the Commonwealth or the affected localities or public entities.


§ 33.2-1812. Financing.
Any financing of a qualifying transportation facility may be in such amounts and upon such terms and conditions as may be determined by the parties to the interim or comprehensive agreement. Without limiting the generality of the foregoing, the private entity and the responsible public entity may propose to utilize any and all revenues that may be available to them and may, to the fullest extent permitted by applicable law: issue debt, equity, or other securities or obligations; enter into leases, concessions, and grant and loan agreements; access any designated transportation trust funds; borrow or accept grants from any state infrastructure bank; and secure any financing with a pledge of, security interest in, or lien on any or all of its property, including all of its property interests in the qualifying transportation facility.


§ 33.2-1813. Material default; remedies.
A. Upon the occurrence and during the continuation of material default, the responsible public entity may exercise any or all of the following remedies:

1. The responsible public entity may elect to take over the transportation facility or facilities and in such case shall succeed to all of the right, title, and interest in such transportation facility or facilities, subject to any liens on revenues previously granted by the private entity to any person providing financing therefor.

2. The responsible public entity may terminate the interim or comprehensive agreement and exercise any other rights and remedies that may be available at law or in equity.

3. The responsible public entity may make or cause to be made any appropriate claims under the performance and/or payment bonds required by § 53.2-1808.

B. In the event the responsible public entity elects to take over a qualifying transportation facility pursuant to subsection A, the responsible public entity may develop and/or operate the qualifying transportation facility, impose user fees for the use thereof, and comply with any
service contracts as if it were the private entity. Any revenues that are subject to a lien shall be collected for the benefit of, and paid to, secured parties, as their interests may appear, to the extent necessary to satisfy the private entity's obligations to secured parties, including the maintenance of reserves, and such liens shall be correspondingly reduced and, when paid off, released. Before any payments to, or for the benefit of, secured parties, the responsible public entity may use revenues to pay current operation and maintenance costs of the qualifying transportation facility or facilities, including compensation to the responsible public entity for its services in operating and maintaining the qualifying transportation facility. Remaining revenues, if any, after all payments for operation and maintenance of the transportation facility or facilities, and to, or for the benefit of, secured parties, have been made, shall be paid to the private entity, subject to the negotiated maximum rate of return. The right to receive such payment, if any, shall be considered just compensation for the transportation facility or facilities. The full faith and credit of the responsible public entity shall not be pledged to secure any financing of the private entity by the election to take over the qualifying transportation facility. Assumption of operation of the qualifying transportation facility shall not obligate the responsible public entity to pay any obligation of the private entity from sources other than revenues.


§ 33.2-1814. Condemnation.
A. At the request of the private entity, the responsible public entity may exercise any power of condemnation that it has under law for the purpose of acquiring any lands or estates or interests therein to the extent that the responsible public entity finds that such action serves the public purpose of this chapter. Any amounts to be paid in any such condemnation proceeding shall be paid by the private entity.

B. Except as provided in subsection A, until the Commission, after notice to the private entity and the secured parties, as may appear in the private entity's records, and an opportunity for hearing, has entered a final declaratory judgment that a material default has occurred and is continuing, the power of condemnation may not be exercised against a qualifying transportation facility.

C. After the entry of such final order by the Commission, any responsible public entity having the power of condemnation under state law may exercise such power of condemnation, in lieu of or at any time after taking over the transportation facility pursuant to subdivision A 1 of § 33.2-1813, to acquire the qualifying transportation facility or facilities. Nothing in this chapter shall be construed to limit the exercise of the power of condemnation by any responsible public entity against a qualifying transportation facility after the entry by the Commission of a final declaratory judgment order pursuant to subsection B. Any person that has provided financing for the qualifying transportation facility and the private entity, to the extent of its capital investment, may participate in the condemnation proceedings with the standing of a property owner.


§ 33.2-1815. Utility crossings.
A. The private entity and each public service company, public utility, railroad, cable television provider, locality, or political subdivision whose facilities are to be crossed or affected shall cooperate fully with the other in planning and arranging the manner of the crossing or relocation
of the facilities. Any such entity possessing the power of condemnation is hereby expressly granted such powers in connection with the moving or relocation of facilities to be crossed by the qualifying transportation facility or that must be relocated to the extent that such moving or relocation is made necessary or desirable by construction of or improvements to the qualifying transportation facility, which shall be construed to include construction of or improvements to temporary facilities for the purpose of providing service during the period of construction or improvement.

B. Should the private entity and any such public service company, public utility, railroad, and cable television provider be unable to agree upon a plan for the crossing or relocation, the Commission may determine the manner in which the crossing or relocation is to be accomplished and any damages due arising out of the crossing or relocation. The Commission may employ expert engineers who shall examine the location and plans for such crossing or relocation, hear any objections and consider modifications, and make a recommendation to the Commission. In such a case, the cost of the experts is to be borne by the private entity. Any amount to be paid for such crossing, construction, moving, or relocation of facilities shall be paid for by the private entity or any other person contractually responsible therefor under the interim or comprehensive agreement or under any other contract, license, or permit. The Commission shall make a determination within 90 days of notification by the private entity that the qualifying transportation facility will cross utilities subject to the Commission’s jurisdiction.

C. Should the private entity and any locality or political subdivision not be able to agree upon a plan for the crossing or relocation of facilities owned or operated by the locality or political subdivision, then the private entity may request in writing to the Commonwealth Transportation Board (Board), with a copy to the chief executive or chief administrative officer of the locality or political subdivision, that the Board consider the matter pursuant to its authority in § 53.2-308, which shall apply mutatis mutandis to any project pursuant to this chapter, regardless of the highway system or location of the project, if the Board decides to exercise such authority, except, however, that the private entity, and not the Board, shall be responsible for the costs of such crossing, construction, moving, or relocation of such facilities. In the event the Board decides to exercise its authority hereunder, the Board shall issue an order within 90 days of receipt of the request from the private entity.

D. For the purposes of this chapter, “facilities owned or operated by the local government or political subdivision” means any pipes, mains, storm sewers, water lines, sanitary sewers, natural gas facilities, or other structures, equipment, and appliances owned or operated by a locality or political subdivision for the purpose of transmitting or distributing communications, power, electricity, light, heat, gas, oil, crude products, water, steam, sewage or waste, storm water not connected with highway drainage, or any other similar commodity or substance, which facilities directly or indirectly serve the public.


§ 33.2-1816. Police powers; violations of law.
A. All police officers of the Commonwealth and of each affected locality or public entity shall have the same powers and jurisdiction within the limits of such qualifying transportation facility as they have in their respective areas of jurisdiction, and such police officers shall have access to the qualifying transportation facility at any time for the purpose of exercising such powers and jurisdiction. This authority does not extend to the private offices, buildings, garages, and other
improvements of the private entity to any greater degree than the police power extends to any other private buildings and improvements.

B. To the extent the transportation facility is a road, bridge, tunnel, overpass, or similar transportation facility for motor vehicles, the traffic and motor vehicle laws of the Commonwealth or, if applicable, any locality or public entity shall be the same as those applying to conduct on similar transportation facilities in the Commonwealth or such locality or public entity. Punishment for offenses shall be as prescribed by law for conduct occurring on similar transportation facilities in the Commonwealth or such locality or public entity.


§ 33.2-1817. Dedication of assets.
The responsible public entity shall terminate the private entity's authority and duties under this chapter on the date set forth in the interim or comprehensive agreement. Upon termination, the authority and duties of the private entity under this chapter shall cease, and the qualifying transportation facility shall be dedicated to the responsible public entity or, if the qualifying transportation facility was initially dedicated by an affected locality or public entity, to such affected locality or public entity for public use.


§ 33.2-1818. Sovereign immunity.
Nothing in this chapter shall be construed as or deemed a waiver of the sovereign immunity of the Commonwealth, any responsible public entity, or any affected locality or public entity or any officer or employee thereof with respect to the participation in or approval of all or any part of the qualifying transportation facility or its operation, including interconnection of the qualifying transportation facility with any other transportation facility. Localities in which a qualifying transportation facility is located shall possess sovereign immunity with respect to its construction and operation.


§ 33.2-1819. Procurement.
The Virginia Public Procurement Act (§ 2.2-4300 et seq.) shall not apply to this chapter; however, a responsible public entity may enter into an interim or a comprehensive agreement only in accordance with guidelines adopted by it as follows:

1. A responsible public entity may enter into an interim or a comprehensive agreement in accordance with guidelines adopted by it that are consistent with procurement through "competitive sealed bidding" as set forth in § 2.2-4502.1 and subsection B of § 2.2-4510.

2. A responsible public entity may enter into an interim or a comprehensive agreement in accordance with guidelines adopted by it that are consistent with the procurement of "other than professional services" through competitive negotiation as set forth in § 2.2-4502.2 and subsection B of § 2.2-4510. Such responsible public entity shall not be required to select the proposal with the lowest price offer, but may consider price as one factor in evaluating the proposals received. Other factors that may be considered include (i) the proposed cost of the qualifying transportation facility; (ii) the general reputation, qualifications, industry experience, and financial capacity of the private entity; (iii) the proposed design, operation, and feasibility of the qualifying transportation facility; (iv) the eligibility of the facility for priority selection,
review, and documentation timelines under the responsible public entity’s guidelines; (v) local citizen and public entity comments; (vi) benefits to the public; (vii) the private entity’s compliance with a minority business enterprise participation plan or good faith effort to comply with the goals of such plan; (viii) the private entity’s plans to employ local contractors and residents; (ix) the safety record of the private entity; (x) the ability of the facility to address the needs identified in the appropriate state, regional or local transportation plan by improving safety, reducing congestion, increasing capacity, enhancing economic efficiency, or any combination thereof; and (xi) other criteria that the responsible public entity deems appropriate.

A responsible public entity shall proceed in accordance with the guidelines adopted by it pursuant to subdivision 1 unless it determines that proceeding in accordance with the guidelines adopted by it pursuant to this subdivision is likely to be advantageous to the responsible public entity and the public, based on (a) the probable scope, complexity, or urgency of a project; (b) risk sharing including guaranteed cost or completion guarantees, added value, or debt or equity investments proposed by the private entity; or (c) an increase in funding, dedicated revenue source or other economic benefit that would not otherwise be available. When the responsible public entity determines to proceed according to the guidelines adopted by it pursuant to this subdivision, it shall state the reasons for its determination in writing. If a state agency is the responsible public entity, the approval of the Secretary shall be required as more specifically set forth in the guidelines before the comprehensive agreement is signed.

3. Interim or comprehensive agreements for maintenance or asset management services for a transportation facility that is a highway, bridge, tunnel, or overpass, and any amendment or change order thereto that increases the highway lane-miles receiving services under such an agreement, shall be procured in accordance with guidelines that are consistent with procurement through “competitive sealed bidding” as set forth in § 2.2-4302.1 and subsection B of § 2.2-4310. Furthermore, such contracts shall be of a size and scope to encourage maximum competition and participation by agency prequalified contractors and otherwise qualified contractors.

4. The provisions of subdivision 3 shall not apply to maintenance or asset management services agreed to as part of the initial provisions of any interim or comprehensive agreement entered into for the original construction, reconstruction, or improvement of any highway pursuant to this chapter and shall not apply to any concession that, at a minimum, provides for (i) the construction, reconstruction, or improvement of any transportation facility or (ii) the operation and maintenance of any transportation facility with existing toll facilities.

5. Nothing in this section shall require that professional services be procured by any method other than competitive negotiation in accordance with the Virginia Public Procurement Act (§ 2.2-4500 et seq.).


§ 33.2-1820. Posting of conceptual proposals; public comment; public access to procurement records.
A. Conceptual proposals submitted in accordance with subsection A or B of § 33.2-1805 to a responsible public entity shall be posted by the responsible public entity within 10 working days after acceptance of such proposals as follows:

1. For responsible public entities that are state agencies, authorities, departments, institutions,
and other units of state government, posting shall be on the Department of General Services' central electronic procurement website. For proposals submitted pursuant to subsection A of § 33.2-1803, the notice posted shall (i) provide for a period of 120 days for the submission of competing proposals; (ii) include specific information regarding the proposed nature, timing, and scope of the qualifying transportation facility; and (iii) outline the opportunities that will be provided for public comment during the review process; and

2. For responsible public entities that are local public bodies, posting shall be on the responsible public entity's website or on the Department of General Services' central electronic procurement website. In addition, such public bodies may publish in a newspaper of general circulation in the area in which the contract is to be performed a summary of the proposals and the location where copies of the proposals are available for public inspection. Such local public bodies are encouraged to utilize the Department of General Services' central electronic procurement website to provide the public with centralized visibility and access to the Commonwealth's procurement opportunities.

In addition to the posting requirements, at least one copy of the proposals shall be made available for public inspection. Nothing in this section shall be construed to prohibit the posting of the conceptual proposals by additional means deemed appropriate by the responsible public entity so as to provide maximum notice to the public of the opportunity to inspect the proposals. Trade secrets, financial records, or other records of the private entity excluded from disclosure under the provisions of subdivision 11 of § 2.2-3705.6 shall not be required to be posted, except as otherwise agreed to by the responsible public entity and the private entity.

B. In addition to the posting requirements of subsection A, the following shall apply:

1. For 30 days prior to entering into an interim agreement, a responsible public entity shall provide an opportunity for public comment on the proposals. The public comment period required by this subsection may include a public hearing at the sole discretion of the responsible public entity. After the end of the public comment period, no additional posting shall be required.

2. For 30 days prior to the planned issuance of a final request for proposals, a responsible public entity shall provide an opportunity for public comment on the draft comprehensive agreement. The public comment period may include a public hearing at the sole discretion of the responsible public entity.

C. Once the negotiation phase for the development of an interim or a comprehensive agreement is complete and a decision to award has been made by a responsible public entity, the responsible public entity shall (i) post the major business points of the interim or comprehensive agreement, including the projected use of any public funds, on the Department of General Services' central electronic procurement website; (ii) outline how the public can submit comments on those major business points; and (iii) present the major business points of the interim or comprehensive agreement, including the use of any public funds, to its oversight board at a regularly scheduled meeting of the board that is open to the public.

D. Once an interim agreement or a comprehensive agreement has been entered into, a responsible public entity shall make procurement records available for public inspection, in accordance with the Virginia Freedom of Information Act (§ 2.2-3700 et seq.). For the purposes of this subsection, procurement records shall not be interpreted to include (i) trade secrets of the
private entity as defined in the Uniform Trade Secrets Act (§ 59.1-336 et seq.) or (ii) financial records, including balance sheets or financial statements of the private entity that are not generally available to the public through regulatory disclosure or otherwise.

E. Cost estimates relating to a proposed procurement transaction prepared by or for a responsible public entity shall not be open to public inspection.

F. Any inspection of procurement transaction records under this section shall be subject to reasonable restrictions to ensure the security and integrity of the records.

G. The provisions of this section shall apply to accepted proposals regardless of whether the process of bargaining will result in an interim or a comprehensive agreement.


§ 33.2-1821. Jurisdiction.
The Commission shall have exclusive jurisdiction to adjudicate all matters specifically committed to its jurisdiction by this chapter.

1995, c. 647, § 56-573.2; 2014, c. 805.

§ 33.2-1822. Contributions and gifts; prohibition during approval process.
A. No private entity that has submitted a bid or proposal to a public entity that is an executive branch agency directly responsible to the Governor and is seeking to develop or operate a transportation facility pursuant to this chapter, and no individual who is an officer or director of such private entity, shall knowingly provide a contribution, gift, or other item with a value greater than $50 or make an express or implied promise to make such a contribution or gift to the Governor, his political action committee, or the Governor's Secretaries, if the Secretary is responsible to the Governor for an executive branch agency with jurisdiction over the matters at issue, following the submission of a proposal under this chapter until the execution of a comprehensive agreement thereunder. The provisions of this section shall apply only for any proposal or an interim or comprehensive agreement where the stated or expected value of the contract is $5 million or more.

B. Any person who knowingly violates this section shall be subject to a civil penalty of $500 or up to two times the amount of the contribution or gift, whichever is greater. The attorney for the Commonwealth shall initiate civil proceedings to enforce the civil penalties. Any civil penalties collected shall be payable to the State Treasurer for deposit to the general fund.

2010, c. 732, § 56-573.3; 2011, c. 624; 2014, c. 805.

Nothing in this chapter shall be construed to repeal or change in any manner the Virginia Highway Corporation Act of 1988 (§ 56-555 et seq.), as amended. Nothing in the Virginia Highway Corporation Act of 1988, as amended, shall apply to qualifying transportation facilities undertaken pursuant to the authority of this chapter.


§ 33.2-1824. Repealed.
Repealed by Acts 2015, c. 709, cl. 2.
EXECUTION VERSION – DECEMBER 5, 2011

COMPREHENSIVE AGREEMENT

RELATING TO THE DOWNTOWN TUNNEL/MIDTOWN TUNNEL/MARTIN LUTHER KING FREEWAY EXTENSION PROJECT

DATED AS OF DECEMBER 5, 2011

BY AND AMONG

VIRGINIA DEPARTMENT OF TRANSPORTATION,
an Agency of the Commonwealth of Virginia

AND

ELIZABETH RIVER CROSSINGS OPCO LLC,
a Delaware limited liability company
EXECUTION VERSION – DECEMBER 5, 2011

Section 4.02 Term

(a) **Term.** This Agreement will take effect on the Agreement Date and will remain in effect until the first to occur of (i) the 58th anniversary of the Financial Close Date or (ii) the effective date of termination of this Agreement pursuant to Article 20 (such period, the “Term”).

(b) **Extension of the Term for Certain Delay Events.**

(i) The Concessionaire will be entitled to an extension of the Term for the following Delay Events; provided however, that as a condition precedent to such extension, the Concessionaire complies with the notice and claims submission requirements in Article 13:

(A) a Delay Event that delays the Scheduled Tolling and O&M Commencement Date of the Existing Project Assets; or

(B) a Delay Event occurring prior to Substantial Completion of the New Project Assets that delays the Design-Build Work for the New Project Assets.

(ii) Any extension of the Term will be limited to the extra period of time reasonably required to recover from the impact of the loss of Toll Revenues attributable to such Delay Event, minus any cost-savings realized by the Concessionaire due to such Delay Event. Notwithstanding the foregoing, to the extent a Delay Event identified in Section 4.02(b)(i) is also a Compensation Event that entitles the Concessionaire to recover a Net Revenue Impact as part of Concessionaire Damages, the Concessionaire will not be entitled to an extension of the Term for such Delay Event.

**ARTICLE 5**

**TOLLING**

Section 5.01 Tolling of the Project

(a) **Toll Revenues.**

(i) From and after the Tolling and O&M Work Commencement Date for each Project Asset and continuing during the Term, the Concessionaire will have the exclusive right to impose, charge, collect, use and enforce the collection and payment of the Toll Revenues, in accordance with the terms of this Agreement. The Concessionaire will have no right to charge or collect the Toll Revenues, except as expressly authorized by this Agreement. Except as otherwise provided in this Agreement, beginning on the Tolling and O&M Work Commencement Date for each Project Asset and through the end of the Term, the Concessionaire will have the exclusive right, title, entitlement and interest in and to the Toll Revenues for such
Project Asset, subject to the provisions of the Electronic Toll Collection Agreement, a form of which is attached as Exhibit I.

(ii) The Concessionaire acknowledges and agrees that it will not be entitled to receive from the Department any compensation, return on investment or other profit for providing the services contemplated by this Agreement and the other Project Agreements, other than the Public Funds Amount and other payments to the extent and in the manner specified in this Agreement.

(b) Concerning Tolls. The Concessionaire’s rights under Section 5.01(a) are limited by, and conditioned on, compliance with Law and all other provisions in this Agreement, including the following provisions:

(i) subject to Section 33.1-252 of the Code of Virginia, vehicles exempted from tolls thereunder ("Exempt Vehicles");

(ii) vehicles (other than vehicles referred to in Section 5.01(b)(i)) will be entitled to use the Project subject to payment of the applicable tolls;

(iii) the toll rates will be set in accordance with the Toll Rate Schedule attached as Exhibit J; and

(iv) the Concessionaire may charge, debit and collect tolls through open road tolling facilities that comply with Section 5.04 or use remote sensing or other technologies (including global positioning system technology) which must be interoperable with E-ZPass (or any successor to E-ZPass utilized on State Highways at that time) to charge, debit, and collect tolls for actual vehicular use of the Project.

(c) Incidental Charges. Except with respect to Exempt Vehicles, the foregoing authorization to impose, charge, collect and enforce the payment of tolls includes the right, to the extent permitted by Law, and subject to the requirement to be interoperable with the E-ZPass network (and any successor to E-ZPass utilized on State Highways at that time) as set forth in Section 5.01(d), to impose, charge, collect and enforce, with respect to electronic tolling accounts managed by or on behalf of the Concessionaire, the following incidental charges:

(i) except to the extent that such services are provided by the Department pursuant to the Electronic Toll Collection Agreement, reasonable administrative fees for account maintenance, account statements and customer service;

(ii) except to the extent that such services are provided by the Department pursuant to the Electronic Toll Collection Agreement, reasonable amounts for the purchase or rental of transponders or other electronic tolling devices;

(iii) except to the extent that such services are provided by the Department pursuant to the Electronic Toll Collection Agreement, reasonable, refundable security deposits for the distribution of transponders or other electronic toll devices;
EXECUTION VERSION – DECEMBER 5, 2011

(iv) except to the extent that such services are provided by the Department pursuant to the Electronic Toll Collection Agreement, reasonable video sucharges for permitted travel on the Project by vehicles that are not equipped with a transponder or other available equipment allowing the processing of the applicable tolls through the E-ZPass network (or any successor to E-ZPass utilized on State Highways at that time);

(v) reasonable fees, penalties and interest for toll violations, including costs of collection in accordance with Law; and

(vi) other incidental fees and charges reasonable and customary in connection with the services being provided at that time by the Concessionaire; provided, that the amount of any such other incidental fees and charges will not exceed the amount reasonably necessary for the Concessionaire to recover its reasonable out-of-pocket and documented costs and expenses incurred with respect to the items, services and work for which they are levied.

(d) **Interoperability.** From and after the Tolling and O&M Work Commencement Date for each Project Asset and through the end of the Term, the Concessionaire will operate and maintain a toll collection system with respect to such Project Asset which will be interoperable with the E-ZPass network and any successor to E-ZPass utilized on State Highways at that time. If the Department (or its successor) intends to change any State interoperability or compatibility standards, requirements or protocols for toll collection systems, it will endeavor to coordinate with the Concessionaire prior to the implementation of such change so as to minimize the loss of Toll Revenues, disruption and cost to the Concessionaire, but the Department will not be liable in any event for any loss of Gross Revenues, disruption or cost attributable to such change. If the Concessionaire selects an ETTM System other than the system then utilized on other State Highways, it will coordinate with the Department prior to the implementation or any change of such system to ensure interoperability and compatibility with the system then utilized on other State Highways in accordance with the Technical Requirements.

(e) **Toll Collection Administration.** The Concessionaire will be responsible for all toll transaction account management services; provided, however, that the Concessionaire will engage and contract with the Department for the provision of toll transaction account management services in accordance with and for the initial term set forth in the Electronic Toll Collection Agreement in which the Department will perform back-office, customer service and related activities for the Project as it relates to transactions processed through the E-ZPass network (and any successor to E-ZPass utilized on State Highways at that time). In consideration of such services the Concessionaire will pay the Department its customary charges for such services in effect from time to time in accordance with the Electronic Toll Collection Agreement. The Electronic Toll Collection Agreement is subject to renewal pursuant to the terms thereof.

(f) **Violations Processing Services.**

(i) The Department has implemented and maintains a processing system for the enforcement of penalties for toll violations in Virginia for electronic toll collection
systems on State Highways. The Concessionaire may, but is not obligated to, enter into an agreement with the Department to obtain the benefits of such enforcement system, in accordance with the Violations Processing Services Agreement, a form of which is attached as Exhibit K. In consideration of such services, the Concessionaire will pay the Department its customary charges for such services in effect from time to time. For purposes of identifying and apprehending toll violators of the Project, provided it is authorized under Law, and any applicable agreements or arrangements, the Department will make available to the Concessionaire the benefits of any agreements or arrangements which the Department has in place with other state authorities or agencies that provide access to records in their possession relating to vehicle and vehicle owner data, and will coordinate with the Virginia State Police in accordance with Section 9.06(a) with respect to the provision of policing services, emergency services, traffic patrol and traffic law enforcement services on the Project.

(ii) The Concessionaire understands and agrees that, notwithstanding anything to the contrary in this Agreement or any other Project Agreement, the risk of enforcement and collection of tolls and related charges (including user fees and civil penalties and administrative fees) remains with the Concessionaire, and that the Department does not, and will not be deemed to, guarantee collection or collectability of such tolls and related charges to the Concessionaire or any other Person; provided, however, that the foregoing will not limit the Department's obligations or duties under the Electronic Toll Collection Agreement or any other Project Agreement with the Concessionaire.

(iii) While the parties do not anticipate that the Virginia Department of Motor Vehicles will charge the Concessionaire a fee for license plate identification pursuant to the Concessionaire's violation processing services, in the event that the Virginia Department of Motor Vehicles does charge the Concessionaire a fee for license plate identification pursuant to the Concessionaire's violation processing services, the Department agrees to pay the Concessionaire the amount of such fees charged to the Concessionaire by the Department of Motor Vehicles related to the collection of tolls for the Project. Prior to the payment by the Department of such amounts, the Concessionaire will submit to the Department on a monthly basis an invoice to the Department for such fees paid by the Concessionaire, including supporting documentation.

(g) No Continuing Department Obligations. Nothing in this Agreement will obligate or be construed as obligating the Department, or any assignee thereof, to continue or cease collecting tolls after the end of the Term.

Section 5.02 Toll Rates

(a) The toll rates charged to each category of user will be set in accordance with the Toll Rate Schedule and any escalation thereof will comply with the provisions of the Toll Rate Schedule; provided, that the Concessionaire may adopt and implement discount programs and any other promotional incentives agreed upon in writing by the parties in advance of the
implementation of such programs or incentives for different classes or groups of persons using the Project, subject to the provisions of Section 24.01.

(b) The Concessionaire will provide to the Department at least 60 Days prior notice of any planned toll rate adjustment (other than in connection with any temporary promotions, incentives or other discounts agreed by the parties pursuant to Section 5.02(a)). The Concessionaire will provide to the general public at least 45 Days prior notice of any planned toll rate adjustment, through website notice, notices published in newspapers of general circulation in the areas where the Project is located, and through other reasonable means; provided, however, that the expiration of any temporary promotions, incentives or other discounts will not constitute a planned rate adjustment subject to the foregoing 45-Day notice requirement. No increase in toll rates otherwise authorized hereunder may take effect unless the Concessionaire has complied with this Section 5.02(b).

Section 5.03 Changes in User Classifications

(a) The Concessionaire may not change, add to or delete any of the User Classifications without the Department’s express prior written consent pursuant to this Section 5.03.

(b) If the Concessionaire desires to change, add to or delete any of the User Classifications, the Concessionaire will apply to the Department for permission to implement such change, addition or deletion at least 75 Days prior to the proposed effective date of such change. Such application will set forth:

(i) each proposed change, addition or deletion;
(ii) the date each change, addition or deletion will become effective;
(iii) the length of time each change, addition or deletion will be in effect;
(iv) the reason the Concessionaire requests each change, addition or deletion;
(v) the effect each change, addition or deletion is likely to have upon users and traffic patterns;
(vi) a proposed schedule of toll rates reflecting each change, addition or deletion;
(vii) a comprehensive report and analysis of the effect each change, addition or deletion is anticipated to have on the Equity IRR, including the effects on the Base Case Financial Model and on the assumptions and data therein; and
(viii) such other information and data as the Department may reasonably request.

(c) The Concessionaire’s application will be deemed granted without conditions unless within 30 Days after receipt of a completed application the Department advises the
Concessionaire in writing that it has granted the Concessionaire’s application with conditions or denied the Concessionaire’s application. The Department may deny an application or impose conditions in its reasonable discretion, including conditioning approval on adjustment of compensation for the Department pursuant to this Agreement. Without limiting the Department’s discretion, the following matters will be grounds for rejection:

(i) the proposals set forth in the application are not reasonable under the circumstances;

(ii) the supporting documentation is erroneous, incomplete, inconsistent, inaccurate or deficient, or is insufficient to support the proposal; or

(iii) the assumptions of projections set forth in the application are unrealistic.

If the Concessionaire resubmits an application after rejection or imposition of conditions, the above procedures will apply to the resubmitted application.

(d) If the Concessionaire’s application is deemed granted without conditions or is granted subject to conditions acceptable to the Concessionaire, then:

(i) the Concessionaire may implement such change in User Classifications on the effective date set forth in the application, subject to such conditions, if any, imposed by the Department, and subject to first giving notice to the public of the change, addition or deletion in the same manner as a planned toll rate adjustment pursuant to Section 5.02(b); and

(ii) the parties will promptly amend (A) the Toll Rate Schedule to incorporate the change, addition or deletion and (B) this Agreement as necessary in accordance with the accepted conditions.

Section 5.04 User Confidentiality

The Concessionaire will comply with all Laws related to confidentiality and privacy of users of the Project.

Section 5.05 Suspension of Tolls

(a) In addition to its rights under Law, the Department will have the right, in its sole discretion, to order immediate suspension of tolling in the event that any of the Project Assets are designated for immediate use as follows:

(i) as an emergency mass evacuation route based on a declared emergency issued pursuant to Law and tolling has been suspended on other tolled roadways operated by or on behalf of Department within the evacuation route that are being used as emergency mass evacuation routes; or

(ii) as the alternate route for the diversion of traffic from another State Highway temporarily closed to all lanes in one or both directions due to: (A) a declared
emergency issued pursuant to Law or (B) a significant incident involving one or more casualties requiring hospitalization or treatment by a medical professional or one or more fatalities on the affected State Highway from which such traffic is diverted; provided, that suspension of tolls will be limited to the lanes in the direction of the diversion.

(b) The Department will lift any such order given in accordance with Section 5.05(a) as soon as the need for such order ceases. The Department will have no liability to the Concessionaire for the loss of Toll Revenues or the increase in costs or expenses attributable to any such order, and any such increase will be the Concessionaire’s sole financial risk; provided, that with respect to Section 5.05(a)(i), the Department lifts the suspension order over the Project concurrently with the lifting of suspension over all other tolled roadways operated by or on behalf of the Department within the evacuation route.

(c) Each party will provide reasonable assistance to the other party in seeking any available reimbursement from Federal sources for lost Toll Revenues and expenses incurred as a result of a suspension and in pursuing insurance coverage.

Section 5.06 Disposition of Gross Revenues

(a) Gross Revenues will be used first to pay all due and payable operations and maintenance costs, specifically including all amounts due to the Department pursuant to this Agreement (which amounts will be paid on a pari passu basis with all other operations and maintenance costs), before they may be used and applied for any other purpose.

(b) The Concessionaire will not use Gross Revenues to make any Distributions (or to pay any amount payable pursuant to an Affiliate Contract subject to approval but not approved by the Department pursuant to Section 24.02(k)), unless and until the Concessionaire first pays the following:

(i) any undisputed amounts due to the Department pursuant to the terms of this Agreement;

(ii) current and delinquent operating and maintenance costs (including any payments to Affiliates made solely in accordance with the applicable Affiliate Contracts entered into in accordance with Section 24.02(k));

(iii) current and delinquent debt service and other current and delinquent amounts, due under any Concessionaire Debt;

(iv) all Taxes affecting the Project that are currently due and payable or delinquent;

(v) all current and delinquent deposits to any Major Maintenance Reserve Fund, the Handback Reserve Fund and any other reserve contemplated by this Agreement; and
(vi) all current and delinquent costs and expenses for Major Maintenance.

In the event there are any disputed amounts due to the Department pursuant to the terms of this Agreement, the Concessionaire will maintain a cash reserve for such disputed amounts in accordance with GAAP or any other generally accepted accounting principles which are acceptable to the Department as a condition precedent to making any Distribution or payment to an Affiliate. If the Concessionaire makes any Distribution or payment to an Affiliate in violation of this Section 5.06(b), the same will be deemed to be held in trust by such Person for the benefit of the Department and the Collateral Agent, and will be payable to the Department or the Collateral Agent on demand. If the Department collects any such amounts held in trust, it will make them available for any of the purposes set forth above and, at the request of the Collateral Agent, deliver them to the Collateral Agent.

(c) The Concessionaire will have no right to use Gross Revenues to pay any debt, obligation or liability unrelated to this Agreement, the Project, or the Concessionaire’s services pursuant to this Agreement, provided, that this Section 5.06(c) does not apply to or otherwise affect the Concessionaire’s right to make Distributions in accordance with the Concessionaire’s governing instruments and this Agreement and the ability of the recipients thereof to apply the same in their sole discretion, subject to compliance with Section 5.06(b).

Section 5.07 Revenue Risk Related to Traffic Volume

Except for its specific obligations to the Concessionaire under the terms and conditions of this Agreement, the Department will not have any risk or liability related to actual traffic volume and revenue, including but not limited to the risk that actual traffic volume is less than the traffic volume projected in the Base Case Financial Model.

Section 5.08 Value Pricing Pilot Program Compliance

(a) The Department will comply with its obligations to FHWA under Section 1012(b) of the Intermodal Surface Transportation Efficiency Act of 1991, as amended by Section 1216(a) of the Transportation Equity Act for the 21st Century, and Section 1604(a) of the Safe, Accountable, Flexible, Efficient, Transportation Equity Act: A Legacy for Users (collectively, “Value Pricing Pilot Program”), and has entered into the Cooperative Agreement with FHWA.

(b) The Concessionaire will maintain and operate the Project in compliance with the Value Pricing Pilot Program, successor provisions, regulations promulgated thereunder, and the Cooperative Agreement attached as Exhibit L. The Concessionaire will assist the Department with respect to the Department’s auditing and monitoring obligations under the Value Pricing Pilot Program and the Cooperative Agreement by providing access to records and data relating to the Project.
EXECUTION VERSION – DECEMBER 5, 2011

EXHIBIT J

TOLL RATE SCHEDULE

Section 1.  Vehicle Classifications

Pursuant to the Agreement, the Concessionaire will have the right to charge toll rates for
different vehicle classes that will be determined based on the vehicle classifications (“Vehicle
Classifications”) defined in Table J-1 below:

Table J-1: Vehicle Classifications

<table>
<thead>
<tr>
<th>Vehicle Classification</th>
<th>Description</th>
</tr>
</thead>
<tbody>
<tr>
<td>Light Vehicles</td>
<td>Vehicles with up to two axles and six tires, including passenger cars, motorcycles, motorcycles equipped with a sidecar, towing a trailer or equipped with a sidecar and towing a trailer, and 2-axle trucks (4 and 6 tires)</td>
</tr>
<tr>
<td>Heavy Vehicles</td>
<td>Vehicles with three or more axles</td>
</tr>
</tbody>
</table>

Section 2.  Tolling Periods

The Concessionaire will have the right to charge tolls for different time periods within a
day (“Tolling Periods”) defined Table J-2 below:

Table J-2: Tolling Periods

<table>
<thead>
<tr>
<th>Tolling Period</th>
<th>Hours</th>
</tr>
</thead>
<tbody>
<tr>
<td>Peak Period</td>
<td>Every Monday through Friday from 5:30 am eastern time to 9:00 am eastern time and 2:30 pm eastern time to 7:00 pm eastern time*</td>
</tr>
<tr>
<td>Off-Peak Period</td>
<td>All other times not specifically defined as Peak Period</td>
</tr>
</tbody>
</table>

* All times are U.S. eastern standard time or eastern daylight savings time, as applicable.

Section 3.  User Classifications

The parties hereby establish the user classifications (“User Classifications”) for Tolled
Vehicles as set forth in Table J-3 below:
Table J-3: User Classifications

<table>
<thead>
<tr>
<th>User Classification</th>
<th>Project Asset</th>
<th>Vehicle Class and User (if applicable)</th>
<th>Tolling Period</th>
</tr>
</thead>
<tbody>
<tr>
<td>A</td>
<td>Existing Downtown Tunnels, Existing Midtown Tunnel and New Midtown Tunnel</td>
<td>Light Vehicles</td>
<td>Off-Peak Period</td>
</tr>
<tr>
<td>B</td>
<td>Existing Downtown Tunnels, Existing Midtown Tunnel and New Midtown Tunnel</td>
<td>Light Vehicles</td>
<td>Peak Period</td>
</tr>
<tr>
<td>C</td>
<td>Existing Downtown Tunnels, Existing Midtown Tunnel and New Midtown Tunnel</td>
<td>Heavy Vehicles</td>
<td>Off-Peak Period</td>
</tr>
<tr>
<td>D</td>
<td>Existing Downtown Tunnels, Existing Midtown Tunnel and New Midtown Tunnel</td>
<td>Heavy Vehicles</td>
<td>Peak Period</td>
</tr>
<tr>
<td>E</td>
<td>New MLK Extension</td>
<td>Light Vehicles (Tunnel Users)</td>
<td>Off-Peak Period and Peak Period</td>
</tr>
<tr>
<td>F</td>
<td>New MLK Extension</td>
<td>Heavy Vehicles (Tunnel Users)</td>
<td>Off-Peak Period and Peak Period</td>
</tr>
<tr>
<td>G</td>
<td>New MLK Extension</td>
<td>Light Vehicles (Non-Tunnel Users)</td>
<td>Off Peak and Peak Period</td>
</tr>
<tr>
<td>H</td>
<td>New MLK Extension</td>
<td>Heavy Vehicles (Non-Tunnel Users)</td>
<td>Off-Peak Period and Peak Period</td>
</tr>
</tbody>
</table>

Section 4. **Transponder Toll Rate**

Subject to the terms of the Agreement (including any adjustments to the toll rates mutually agreed to by the Department and the Concessionaire in relation to funding secured pursuant to Section 8.11(c)(ii)(A) or 14.01(d) of the Agreement), the maximum transponder toll rate ("Maximum Transponder Toll Rate") for Tolled Vehicles with transponders applicable at any point of time during the Term will be calculated in accordance with the following formula:

\[
\text{Maximum Transponder Toll Rate}_{uc,t} = \text{Base Toll Rate}_{uc,t} \times \text{Cumulative Escalation Index}_t
\]

(except for the period from the Tolling and O&M Work Commencement Date up to, but not including, the Substantial Completion Date, where the Maximum Transponder Toll Rates are the tolls described for this period in Table J-A1 of Attachment 1)

Where:

- Maximum Transponder Toll Rate\(_{uc,t}\) = the maximum toll for Tolled Vehicles with transponders, in U.S. dollars, for User Classification \(uc\) and year \(t\) Base Toll Rate\(_{uc,t}\) = the maximum Base
Toll Rate for Tolled Vehicles with transponders for User Classification uc and for year t as provided in Table J-A1 of Attachment 1

Cumulative Escalation Index\_t = (1 + Applicable Escalation Factor\_t) \times Cumulative Escalation Index\_\text{Index\_t,1}, for the index year t, which is calculated on the New Midtown Tunnel Substantial Completion Date and each [date] beginning after the first anniversary of the Substantial Completion Date of the New Midtown Tunnel:

Where:

the Cumulative Escalation Index\_\text{Index\_t,1} = 1; and

the Applicable Escalation Factor\_t = the greater of (i) \{(CPI\_t / CPI\_\text{Index\_t,1}) - 1\} or (ii) \{3.50\%\}

CPI\_t = the most recently published Consumer Price Index as of the beginning of t, and CPI\_\text{Index\_t,1} = the most recently published Consumer Price Index as of the date 12 months prior to the beginning of t.

Section 5. Non Transponder Toll Rate

(a) Subject to the terms of the Agreement (including any adjustments to the toll rates mutually agreed to by the Department and the Concessionaire in relation to funding secured pursuant to Section 8.11(c)(ii)(A) or 14.01(d) of the Agreement), the Concessionaire will have the right to impose, charge, collect and enforce a surcharge for Tolled Vehicles without a transponder ("Surcharge"). The maximum non transponder toll rate ("Maximum Non Transponder Toll Rate") for Tolled Vehicles without transponders applicable at any point of time during the Term will be calculated in accordance with the following formula:

Maximum Non Transponder Toll Rate\_\text{uc, t} = (Base Toll Rate\_\text{uc, t} + Surcharge\_\text{uc, t}) \times Cumulative Escalation Index\_t

Where:

Maximum Non Transponder Toll Rate\_\text{uc, t} = the maximum toll for Tolled Vehicles without transponders, in U.S. dollars, for User Classification uc and for year t

Surcharge\_\text{uc, t} = the maximum Surcharge for Tolled Vehicles without transponders for User Classification uc as provided in Table J-A2 of Attachment 1

Cumulative Escalation Index\_t = Cumulative Escalation Index\_\text{Index\_t,1} as described in Section 4 of this Exhibit J.

Section 6. Rounding of Toll Rates

The resulting Maximum Transponder Toll Rate and Maximum Non Transponder Toll Rate for each User Classification will be rounded up to the next greatest hundredth of a dollar denomination ($0.01); provided however, that any calculation made pursuant to Section 4 of this Exhibit C shall be made as if any such increase had not occurred.

Section 7. Toll Rate Changes
EXECUTION VERSION – DECEMBER 5, 2011

Subject to Sections 5.02 and 5.03 of the Agreement, the Concessionaire will have the right to change toll rates for each User Classification at any time; provided, that (a) the toll rates charged do not exceed the applicable Maximum Transponder Toll Rate and Maximum Non Transponder Toll Rate for each User Classification, and (b) the toll rates charged are rounded up to the next greatest hundredth of a dollar denomination ($0.01).

Section 8. Definitions

Capitalized terms used but not otherwise defined in this Exhibit J have the respective meanings set forth in Exhibit A to the Agreement. In addition, the following terms have the meanings specified below:

Non-Tunnel Users means vehicular traffic traveling through the New MLK Extension that does not fall under the definition Tunnel Users.

Tolled Vehicles means Light Vehicles and Heavy Vehicles, excluding Exempt Vehicles.

Tunnel Users means vehicular traffic traveling through the New MLK Extension and one of the following within a 30-minute period: (a) the Existing Midtown Tunnel, (b) the New Midtown Tunnel, or (c) the Existing Downtown Tunnels.
Table J-A1: Applicable Maximum Base Toll Rate for Tolled Vehicles with transponders in un-inflated U.S. dollars.

<table>
<thead>
<tr>
<th>Classification</th>
<th>Classification</th>
<th>Period</th>
<th>Substantial Completion Date</th>
<th>m2</th>
<th>m3</th>
<th>m4</th>
<th>m5</th>
<th>m6</th>
<th>m7</th>
<th>m8</th>
<th>m9</th>
<th>End of Term</th>
</tr>
</thead>
<tbody>
<tr>
<td>B Light Vehicle</td>
<td>Peak</td>
<td>$1.840</td>
<td>$1.850</td>
<td>$1.860</td>
<td>$1.870</td>
<td>$1.880</td>
<td>$1.890</td>
<td>$1.900</td>
<td>$1.910</td>
<td>$1.920</td>
<td>$1.930</td>
<td></td>
</tr>
<tr>
<td>D Heavy Vehicle</td>
<td>Peak</td>
<td>$1.360</td>
<td>$1.370</td>
<td>$1.380</td>
<td>$1.390</td>
<td>$1.400</td>
<td>$1.410</td>
<td>$1.420</td>
<td>$1.430</td>
<td>$1.440</td>
<td>$1.450</td>
<td></td>
</tr>
<tr>
<td>E Light Vehicle</td>
<td>Off Peak &amp; Peak</td>
<td>$0.500</td>
<td>$0.500</td>
<td>$0.500</td>
<td>$0.500</td>
<td>$0.500</td>
<td>$0.500</td>
<td>$0.500</td>
<td>$0.500</td>
<td>$0.500</td>
<td>$0.500</td>
<td></td>
</tr>
<tr>
<td>F Heavy Vehicle</td>
<td>Off Peak &amp; Peak</td>
<td>$1.500</td>
<td>$1.500</td>
<td>$1.500</td>
<td>$1.500</td>
<td>$1.500</td>
<td>$1.500</td>
<td>$1.500</td>
<td>$1.500</td>
<td>$1.500</td>
<td>$1.500</td>
<td></td>
</tr>
<tr>
<td>G Light Vehicle</td>
<td>Off Peak &amp; Peak</td>
<td>$1.000</td>
<td>$1.000</td>
<td>$1.000</td>
<td>$1.000</td>
<td>$1.000</td>
<td>$1.000</td>
<td>$1.000</td>
<td>$1.000</td>
<td>$1.000</td>
<td>$1.000</td>
<td></td>
</tr>
<tr>
<td>H Heavy Vehicle</td>
<td>Off Peak &amp; Peak</td>
<td>$3.000</td>
<td>$3.000</td>
<td>$3.000</td>
<td>$3.000</td>
<td>$3.000</td>
<td>$3.000</td>
<td>$3.000</td>
<td>$3.000</td>
<td>$3.000</td>
<td>$3.000</td>
<td></td>
</tr>
</tbody>
</table>
Table J-A2: Applicable Maximum Surcharge for Tapped Vehicles without transponders in un-inflated U.S. dollars.

<table>
<thead>
<tr>
<th>User</th>
<th>Vehicle</th>
<th>Tapping</th>
<th>Ongoing until</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td></td>
<td></td>
<td>Commencement Date</td>
</tr>
<tr>
<td></td>
<td></td>
<td></td>
<td>in m, but not including the Substantial Completion Date</td>
</tr>
<tr>
<td>C</td>
<td>Heavy Vehicle Off Peak</td>
<td>$3.150</td>
<td>$3.150</td>
</tr>
<tr>
<td>D</td>
<td>Heavy Vehicle Off Peak</td>
<td>$3.150</td>
<td>$3.150</td>
</tr>
<tr>
<td>E</td>
<td>Light Vehicle Off Peak &amp; Peak</td>
<td>$0.000</td>
<td>$0.000</td>
</tr>
<tr>
<td>F</td>
<td>Heavy Vehicle Off Peak &amp; Peak</td>
<td>$0.000</td>
<td>$0.000</td>
</tr>
<tr>
<td>G</td>
<td>Light Vehicle Off Peak &amp; Peak</td>
<td>$2.000</td>
<td>$2.000</td>
</tr>
<tr>
<td>H</td>
<td>Heavy Vehicle Off Peak &amp; Peak</td>
<td>$2.000</td>
<td>$2.000</td>
</tr>
</tbody>
</table>
Bacon's Rebellion
Reinventing Virginia for the 21st Century

Lessons from the Pocahontas Parkway Fiasco

Posted on June 22, 2012 by James A. Bacon | Leave a comment

by James A. Bacon

Transurban, the majority investor in the Pocahontas Parkway (Route 895) has learned the hard way that human settlement patterns hit a major inflection point during the 2007-2008 recession. Unlike most planners and politicians in Virginia, whose policy prescriptions presume that nothing fundamental has changed, the Australian infrastructure company has taken a $181 million write-off, effectively reducing its equity investment in the project to zero.

Said Transurban CEO Chris Lynch:

*The Pocahontas investment was made in 2006 on the expectation of significant housing and other development along the corridor resulting in growing traffic volumes and revenues. That development, due to specific issues in the local area and the continuing difficult macroeconomic environment, has not yet manifested and is now expected to take longer to eventuate, resulting in a significantly reduced population of potential toll paying customers.*

*Based on revised traffic forecasts, Transurban now believes Pocahontas' future cash flows will be significantly impaired relative to the original forecasts.*

The 8.8-mile highway, which creates a southeastern bypass for the Richmond metropolitan region, was promoted as an economic development project and opened in 2002. Toll revenues did not live up to forecasts, however, and the project was close to defeasing on its bonds. Transurban took over in 2006, recapitalized the project and began operating the toll road. Now it, too, has lost its shirt.

The significance of this announcement cannot be over-stated.

**Lesson No. 1: Beware transportation projects that are justified on the basis of anticipated economic development.** I'm talking to you, Loudoun County supervisors, as you prepare to approve the new financing structure for the Rail-to-Dulles project! I'm talking to you, members of the Commonwealth Transportation Board (CTB), which just approved a subordinated $80 million loan for the U.S. 460 Connector in the expectation of a Panama Canal-sparked port boom! The hoped-for traffic may not materialize.
Lesson No. 2: Beware all transportation projects built to serve the metropolitan periphery. There ain’t no more growth heading out there any time soon! The limited development that is taking place is shifting closer to the urban core. It’s re-development, really, recycling aging neighborhoods and commercial areas into walkable, mixed-use communities for which there is considerable pent-up demand. There is very little demand for conventional development on the metropolitan periphery.

Corollary to Lesson No. 2: Beware all major real estate projects built on the metropolitan periphery. I’m talking to you, CTB members, who just approved an $80 million loan to fund transportation elements of a $2 billion mixed-use mega-project in Loudoun County.

Lesson No. 3: Let the private sector shoulder the risk of speculative transportation projects. I bear Transurban no ill will, but I’m really glad that it’s Transurban taking the hit and not Virginia taxpayers. The road never should have been built in the first place. But if the state is bound and determined to get speculative roads built, then the deals should be structured so that private-sector partners assume the risk and pocket the reward. The Commonwealth of Virginia should not be in the business of making speculative infrastructure deals.

Lesson No. 4: Public-private partnerships create transparency. As a publicly traded company, Transurban must use Generally Accepted Accounting Procedures and report material write-offs like the Pocahontas Parkway. There is no such accounting or accountability for non-tolled state projects, whose accounting is opaque and inaccessible to outsiders.

For purposes of comparison, consider Rt. 288, an untolled section of the Richmond metropolitan beltway built entirely with state dollars — including many tens of millions from the General Fund — just a few years later. Rt. 288, too, was touted for its “economic development” benefits. Has it lived up to expectations in light of the real estate crash? Do traffic counts meet projections? Is there even any way to measure the success or failure of the project? No, there is not. The public is left in total ignorance, decision makers are not held accountable, and critical questions never get asked.
Picking up the Pieces of the U.S. 460 Fiasco

by James A. Bacon

Transportation Secretary Aubrey Layne said today he suspended work on the U.S. 460 Connector project because he didn’t want to run the risk of paying the contractor millions of dollars for work on a project that might be radically revised. The state of Virginia has spent $300 million already on the proposed 55-mile interstate-grade highway with no guarantees that it can obtain the necessary environmental permits to push the $1.4 billion project forward — or get its money back if the permits don’t come through.

"There’s no point in spending money on a road we don’t know will get built," he said at the monthly Commonwealth Transportation Board (CTB) meeting. "There will be five alternatives looked at, including a no-build option."

As a member of the CTB before he joined the McAuliffe administration as transportation chief, Layne had been one of the project’s most vocal backers. He reiterated his support today. "I still believe in the purpose and need — increased mobility in the corridor, support of the port, hurricane evacuation," he said.

But Layne suspended work on the mega-project late last week, citing concerns that the U.S. Army Corps of Engineers might not give its approval. The Corps had expressed concerns from the very beginning about the impact of the proposed alignment on wetlands, he said. Early on, the best guess was that 200 acres of wetlands might be disrupted. But soil borings showed that nearly the entire route transversed wetlands. "It was discovered that it could be 480 acres," he said.

When Layne took over as transportation secretary, he explained, he adopted a different perspective from his previous role as CTB member, advocate and chairman of the 460 Funding Corporation, the entity created to float toll-backed bonds to help pay for the project. As chairman of the funding corporation, he had a fiduciary responsibility to look out for the interests of the bond holders. As transportation secretary, he has a responsibility to look out for the interests of citizens and taxpayers.
To date the state has spent roughly $300 million on the project. VDOT accounts for roughly $60 million in project management costs. The contractor, US 460 Mobility, has spent about $100 million on environmental work, and the state has paid it roughly $140 million for “mobilization,” preparing for construction by setting up an office and hiring crews. He doesn’t have any more environmental work for the contractor, and he doesn’t want to continue paying millions of dollars for months on end when there is no certainty that the proposed route will win regulatory approval.

Problems with P3s. CTB members were generally supportive yesterday of Layne’s decision. Earlier this week, however, former Transportation Secretary Sean Connaughton was quoted in the Washington Post as saying, “Preliminary studies show around 400 acres impacted over a 55-mile corridor, which is fairly small given the size and scope of the project. The current Administration needs to complete the supplemental study, design a wetlands mitigation and avoidance strategy, get the Army Corps permit, and build the road. It’s that simple.” He also said there was “no problem with the structure of the contract” with US 460 Mobility.

In a lengthy explanation of the background to the deal, Layne offered a different spin. “From my viewpoint, it was people in their particular positions making the best decisions they had with the data they had,” he said. However, he alluded to the inherent tension between confidentiality and openness in the Public Private Partnership (P3) process.

The process was open in the early stage when an advisory group studied broad approaches to the 460 corridor. Based on that group’s recommendations, three different consortia submitted their proposals on how to finance and build the highway. In the end, the McDonnell administration decided they were all too expensive and took over ownership of the proposed highway, enlisting US 460 Mobility only to design and build the project. Those negotiations occurred totally in secret, as allowed by the P3 law. The McDonnell administration was not required to obtain CTB approval to sign the contract (although the CTB did have to allocate money for the project), and VDOT gave the CTB what Layne characterized as a “high-level briefing.” “The CTB,” he added, “was not privy to the terms of the contract.”

W. Sheppard Miller III expressed frustration with the process that he did not voice publicly at the time: “I have been very uncomfortable on a couple of projects we had. I didn’t have the data I needed to make a decision. At the same time, I was asked to vote. Don’t ask me to do something without giving me the information I needed. I voted like everyone else. I didn’t like it. I was very uncomfortable at the time. I don’t want to be in that position again.”

Is the money gone for good? CTB members also were concerned what financial exposure the state might have after suspending work on the project. The state financed some of its expenditures by issuing $90 million in toll-backed bonds so far. But delays in the building the toll road means there will be delays on collecting toll revenue to pay interest and principle on the bonds. Would the funding corporation be able to meet its obligations?

John W. Lawson, VDOT’s chief financial officer, said that the bond deal was structured to give the Commonwealth a $9 million “ramp up reserve fund.” Also, he said, the Virginia Transportation
Infrastructure Bank has extended an $80 million line of credit. “There are substantial resources in place to support the debt service.”

It is unclear whether the state can claw back some of the money it paid US 460 Mobility. Layne said it might be possible to negotiate something with the contractor, although there are no guarantees the state could recoup its money because the contractor “was acting in good faith that the project would proceed.” At the same time, the state has to weigh the possibility of damages to the contractor from suspending the work.

“Should we have had a better assessment of risk when the contract was signed?” he asked rhetorically in speaking to Bacon’s Rebellion. “That’s subject to debate.”

There are currently no comments highlighted.

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  - May 27, 2015
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**16 RESPONSES TO “PICKING UP THE PIECES OF THE U.S. 460 FIASCO”**

**salz** | March 19, 2014 at 10:50 pm | Log in to Reply

Again, see Penn State law professor Ellen Dannin’s “crumbling Infrastructure, Crumbling Democracy: Infrastructure Privatization Contracts and Their Effects on State and Local Governance.”

Today, it was apparent that Sec Layne was connecting some terrifying dots, implying that some, at least, of the insights Ms Dannin has discovered over a dozen prior P3 contracts are showing up in Connaughton’s 460 contract with the 460 Mobility Partners.

**larryg** | March 20, 2014 at 6 39 am | Log in to Reply

...
Bacon's Rebellion
Reinventing Virginia for the 21st Century

The Great U.S. 460 Swamp
Posted on July 9, 2014 by James A. Bacon | 13 Comments

VDOT had loads of warning that wetlands could kill the U.S. 460 project but the state charged ahead with a design-build contract that everyone knew could explode. The state has spent $300 million it may never recoup.

by James A. Bacon

Weeks after the release of the “Special Review of the U.S. Route 460 Corridor Improvements Project,” submitted last month to Transportation Secretary Aubrey Layne, important questions remain about how the Commonwealth could have paid $250 million to US Mobility Partners, the design-build contractor on the $1.4 billion project, and run up another $50 million in expenses without turning a single spade of dirt. The Special Review is a dense and tangled document but one important theme comes through loud and clear: The wetlands controversy that caused the McAuliffe administration to suspend the project this March was bubbling on the front burner when the McDonnell administration put the project into overdrive two years ago. VDOT and the McDonnell transportation team had ample warning of the project’s problems and took no effective action to defuse them.

The Army Corps of Engineers (USACE) had been expressing reservations for years about the route preferred by the Virginia Department of Transportation (VDOT) for the 55-mile highway project, and it reiterated those warnings repeatedly as McDonnell’s transportation team lined up funding for the project and signed a contract with US Mobility Partners to design and build the highway. The inability of VDOT to obtain a USACE wetlands permit on a timely basis prompted the McAuliffe administration to put the project on ice in March until the differences could be resolved.

The question before the public is how did VDOT find itself paying tens of millions of dollars monthly to US Mobility Partners to mobilize for a massive construction project while knowing that the USACE was unlikely to issue the necessary wetlands permits — indeed, without even having submitted the documentation to begin a formal USACE review! Unless we know what went wrong and take appropriate corrective measures, citizens and taxpayers have no assurance that comparable fiascos will not occur again in future mega-projects.

The Special Review, prepared by VDOT and the State Inspector General’s Office, is extremely cautious in drawing conclusions. But the report does provide a wealth of documentation, primarily in the form of emails involving senior VDOT employees and members of the Office of Transportation Public Private
Partnership (OTP3) staff who structured the public-private partnership and negotiated the contract. As I noted in a past post, deciphering what transpired is like peeling back the layers of an onion. For now, I am focusing upon the onion peel documenting the wetlands controversy between VDOT and the Army Corps of Engineers.

**A long running disagreement.** The origins of the wetlands controversy predate the McDonnell administration. VDOT had been noodling the proposed Interstate-grade highway for years, and it had identified a preferred route, one that would swing north of the existing U.S. 460 highway, a four-lane highway with top speeds of 55 miles per hour interrupted by numerous stoplights and plagued with local traffic. VDOT argued that only a limited access highway could provide the mobility that was needed for trucks serving the Virginia ports and in the event of a hurricane evacuation, and that the existing route would be impractical to upgrade. But that was not a decision it could render on its own. VDOT’s appraisal had to pass muster with the USACE, which is tasked with ensuring that any route chosen is the “Least Environmentally Damaging Practical Alternative.” The USACE preferred a route with a lower environmental impact, preferably one grafted onto the existing U.S. 460 with bypasses around the hamlets along the highway.

The Special Review correspondence between VDOT and USACE details the disagreement as far back as 2003. As the authors conclude from their review of the documentation:

"The correspondence ... indicates an ongoing, decade long, discussion between VDOT and the Corps over whether CBA-1 (VDOT's preferred alternative) or CBA-2 (the Corps' preference) was the best location for the 460 project. Although VDOT employees have indicated nothing unusual about this discussion, the length of the ongoing discussion seems unusual to us, particularly since no resolution as to an accepted route was reached."

The discussions were ongoing in 2012 when the McDonnell administration was moving heaven and earth to move the project forward. As various emails cited in the review make clear, Governor McDonnell regarded the Route 460 corridor as his "number 1 transportation priority," and Transportation Secretary Sean Connaughton rode herd on the VDOT bureaucracy to meet the goal of closing the deal by the end of the year.

By mid-2012, Connaughton and VDOT were closing in on a deal structure for the public-private partnership but had not resolved the environmental issues. In a letter dated May 30, 2013, Kimberly Prisco-Baggett, chief of USACE’s Eastern Virginia regulatory section, wrote the following to VDOT’s environmental project manager:

"We are concerned that the project has moved ahead with CBA 1 (VDOT’s preferred route alignment) as the alternative, and that although seven years have passed since we indicated that CBA 2 appears to be the [Least Environmentally Damaging Practical Alternative], neither FHWA (the Federal Highway Administration) nor VDOT has requested to meet with us to discuss this apparent conflict. It is not helpful to the public, or any potential private-public partners, not to address this critical matter before incurring additional expense and delays associated with pursuing a project that may not be permissible."
In an email chain between June 7 and July 13, 2012, Morteza Farajian, program manager with OTP3 (the public-private partnership office) warned senior VDOT officials that the three construction consortia bidding for the project were getting nervous about the unresolved permitting issue:

*I have received serious concerns from our Offerors in regard to the Comments from the Corps of Engineers on the Route 460 reevaluation. They would like to know where we stand today and how we will resolve the issue with the Corps of Engineers and FHWA. They emphasized that this is a huge risk to the procurement and they might stop working on this procurement if the issue between VDOT and COE is not resolved.*

And in an emailed dated June 12, Farajian said: “VDOT will have to assume all cost risk for a change like this to the project after financial close and make it clear in the [Comprehensive Agreement] and financing documents.”

In its own internal risk assessment, OTP3 listed a 50% probability that VDOT and/or the contractor would fail to obtain a permit in a timely manner. By way of explanation, the assessment said, “Letter from Army Corps said they continued to disagree with FHWA that they had selected the least damaging practical alternative. This increases the likelihood the concessionaire will have to provide additional information regarding impacts/compensation.”

On August 16, OTP3 received a warning from an attorney with the Allen & Overy LLP law firm that two private-sector consortia “have indicated that a 30-month trigger for the [USACE] permit does not provide them with enough time to perform construction work. ... At least one Offeror also expressed concern about the possibility that a permit is never issued. They have asked for a cut-off date. ... Depending on the response from [USACE] progressing to financial could result in significant risk being assumed by VDOT.” These and other risks were reiterated in an OTP3 memo to Charlie Kilpatrick and John Lawson, VDOT’s chief deputy commissioner and CFO.

Later that month, VDOT got more discouraging news. HDR Engineering, hired to take a more detailed look at the proposed 460 route found that previous estimates of wetlands impact had been underestimated: “Or average there are about 65% more wetlands within the study area than are mapped.” The findings suggested that the actual wetlands impact would not be 129 acres, as previously believed, but 213 acres.

The drive to close the deal. As the time neared for VDOT to pick one of the three groups vying for the design-build contract, US 460 Mobility Partners (which would end up winning the contract) clearly delineated the wetlands risks in its Technical Proposal. “The wetlands impacts estimated to date may be underestimated. ... The risk remains that obtaining a permit from [USACE] will be extremely challenging and could require more work than anticipated for a project of similar magnitude.”

By early October, according to the Special Review, VDOT was discussing the purchase of wetland credits from private mitigation banks. In an October 5 email, William Walker, chief of USACE’s regulatory branch, said that such credits might be an acceptable offset but warned that they might not. “Recent
information indicates a potentially sizable increase in impacts to waters of the US over those addressed” in a years-old Environmental Impact Statement.

That was the state of affairs on October 17 when Charlie Kilpatrick, deputy highway commissioner, made a presentation to the Commonwealth Transportation Board summing up the business terms of the agreement that VDOT was consummating with US 460 Mobility Partners. While he disclosed everything he was statutorily required to, he said nothing about the ongoing permitting issues. Both Transportation Secretary Sean Connaughton and Virginia Highway Commissioner Gregory Whirley attended the meeting but neither saw fit to say anything either. The board proceeded to vote to issue up to $425 million in tax-free bonds to help underwrite the cost of constructing the highway. US 460 Mobility Partners was selected the same day as the project’s design-build contractor.

But the wetlands issue didn’t go away. John Lawson, VDOT’s CFO, was involved with the task of compiling information for submission to bond buyers. In a November 14 email to Connaughton and others, Lawson wrote, “As we move to closing the Rt. 460 deal and continue to work with the Corps on the permitting issue, I am providing the detailed Funding Corporation bond issuance schedule as prepared by the underwriters. ... As discussed, obtaining written commitment from the Corps of Engineers that the project is permissible is critical to the project and the schedule.”

Connaughton’s response: “Close the deal!”

Meanwhile, Kilpatrick still was pressing VDOT’s case with the Army Corps. In a letter dated November 20, he argued that VDOT’s preferred route swinging north of the existing 460 was the best route for improving safety, accommodating freight and reducing travel delays. The northern route would allow for wider lane and shoulder widths appropriate for large vehicles and high-speed traffic. “We hereby request that the Corps concur in this determination and withdraw and earlier determination otherwise.”

The next day, William Walker, chief-regulatory branch with the Army Corps, responded with a wishy-washy statement to the effect that the routes preferred by both VDOT and the Army Corps would result in “substantial and similar impacts” to U.S. waters. Based on a comparison of recently provided highway designs, “It does not appear that the [USACE-preferred] alignment would necessarily produce a lesser environmentally damaging practicable alternative.” In other words, there was no way of knowing at that point which design would have the least environmental impact.

However, that equivocal statement came with a big caveat. VDOT would have to submit an application for a permit, which would have to undergo a public interest review. “We have not initiated the required public interest review nor do we have sufficient information to complete the required [Clean Water Act] analysis,” Walker wrote. “Should plans change or new details come to light during the permit review process, VDOT and/or its contractor may be required to provide additional information and assessment.”

Kilpatrick forwarded Walker’s letter to Connaughton with the comment, “I hope this satisfies bond counsel.”

Connaughton’s response: “Let’s get to close!”
On December 20, VDOT formally executed the Comprehensive Agreement with US 460 Mobility Partners. It is not clear from the Special Review how much exposure to an adverse permitting outcome the Commonwealth took on in order to close the deal.

Connnaughton emailed key members of the VDOT and OTP3 teams: “Great work on getting the 460 deal done! Congratulations and thanks. ... This was one of the Governor’s top priorities and it wouldn’t have been accomplished without your hard work and dedication.”

**Things fall apart.** At that point, US 460 Mobility Partners began submitting periodic invoices to VDOT for payment. The first invoice, payable Feb. 8, 2013, was for $36.7 million. Over the course of the next year or so, the contractor would submit 15 applications for payment and VDOT would deem $250 million eligible for payment. None of the money went to actual construction work. It went instead to cover “insurance, bonds, pre-execution, mobilization, and general construction management.” Mobilization work covered preparatory operations such as moving personnel and equipment to the project site, paying bonds and insurance premiums, and setting up the contractor’s offices, buildings and other facilities. The Special Review found the project expenditures “reasonable,” as defined by the terms of the contract.

While US 460 Mobility Partners was mobilizing its construction team, VDOT was making little progress with the Army Corps. Tom Walker, with the USACE regulatory branch, wrote another letter on Feb. 13, 2013:

> Recent information suggests that design and acquisition for this project is moving ahead rapidly. As you know we have yet to receive an application requesting authorization for discharges of fill associated with this project. Therefore, I find it important to reiterate some of our key concerns.

In addition to the old concerns, Walker raised a new one.

> In November 2012, VDOT presented a new eight-lane design for [upgrading the existing 460 alignment], stating this design, not the design included in the EIS (Environmental Impact Statement), would be the minimum necessary for [the alternative] to adequately address the purpose and need. This design had not previously been discussed and was not reviewed in the EIS. ... To complete the necessary evaluation VDOT and/or its contractor must provide information sufficient for the Corps to determine whether this new, larger alignment would be the minimum necessary to meet the agreed upon purpose and need.

> Any purchase of right-of-way, commitment of resources, or construction activities conducted prior to our permit decision is at your risk and may not be considered in our analysis.

Connnaughton’s reaction? Go on a P.R. offensive. In a July 10 email to Kilpatrick, he wrote that the USACE actions and VDOT’s response likely would leak into the public domain. “We need to be prepared to respond aggressively.” He suggested blasting out a letter to Walker, scheduling a meeting with the senior regional Army Corps official, meeting with Virginia congressmen, reaching out to local officials along the
proposed route, and developing a media response plan “The message must be that the [USACE] is trying to destroy southside Virginia along the existing 460 and destroy the environment.”

Kilpatrick wrote a letter back to Walker complaining of the onerous nature of USACE’s requests.

VDOT reiterated that your alternative facility [along the existing 460 alignment] costs substantially more than the selected build alternative (preferred by VDOT); has equal or greater wetland and environmental impacts than the selected alternative; will have significant negative impacts of local communities, citizens and businesses; and will lead to loss of access and a reduction in traffic flow between towns.

Unfortunately, our concerns do not seem to be taken seriously, as you have requested plan layouts for the entire 55 mile corridor in order to independently evaluate the potential impacts to individuals properties (and the subsequent need for parallel secondary roadways to accommodate local traffic). ... We are extremely concerned that the Corps permitting staff is attempting to make access determinations in the abstract.

On August 5, Walker wrote another letter, raising yet another concern. Wetlands mapping conducted since the beginning of the year indicated that previous projections had been off by as much as 50%. “It has become even clearer that the wetland impacts may be substantially higher than the substantial impacts previously projected.”

As emails make clear, Connaughton’s focus around this time was to apply political pressure to avoid the necessity of a protracted and risky regulatory review, which by this point, could include a Supplementary Environmental Impact Statement. Among other initiatives, VDOT began work on a hurricane evacuation study that would support the advantages of the VDOT-preferred alternative route. At some unspecified point during the fall of 2013, the administration also pressed VDOT to buy Right of Way and “move dirt” in areas not subject to the Army Corps permit, according to an overview of the project presented earlier this year.

Yet another problem surfaced in mid-October. HDR Engineering, the company that had performed some of the detailed wetlands work, expressed concern that US 460 Mobility Partners had made “inappropriate” use of its findings in communications during the bond tender phase.

The information was provided to the offerers during the tender phase to demonstrate that there are substantially more wetlands along both alignments than was estimated in the EIS. When the information was provided, it was noted that it was for informational purposes only. Any use of the information was solely at the risk of the offerors. In HDR’s report, the percent difference was never extrapolated out to the whole project. ... This dramatic variability in what was observed in the field as opposed to what was mapped by NWI should have clearly alerted anyone with knowledge of wetlands in the region to the fact that they needed to do a serious evaluation of all readily available resources to be able to more accurately estimate the effort that would be required to delineate the wetlands along the preferred alignment.
In October, VDOT, the Army Corps and the Federal Highway Administration negotiated a scope of Supplemental Environmental Impact Statement to review alternate routes. On Oct. 29, US 460 Mobility Partners notified officials that a requirement for a Supplementary Environmental Impact Statement (SEIS) would undermine its ability to complete the project within the parameters of the design-build agreement.

Up until this point, despite lingering doubts, US 460 MP has moved forward as if the SEIS were not taking place, going so far as to request the scheduling of a public hearing that all concerned parties know will not take place. US 460 MP is being forced ... to continue design effort for an alignment likely to be significantly altered as a result of the SEIS process, wasting time, resources and money. The failure of VDOT to obtain approval of [the VDOT-preferred route] ... moreover, is the driving force behind all the delays that will affect this Project and indeed now is causing the USACE to perform a more stringent alternatives analysis than otherwise would have been necessary during the permit review process. It is inefficient and unproductive for US 460 MP to continue to operate as if these issues, beyond its control and outside of its contractual responsibility, are not taking place.

By that time, the McDonnell administration was drawing to a close and the project was fast unraveling. There is no indication in the Special Review report of substantive responses to US 460 Mobility’s concerns. The project was adrift. In one email, Kilpatrick had to inform VDOT CFO Lawson that the 460 project was still alive. “Yes... We’re still moving."

In January 2014, Governor Terry McAuliffe took office and appointed Aubrey Layne as transportation secretary. The Special Review does not document correspondence that took place when he came on board, but in March Layne effectively suspended the project until the wetlands issues could be resolved. By that point, VDOT had paid $250 million to US 460 Mobility Partners and racked up nearly $50 million in internal expenses on the project. Layne said that the state could face $100 million to $200 million in additional exposure.

**Bacon’s bottom line:** The Special Review provided a valuable service in assembling the correspondence but it was exceedingly timid in drawing conclusions: Regarding the disagreement between VDOT and USACE, the authors wrote, “The length of the ongoing discussion seems usual to us, particularly since no resolution as to an accepted route was reached.” They then offered some milquetoast recommendations urging VDOT to be more proactive in settling environmental controversies earlier in project life cycles.

But the report leaves many important questions unanswered.

- **Why** did VDOT fail to reach an agreement with the Army Corps of Engineers? It was one thing to procrastinate when the project existed on paper only, with no funding, but quite another thing once the McDonnell administration had found the money and was driving to close the public-private partnership deal. Whose job was it to shepherd the U.S. 460 project through the wetlands permitting process? Given the mission-critical nature of the wetlands permit, why weren’t senior VDOT executives more proactive?
• Was anyone at VDOT or OTP3 willing to speak truth to power? The email correspondence is unambiguous: VDOT officials, OTP3 officials and US 460 Mobility Partners officials were acutely aware that the wetlands controversy could create major complications. It is not clear how forcefully those concerns were communicated to Connaughton or McDonnell. Any such correspondence is protected as “governor’s confidential working papers.”

• Perhaps most important of all: When OTP3 negotiated the contract with US 460 Mobility Partners, knowing full well that the wetlands permit had a 50% chance of cratering, did it build in any protection from the massive liability that such an outcome would create for the Virginia taxpayers? What role, if any, did Transportation Secretary Sean Connaughton play in affecting the outcome of the negotiations?

Perhaps the Special Review contains evidence that will help provide answers. I will continue to peel layers of the onion.

There are currently no comments highlighted.

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13 RESPONSES TO “THE GREAT U.S. 460 SWAMP”

larryg | July 9, 2014 at 3:25 pm | Log in to Reply

I think after all the back and forth is done – it’s clear that FHWA ALSO knew about USACE concerns (a euphemism for no-permit) – and took them seriously enough to be talking about a Supplemental – which is a much more significant NEPA term, that the word “supplemental” might connote to the average person. It’s basically FHWA reading the riot act to the DOT that they better get their ducks in a row or else. FHWA is not likely going to issue a ROD without a USACE permit (though maybe they have sometimes).

I don’t know if it has been done yet – but a FOIA to USACE on the issue might get more of this out in terms of timeline and correspondence from USACE.
**Bacon's Rebellion**
Reinventing Virginia for the 21st Century

**Closing the Books on the U.S. 460 Fiasco**

Posted on July 2, 2015 by James A. Bacon | Leave a comment

The state will recover $46 million from US 460 Mobility Partners for work never performed on a 55-mile highway between Petersburg and Suffolk, reports the *Virginian-Pilot*. Under the settlement negotiated with the McAuliffe administration, US 460 will keep about $210 million of the payments it received under former Governor Bob McDonnell but waive an additional $103 million it could have been owed under the contract.

The settlement allows both sides to avoid a lengthy court fight. The payments were made under a $1.4 billion contract to build an Interstate-quality highway on U.S. 460 to improve transportation access to Hampton Roads. Construction never commenced because the state could not obtain necessary wetlands permits from the U.S. Corps of Army Engineers. The McAuliffe administration does not dispute that US 460 billed and received the money legally, but argues that the company did not spend all money it received while waiting for the permitting issues to be resolved.

The final tally: US 460 keeps $210 million, and the state eats about $43 million spent on its own work developing the project. The total cost for a road never built: $253 million. Transportation Secretary Aubrey Layne had guesstimated that the bungled project could cost the state $300 million to $400 million.

The settlement closes the books on one of biggest contracting fiascoes in recent Virginia history. Meanwhile, the Virginia Department of Transportation has developed a scaled-down plan to build a 12-mile highway between Suffolk and Windsor and make other improvements to U.S. 460. That plan is expected to cost in the realm of $400 million.

—JAB

There are currently no comments highlighted.
Industries

Dead end for the new Route 460?

Reforms wanted on public/private projects after nearly $300 million is spent on road with no permit

by Paula C. Squires

The existing Route 460, between Suffolk and Petersburg, is an undivided four-lane highway. Photo by Mark Rhodes

On the second day after Aubrey L. Layne Jr. was sworn into office in January as Virginia’s new transportation secretary, he called a meeting of top advisers. Layne needed to know how he could halt payments on a massive highway project — a project he had helped raise millions for.

Before being named secretary of transportation by Democratic Gov. Terry McAuliffe, Layne was chairman of the Route 460 Funding Corp. of Virginia. The nonstock, nonprofit corporation created by the state sold about $243 million in tax-exempt bonds to help finance the U.S. Route 460 Corridor Improvement Project, a 55-mile, $1.4 billion toll road that would stretch from Suffolk to Petersburg.

While heading the corporation, Layne had a fiduciary responsibility to protect the interests of bondholders. Now, as chief of one of Virginia’s largest and most powerful agencies, he was charged with watching out for the taxpayers. His first order of business: stop an average of $16.7 million going out the door in monthly payments to the 460 contractor.

Layne says he couldn’t understand why the state kept paying US Mobility 460 Partners LLC after it became apparent that the route it had been hired to build was in trouble. The contractor filed a preliminary application for a required environmental permit in September 2013. It estimated that the new road would impact as many as 486 acres of wetlands — a figure more than three times higher than an earlier estimate of 130 acres.

Concerned over the higher impact, the U.S. Army Corps of Engineers determined that a supplemental review to an earlier environmental impact statement was necessary to satisfy requirements under the National Environmental Policy Act.

“I got VDOT [Virginia Department of Transportation], the attorneys and everybody together,” Layne recalls. If the wetlands issue couldn’t be mitigated, that meant the route might be revised, with a permit going to a less harmful alternative. “I told the governor, ‘We’ve got a real issue.’ Why would you be pushing out money for construction and money for mobilization until you knew you had a permit?”

Adding to the secretary’s concerns was the 773-page contract between the state and U.S. 460 Mobility Partners. While Layne was familiar with the portion of the contract governing the funding corporation, it wasn’t until McAuliffe chose him as secretary late last year that Layne, a former president of a real estate management and development company, looked over the arduous document.
His reaction: "How do we get out of this?"

While the contractor was responsible for obtaining the permit, the financial risk for the project remained with the state if a permit was not obtained. Virginia already had blown through nearly $300 million dollars and didn't have an inch of payment to show for it.

So Layne asked the governor for permission to stop payments to the contractor except for work associated with the supplemental review. McAuliffe agreed. Then on March 14 the state issued a stop work order after field tests indicated it would be difficult to mitigate such a large wetlands area.

The action stalled 460 — a top transportation priority of former Gov. Bob McDonnell. Some say the public/private project hit the wall because of a tangled interchange of political ambition, state bureaucracy, federal regulations and environmental risk. In some ways, 460 represents what can go wrong on a P3, an acronym for public-private partnerships, (See Definitions for road-building acronyms) which have become increasingly popular as cash-strapped states scramble to find ways to build major infrastructure. Yet in other ways — with upfront money required to get a large road project to the permitting stage — it was business as usual.

Project in limbo
Lots of people in Virginia are asking questions about 460. It's an embarrassing imbroglio for a state hailed as a national model for its 1995 Public/Private Partnership Transportation Act, the law that opened the door to private sector money being used for public projects.

"Virginia has been one of the leading states in the country on P3s," says Jonathan Gifford, director of the Center for Transportation Public/Private Policy in Arlington. "Many people are looking at the 460 project. Is it a P3, a design-build, a change of mind from one governor to another? ... Obviously there's a great deal of money involved, and many people will be watching."

In fact, 460 might turn out to be a litmus test for future P3 projects. Legislators, environmental groups and the transportation board are calling for reforms. "You have to scratch your head as to how we ended up where we are," says Del. S. Chris Jones. R-Suffolk, chairman of the House Appropriations Committee. "The project started out as a P3 and ended as a design-build project with no risk to the contractor ... Who was looking out for the taxpayer?"

Trip Pollard, a lawyer with the Southern Environmental Law Center who has followed the project for years, calls it, "a bad use of taxpayer money. The existing 460 is one of the most lightly traveled highways we have ... I work in six states, and I've never seen a case where a state has spent $300 million without having the necessary permits, and especially when the agencies that have to give those permits have raised red flags."

One of the highway's most vocal proponents, Sean Connaughton — the transportation secretary under McDonnell who spearheaded the project — refrained from commenting on the current state of affairs. Connaughton has since moved on to a job that has nothing to do with transportation, heading up the Virginia Hospital and Healthcare Association.

However, Layne has plenty to say. A resident of Virginia Beach, he supports the concept behind 460 and voted to fund it while serving as a Hampton Roads representative on the Commonwealth Transportation Board (CTB). The four-lane, divided toll road would give congested Hampton Roads a straight shot to Interstates 95 and 85 near Richmond. At 70-miles-per-hour, Layne says the limited-access road would help relieve truck traffic at the Port of Virginia by providing another route besides Interstate 64. Plus, the road was expected to help spark new economic development in Southeast Virginia and give Hampton Roads' 1.7 million residents another escape route in the event of a hurricane.
The new 460 would parallel, but not replace, an existing, toll-free 460 corridor — an undivided, four-lane highway that some Northern Virginia legislators say gets less traffic than some of their subdivisions.

According to 2012 figures from VDOT, annual average daily traffic counts on Route 460 between Suffolk and Petersburg ranged from 9,000 in and around County Drive in Petersburg to 66,000 in Suffolk where the highway connects to U.S. Routes 58 and 13.

**Alternatives under study**
As part of the ongoing supplemental environmental review, VDOT, the Federal Highway Administration and the Corps of Engineers are taking another look at the original design of the proposed 460 route. They also are assessing four other alternatives to see if one of those routes would cause less environmental damage. When that route is determined, it could be considered for the permit. Three of the alternatives are modeled around improvements to the existing 460, a road with no median that runs through the peanut fields and small towns of southeastern Virginia. (See Alternatives)

The Norfolk District of the Army Corps of Engineers raised concerns as early as 2005 about the proposed route. It indicated that fewer U.S. waters would be affected by an alternative along the existing 460 that called for the addition of a center turn lane. (See timeline).

By November 2012, VDOT proposed a new eight-lane design for that alternative, which the agency felt would better meet the new road’s scope and purpose. The design, says William T. (Tom) Walker, chief of the Corps regulatory branch in Norfolk, had not been included in the project’s original 2008 environmental impact statement. Bumping up the old 460 to eight lanes would give the alternative route and the proposed new route a comparable impact on the wetlands.

In February 2013, with design and engineering work proceeding on the project, Walker warned in a letter to VDOT that “any purchase of right-of-way, commitment of resources or construction activities conducted prior to our permit decision is at your risk …”

The Corps now could weigh in with a recommendation on a preferred route as early as September or at least by the end of the year. “That’s our goal,” says Walker. The supplemental review “is not a throw away the old document and start a new one;” he adds. “We just want to make sure that all the alternatives are equally evaluated in light of the information we have.”

Meanwhile, the clock is ticking. The contractor planned to begin construction on the road this year. It faces an October 2017 deadline for finishing the road.

If an environmental permit is not obtained by June 30, 2015, the contractor can terminate the project and pursue damages, but state officials say that scenario is unlikely. “We have negotiated a standstill with the contractor until Sept. 14,” says Layne, “when we should have a good idea of where we’re headed … My guess is that there will have to be a renegotiation of the contract.”

Shannon Moody, a 460 Mobility Partners spokeswoman, says the contractor remains committed to the project. “We have been actively working on the corridor for nearly two years, including some 15 months of comprehensive design and field mobilization work in preparation for construction … We look forward to being part of the ultimate solution.” (See Participant responsibilities and risks)

Layne hopes a solution can be worked out, but there are no guarantees. “What may be permitted [by the Corps of Engineers] may be much more expensive than what we thought. If it’s, say, the existing 460, we’ve got to compensate a whole lot of businesses to be moved. The budget may have to be reworked.”

In other words, the road could fall behind schedule and go above budget. “I’m not trying to be negative,” Layne adds. “Our intent is to do it.”

Even if the state opts not to build 460, it’s still on the hook. “We could be on the hook for another $100 [million] to $200 million between the contractual obligations and any possible actions by bondholders,” says Layne.

He’s referring to the $108 million paid to the contractor from bond proceeds raised by the funding corporation. (See graphic: Breaking down the costs) Building delays could postpone toll collections, which are supposed to pay off the bonds.

20/20 hindsight

If W. Sheppard “Shep” Miller III had it to do over, he would have withheld his vote on state funding for the 460 project. A Hampton Roads businessman with stakes in three fiber-optic companies, he knows better than to put up money for a project without seeing the terms of the deal.

Yet Sheppard joined other members of the state’s Commonwealth Transportation Board in late 2012 in transferring $904 million in state money for the $1.4 billion project.

“I was a little bit uncomfortable, because I did not have the opportunity to see what the contract actually said,” Miller says. “What I had was a high-level briefing on what the major points of the contract were. One of the critical components that wasn’t included in the briefing was the risk of the permitting.”

Miller says it was the board’s understanding that the contractor had the responsibility for getting an environmental permit. “What we didn’t understand was that they had no risk if this didn’t occur — that all the risk was back on the commonwealth. We also had some assurances that permitting would not be a problem.”

Besides the $904 million, the rest of the road’s funding was supposed to come from the sale of bonds and a $250 million contribution from the Port of Virginia that would be paid in $4 million increments over a period of time. That commitment (made following a major shakeup on the port’s board by McDonnell) rankles Jones, particularly since the port has been losing money on operations during the past five years. “In my opinion, it was an inappropriate use of port funds from the beginning,” says Jones. To date, no funds have been transferred.

Under Virginia law, the Commonwealth Transportation Board does not play a direct role in the development, negotiation or implementation of public/private projects, even though the board authorizes funding for the state’s road projects. Nor do board members see the contractual documents, because of the proprietary nature of information submitted by private companies. Basically, the governor, VDOT and the state’s P3 office control the process with limited oversight.

That process, Miller says, needs change. “When you’re dealing with the P3 law and you have massive, long-term projects and the administration — any administration — is the only one that sees the details before it’s done, where’s the check?”

Finding an appropriate balance of power is becoming a central issue as more states look to public/private partnerships to get big projects done. P3s tap into private sector funds and create jobs. When McDonnell announced the U.S. 460 project, he said it would create 4,000 jobs during construction. The project already has involved 131 subcontractors, ranging from such well known companies as Verizon and Hewlett Packard to smaller players like SkyShots Photography and Stealth Shredding, as well as an array of engineering and design companies.


04/27/2017
Environmental group donation
State environmental groups have had 460 on their radar for years. After the state signed an agreement with the contractor in December 2012, the Virginia chapter of the Sierra Club called it a billion-dollar “boondoggle” that would destroy wetlands and siphon state funds that could be used for more worthy projects.

Another group, the League of Conservation Voters, gave $1.7 million to McAuliffe’s gubernatorial campaign last year — one of his biggest donations, according to the Virginia Public Access Project, which tracks political contributions. In December, the League joined eight other environmental groups in sending the governor-elect a letter. It urged him to ask the McDonnell administration to halt work on 460 so that the new McAuliffe administration (taking office in January) could reconsider the project.

Emily Francis, the League’s interim executive director in Richmond, says it donated the money to McAuliffe because of his stands on climate change and the environment. “There was a big difference in the views of a Cuccinelli vs. a McAuliffe administration ... They were two polar opposites.” (Republican Attorney General Ken Cuccinelli was McAuliffe’s opponent.)

Francis says McAuliffe’s decision to suspend work on 460 was warranted and should not be linked to any donation. “The details on 460 that have come out are important, substantive details that any governor would want to dig into,” she says.

A spokesperson for the governor, Rachel Thomas, says McAuliffe agrees with the concept behind 460. “We need to open up the port for business growth and for evacuation routes,” says Thomas. “However, he did not believe it was in the taxpayers’ best interest to be spending millions of dollars on a road that did not yet have the permits required to ensure completion.”

If the structure of the 460 deal was so risky, one has to wonder whether the lawyers weighed in. According to public documents, the commonwealth paid $3.1 million to two firms, Allen & Overy and Hunton and Williams, to assist in the development of procurement documents and negotiations. Plus, it used the attorney general’s office. Did counsel raise any warnings?

Not according to sources in McDonnell’s administration, who said they couldn’t recall the lawyers raising any red flags. Hunton & Williams said it couldn’t comment on the project due to client confidentiality, and Allen & Overy referred inquiries to the attorney general’s office.

In a written statement to Virginia Business, Cuccinelli, the attorney general during McDonnell’s administration, says that, for ethical reasons, he can’t divulge legal advice provided to clients. “Having said that, as attorney general, I was astonished how freely agencies and others felt to simply ignore legal advice that they didn’t like. And this had nothing to do with politics; they just wanted a different answer ... With regard to the route 460 project, I vehemently agree with Governor McAuliffe’s decision to pull the plug.”

From P3 to design-build
Layne, Jones and others note that 460, originally procured as a public-private partnership, morphed into a design-build project with a financing component — the bonds — but without the controls that typically come with this more conventional construction model. Instead of having a contractor bid on another company’s design (known as the design-bid-build model), the contractor working under the design-build structure designs and builds the project with the freedom to incorporate design efficiencies along the way.

While the 460 deal retained the confidentiality of a P3, the agreement didn’t have the shared risk component that typically defines public-private projects. The contractor didn’t invest any money. “Had the project been a design-build from the start, it would have been under much stricter procurement rules through the Virginia Department of Transportation” rather than controlled by the executive branch, says Layne.
There would have been tighter controls, he explains, on how much money could be spent before having a required permit in hand. Nonetheless, the state still would have spent some money, and in this way the 460 project is typical of other large road projects.

According to VDOT officials, a certain amount of work has to be done — on tasks like surveys, soil borings and design — before a contractor can reach the permit application stage for a major road. “Design work has to be close to completion before the Corps has the information it needs to issue a permit,” says Charlie Kilpatrick, VDOT’s commissioner.

On other major P3 projects, he adds, such as the Midtown Tunnel in Portsmouth and the 95 Express Lanes, Corps permits were not secured prior to the state signing comprehensive agreements, because design work was not complete at that time.

Even so, Layne insists that the design-build model, rather than a P3 on 460, would have offered more protections. “Had it been a design-build, the state would have been out about $100 million [in the effort to obtain a permit], not $250 million,” Layne says, referring to the money already paid to 460 Mobility Contractors.

The contracting company is a joint-venture partnership involving Ferrovial Agroman S.A., an international construction firm based in Spain, and American Infrastructure, a civil construction company with regional offices throughout the mid-Atlantic, including one in Glen Allen.

In 2006, three private consortia submitted conceptual proposals under then-Gov. Timothy Kaine to develop and operate the proposed new toll road under a long-term concession that required private equity and risk. By 2009, however, the P3 solicitation was put on hold after the groups said the project couldn’t work without a major public subsidy. They didn’t think the road would draw enough traffic to generate adequate toll revenues.

When McDonnell took office in 2010, VDOT terminated the old P3 procurement for 460 only to initiate a new one with revised assumptions about the project’s economic appeal. After the state recast the project as a design-build contract, 460 was not resubmitted to competitive bidding. Instead, the administration went with one of the three private consortiums that had submitted proposals under the P3 process.

A $1.4 billion bid to build the road was far below the $2.4 billion originally estimated by the Federal Highway Administration. “We got a great price on 460,” says a source in McDonnell’s administration. According to the source, the administration didn’t want to put a P3 project, which had already been canceled twice, out to bid again for fear the construction industry wouldn’t take it seriously — a decision that has drawn criticism. “Who knows, we might have gotten it for less than $1.4 billion,” says Layne.

Now VDOT’s top officer, Kilpatrick served as chief deputy commissioner during McDonnell’s term. He was the official who gave one of the briefings on 460 to the Commonwealth Transportation Board. For a time, Kilpatrick also served as the interim director of the state’s P3 office, so he is well versed on the nuances of public/private projects.

Asked why the state signed off on such a high-risk project, Kilpatrick says, “It was a high risk if a permit was not obtained. When we went to closing [in December 2012], we believed that we had a permittable project.” However, he adds, “It was recognized from the beginning that this was going to be a complex and challenging permitting process.”

As a VDOT veteran, Kilpatrick observes “I don’t know that it has ever happened in Virginia, where a project was not ultimately permitted, after it went through the regulatory steps ... I do think we will get a permit.”

According to him, pressure from the McDonnell administration played a role in how the project was
handled. "This project was a clear priority of Governor McDonnell," Kilpatrick says. "Move it as quickly as possible ... Deliver the project. Get it under construction."

Those were VDOT’s marching orders, he recalls. "VDOT’s job here was to deliver. The project — it complied with the law."

The state agency began to balk, though, after the original route became questionable last September because of its wetlands impact. The administration wanted to begin right-of-way proceedings and public hearings.

"We said no," says Kilpatrick. "We’re not going to go out and acquire right of way, because we don’t have a permit ... I had the potential of VDOT purchasing land that would not fit with an ultimate road alignment ... To have a public hearing on a roadway that may need to shift the alignment, that’s not a prudent thing to do."

**Years of planning**

The 460 project has been on the planning board for years. The Federal Highway Administration signed off on the project’s original route in September 2008 after an environmental review. In November 2012, the agency confirmed that its original environmental impact statement remained valid and did not need a supplemental review. That, however, was before more extensive groundwork and mapping revealed a bigger impact on wetlands.

“I can say this, that we followed every bit of the P3 law and every step involved in our process,” says Tony Kinn, executive director of the state’s P3 office under McDonnell.

Attempts to reach McDonnell through his attorneys to comment on 460 were not successful. The former governor and his wife are scheduled to go on trial in late July on federal corruption charges unrelated to the 460 project.

Whatever happens with 460, P3 projects are in for more scrutiny in Virginia. In June, the state Inspector General’s Office — created in 2011 to investigate waste and inefficiencies in government — joined VDOT in an internal probe. The agencies wanted to review whether VDOT and the state’s P3 office followed state processes and contract terms in the procurement and development of the 460 project.

The probe, released at the end of the month, said the 460 project complied with provisions of the state’s PPTA. However, it noted concerns were raised during the review regarding “expedited steps that were taken during the McDonnell administration to bring the project to ‘close’ and to preserve the confidentiality of the negotiation process.”

The inspector general and VDOT’s oversight division recommends that consideration be given to a possible 30-day cooling off period within the contractual terms of a P3 project to allow details of the negotiation to be disclosed to members of the Virginia General Assembly. If the assembly raised valid concerns during the 30-day period, “the commonwealth or assigns could terminate the project without penalty.”

Another recommendation includes a comprehensive right to audit clause in future P3 contracts. This would build in another safeguard for state review of invoices and the evaluation of project costs.

The special review also said that while members of the CTB were provided all “statutorily required” disclosures, they were not provided “effective communication and/or notice of key events impacting the 460 project.”

In that same vein, the investigators said the project met statutory requirements for disclosing the risks involved. Yet the investigators said they “do not believe that key stakeholders, including the public, were aware of the nature and extent of the risks associated with the 460 project.”

The Commonwealth Transportation Board also has ratcheted up its review of P3 projects, directing the head of the state’s P3 office, Doug Koelemay, to review policies and projects in the pipeline with an eye toward increased oversight and transparency.

Layne says he is open to making all aspects of P3 projects public, with the exception of the bids, and to giving more notice to the General Assembly and the board, with the board getting a look at the contracts.

Layne, however, doesn’t approve of a legislative sign off on deals as a hedge against keeping politics at bay.

Jones isn’t buying that argument. “Administrations come and go, but the legislature is here to stay. There has to be more accountability.”

As the debate rages in Richmond, the people and businesses that line the existing 460 wonder about the final outcome. In September Chris Epperson and her staff will celebrate the 85th anniversary of the Virginia Diner in Wakefield, a town that bills itself “The Peanut Capital of the World.” The diner is an institution, with many motorists stopping to eat on their way to and from the Outer Banks.

The restaurant, says Epperson, does about $2 million in sales a year, and the diner’s catalog peanut business pulls in another $10 million. The company employs 130 people. She’s against a new 460. “Anything that takes traffic from our front door is not good. They need to improve the road, but they don’t need to rebuild it.”

POLL: Should the Route 460 project proceed? Give us your feedback.
Final Report Prepared for the
U.S. Department of Transportation

under the

University Transportation Center
Region One

PRIVATE TOLL ROADS IN THE UNITED STATES
THE EARLY EXPERIENCE OF VIRGINIA AND CALIFORNIA

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December, 1991

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CHAPTER 2
VIRGINIA'S DULLES TOLL ROAD EXTENSION

Although Virginia's 1988 law authorizing private toll roads sets no limit on the number of projects allowed, the law was developed with the Dulles Toll Road Extension (DTRE) in mind and it has been the only project seriously advanced so far. The DTRE is particularly interesting because it predates and is more advanced than the four California demonstration projects. Virginia's law differs from California's, moreover, in the manner in which private projects can be developed, in the forms of state oversight and regulation, and in requiring a comparison of the relative cost and timeliness of private and public alternatives.

The Origins of the Proposal

The Dulles Corridor

The Dulles corridor extends northwest from Washington, D.C. through two northern Virginia counties: Fairfax and Loudoun (see Figure 2-1). It is named after the Dulles International Airport, which straddles the borders of the two counties approximately 25 miles northwest from downtown Washington. Dulles Airport was opened in 1962 by the federal government to relieve congestion at National Airport and provide a more aesthetically pleasing, architecturally dramatic international gateway to the nation's capitol. Fairfax County became one of the region's fastest growing areas during the 1970s and 1980s, and residential and commercial development spread rapidly west through the County toward Dulles Airport. During the 1970s Tyson's Corner in Fairfax County emerged as a major shopping and office center, for example, and a major new planned community at Reston was developed. Development intensified and filled in the areas along the Tysons Corner-Reston-Herndon axis in the following decade and by the mid 1980s it seemed clear that this growth would soon spread outward into Loudoun County.

The Virginia Department of Transportation (VDOT) opened the original Dulles Toll Road in the fall of 1984 in response to the development pressures in Fairfax County. Dulles Airport's
planners had thought that good access would be critical if the distant facility was ever to become a significant alternative to close-in National Airport. Accordingly, part of the airport project was a 15-mile Dulles Access Road connecting the airport with the I-495 beltway and with I-66, which ran between the beltway and downtown Washington. The Dulles Access Road was deliberately designed to serve airport origination and destination traffic only; no interchanges were built between I-495/I-66 and the airport to prevent local traffic from congesting the road. To forestall pressures for local access, however, the federal government purchased a right-of-way wide enough to allow state or local officials to construct a second expressway for non-airport traffic later. VDOT eventually leased this land from the Federal Aviation Administration (FAA), which operated Dulles Airport at that time, to build the Dulles Toll Road to serve traffic travelling to and from intermediate points in Fairfax County.

The possibility that the Dulles Toll Road would be a free rather than a tolled facility was never really an issue when the road was being planned in the late 1970s, even though toll roads are rare in Virginia.¹ The road was largely the initiative of Fairfax County officials who felt hard pressed to cope with the County’s rapid development and growing traffic congestion. VDOT’s resources were already committed to other projects, however, and a toll road seemed like the only way to obtain a new road quickly. The costs for the road were fairly modest since the federal government would lease the right-of-way for free, which also improved prospects for toll financing. The road was built for $57 million, financed out of revenue bonds backed by the full faith and credit of the state. Tolls were set at about 7 cents per mile, and traffic soon exceeded forecasts so that toll revenues covered not only the debt and operating costs but began to generate a small profit for VDOT as well.

There was no expectation that the Dulles Toll Road eventually would be extended into Loudoun County when it was planned and opened. The road’s early success and the westward spread of development soon made both VDOT and Loudoun County interested in the possibility, however. Loudoun County residents and public officials were (and are) supportive of development because of the jobs, income and property value appreciation it brings. But they want to avoid the severe congestion that accompanied Fairfax’s rapid growth by insuring that there will be adequate road capacity to support planned development.

Road capacity is a pressing issue because the county has no expressways and relatively few major

¹This account of the history of the Dulles Toll Road is based largely on Ray Peetel, Virginia Commissioner of Transportation, personal interview, Richmond, VA, October 8, 1991; and James Wilding, Chairman of the Washington Metropolitan Airports Authority, personal interview, Alexandria, VA, August 9, 1991.
arterial roads, as shown in Figure 2-2. Routes 50 and 7 provide the main east-west links, while routes 28 and 15 are the major north-south roads. The large area bounded by these routes in the center of eastern Loudoun County is still undeveloped and served by only a modest network of two-lane (one in each direction) roads. Route 28 around the airport is already developing as a site for office and commercial development, and in 1987 the Route 28 property owners banded together to form a special property tax assessment district to provide funds to widen and upgrade that road to expressway standards. There is room to widen Route 7 to expressway standards between Leesburg and Route 28, but Route 7 skirts the northern boundary of the undeveloped area and is severely congested and impossible to widen further to the east, in Fairfax County. An extension of the toll road to Leesburg, however, would pass straight through the undeveloped area and, by linking directly with the original toll road, provide a better route to the east as well.

John Miller and the Municipal Development Corporation

The idea of building the extension as a private toll road surfaced in 1986, at about the time VDOT and Loudoun County were beginning to seriously consider a public extension. The idea originated with John Miller of the Municipal Development Corporation (MDC) and Bill Allen of Parsons Brinckerhoff, the transportation planning and engineering consulting firm.² MDC was a small New-York based spinoff of Catalyst, a company that had worked on developing private cogeneration plants when those facilities first became popular in the early 1980s. MDC had been set up to apply the privatization concept to public infrastructure, and John Miller had been looking about for potential projects. Bill Allen was familiar with the Dulles corridor because Parsons Brinckerhoff had worked on the designs for the original Dulles Toll Road and had been a consultant to the Dulles Airport; he apparently brought the DTRE to Miller's attention.

The DTRE looked like an attractive possibility to Miller and Allen given the profits on the original road and the development potential of Loudoun County. Land assembly might be easy, moreover, since there were less than 20 landowners along the entire 14-mile route and several of these were large developers with an important stake in the area's development potential. Miller began

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²This account of the origins of the idea is based primarily on Ralph Stanley, President, Toll Road Corporation of Virginia, personal interview, August 9, 1991, Leesburg, VA; and Steven W. Pearson, attorney, Hazel and Thomas, personal interview, August 9, 1991, Washington, D.C.
Figure 2-2:
The Dulles Toll Road Extension

Source: Commonwealth of Virginia, State Corporation Commission, "Staff Report, Application of the Toll Road Corporation of Virginia, Case Number PUA9000013, April 17, 1990, Part A, p. 21.
to consider a range of options, including building the extension as a turnkey project for the Commonwealth as well as building and operating it as a private road.

The Virginia Highway Corporation Act of 1988

Governor Baliles Makes Transportation a Priority

Miller and Allen had undoubtedly been encouraged too by the fact that Virginia Governor Gerald L. Baliles had campaigned the previous fall on a platform that promised, among other things, to dramatically improve transportation services throughout the Commonwealth. The new Governor had announced that transportation would be the top priority in his first year in office, 1986, and had charged his Transportation Secretary, Vivian Watts, and the Commissioner of Transportation and head of VDOT, Ray Pehtel, with the responsibility of developing a broad financing strategy for improvements. With their encouragement, the Governor appointed a bi-partisan, blue-ribbon committee of civic leaders and public officials to develop a consensus on the Commonwealth’s transportation needs and resources. The committee, called the Commission on Transportation for the 21st Century, or COT 21 for short, was to work for two years. The first year (1986) was to focus on highways, which were widely regarded as the most serious problem, and the second year (1987) on other modes of transportation.3

In its first year report, delivered in August 1986, COT 21 identified $7 billion in needed transportation investments and recommended a package of tax increases to generate approximately $550 million a year to help fund them. The package included an extra 3/4 percent on Virginia’s sales tax and a 3 cent per gallon increase in its gas tax (from 4 to 7 cents per gallon) as well as increases in motor vehicle excise taxes and registration fees. The new taxes were to be dedicated for transportation purposes and the Commonwealth would be authorized to issue “pledge” bonds on the basis of anticipated tax receipts so that spending could be increased more rapidly than tax collections in early years.

The legislature, which normally meets only for 30 to 60 days each year beginning in January, was called into special session in September 1986 to consider the tax proposals. In the final compromise taxes were increased by approximately $425 million per year, largely because the sales tax increase was cut back to 1/2 percent and the gas tax increase to 2.5 cents. Recognizing that it would be difficult for the legislature to raise transportation taxes again in the next session, only 85 percent of the new funds were dedicated to highways with the remaining 15 percent reserved for other modes (i.e., mass transit,

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3This account of COT 21 is based primarily on Pehtel, interview, October 8, 1991; and Pearson, interview, August 9, 1991.
airports and ports).

**Interest from Senator Waddell and COT 21**

That same fall, Miller had met with Transportation Commissioner Pethtel several times about the possibility of a turnkey DTRE project. Pethtel was interested but noncommittal, however, and Miller abandoned the turnkey approach in favor of a private road soon after. He found that Virginia law reserved the authority to operate turnpikes or toll roads for the Commonwealth or its political subdivisions, and therefore approached Hazel & Thomas, one of Virginia's leading law and political lobbying firms, for advice on promoting his idea and any necessary legislation.

Miller tested the idea of a private road on a few key legislators in late 1986 and early 1987, with Hazel & Thomas' aid and advice. He found that attitudes were not hostile, in large part because Senator Charles Waddell, who chairs the Senate Transportation Committee, also represents Loudoun County and was interested in the possibility of private financing as a way to get the DTRE built quickly. Senator Waddell was cautious, however, and not ready to endorse the idea without support from Loudoun County and VDOT. Nevertheless, Miller was encouraged enough to ask Steve Pearson of Hazel & Thomas to begin drafting legislation that would authorize private toll roads in March and April of 1987.

Since the legislature wouldn't be in session until January 1988, Miller and Pearson decided to try to get an endorsement of their draft legislation from COT 21, which was then in its second and final year. Since non-highway funding had been resolved in 1986, COT 21 was concentrating in 1987 on a host of other transportation issues, including long-term planning and potential economies in the delivery of services. Private toll roads seemed to fit this new charge nicely, and Miller and Pearson presented the draft legislation to two of COT 21's subcommittees in the spring and summer. The response from the subcommittees was neutral to lukewarm, according to Pearson; Commissioner Pethtel, who was a member of COT 21, was non-committal, perhaps because he thought the MDC had not fully worked out its proposal. Nevertheless, the subcommittees were interested enough that COT 21's final report, delivered that August, included a recommendation that Virginia explore the possibility of privately financed and operated roads, although it stopped short of endorsing the specific draft legislation or the DTRE project.

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*According to Pearson, Commissioner Pethtel believed the idea was not worth pursuing; Transportation Secretary Watts, who was also on COT 21, observed, but was noncommittal and Governor Ballies was not at the presentations and had no position; Pearson, interview, August 9, 1991. VDOT sources argue that Commissioner Pethtel's non-committal position stemmed from the fact that MDC's proposal was still in a very preliminary conceptual form; Bob Atherton and Robert Mannell, present and retired (respectively) VDOT staff, telephone interview, December 12, 1991.*
Buoyed by COT 21's recommendation, Miller and Pearson began working in the fall of 1987 with Senator Waddell and members of his committee, state transportation officials, and Loudoun County representatives to refine their draft bill for possible consideration in the legislative session that would begin in January 1988. COT 21's recommendation was probably less important than Senator Waddell's cautious interest, however, especially since the COT 21 had endorsed only the idea, not the specific project, and only as one of its many recommendations. Nevertheless, the COT 21 recommendation gave the idea of private toll roads added respectability. Perhaps more important, the two-year COT 21 exercise had highlighted the fact that Virginia's resources were limited relative to its transportation needs. The short-term benefits of the 1986 tax increases had been reduced in 1987, moreover, when the Virginia Supreme Court ruled that the proposed pledge bonds were illegal. There was now no longer enough money to fund all the projects that Governor Baliles and his commission had proposed, and a private toll road proposal was bound to receive a more sympathetic hearing in this context.

**Negotiating Public Safeguards**

The key participants in the fall negotiations were Pearson, Miller, and Allen for the MDC, Commissioner Pethel, Deputy Secretary of Transportation Bill Leighty, Senator Waddell's assistant Tom Hyland, Senator Tom Michie, and several representatives of Loudoun County government. VDOT was highly regarded within the legislature, and the MDC team knew their bill could not pass unless they won the support of Commissioner Pethel and Deputy Secretary Leighty. Senator Michie, from Charlottesville, chaired the Transportation Subcommittee that deals with roads and would have jurisdiction over the bill. Loudoun County was represented primarily by Ed Finnegan, the County Attorney, and Memory Porter, the Assistant to the County Administrator for Legislative Affairs.

Senator Michie, VDOT and Loudoun officials were open to MDC's arguments that a private road would be cheaper and faster than a public road, but they wanted to be sure that the interests of the public in general and the tollpayer in particular were adequately protected. Thus they sought to include a variety of safeguards. Local jurisdictions through which a proposed road would pass would have veto power, for example, and the road would have to meet VDOT design standards. The alignment would have to be approved by the Commonwealth Transportation Board (CTB), a 15-member citizen board appointed by the Governor and chaired by the Commissioner of Transportation and whose approval is needed for

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2The court ruled that the state constitution required a public referendum. Subsequently the referendum failed; Gary R. Allen, Research Director, VDOT Transportation Research Council, letter to the author, December 5, 1991.
any VDOT alignment or construction contract. Loudoun County insisted that the State Corporation Commission (SCC)—which regulates Virginia’s insurance companies, banks, and electric and gas utilities—should regulate the tariffs and returns of the private toll road operator.

For Commissioner Pethel and Senator Michie in particular, a key element in protecting the tollpaying public was a requirement that the private toll road operator demonstrate that it was relatively more cost-efficient and would open the road more quickly than the public highway authorities would. Unless a private road was cheaper and faster, as privatization proponents claimed, it was hard to see how it would be in the tollpayers’ interests. “As long as it was relatively more cost efficient and timely, why not?” Commissioner Pethel would later recall. “We (VDOT) had a lot on our plate already, and the Governor, the Secretary and I viewed it as an innovative experiment.”

The bill they negotiated was introduced by Senator Waddell and passed by the legislature with only a few minor amendments in early 1988. Commissioner Pethel could have easily killed the bill quietly, according to Steve Pearson, particularly when the House Speaker asked to meet with him about the Speaker’s reservations. But Pethel thought the bill now included adequate safeguards, and lent it his support.

Provisions of the Legislation

The Virginia Highway Corporation Act of 1988 establishes a general framework for the government approval and oversight of private toll road projects. The DTRE is never mentioned specifically, even though the bill’s drafters believed it was the only project to which the law would be applied, at least for a while. The Act begins with a general statement of policy:

The General Assembly finds that there is a compelling public need for rapid construction of safe and efficient highways ... and that it is in the public interest to encourage the construction of additional safe, convenient and economic highway facilities by private parties, provided that adequate safeguards are provided against default in the construction and operation obligations of the operators of roadways. The public interest shall include without limitation the relative speed of the construction of the project and the relative cost efficiency of private construction of the project.

A four-step process for licensing a private highway is outlined. First, the CTB must approve the

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6Pethel, interview, October 8, 1991.

7Pearson, interview, August 9, 1991.

"Virginia Highway Corporation Act," Virginia Code, Section 56-537.
construction cost, location, and design of the road. The CTB would be guided by several considerations:

The Board shall approve ... if there is a public need for the project and the project and its connections are compatible with the existing highway network. ... In making its determinations, the Board shall keep in mind the public interest, which may include, without limitation, such considerations as the relative speed of the construction of the project and the allocation of the financial and human resources of the Department (of Transportation).9

To protect the applicant against lengthy delays before the CTB, the MDC team had added the requirement that the CTB approve or deny the application within 60 days of its receipt or within 45 days of a public hearing (which had to be scheduled within 30 days of the application). The design could not be rejected, moreover, if the project conformed to VDOT designs for toll roads.

Second, each local jurisdiction through which the roadway passed would have to approve any interconnection with its streets or roads. Local authorities also could participate in the proceedings before the CTB and the SCC. In DTRE's case the affected local jurisdictions are the Town of Leesburg, Loudoun County, and Fairfax County (since the eastern tip of the extension is in Fairfax).

Third, with CTB and local government approvals in hand, the applicant would apply to the SCC for a certificate of authority. The SCC application had to include the operator's plans for securing the right-of-way and financing, including proposed tolls and projected traffic volumes. In addition, the operator had to provide assurances that the roadway would be built to VDOT standards and a plan for VDOT to review the specifications and construction. The project had to conform to the comprehensive plans of all local governments through which it would pass and the SCC could not issue the certificate if any affected local government objected. The SCC had to find that the application was complete, that it complied with the other provisions of the Act, and that "the application is in the public interest," which presumably included the tests of relative timeliness and cost outlined in the Act's preamble.10

Finally, after CTB approval (but not necessarily before SCC action), VDOT and the operator would enter into a comprehensive agreement providing for VDOT review of specifications, inspection of construction, and oversight of maintenance. VDOT would be reimbursed for its direct costs in the supervision of the project.

Virginia would not exercise eminent domain on the operator's behalf, although local jurisdictions could chose to do so. The franchise would expire 10 years after the initial debt was paid off, which

would mean a 40-year life in DTFRE's case since MDC planned on using 30-year bonds. The operator
would own the roadway during the life of the franchise, and was responsible for liability insurance during
that period. The facility would be transferred to the state at no cost at the end of the franchise. During
the franchise the state police would enforce the traffic laws, and be reimbursed for that expense.

Toll rates would be set by the SCC during the franchise 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 no more than a reasonable return." A transportation fund could
be established by the CTB to finance improvements on nearby roads affected by toll road traffic. Tolls
would be set at multiples of five cents and if, as a consequence, the toll rate was higher than needed to
allow a reasonable return the excess would be deposited in the improvement fund. The toll road
operator, the CTB, and the local governments could also jointly petition the SCC to raise tolls to make
additional contributions to the fund.12

Public vs. Private, Design and Regulatory Issues

It would take two years from the time the Virginia Highway Corporation Act passed before a
private road proposal would be approved by both the CTB and the SCC. During that period a new
investor group would take over from the MDC, and VDOT would develop an alternative public road
proposal. The most publicized and acrimonious disputes would be over the relative merits of the private
and public alternatives. In addition, however, issues about the detailed design and alignment of the
roadway and the appropriate form of financial regulation would also arise and be resolved.

Early VDOT Plans for a Public Toll Road

VDOT had begun preliminary planning for a publicly owned extension of the Dulles Toll Road
in 1986, well before MDC's private proposal surfaced or the legislation passed.13 VDOT's intention
was to use tolls on the extension as the primary means of financing the project. Both the extension and

12"Virginia Highway Corporation Act," Section 56-552.

13This history of VDOT's early planning is based on a chronology in toll Road Corporation of
Virginia's 1990 application to the U.S. Army Corps of Engineers (chapter 6: Comments and
Coordination) and on Pehtel, interview, October 8, 1991 and Atherton and Mannell, interviews,
December 12, 1991.
the original road would be operated as a single VDOT facility, however, and thus surpluses earned on the original toll road could be used to help support the debt service for the extension in the early years, when the extension's toll receipts alone might be insufficient. The extension was to be coordinated with a project to widen the original road from two lanes in each direction to three lanes, since traffic was already approaching the original facility's capacity.

In February 1987, VDOT established a location study team for the extension headed by Robert Mannell, a senior VDOT engineer. The team was charged with coordinating with the emerging private proposal as well as pursuing VDOT's own plans. In May 1987, Leesburg Town Council and the Loudoun County Board of Supervisors passed unanimous resolutions endorsing the need for an extension terminating at Leesburg, although not endorsing any specific proposal. VDOT then began a detailed environmental assessment and held two public hearings that July in Loudoun and Fairfax counties to introduce the study team.

VDOT's planning efforts continued after the Virginia Highway Corporation Act was passed in early 1988. In June 1988 preliminary environmental findings were presented to the U.S. Army Corps of Engineers, and the draft environmental report was completed and presented at a public hearing in Loudoun County on August 30. The response was largely favorable, and VDOT began to prepare to ask the CTB to approve the proposed alignment at a November 19 CTB meeting.

Ralph Stanley and the Toll Road Corporation of Virginia

In May 1988, shortly after the private toll road bill had passed, Ralph Stanley joined the MDC, assuming, with John Miller, the title of Co-President. Stanley, a lawyer by training, had previously been the Administrator of the Urban Mass Transportation Administration (UMTA), an agency of the U.S. Department of Transportation responsible for administering several billion dollars per year in federal aid to the nation's mass transit systems. As UMTA Administrator, Stanley had aggressively pushed public mass transit authorities to consider contracting out to the private sector and had served on President Reagan's Privatization Commission. The private DTRE proposal had come to UMTA Administrator Stanley's attention when he was trying to get Fairfax County to consider seriously a proposal by another group to build a private extension of Washington's Metrorail subway system in the median of the original Dulles Airport Access Road. Stanley joined MDC because he thought privatization had great potential.

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and because the DTRE seemed an extremely promising project.

Stanley would take control of the private DTRE proposal soon after he arrived, and would be the driving force thereafter. Although only in his mid 30’s at the time, he had already established a reputation as one of the brighter, more innovative and aggressive officials in the Reagan Administration, with good instincts for publicity and hard-ball politics as well. These qualities won some detractors as well as admirers, however, and some who differed with him would say, privately, that they came away bruised from the experience.

Soon after Stanley joined MDC it became obvious that the firm was in serious financial trouble, largely because the firm was overextended on a number of its other projects. In March 1988 MDC had selected its preferred alignment, after consulting with local landowners, which the VDOT location study team then included in its ongoing environmental assessment. Miller had made an informational presentation to the SCC on April 26, 1988, at which he had stated that MDC intended to apply for and get its certificate by the end of the year. By the summer of 1988, however, MDC had run out of funds and, with few prospects for obtaining more, the firm effectively backed out of the DTRE project. Miller left for Public Financial Management, a Philadelphia-based consulting firm, and later would be paid $254,000 for his rights to the project by a new investor group formed by Stanley.

Stanley, together with another ex-MDC director, John R. Reilly, formed the Toll Road Corporation of Virginia (TRCV) to pursue the DTRE project in September 1988. Stanley was the CEO and Reilly the President of the new company, although Reilly would soon leave in a policy dispute with Stanley. An initial stock offering of $4 million by TRCV’s parent holding company made that month netted the firm $3.63 million to develop the proposal. Most of this initial equity investment came from Maggie Bryant, a wealthy Virginia investor who has remained one of the projects key supporters. Stanley deliberately did not solicit local landowners or developers as investors or to be part of the consulting team, so as to emphasize TRCV’s commitment to the project as a transportation venture and to avoid the

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16Richard J. Williams, Director, Division of Economics and Finance, State Corporation Commission, personal interview, October 8, 1991, Richmond, VA.


appearance of conflicts of interest. Landowner contributions of right-of-way, however, would be central to TRCV’s later proposals.

Stanley and Pearson decided to locate the TRCV in Loudoun County, to demonstrate commitment its to the project and to keep close touch on local politics. TRCV opened its office in a small house in a very visible site in downtown Leesburg, next to the local newspaper and across the street from the offices of Loudoun County government. Stanley also moved his residence to the area, and would later argue that TRVC’s local presence was critical to its subsequent successes:

Being local really allowed us to understand the issues, find allies and take advantage of competing interests. You don’t really understand what people are concerned about if you are not part of the community but always flying in from Houston, New York or Washington.19

TRVC put together an impressive team of consultants to develop its proposal. Bill Allen’s firm, Parsons Brinckerhoff, would do the initial highway design and environmental work. Vollmer Associates, a nationally prominent traffic forecasting firm and consultant to many U.S. public toll road authorities, would prepare the traffic and toll revenue projections. Kiewit Eastern, the regional subsidiary of the nation’s largest roadbuilding company, would be the construction contractor and Goldman Sachs, the prominent New York investment bankers, would design the financing scheme. Hazel & Thomas would continue as legal and political advisors.20

TRCV’s Application to the CTB

By this point, VDOT’s toll road proposal was already in the state’s six-year highway plan, and TRCV had to work quickly to develop its own proposal. TRCV rushed a preliminary application to the CTB before its scheduled November 19 meeting in an attempt to head off the Board’s approval of a VDOT alignment, which differed somewhat from that preferred by TRCV. CTB rejected TRCV’s application as incomplete, however, and approved VDOT’s proposed alignment instead. TRCV reportedly viewed VDOT’s request for design and alignment approval as a hostile act, in as much as TRCV was now poised to make a more credible application than cash-poor MDC could have. For its part, VDOT may have felt that it was imprudent to abandon planning for a public road until a credible


20In addition, Johnson & Higgins served as insurance advisor and Putnam, Hayes and Bartlet as consultants on rate regulation.
and superior private proposal was on the table. In any event, in December VDOT sent TRVC a letter explaining that TRCV’s proposed alignment could be considered acceptable by the CTB if part of an otherwise acceptable and complete application.\textsuperscript{21}

VDOT kept working on the public option as TRCV was preparing a new application. VDOT prepared legislation authorizing the issuance of $253 million in revenue bonds (also backed by the Commonwealth’s full faith and credit) for the widening of the original toll road and for construction of the extension. The bill, passed in a special legislative session in early 1989, included a provision that the bonds could not be issued, however, if the SCC awarded a private operator a certificate for the construction of the DTRE.\textsuperscript{22}

TRCV submitted a complete application on March 29, 1989. The proposed 14-mile road would have two lanes in each direction and five interchanges initially, with four more interchanges to be added later. Construction would begin by the end of the year and the facility opened to traffic in December 1991. The road would be built at a cost of $118 million, which excluded right-of-way costs since preliminary negotiations with landowners suggested that 100 percent of the needed land might be donated. Long term financing of $146 million would be used to repay the project development costs and to provide reserves for the deficits expected in early years as well as to cover construction expenses. $110 million would be taxable debt, including $40 million in 15-year senior debt at 11 percent interest and $70 million in 30-year subordinated debt paying a higher rate of 15 percent, since some interest payments would be deferred for the first 15 years.\textsuperscript{23} The remaining $36 million would be in equity, and included the $4 million already raised.

TRCV proposed an initial (1992) toll rate of $1.50 per vehicle or 10.7 cents per vehicle mile, which it argued was not much higher in real terms than the 85-cent toll being charged on the original Dulles Toll Road in 1989.\textsuperscript{24} However, the toll would increase to $1.75 in 1994, to $2 in 1996, and

\textsuperscript{21}Toll Road Corporation of Virginia, "Application of the Toll Road Corporation of Virginia to the Commonwealth Transportation Board," March 29, 1989, p. 9.

\textsuperscript{22}"Commonwealth of Virginia Transportation Facilities Bond Act of 1989," (S 703), Virginia Acts of Assembly, Chapter 615.

\textsuperscript{23}The subordinated debt would also earn an additional 2 percent of operating income starting in 1997, which would raise its effective pre-tax return to 16.55 percent; see Reinhardt, "Financial Plan," p. 10.

\textsuperscript{24}In this calculation, TRCV assumed a 5 percent inflation rate between 1989 and 1992.
to $2.25 in 1998, after which it would increase by 25 cents every three years until it reached $3.25 in 2010. Between 2010 and 2031 (the end of the franchise) tolls would rise at 3.2 percent per year. At these rates, Vollmer predicted traffic volumes would rise from 19,550 vehicles per day in 1992 to 33,992 in 1995 and 86,850 in 2010.25

The Debate Before the Commonwealth Transportation Board

Loudoun County’s design concerns. The debate that ensued before the CTB revolved primarily around two issues: (1) the detailed design and alignment of the road; and (2) the relative cost and timeliness of the public and private alternatives. The design issues were of concern primarily to Loudoun County officials and residents. Loudoun County had other concerns too, including whether a public extension might be better than private, whether TRCV’s financing plan was realistic, and what property taxes TRCV would pay. (TRCV had not included property tax payments in its financial plan arguing that, although it was liable for taxes, the method of valuation and amounts were uncertain.)26

The designs for the interchanges were particularly controversial. The TRCV plans relied primarily on diamond interchanges instead of full cloverleaves. The original Dulles Toll Road had been built with diamond interchanges, however, and many Fairfax and Loudoun residents thought they were the cause of serious congestion. Loudoun County wanted full cloverleaves or, failing that, spread diamonds (with the ramps at least 1000 feet apart) to minimize turning conflicts on the secondary roads and to provide enough land for full or partial cloverleaves in the future. VDOT was sympathetic with this view, and had included full cloverleaves at a few high volume interchanges in its own proposal for the toll road extension. TRCV argued that full cloverleaves would be prohibitively expensive, however, and that diamonds were more than adequate for the projected volumes.27

Other design issues included the timing of construction of the intersections, the detailed location of the right-of-way, and the capacity of local roads. Loudoun County wanted some assurances that the four additional interchanges would be built when promised. Some County officials were worried that


26See Philip A. Bolen, County Administrator, “Issues and Concerns Involved in the TRCV Proposal for the Dulles Toll Road Extension,” memorandum to the Board of Supervisors, County of Loudoun, July 10, 1989.

TRCV's alignment had been selected to increase the chances of land donations rather than for the convenience of the travelling public. In addition, TRCV offered no plans to improve the local roads that would feed the DTRE.

**VDOT's public-private comparison.** Commissioner Pethtel had ordered a stop to further work on a public extension when the completed TRCV application was received by the CTB. VDOT's interpretation of the Virginia Highway Corporation Act was that it required a demonstration that the private road would be relatively cheaper and faster, however, which implied an explicit comparison of public and private alternatives. Loudoun County staff reportedly shared this concern to some degree, although its Board of Supervisors seemed preoccupied with design issues at the time. VDOT asked Wilbur Smith Associates, the transportation consulting firm that had been working on the public extension, to complete the traffic and toll revenue projections it had been preparing to provide a public baseline.²⁸

VDOT used Wilbur Smith's work as the basis for a new public option. The public extension would open by April 1993, about 15 months later than TRCV was projecting. Construction would cost $184.7 million, a figure substantially higher than the comparable TRCV figure, which VDOT put at $127.6 million. (VDOT included project development and administration costs in both figures, which, by VDOT's reckoning, added $9.2 million to TRCV's $118.4 construction costs.) Most of the difference was due to the fact that VDOT assumed it would receive only half of the right-of-way by donation and would have to pay $38.4 million for the remainder. Direct construction was $24.9 million higher as well, perhaps because VDOT had allowed slightly more ample interchanges.

Construction expenses would be financed by $188.4 million in tax-exempt 30-year bonds paying 7.5 percent annual interest. In the early years, when extension traffic revenues were insufficient to cover operating expenses and debt service, the shortfall would be made up by $51.6 million in surpluses from the original toll road. VDOT projected that it could maintain a toll of $1.50 per vehicle for the life of the project, as opposed to TRCV's toll which started at $1.50 but rose steadily thereafter. In fact, the $1.50 lifetime toll would eventually generate $704.7 million in surpluses that VDOT could use for other transportation improvements.²⁹


²⁹In earlier versions VDOT assumed a $1 toll on the public alternative, which generated no surpluses. It used a $1.50 toll instead to make the initial toll rates on the public and private options more comparable; “Is Private Ownership in the Public Interest?” Public Works Financing, April
VDOT met with TRCV to discuss how the public-private comparison should be presented in public hearings in Loudoun and Fairfax counties scheduled for June 6 and 7, 1989. TRCV objected that the 50 percent right-of-way donation was too optimistic, but VDOT held its ground arguing that if TRCV could get 100 percent it should be able to get 50. TRCV strongest complaints were about graphs that compared projected toll rates over the life of the project, and on this issue VDOT relented. The comparison would be made on total cost, not tolls, and the value of TRCV's tax payments to the Commonwealth and its early completion would be recognized as well.

The negotiations resulted in a 19-page informational booklet that VDOT would produce and distribute at the public hearings. The booklet compared the construction costs, schedules, financing plans and toll rates in a narrative and tables summarized in Table 2-1. The bottom line was a consolidated total cost comparison shown in the lower half of Table 2-1. TRCV was credited with $105 million in state tax payments over the life of the project and $17 million in travel time savings due to earlier opening, with these savings deducted from TRCV's reported costs. (VDOT inadvertently doubled the effect of these TRCV benefits in the comparison by also adding them as costs to the public alternative). The public road's $704.7 million in surpluses were counted as a cost of the public project, moreover, instead of a benefit. Undiscounted, the public alternative would cost state residents $1.7 billion over the life of the project, VDOT argued, while the private alternative would cost $3.0 billion. The present values of these cost streams were estimated at $222 million for the public option versus $359 million for the private alternative (assuming a discount rate of 10 percent per year).

TRCV prevailed at the public hearings. TRCV mobilized to counteract the potentially damaging comparison. To start, it commissioned its own comparison of private and public costs by Steven Steckler, a privatization expert at Price Waterhouse, the respected financial consulting firm. Steckler argued that the two projects should be put on an equal footing by covering VDOT's outlays from debt rather than from the surpluses of the original toll road. To insure that the state taxpayer was not bearing some of the risk, moreover, conventional revenue bonds should be used rather than bonds backed by the

1989, p. 3; and Pethel, interview, October 8, 1991.

\(30\) VDOT had actually considered presenting alternatives where it received 100 percent or no donations as well as 50 percent.

\(31\) Pethel, interview, October 8, 1991 and Pearson, interview, August 9, 1991.

\(32\) Virginia Department of Transportation, "Public Hearing, Route 267, Dulles Toll Road Extension, Fairfax and Loudoun Counties," booklet, May 1991.
Table 2-1:
VDOT's Comparison of Public and Private DTRE Projects

<table>
<thead>
<tr>
<th></th>
<th>Public</th>
<th>Private</th>
</tr>
</thead>
<tbody>
<tr>
<td>Project costs (millions)</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Construction</td>
<td>$143.3</td>
<td>$118.4</td>
</tr>
<tr>
<td>Right-of-way (50% donated for</td>
<td>38.4</td>
<td>0</td>
</tr>
<tr>
<td>public, 100% donated for</td>
<td></td>
<td></td>
</tr>
<tr>
<td>private)</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Development, administration</td>
<td>3.0</td>
<td>9.2</td>
</tr>
<tr>
<td>Total</td>
<td>$184.7</td>
<td>$127.6</td>
</tr>
<tr>
<td>Schedule</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Begin construction</td>
<td>May 1991</td>
<td>early 1990</td>
</tr>
<tr>
<td>Project financing (millions)</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Tax-exempt bonds (7.5%, 30 yrs.)</td>
<td>$188.4</td>
<td></td>
</tr>
<tr>
<td>Surplus of exist. toll road</td>
<td>51.6</td>
<td></td>
</tr>
<tr>
<td>Equity</td>
<td>$35.6</td>
<td></td>
</tr>
<tr>
<td>Senior debt (11%, 15 yrs.)</td>
<td></td>
<td>40.0</td>
</tr>
<tr>
<td>Subordinate debt (15%, 30 yrs. plus 2% of operating income after 5 years)</td>
<td></td>
<td>70.0</td>
</tr>
<tr>
<td>Total</td>
<td>$240.0</td>
<td>$145.6</td>
</tr>
<tr>
<td>Tolls</td>
<td>$1.50</td>
<td>$1.50 rising to $3.25 by 2010</td>
</tr>
<tr>
<td>Summary of costs to state residents</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Operations, maint., reserves</td>
<td>$399.4</td>
<td>$732.1</td>
</tr>
<tr>
<td>Debt service</td>
<td>980.9</td>
<td></td>
</tr>
<tr>
<td>Taxes not paid to Virginia</td>
<td>105.0</td>
<td>(105.0)</td>
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<tr>
<td>Taxes to federal government</td>
<td></td>
<td>524.5</td>
</tr>
<tr>
<td>Travel time lost from late opening</td>
<td>17.0</td>
<td>(17.0)</td>
</tr>
<tr>
<td>Surpluses available to other Virginia road projects</td>
<td>704.7</td>
<td>927.6</td>
</tr>
<tr>
<td>Dividends to investors</td>
<td></td>
<td>3043.1</td>
</tr>
<tr>
<td>Total (undiscounted)</td>
<td>1698.2</td>
<td></td>
</tr>
<tr>
<td>Present value at 10 percent</td>
<td>$232.4</td>
<td>$359.4</td>
</tr>
</tbody>
</table>

full faith and credit of the Commonwealth. Without the full faith and credit of the state VDOT would have to pay 8.5 percent interest on its 30-year revenue bonds, not 7 percent. The bond buyers would also insist that the extension have enough cash flow to cover 1.3 times the debt service at all times, Steckler argued, which would have to be met by selling unsecured capital appreciation notes for the first 10 years at an interest rate of 10.5 percent. These higher debt costs, combined with VDOT's higher construction costs (Steckler assumed that 100 percent of the right-of-way would have to be purchased), would mean that VDOT would have to charge a toll of $3.68 to $3.88 per vehicle over the life of the project just to cover expenses.\textsuperscript{33}

Price Waterhouse's analysis received relatively little attention in the debate that followed; what mattered much more were TRCV's efforts to depict VDOT as a disgruntled loser and to play on the suspicions of many Loudoun County residents that VDOT was untrustworthy and had served them poorly in the past. Many Northern Virginians feel their area doesn't get its fair share of time and attention from the state's political establishment, and local politicians have a long history of blaming many of the area's problems on Richmond. VDOT is perceived as part of that same downstate establishment, and therefore not to be trusted.

Many Loudoun County residents thought it was important to get the road built quickly, moreover, since rapid development seemed to be just around the corner. Land values had picked up in Loudoun County, perhaps because the TRCV road appeared imminent, and some may have feared losses if the extension were delayed. Here was an innovative company promising to open the road soon. Could they afford to trust what appeared to be a last minute proposal from VDOT?

Stanley also drew attention to VDOT's proposed use of the surpluses on the original toll road, which embarrassed the Department and caused additional problems with Fairfax County. VDOT hadn't acknowledged the possibility of surpluses when Governor Baliles' commission was doing its work, Stanley claimed, and was doing so now only because it suited its purposes. The original toll road was wholly within Fairfax County, moreover, and the County had plenty of its own transportation problems, including the now famous interchanges. "The road was underdesigned. (Improvements to the) interchanges will be extraordinarily expensive," explained Audrey Moore, Chairwoman of the Fairfax

\textsuperscript{33}Steckler assumed that excess cash would earn an average rate of 6.5 percent and that inflation would average 5 percent per year (the same inflation rate VDOT assumed).

County Board of Supervisors. "We want the money."  

The Metropolitan Washington Airports Authority (MWAA) also made a claim on the surpluses from the original toll road, once the VDOT-TRCV dispute brought them to the airport's attention. MWAA had been created in 1986 to take over operation of the region's airports from the FAA. Its Board of Directors had been convinced from the very beginning that a rail connection to downtown Washington would greatly help Dulles Airport, and was frustrated that Fairfax County and the Commonwealth of Virginia seemed to oppose a private proposal to build such a rail link (the same proposal that had drawn UMTA Administrator Stanley's attention to the Dulles corridor).  

A DTRE (public or private) would have to pass through MWAA property, which gave MWAA leverage over VDOT. The MWAA board would formally warn the CTB in a July 10 resolution that the airport would not grant an easement for a DTRE unless the CTB and VDOT dedicated the surpluses on the existing toll road to transportation improvements in the Fairfax portion of the corridor, and particularly to rail.  

Virtually every speaker at the June public hearings spoke in favor of TRCV and against VDOT. Senator Waddell chided the Department for being unreceptive to a private bid in the face of the "astronomical" cost of transportation needs in Northern Virginia. The public alternative should be only a standby, in case a private road could not be financed. One Loudoun resident, in a statement quoted in many newspaper accounts, even declared "Anyone would be better (than VDOT) to build that road ... If Snow White and the Seven Dwarfs asked to build the road, let them do it." In the following days, many of the local papers printed editorials praising TRCV and lambasting VDOT.  

Transportation Secretary Vivian Watts met with the boards of supervisors of both counties in the following week and apparently pulled off the gloves. This time the presentation included a graph contrasting a stable VDOT toll of $1.50 for 20 years with a TRCV toll rising to $3.25 over the same  


35For background on the MWAA and the rail project see Gomez-Ibanez et al., "Prospects for Private Rail," ch. 3.  


period. The final slide put the matter succinctly:30

- **Public Policy Call:**
  
  The Use of the Road up to One and One-Half Years Earlier
  and
  The Use of $51 Million Dollars Over the Next Seven Years,
  Worth
  Availability Over the Next Forty Years of $700 Million
  at
  One-Half the Cost to the Public?

Secretary Watts’ presentation had little apparent effect, however, in the face of TRCV’s counterarguments that VDOT was being unrealistic about its construction schedule, its ability to get 50 percent of the right-of-way donated, or the availability of the existing toll road surpluses to subsidize the extension. At its July 10 meeting, the Loudoun County Board of Supervisors unanimously approved a statement requesting that the CTB approve TRCV’s application with some reservations outlined in a staff memo. The memo outlined one page of financial issues, which it implied could be dealt with at the next stage before the SCC, and then detailed six pages of design issues which it hoped the CTB and VDOT would resolve.40

On July 20 the CTB, chaired by Pethel, approved TRCV’s application. Stanley and Pearson had met with each member of the Board beforehand to present TRCV’s case.41 Several Board members had been enthusiastic from the start about TRCV’s proposal to build a road with no public funds and, in any event, the Board may have felt it had no choice given the public outcry. Stanley had pointed out, moreover, that the section of the Virginia Highway Corporation Act dealing with the CTB only mentioned relative construction speed and VDOT resources when illustrating what the “public interest” might include. SCC’s mandate about the public interest seemed less restrictive, since it was also specifically charged with reviewing financial plans. Perhaps these issues were best left for the SCC.

The CTB did, however, condition its approval on a number of design changes and on TRCV reaching a satisfactory agreement with VDOT governing oversight of specifications, construction and maintenance. The design changes ordered mainly dealt with the interchanges and gave Loudoun County

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40Bolen, “Issues and Concerns.”

41Pearson, interview, August 8, 1991.
some, but not all, of what it wanted. From CTB’s perspective, moreover, Loudoun County’s requests were reasonable given that the 1988 Virginia Highway Corporation Act required that any private road be built to VDOT standards (VDOT’s had included more ample interchanges in the design for its public toll road alternative). Subsequently, TRCV would estimate that these and later design changes requested by Loudoun County increased the cost of the project by approximately $50 million.²

VDOT’s arguments that private financing might be more costly than public financing did reach some, however, and in the fall of 1989 helped to briefly revive Miller’s old proposal that the extension be a turnkey project. The idea was pushed by a local business group, who suggested that TRCV be given a $10 million development fee plus actual construction costs. Stanley argued that the proposal was unfair:

It’s kind of like saying “You guys take the risk and we’ll sit by and if it’s a success we’ll come in. If it isn’t, the project is yours.”²²

Fair or not, the idea soon died because the 1988 law contained no provisions for a buyout and it was unclear where VDOT would get the money.²⁴

TRCV now turned in earnest to preparing its application for a certificate of authority from the SCC. The debate before the CTB had taken longer than TRCV had expected and had nearly exhausted its initial $4 million in capital. The delay and the CTB’s conditions meant, moreover, that TRCV’s previous plan would have to be revised. To fund further work, in September 1989 TRCV arranged for a $2.5 million loan from American Security Corporation, personally guaranteed by TRCV’s principal investor.²⁵

The Debate Continues Before the State Corporation Commission

The SCC is a quasi-judicial, independent regulatory body, headed by three Commissioners who are elected to six-year, staggered terms by the legislature. Its staff of approximately 600 is divided into divisions according to the industries that they regulate, and the responsibility for dealing with the TRCV was assigned to two of its five utility divisions. The utility divisions normally dealt with electric,

²Tim McDonald, Vice President, Toll Road Corporation of Virginia, personal interview, August 8, 1991, Leesburg, VA.

²²As quoted in “Into the Home Stretch,” p. 9.


“Toll Road Lurches Toward Closure,” p. 15.
telephone and gas companies. The TRCV was the first toll road they (and the SCC) had ever had to deal with, and it raised a number of novel issues for division staff.

TRCV and its consultants had begun meeting with SCC staff in early 1989 to discuss the issues that would have to be addressed in the application. Two main topics emerged: TRCV's financial structure and the form of financial regulation and, once again, the appropriateness of a public-private comparison. TRCV and the SCC staff would reach an understanding on many of the financial issues in the discussions before February 2, 1990, when TRCV finally submitted its SCC application. The public-private comparison became the focus of debate only after the application was submitted.

Financial structure and regulation. Several financial issues concerned TRCV in its early discussions with SCC staff.43 One involved the legal structure of the toll road company and the ownership of the road. TRCV had proposed a limited partnership in its March 1989 application to the CTB. The toll road company itself could not use the tax advantages of the early year losses and depreciation since it had no other sources of income to shield, but the limited partners could, and this would reduce the company’s cost of capital. The 1988 Highway Corporation Act required that the toll road be a public service corporation, however, and the SCC’s legal staff soon ruled that a limited partnership did not qualify. TRCV then switched to a sale-leaseback scheme, under which the toll road company would build the road but then sell it and lease it back from another company that had other sources of income and thus could take better advantage of the tax shields. Both the SCC and VDOT were worried that the sale-leaseback scheme might cause problems if the TRCV defaulted and Virginia had to move to take over the road, but they let the TRCV proceed on that basis.

Regardless of the form of ownership, TRCV was also concerned with how the SCC would treat the negative cash flows in the early years of the project. Some investors might not start earning a return until 10 or 20 years out, after traffic had built up. This problem was more severe for TRCV than for the utilities the SCC normally dealt with since the toll road would be TRCV’s only facility while the utilities’ new investments were usually just a fraction of an enormous existing investment base. TRCV wanted some assurance that future SCC commissioners would remember, 20 years later, that there had been losses in the early years that had to be recovered. The solution was to establish a reinvested earnings account in which the allowed but unpaid early year returns would be accumulated for repayment at a later date. (The account gets its name from the fact that these early unpaid returns are not withdrawn

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43This description of the early discussions is based primarily on Williams, interview, October 8, 1991; and Donna Tanner, Manager of Finance, Division of Economics and Finance, State Corporation Commission, personal interview, October 8, 1991, Richmond, VA.
but rather, in effect, reinvested in the project.)

A related and fundamental issue was the allowed rate of return on the investment. The discussions focused on the returns to equity, since the required returns to debt or the terms of the lease would be established by market conditions when the permanent financing was taken out. (The SCC would later require, however, that TRCV demonstrate that it had selected the best available terms within 90 days after completion of final financing.)47 The problem was complicated, TRCV contended, because the degree of risk varied over the life of the project. In the early years, when there was no assurance of the project’s success, the risks were enormous because the investors might lose everything. Later, if the toll road’s costs, traffic and revenues were developing as expected, the risks to the investors would decline considerably.

In the end, TRCV would request an average lifetime return on equity of 21 percent per year. The request was based on several analyses of the returns required by investors on other investments of comparable risk developed by Lawrence Kolbe of Putnam, Hayes and Bartlett, TRCV’s consultant on regulatory matters.48 In his first analysis, Kolbe contended that the returns demanded on the junior lease security, which he estimated would be 19.2 percent, should be a floor for the cost of capital for the TRCV since the junior lease security would carry less risk than TRCV equity.49 Next he calculated that the historic returns to equity for tire, auto parts, and car rental companies, which he argued faced similar risks to a toll road, were 23.0 to 25.9 percent. Finally, he analyzed a large sample of publicly traded companies to determine how their returns varied with various measurable risk factors or variables (such as the debt/equity ratio). He then applied these results to TRCV’s risk factors and arrived at rates of 17.2 to 20.7 percent. Kolbe’s analyses were also supported by a less elaborate analysis of the returns required on real estate investments done by another consultant.

TRCV proposed to the SCC staff that the allowed rate of returns vary over the life of the project to reflect the varying degrees of risk. While the average expected lifetime return would be 21 percent,

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49 Kolbe explains why the junior lease should be the floor but not how he arrived at 19.2 percent; Kolbe, "Direct Testimony," pp. 39-41 and 44-45.
the returns would start at 30 percent for the first 5 years or until cash flow exceeded 1.15 times the lease payment, whichever was longer. Returns would be 25 percent for the next 2 years or until lease coverage reached 1.25, then 20 percent for 4 years or until coverage of 1.5, 15 percent for 5 years or until coverage of 1.75, and 14 percent thereafter.

TRCV’s February 1990 proposal to the SCC included revised deadlines, costs and traffic projections as well as the financial structure that had been discussed earlier with the SCC staff. The schedule had slipped, understandably, by nine months. TRCV now hoped to close the financing by June 30, 1990, begin construction immediately afterwards and open the facility by September 30, 1992. Direct construction costs had increased from $118.4 million to $145.4 million, largely as a result of the CTB-ordered design changes. Total costs for opening the project (including project administration and finance during construction) had risen from $145.6 million to $198.9 million. At the end of construction the road would be sold to the lessor for the $198.9 million, and then leased back over 30 years (with an option to buy back or extend for the next 10 years) at payments that would be the equivalent to those on 30-year debt paying 10.03 percent annual interest. Early year losses would be covered by $30 million in equity, with an additional $5 million available if needed. Toll rates were the same as in the earlier CTB proposal.

Another public-private comparison. TRCV had not reached an understanding with the SCC staff as to how the public interest test might be met, just on the financial structure and regulation. After the TRCV’s application, the staff began to develop its own comparison of public and private costs, reportedly much influenced by the analysis VDOT had done the previous year. At the request of the SCC staff, VDOT asked its consultants, Wilbur Smith, to update their public toll road feasibility study of the previous year to provide a new public baseline for the SCC’s analysis.

On April 17, 1990 the SCC released a two-part report which laid out the staff’s findings in detail.

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25TRCV’s application and testimony are 5,562 pages long; for a concise description see “Virginia Toll Road Lurches Toward Closure,” Public Works Financing, April 1990, pp. 14-18.


One part dealt primarily with financial aspects and was generally favorable. The requested 21 percent lifetime average return on equity was "quite reasonable," the staff concluded, and the reinvested earnings account and phased equity returns made sense.  

The other part of the report, however, dealt with the public interest issues and was highly critical. The staff suggested that a public road would be much cheaper and questioned TRCV's assumptions about right-of-way donations, traffic growth and operating costs as well. The comparison of public and private alternatives, summarized in Table 2-2, was in many respects an updated version of the VDOT analysis of the previous year. The public road would cost more to build than a private road ($210.8 vs. $153.2 million), the staff acknowledged, largely because only half of its right-of-way would be donated. The public road could be financed with $218 million in tax-exempt revenue bonds at only 7 percent interest, however, plus $22.3 million in surpluses from the original toll road to cover interest during construction. In the SCC's public option the toll would be only $1 per vehicle over the lifetime of the project. The lower toll was just enough to cover extension costs but not so great that it would generate later surpluses. The SCC's analysis was slightly more elaborate than VDOT's in that it distinguished different "publics" in the cost comparison. If the toll road users were considered the relevant public, for example, the SCC staff argued that the lifetime direct costs of service would be only $0.9 billion for the public road compared to $3.5 billion for the private road. The public road would be cheaper, as shown in the bottom half of Table 2-2, because it used low-interest, tax-exempt debt and because the public highway authority did not pay federal, state or local taxes or dividends to shareholders. The private road did offer an advantage to the toll road users in that it would be completed earlier, the SCC staff acknowledged, although they did not estimate the value of earlier opening to the users. If other groups were considered part of the relevant public, however, the SCC staff acknowledged that the comparison was more complex. Landowners might be better off with the public proposal, for example, because they would make fewer donations (although they also would not get the road, and its associated development benefits, as early). The taxpayer would be better off with the private proposal, however, to the extent that the private company would pay state and federal income taxes and local property taxes and would reimburse VDOT and the state police for the costs of overseeing and policing the road. Despite these complications, however, the SCC analysis left the strong impression that the

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30 Commonwealth of Virginia, State Corporation Commission, "Staff Report," Part B.

34 Commonwealth of Virginia, State Corporation Commission, "Staff Report," Part A.
public option was cheaper for most groups.\textsuperscript{35}

The following day, April 18, the Commission ordered both the TRCV and VDOT to supply it with additional information by May 1 "to resolve uncertainties in the application and to determine whether the TRCV proposal was in the public interest."\textsuperscript{36} TRCV was asked to provide its best estimates of costs, construction schedules, and the progress that had been made in negotiating a comprehensive agreement with VDOT, while VDOT was asked the tolls it would charge if the road were a public project. Some TRCV supporters despaired that a lengthy SCC review on the public-private issue would kill the private proposal. At least, as one observer put it, "The guerilla warfare between VDOT and TRCV is finally out in public."\textsuperscript{37}

VDOT withdraws its alternative. The public-private comparison never went any further, however, because on April 30 Transportation Commissioner Pethel sent the SCC a letter stating that VDOT had no plans to build an extension with public funds and that it hoped to sign a comprehensive agreement with TRCV soon. There are at least two explanations for VDOT's apparent about face, both of which may be true. One is that VDOT bowed to pressure from Virginia's new Governor, L. Douglas Wilder, and his new Secretary of Transportation, John Milliken.\textsuperscript{38} Douglas Wilder had taken office in January 1990, just a month before TRCV's application to the SCC. Wilder, a Democrat, had been elected without the strong support of the business community and was reportedly anxious to demonstrate that he was not anti-business. The new Governor had also campaigned on a promise not to raise taxes yet he was acutely aware of Virginia's transportation needs. VDOT had updated and submitted its case against a private road to the SCC without telling Wilder or Milliken, according to some accounts. When the dispute was brought to their attention, some contend that the Governor and the Transportation Secretary told Commissioner Pethel that he would not be reappointed unless VDOT dropped its


### Table 2-2:
SCC's Comparison of Public and Private DTRE Projects

<table>
<thead>
<tr>
<th></th>
<th>Public</th>
<th>Private</th>
</tr>
</thead>
<tbody>
<tr>
<td>Project costs through construction (millions)</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Direct construction</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Construction</td>
<td>$154.3</td>
<td>$145.4</td>
</tr>
<tr>
<td>Right-of-way</td>
<td>49.5</td>
<td></td>
</tr>
<tr>
<td>Engineering &amp; design</td>
<td>7.0</td>
<td>6.0</td>
</tr>
<tr>
<td>VDOT charges to TRCV</td>
<td></td>
<td>1.8</td>
</tr>
<tr>
<td>Subtotal</td>
<td>$210.8</td>
<td>$153.2</td>
</tr>
<tr>
<td>Other</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Development/administration</td>
<td>$2.5</td>
<td>$13.6</td>
</tr>
<tr>
<td>Financing fees, const. int.</td>
<td>22.4</td>
<td>30.4</td>
</tr>
<tr>
<td>Taxes during construction</td>
<td></td>
<td>1.6</td>
</tr>
<tr>
<td>Subtotal</td>
<td>$24.9</td>
<td>$45.6</td>
</tr>
<tr>
<td>Grand Total</td>
<td>$235.7</td>
<td>$198.8</td>
</tr>
<tr>
<td>Financing</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Revenue bonds (7%, 30 yrs.)</td>
<td>$218.0</td>
<td></td>
</tr>
<tr>
<td>DTR surpluses</td>
<td>22.3</td>
<td></td>
</tr>
<tr>
<td>Sale to owner (for lease back)</td>
<td></td>
<td>$198.8</td>
</tr>
<tr>
<td>Equity</td>
<td>30.0</td>
<td></td>
</tr>
<tr>
<td>Tolls</td>
<td>$1.00</td>
<td>$1.50</td>
</tr>
<tr>
<td>constant</td>
<td></td>
<td>initially</td>
</tr>
<tr>
<td>Direct costs of service (40 years, undiscounted)</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Debt service</td>
<td>$456.5</td>
<td>$916.0</td>
</tr>
<tr>
<td>Operations and maintenance</td>
<td>438.1</td>
<td>640.0</td>
</tr>
<tr>
<td>Federal and state taxes</td>
<td></td>
<td>689.0</td>
</tr>
<tr>
<td>Local taxes</td>
<td></td>
<td>96.0</td>
</tr>
<tr>
<td>Dividends to stockholders</td>
<td></td>
<td>1127.0</td>
</tr>
<tr>
<td>Total</td>
<td>$894.6</td>
<td>$3468.0</td>
</tr>
</tbody>
</table>

opposition to the private road.\textsuperscript{59}

Commissioner Pethitel argues, however, that no pressure was involved. VDOT had no choice but to back off at this point since, in reality, it had no viable alternative to the private road.\textsuperscript{40} Each of VDOT's plans depended to some degree on the use of surpluses from the original toll road, but those surpluses were not really available given the claims Fairfax County and the MWAA were making on them. VDOT's earlier proposals were hypothetical benchmarks—it could not provide SCC with a firm estimate of the toll for a public road because it still had no viable financing plan.

Loudoun County still could have vetoed the road at this point, since the 1988 law prohibited the SCC from issuing a certificate if any local jurisdiction involved objected. Loudoun County had obtained most of its desired design changes before the CTB, however, and its Board of Supervisors still did not seem greatly troubled by the public-private comparison.\textsuperscript{41} The Board's resolution of March 20, 1990 and its subsequent testimony to the SCC restated its general support and willingness to condemn land for the project. The Board requested that the SCC grant the certificate conditional on a comprehensive VDOT-TRCV agreement that satisfied the County and on a special County land use permit that was still needed, but these conditions appear to have been added by the County as a means to maintain leverage over the project rather than a reflection of pressing concerns. The County also expressed its interest in the TRCV and the SCC reaching an agreement on contributions of toll revenues to a transportation improvement fund.\textsuperscript{42}

The SCC granted TRCV its certificate on July 6, 1990, but its opinion and final order suggested some reluctance. In discussing the required finding of public interest, the SCC opinion repeated the figures from the staff report that the direct cost of service would be less than $1 billion for a public road

\textsuperscript{59}None will say this for the record, although several accounts contend that Wilder and Milliken pressured Pethitel to withdraw the VDOT alternative; see, for example, "Franchise Approved for Private Virginia Toll Road," \textit{Public Works Financing}, July 1990, pp. 1-2; Steve Bates, "Dulles Toll Road Extension Gets Final Approval from Va." \textit{Washington Post}, July 7, 1990, pp. A1 and A12.

\textsuperscript{40}Pethitel, interview, October 8, 1991.

\textsuperscript{41}Memory Porter, Special Assistant to the County Administrator for Legislative Affairs, Loudoun County, personal interview, August 8, 1990, Leesburg, VA.

\textsuperscript{42}Loudoun County Board of Supervisors, "Resolution Concerning the Dulles Toll Road Extension Proposed by the Toll Road Corporation of Virginia," March 20, 1990; and Loudoun County Board of Supervisors, "Statement to the State Corporation Commission on the Application of the Toll Road Corporation of Virginia," n.d.
compared to more than $3 billion for the private road. The opinion continued:

We realize that some of the estimates and assumptions of the VDOT consultant may be open to question. However, the facts of the case do not require that we explore them further. This is because our initial effort to do so by our Order of April 18, 1990 resulted in a response from VDOT which consigns any VDOT-constructed facility ... to the realm of the hypothetical. ...

We have diligently sought to give full efficacy to the public policy enunciated by the General Assembly in section 56-537, including the particular relativity tests to determine if the project is in the public interest. Having found that there is a public need for the project, it would be inconsistent with the public interest to deny the Application on the ground that its relative project life costs greatly exceed those of VDOT, which have become totally academic with VDOT having said that it does not intend to build the project. Put succinctly, the Applicant's proposal is the only game in town.63

The SCC went on to approve the idea of a reinvested earnings account and to endorse the proposed rates of return on equity as "reasonable at this time." The proposed toll rates were approved as well, although only through 1997.64

Is Public Cheaper than Private?

Hidden costs. The simple cost comparisons made before the CTB and the SCC in 1989-1990 are misleading in several respects. In the first place, as Steve Steckler argued, they ignore certain real costs to the state of VDOT's proposed financing schemes. VDOT proposed to use surpluses from the original toll road to cover early year losses on the extension, for example, which made it unnecessary for the state to raise costly equity. Similarly VDOT's revenue bonds were backed not just by toll revenues (as TRCV's debt would have been), but by the full faith and credit of the state as well. These financing devices do not change the underlying or fundamental risks of the project, however; they just shift the burden of some risks from the toll road users to the state taxpayer. VDOT in effect was asking the taxpayers to make a risky equity investment in the project (by pledging toll road surpluses and the full faith and credit of the state to cover early year losses) but not compensating them for the risks they were assuming.

63Commonwealth of Virginia, State Corporation Commission, "Opinion and Final Order," application of Toll Road Corporation of Virginia, case number PUA9000013, July 6, 1990, pp. 5-6.

64TRCV requested approval for toll rates through 1997 only, although it projected rates for later years as well. Commonwealth of Virginia, State Corporation Commission, "Order," pp. 8-9.
One might argue that the state taxpayers should receive the same 21 percent return on their investment of toll surpluses that TRCV estimated its equity investors would require, since the underlying risks are much the same. In that case, calculations suggest that VDOT would have to charge a toll similar to that being proposed by TRCV to recover its debt and "equity" costs. Indeed, VDOT tolls might be slightly higher than TRCV tolls if VDOT used bonds backed only by toll revenues and not by the full faith and credit of the state.

Real cost savings vs. transfers. A second (and related) problem with the comparisons is that most of the reported differences in VDOT and TRCV costs do not represent fundamental savings to society or the economy as a whole but rather transfers of costs from one part of society to another. From the perspective of society as a whole, a private road would be less costly only if it required fewer physical resources, services or amenities to build or operate than a comparable public road. The private road might be less costly, for example, if it required less right-of-way, concrete, or labor to build because of more efficient design. The leftover land, labor and concrete could then be used for other projects, such as building another road or housing.

Most of the claimed savings for VDOT or TRCV are not of this fundamental type, however, but rather are transfers. VDOT and TRCV’s designs, alignments and direct construction costs appear fairly similar. VDOT exhibits savings because state taxpayers make an equity contribution that earns no return and because the state can issue tax-exempt debt. The uncompensated equity investment is, as noted earlier, just a transfer of risk from the toll road user to the state taxpayer. Similarly, the use of tax-exempt debt is just a transfer of cost from facility users (who now pay less for debt) to the state and federal taxpayers (who now receive fewer income tax payments from the road’s investors). The use of toll road surpluses as equity does not reduce the fundamental risk of the VDOT project, nor does the use of tax-exempt debt reduce the real labor, land, construction materials or other inputs required to build the road.

By the same token, TRCV savings from donated right-of-way and the sale/leaseback scheme are also transfers. TRCV’s road requires roughly the same amount of right-of-way as VDOT’s, so the donation does not increase the amount of land available for other purposes. The donation represents, in effect, just a transfer of costs from road users to landowners. Similarly, the sales/leaseback scheme is a transfer of costs from the road user to the federal taxpayer (since it makes it easier for the investors to take full advantage of federal tax shields).

*Calculations performed by Paul Kerin for the authors.*
The one real cost advantage claimed in the TRCV-VDOT debate is TRCV’s argument that it can open the road sooner by starting construction earlier and building it faster. If true, this would represent a real savings to society as a whole. Starting sooner and building faster (all else being equal) reduces the amount of capital that must be tied up during the construction period and the time before the fruits of the investment are enjoyed. It is conceivable that there are other real savings for TRCV or VDOT. VDOT might be able to coordinate the operations of the original road and the extension more efficiently (since it would own them both), for example, while the for-profit TRCV might have stronger incentives to operate more efficiently. These types of savings were not, however, the focus of the VDOT-TRCV debate.

Whose perspective? A final limitation of the comparisons is, as the SCC staff pointed out, that the advantages of a public or private road depend upon one’s perspective. Since the two alternatives transfer costs to different parties, which is better depends on who you are. Estimating the benefits and costs of a project to particular parties is even more complicated, moreover, because market forces also shift these benefits and costs among parties, and often in subtle and poorly understood ways. Consider, for example, the difficulty of estimating how much of a new road’s benefits or costs are captured or paid by local motorists or residents. The faster travel times enjoyed by a motorist may be partially captured by landowners in the form of higher rents for the motorist’s residence or business. The landowners and motorists may be residents of other counties or states, moreover, so it is difficult to know how many of these benefits ultimately remain in the county or state. Estimates of the advantages or disadvantages for particular groups are thus fairly speculative, although some tentative conclusions can be drawn.

Ignoring for the moment the possibility that a private road could be opened sooner, a public road is probably cheaper than a private road from the perspective of either the road user or a typical Loudoun County resident. The users of the public road would effectively be subsidized by state, local, and federal taxpayers (through the original toll road’s surpluses used to cover early year deficits, bonds backed by the state’s full faith and credit, bond interest exempt from state and local income taxes, and the public road operator’s exemption from local property tax and federal income tax). The users of a private road would be subsidized too, but to a much lesser extent. For the private road the assistance would come primarily from the landowners donating right-of-way and from federal taxpayers (through the use of interest and depreciation as deductions on federal income taxes).

A public road might be cheaper for the typical Loudoun County resident as well simply because most of the DTRE users are likely to reside in the County. The private road would pay property taxes to the County, but this advantage could be offset by the toll rate savings the public road offers local
motorists.

Public may not be cheaper than private, however, from the perspective of the Virginia's citizens or taxpayers as a whole. The public road's advantages for users stem primarily from greater subsidies from federal, state and local taxpayers—if these are removed, the costs of the public and private roads are probably more nearly equal. The primary difference from the state's perspective (ignoring, again, earlier delivery) might be the degree to which the two proposals take advantage of federal tax shields. The public road appears to enjoy more federal subsidies since its income is not subject to federal taxation and it would pay only 7 percent on its tax exempt debt; the private road, by contrast, pays federal income tax and an effective rate of 10 percent on debt (through its lease). The apparent advantage of the lower interest rate on the public road's debt may be misleading, however, in that it is partly due to the interest exemption from state taxes and to the backing of the Commonwealth's full faith and credit. In short, public and private costs might be reasonably similar if all these subtle advantages and disadvantages were considered.

If the credibility and the speed of the two proposals are considered as well as cost, however, the comparison becomes much more difficult. Loudoun County's failure to champion the public road can be understood, for example, if it (quite reasonably) believed that the state did not have a realistic plan for financing the road. From the County's perspective the choice may have been a more costly road now versus the uncertain prospect of a cheaper road in the future. It is, in sum, hard to make a compelling argument that either the public or private alternative is superior. It is relatively easy, though, to say that certain groups will be better or worse off by the choice between the public and private options.

Landowners, Environmentalists and Development Financing

When SCC issued its certificate in July 1990, TRCV still hoped to complete its permanent financing by September 30, 1990 and open the road by April 1, 1992.64 However, the company still had to complete the assembly of the right-of-way, wait for the MWAA to reach an understanding with VDOT on toll road surpluses, obtain an environmental permit from the U.S. Army Corps of Engineers, complete land use negotiations with Loudoun County, and complete a comprehensive oversight agreement with VDOT.

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64"Franchise Approved," p. 2.
Negotiating with Private Landowners

The TRCV had been working hard to negotiate right-of-way donations from the 18 private landowners along the route and the MWAA during the debates before the CTB and the SCC. The effort began in earnest in early 1989, soon after TRCV applied to the CTB. TRCV had to show a plan for right-of-way acquisition in its SCC application and, more important, banks and investors would insist that the land be in hand before granting construction or permanent financing. Loudoun County already had indicated its willingness to condemn land on TRCV's behalf, but condemnation was a last resort because TRCV would have to post 1.5 times the estimated market price to secure title to the property while the fair market value was determined.

Owners of about half the land had agreed to donate by the late summer of 1989, but the remaining half were harder. TRCV set up a trust into which some of the more enthusiastic and larger landowners would contribute money (in addition to the land they would convey), and this would be used to buy land from some of the smaller owners, who had less stake in the road’s success. This was not a perfect solution, however, since it raised expectations among some of the holdouts about the possibilities of compensation. Moreover, the last major holdout, Alan Kay of Bethesda, Maryland, reportedly wanted in return zoning concessions from the Town of Leesburg on 190 acres he had recently purchased at inflated prices. In December 1989 the Town passed a resolution giving Kay most of what he wanted if he conveyed, and threatening to condemn the needed land if he did not. Even with this obstacle removed, however, it took TRCV until sometime in 1991 to find a solution for the remaining smaller holdouts.

Metroplitan Washington Airports Authority

MWAA had first been approached about an extension by VDOT in 1987, and had worked with VDOT throughout the 1987-1989 period to develop an acceptable alignment. MWAA officials had


68"Into the Home Stretch," p. 5.


70At the time of the April 1990 SCC staff report, for example, several landowners were still holding out; State Corporation Commission, "Staff Report," Part A, pp. 74-77.

71This description of the MWAA negotiations is based primarily on Wilding, interview, August 9, 1991.
been a pessimistic that the extension would fit on the airport property at first. By early 1989, however, MWAA and VDOT had come up with an acceptable alignment (which TRCV would use as well), and the MWAA staff began discussing the possibilities with its board. The design required an easement of approximately 230 acres from MWAA, approximately one-third of the total extension right-of-way.

It was at this point that the MWAA board realized that the easement might be leverage for achieving its other goals, and passed its July 10, 1989 resolution holding the easement hostage to an agreement on the use of the existing toll road surpluses for rail transit. When CTB and VDOT seemed to pay little attention, the MWAA passed a second similar resolution in December 1989. In February 1990 the MWAA and Fairfax County also convinced the legislature to pass a bill restricting the use of any Dulles Toll Road surpluses to transportation improvements in the Fairfax County portion of the corridor, although leaving open the question as to whether those would be highway, bus or rail.\(^2\)

The MWAA's concerns were not addressed, however, until after VDOT withdrew the public alternative before the SCC. On April 18, 1990, as it became clear that the public-private debate at the SCC was coming to a close, the CTB authorized Commissioner Pethtel to develop a policy for the surpluses consistent with the legislature's bill and MWAA's interest in rail. Pethtel began negotiations with Fairfax County and MWAA immediately and an understanding was reached around July and formally ratified in a CTB resolution of September 20, 1990.\(^3\) The resolution committed CTB to develop a long-range comprehensive plan for using the surpluses to Improve the Fairfax part of the corridor. The resolution represented a concession for both VDOT and Fairfax County, in that it specified that the plan would eventually lead to a rail line.\(^4\) At this point VDOT may have felt it could not afford to be seen as an obstacle to the extension, especially since it had just told the SCC that it was not planning to build its own roadway and was supporting TRCV instead. In any event, the decision finally put to rest any possibility of using the surpluses for a public extension of the toll road.


\(^4\)It is not clear how much of a concession this actually was. Although the resolution said that 85 percent of the surpluses would eventually go to rail, rail could conceivably be put off until the very distant and largely irrelevant future.
The MWAA’s July and December 1989 resolutions included another condition which escaped notice until the issue of the existing road surpluses was finally resolved. The MWAA board had said that the airport must be adequately compensated for the easement, although initially it was apparently thinking of some form of in-kind compensation, such as preferential access to the extension for airport users. When it became clear that TRCV would build the extension rather than VDOT, some MWAA board members began to argue that the for-profit company should be expected to make a cash payment instead. The MWAA and TRCV began to negotiate in earnest in 1991, and eventually reached an agreement in which TRCV would pay the MWAA less than $100,000 annually for the easement in early years, rising with traffic volumes to more than $500,000 annually in later years.26

Environmental Permits and Aggressive Compliance

TRCV had been working to identify and resolve environmental problems in 1988 and 1989, but its efforts accelerated after the SCC granted its certificate in the summer of 1990. TRCV benefitted from the fact that VDOT had completed a draft environmental assessment of a public toll road extension in 1988, and (at TRCV’s request) had included an alignment similar to VDOT’s among the alternatives studied. The environmental problems posed by the road did not appear too serious, moreover. TRCV needed to update and adapt VDOT’s study so as to resolve several outstanding issues, the most important being wetlands and a bridge over Goose Creek. TRCV’s proposed alignment would fill 40 to 45 acres of wetlands, which raised concerns about flood control for the U.S. Army Corps of Engineers and habitat loss for local naturalists and duck hunters. The extension would cross Goose Creek as well, and the Goose Creek Scenic River Association was concerned that the bridge would be an eyesore.

Stanley’s solution was what he would later call “aggressive compliance.” Rather than waiting for the environmental groups to object, TRCV went to the environmental groups and asked them how the company could best resolve the issues. TRCV made it clear from the outset that it was prepared to be helpful, and more interested in the environmental groups’ support than in pinching pennies. TRCV offered to build two new acres of wetland for each one filled, for example, instead of the 1.5 for 1 replacement usual in environmental settlements. It invited the naturalists and duck hunters to suggest the sites where the replacement wetlands should be built and offered to sign a long-term contract with a firm

26This idea apparently originated from the Congressional review board that oversees the MWAA; Wilding, interview, August 9, 1991.

26McDonald, interview, August 8, 1991.
that specialized in constructing and maintaining wetlands. TRCV's alignment crossed the Goose Creek at one of the river's narrow points and the company offered to build an expensive 70-foot clear span so that there would be no bridge piers in the river. From Stanley's perspective being generous benefitted TRCV as much as the environmentalists, since environmental lawsuits might create costly delays. TRCV had more incentive to compromise than VDOT would have, he would later argue, since TRVC was more sensitive to the costs of delay.  

TRCV applied to the U.S. Army Corps of Engineers for a permit in November 1990 after a crash effort to complete environmental negotiations and documents. (The Corps would serve as the lead agency in reviewing TRCV's environmental permit since wetlands were involved.) In April 1991 the Corps issued a preliminary decision to approve a permit subject to a few minor conditions that were resolved that May.  

In the fall of 1990 and the spring of 1991 TRCV would also clarify some of the outstanding land use questions with Loudoun County. TRCV needed a special exceptions permit from the County because a road was a special land use. The County granted the permit on September 18, 1990 with 33 conditions relating to intersection design and timing and other similar issues. Several reluctant landowners (including Alan Kay) had insisted on a deadline of September 1, 1991 for TRCV to complete land assembly, since they did not want to have their land tied up indefinitely. TRCV's agreements with landowners typically provided that the land would be conveyed only when construction and permanent financing was in hand and all other parcels were under similar agreement. TRCV would eventually go back to the County on August 27, 1991 to extend the deadline when it became clear that financing would not be complete by September.

Financing Development Costs

The cost of preparing TRCV's many applications and permits mounted during 1990 and 1991, forcing the company to seek additional sources of financing for its development expenses. In the spring

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79Porter, interview, August 8, 1991; and McDonald, interview, August 8, 1991.

80This permit had to be modified on April 16, 1991 to accommodate changes in the extension design.
of 1990 it began to look to its consultants and contractors for contributions to supplement the $4 million in cash it had raised in 1988 and the $2.5 million in bank loans it had assumed in 1989. The issue came to a head in the spring of 1990 with Parsons Brinckerhoff, TRCV’s transportation engineering consultant. Parsons Brinckerhoff’s original agreement, according to Stanley, was that it would be paid for the preliminary designs but do much of the final engineering work at-risk. That agreement had been made when TRCV had expected total engineering fees would range from $2 to $3 million, however, and now it looked as if the final engineering bills might exceed $10 million. The consulting firm had already received $1.1 million in fees when, around the time that the SCC staff released its negative report, it got nervous and insisted on prompt payment for all future work.\(^{41}\) TRCV would replace Parsons Brinckerhoff that fall with Dewberry & Davis, a local engineering consultant (and designer of the original Dulles Toll Road) that was more willing to assume risks. It was Dewberry & Davis rather than Parsons that completed the environmental work for the Corps permit in the fall of 1990 and the spring of 1991.

By early 1991, TRCV had arranged approximately $20 million in cash, loans and deferred bills from various sources, and was looking for another several million to cover costs while it was arranging permanent financing. Equity had risen slightly to $4.2 million and the loans now amounted to $11 to 12 million, most signed for by the original investor. In addition, Kiewit Eastern, Goldman Sachs, and Dewberry & Davis together had around $5 to $6 million in unpaid bills they had agreed not to collect.\(^{42}\)

TRCV was looking for an additional $5 million, however, since it now estimated that total development costs would amount to around $25 million before construction and permanent financing could be arranged. TRCV began to negotiate with European toll road operators for both help in operating the road and development loans. In early 1991 TRCV had unsuccessful discussions with Cofiroute, France’s only major private toll road company. TRCV finally concluded an agreement in August 1991 for a $3 million loan from Italstat, the government-controlled holding company that owns Italy’s largest toll road operator, Autostrada. The agreement anticipates that Autostrada’s international consulting affiliate, Autostrada International, will help TRCV operate the DTRE for a seven year term.

\(^{41}\) Stanley, interview, August 8, 1991; and "Franchise Approved," p. 2.

\(^{42}\) Kiewit Eastern had around $3 million, Goldman Sachs $1-$2 million, and Dewberry & Davis around $2-3 million in unpaid bills; Stanley, interview, August 8, 1991.
The Final Proposal?

Revised Costs, Financing Plans and Traffic Projections

On May 23, 1991, shortly after the Corps issued the environmental permit, TRCV submitted amendments to its application to the SCC. Construction costs had risen, due to a combination of inflation and the design changes ordered by CTB and Loudoun County. More importantly, TRCV wanted to revert from a sale-leaseback to a limited partnership, since developments in the financial markets had made a sale-leaseback less attractive. TRCV had decided to take advantage of all the delays caused by environmental permitting and landowner negotiations to try to get the legislature to amend the 1988 Virginia Highway Corporation Act to allow limited partnerships, and these amendments were passed in early 1991 and went into effect in April.42

The new proposal called for two limited partnerships: Toll Road Investors Partnerships (TRIP) I and II. TRIP I would build the extension, with TRCV as its general partner. TRIP II would buy and operate the completed road from TRIP I, and at this time TRCV would dissolve (although its equity investors would continue to be partners in TRIP II). Construction would begin at the end of 1991 and the road would open in September 1994. The road would cost $292.7 million to open, TRCV now estimated, including $189.5 million in direct construction, $48.3 million in project development costs (including the original $4 million in equity and an estimated $15 million in loans that would have been acquired along the way), and $54.9 million in interest during construction.

Permanent financing would be for $359.6 million, to cover the $292.7 million in construction costs, $53.5 million in debt service reserves, and $13.4 million in special payments to the original equity investors and the development lenders for interest during construction.43 The $359.6 million would be raised through a combination of debt ($205 million paying 11 percent over 30 years), commercial bank loans (up to $112.9 million, as needed, paying 10.75 percent for up to 12.5 years), and equity ($41.7 million, including the original $4 million and the balance from new partners). In addition, the partners would irrevocably commit to provide an additional $41.7 million in stand-by equity (the commitment would lapse when revenues exceeded 1.5 times debt service for two years in a row).


43These special payments would give the original $44 million equity a 30 percent return during construction and would supplement the 20 percent return provided to the development lenders in the construction financing so that their total returns during the construction period were 30 percent too.
The higher development and construction costs could be recovered, TRCV explained, because toll receipts would be greater than they had originally projected. The schedule for toll rates would be similar to that originally proposed to and approved by the SCC. But since the opening was now delayed from 1992 to 1994, tolls would start at $1.75 instead of $1.50 on opening day, rise to $2.00 in 1996, $2.25 in 1998, and then continue on the original schedule of 25 cent increases every three years to $3.25 by 2010. The original toll schedule would yield far greater revenues because TRCV’s consultant, Vollmer Associates, now forecast that traffic would be 30 to 40 percent higher than originally projected in 1989, as shown in Table 2-3. The original forecasts had been based on population and employment projections from Washington’s regional planning agency that were proving too low, TRCV argued. Several major developers had announced plans to build along the route of the proposed road in the past few years. In early 1991 a major shopping mall developer announced a 1.4 million square foot mall that, if fully built, would add 15,000 daily trips to the road.\(^2\) Vollmer Associates had increased projected population and employment near the road in order to reflect these and similar developments, although it was not clear that they had made corresponding reductions in the population or employment elsewhere in the corridor.

**Permanent Financing**

By the summer of 1991 nearly everything was in place except the permanent financing. The comprehensive agreement with VDOT was still not signed but it lacked only a few details. Similarly, the special permit from Loudoun County would expire in September but an extension seemed likely. TRCV had until July 1992 to raise the permanent financing since the Virginia Highway Corporation Act required that construction begin within two years after the SCC issued its certificate. TRCV wanted to complete financing sometime in the fall of 1991, however, as every month of delay added to its development costs.

Goldman Sachs had found several groups of institutional investors and commercial banks that might participate in the financing, although both TRCV and Goldman Sachs were understandably tight-lipped about their identities. These groups were busy scrutinizing the project during the summer and early fall of 1991, and were expected to focus on traffic projections, construction costs, and the

\(^2\)“Corps Permit,” p. 1; and “A Deal-maker for Dulles Toll Road?” *Public Works Financing,* December 1990, p. 3.
regulatory environment. The DTRE didn’t have a well defined or assured market, for example, unlike a power plant that might have long-term contracts with major customers. The rate of growth in traffic was particularly critical for a road like the DTRE since the early year losses could be disastrous if they dragged on longer than expected. Vollmer Associates’ new traffic forecasts would have to stand up to the examination of the potential investors.

The construction contract and cost estimates were another potentially serious source of financial risk. Investors would want assurances that construction would not come in over budget, late, or not be completed. Fortunately, Klewitz Eastern was a reputable builder and TRCV had negotiated a guaranteed price contract that included late penalties and incentives for early for cost savings and early completion.

Finally, investors were also interested in the attitudes of the government agencies that would regulate the DTRE. The SCC was particularly important, since it would set tolls and rates of return over the life of the project. The SCC had approved TRCV’s proposed toll rates until 1997 and had said its proposed returns on equity were acceptable for now. There was always the possibility that the SCC might change its mind in the future, however, so the groups of potential investors were meeting with SCC staff during the summer of 1991 to gauge the agency’s attitude toward the project.

Getting This Far

The DTRE seems more likely to be built than the other U.S. private road proposals studied here. It already has virtually all of the needed regulatory approvals, unlike the California projects to be described in later chapters. The fundamental economics and financing risks appear to be at least as favorable as the best of the California projects, and a good deal better than some.

One striking lesson from DTRE’s experience, however, is how much longer the project has taken and how much more costly it has become than originally anticipated. The idea for the project first emerged in 1986, although it wasn’t until 1988 that the authorizing legislation was in place and a well financed promoter had taken over the project. TRCV’s first proposal suggested that construction could begin in late 1989 and the road would be open in early 1991. By 1991, the schedule had slipped to a late 1991 or early 1992 construction start and a 1994 opening, and even those dates were beginning to look optimistic. Over the same period, direct construction costs had risen from $118 million (the 1989 estimate) to $189 million (1991) and total financing requirements from $146 million to $360 million.

<table>
<thead>
<tr>
<th></th>
<th>Forecast of April 1989</th>
<th>Forecast of April 1991</th>
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<tbody>
<tr>
<td>Total average daily traffic</td>
<td></td>
<td></td>
</tr>
<tr>
<td>1992, $1.50 toll</td>
<td>19,550</td>
<td>44,780</td>
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<tr>
<td>1995, $1.75 toll</td>
<td>33,992</td>
<td>77,610</td>
</tr>
<tr>
<td>2000, $2.25 toll</td>
<td>63,809</td>
<td>124,360</td>
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<tr>
<td>2010, $3.25 toll</td>
<td>86,850</td>
<td></td>
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<tr>
<td>Peak segment daily traffic</td>
<td></td>
<td></td>
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<tr>
<td>(interchanges 3-2 or 2-1)</td>
<td></td>
<td></td>
</tr>
<tr>
<td>1992, $1.50 toll</td>
<td>18,000</td>
<td>38,650</td>
</tr>
<tr>
<td>1995, $1.75 toll</td>
<td>27,120</td>
<td>68,300</td>
</tr>
<tr>
<td>2000, $2.25 toll</td>
<td>41,109</td>
<td></td>
</tr>
<tr>
<td>2010, $3.25 toll</td>
<td>56,917</td>
<td>88,600</td>
</tr>
<tr>
<td>Annual toll revenues</td>
<td></td>
<td></td>
</tr>
<tr>
<td>(in $ millions)</td>
<td></td>
<td></td>
</tr>
<tr>
<td>1992, $1.50 toll</td>
<td>$8.8</td>
<td>$25.4</td>
</tr>
<tr>
<td>1995, $1.75 toll</td>
<td>$17.1</td>
<td>$58.2</td>
</tr>
<tr>
<td>2000, $2.25 toll</td>
<td>$40.8</td>
<td></td>
</tr>
<tr>
<td>2010, $3.25 toll</td>
<td>$79.3</td>
<td>$161.4</td>
</tr>
</tbody>
</table>

These delays and cost increases have occurred despite circumstances that seem to favor a private toll road. Loudoun County is relatively supportive of the toll road and the development it might bring, and DTRE’s route involves comparatively few landowners, several of whom have large holdings and are enthusiastic enough to donate their land and to finance land purchases from others. DTRE’s environmental problems, while not trivial, are far less serious than many other roads. Tolling is also not controversial in Loudoun County, unlike several of the California projects.

One factor that might have handicapped the DTRE, at least compared to most of its California peers, is the debate over public and private alternatives. VDOT had been planning to build a public DTRE even before the private proposal emerged. Virginia’s highway privatization law appears to require a public-private comparison, moreover, so VDOT might have felt compelled to advanced a public alternative under any circumstances. The public-private comparison does not appear to have accounted for much of TRCV’s delay, however. TRCV managed to defeat the public alternative relatively quickly before the CTB in spring 1989 and the SCC in spring 1990. The delays seem due more to the complex negotiations with Loudoun County, the SCC staff (over financial regulation), landowners, environmentalists, and now potential investors. The construction cost increases also do not appear to be a direct product of the public-private comparison but rather to a combination of the detailed design concerns of CTB, MWAA and Loudoun County officials, normal inflation, and (perhaps) early optimism of the developers.

Whether TRCV experienced more delays and cost increases because it is a private company is unclear. On the one hand, Ralph Stanley and the TRCV team were skillful in exploiting the potential advantages and flexibility of a private company. Stanley’s willingness to move to Loudoun County clearly helped him anticipate and counter many potential problems. His idea of aggressive compliance appears to have reduced environmental opposition and delays. It is doubtful that landowners would have contributed as much right-of-way to a public project and the voluntary contributions may have saved time.

On the other hand, being private probably contributed to costs and delays in several ways. The debate over public vs. private alternatives could not have helped, for example, even if it was not responsible for most of the delays. It seems possible that Loudoun County asked for more design changes from TRCV than it would have from VDOT, since the Virginia law gave Loudoun an explicit veto it would not have enjoyed over a VDOT project and because TRCV may have been perceived to have deeper pockets. A private toll road was also a novelty for Loudoun County staff, which may have added to the delays. A public project would not have had to submit to SCC oversight, and TRCV was also SCC’s first toll road case.
To some observers, the unexpected delays to TRCV’s proposal have undermined a key advantage Loudoun County expected from a private road.

When TRCV initially came to town, it seemed a marvelous proposal with rapid construction. The project has dragged on for years, from one crisis to the next. If (local officials and citizens were) in a private voting booth now, I wonder whether they wouldn’t vote for the VDOT alternative.7

The advantages of private and public roads are revisited in Chapter 6, after the California experiences have been described. Virginia’s experience does suggest, however, that pioneering toll road projects are complex and time consuming even under comparatively favorable circumstances. One should not be surprised, therefore, that the California projects are far behind Virginia’s DTRE since they started a year or two later and several face obstacles that seem more serious.

7Wilding, interview, August 9, 1991.