

COMMONWEALTH OF VIRGINIA
STATE CORPORATION COMMISSION

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APPLICATION OF

TOLL ROAD INVESTORS
PARTNERSHIP II, L.P.

CASE NO. PUR-2019-00218

For an increase in the maximum level of tolls

FINAL ORDER

On January 23, 2020, Toll Road Investors Partnership II, L.P. ("TRIP II" or "Company"), the operator of the Dulles Greenway, completed the filing of an application ("Application") with the State Corporation Commission ("Commission") for an increase in the maximum level of tolls pursuant to the Virginia Highway Corporation Act of 1988, § 56-535 *et seq.* of the Code of Virginia ("Code").¹

Code § 56-542 D provides that the Commission has the duty and authority to approve or revise toll rates charged by the Dulles Greenway. This Code section further provides that, upon application and after investigation, the Commission may order new tolls that (i) are reasonable to the user in relation to the benefit obtained; (ii) will not materially discourage use of the roadway by the public; and (iii) will provide the Company no more than a reasonable return as determined by the Commission.

¹ Supporting testimony and other documents also were filed with the initial Application on December 20, 2019. The Company filed Supplemental Direct Testimony on January 23, 2020.

TRIP II requests approval of "a toll schedule that provides for small increases in the maximum two-axle vehicle peak and off-peak tolls over a five year period."² Specifically, the Company requests approval of increases in the maximum two-axle toll as follows:³

	January 1, 2021	January 1, 2022	January 1, 2023	January 1, 2024	January 1, 2025
Maximum two-axle toll for all off-peak traffic	\$5.00	\$5.25	\$5.55	\$5.85	\$6.15
<i>Implied % increase</i>	5.3%	5.0%	5.7%	5.4%	5.1%
Maximum two-axle toll for peak traffic (weekday traffic in peak time and direction)	\$6.15	\$6.55	\$6.95	\$7.40	\$7.90
<i>Implied year-on-year increase</i>	6.0%	6.5%	6.1%	6.5%	6.8%

TRIP II also proposes that the maximum toll for three-axle vehicles be established at double the two-axle maximum and that the maximum toll for vehicles with four to five axles be equal to the maximum toll for three-axle vehicles plus an amount equal to 50% of the two-axle maximum toll for each additional axle above three axles.⁴ The Company proposes that vehicles with more than five axles will pay the same toll as vehicles with five axles.⁵ TRIP II asserts that "[t]he proposed tolls will allow TRIP II to continue to provide a safer, more efficient, and well-maintained alternative travel route for drivers."⁶ The Company further states that the requested toll rate increases satisfy the criteria in Code § 56-542 D,⁷ and that the proposed tolls

will allow TRIP II to undertake major capital improvement projects to further improve the Greenway and adjoining public roads which will, among other things: (1) reduce congestion in the surrounding road network; (ii) improve the travel time and

² Ex. 2 (Application) at 1-2.

³ *Id.* at 2.

⁴ *Id.* See also Exhibit 2 to the Application.

⁵ *Id.* at 2, Exhibit 2.

⁶ *Id.* at 2.

⁷ See *id.* at 3-8.

experience for TRIP II customers; and (iii) ensure TRIP II remains in compliance with the Comprehensive Agreement [between TRIP II and the Virginia Department of Transportation].⁸

On January 27, 2020, the Commission issued an Order for Notice and Hearing that, among other things, directed the Company to provide public notice of its Application; established a procedural schedule; directed the Staff of the Commission ("Staff") to investigate the Application and file testimony and exhibits containing Staff's findings and recommendations; permitted interested persons to file written or electronic comments on the Application⁹ or to participate in this proceeding as a respondent; and appointed a hearing examiner to conduct all further proceedings on behalf of the Commission, including filing a report containing the Hearing Examiner's findings and recommendations.

By Ruling issued March 2, 2020, the Hearing Examiner scheduled local public witness hearings to convene in Leesburg, Virginia, and Ashburn, Virginia, on May 11-12, 2020.

On March 16, 2020, the Board of Supervisors of Loudoun County (the "Loudoun Board") filed a notice of participation. On March 24, 2020, the Loudoun Board filed the "Motion of the Board of Supervisors of Loudoun County for an Extension of Time to File Direct Testimony and to Amend the Procedural Schedule" ("Motion"). In its Motion, the Loudoun Board requested an expedited ruling modifying the procedural schedule due to the public health emergency declared in response to the novel coronavirus ("COVID-19") pandemic.

On April 9, 2020, after filing of responses by TRIP II and Staff and the Loudoun Board's reply, the Hearing Examiner issued a Ruling granting in part and denying in part the Loudoun Board's Motion. Specifically, the Hearing Examiner's Ruling: (1) extended the dates for filing

⁸ *Id.* at 2-3.

⁹ The Commission received approximately 730 public comments. All but one opposed the proposed toll increases.

respondent, Staff and rebuttal testimonies; (2) rescheduled the evidentiary hearing; (3) cancelled the in-person local public witness hearings; and (4) extended the public comment period.

On May 29, 2020, the Hearing Examiner issued a Ruling scheduling a public witness hearing to receive public witness testimony telephonically. The public witness hearing was held on June 30, 2020. The Hearing Examiner received testimony from approximately 60 public witnesses, all in opposition to the Application.

Testimony was filed in the case by the Loudoun Board on June 26, 2020, and the Staff on July 10, 2020. On July 24, 2020, TRIP II filed rebuttal testimony.

On July 24, 2020, a Hearing Examiner's Ruling converted the evidentiary hearing from an in-person hearing to an electronic format, due to the ongoing public health emergency associated with COVID-19.

The hearing in this matter was convened via Skype for Business, with no party present in the Commission's physical courtroom, on August 13-14, 2020. TRIP II, the Loudoun Board and Staff participated in the hearing. On September 28, 2020, the parties and Staff filed post-hearing briefs.

The Report of D. Mathias Roussy, Jr., Hearing Examiner ("Report"), was filed on October 13, 2020. In his Report, the Hearing Examiner summarized the record and made the following findings and recommendations:¹⁰

1. Under the "reasonable to the user in relation to the benefit obtained" standard of Code § 56-542 D, conclusions about the Greenway's quantifiable user benefits are significantly influenced by value inputs and traffic assumptions;
2. Based on the Hearing Examiner's recommended value inputs, and assuming 2019 traffic levels, the Greenway's quantifiable user benefits exceed the cost of the proposed tolls compared to the Greenway's primary alternative and a composite alternative;

¹⁰ Report at 97-99.

3. Based on the Hearing Examiner's recommended value inputs, and assuming April 2020 or July 2020 traffic levels, the Greenway's user benefits exceed the cost of the proposed tolls compared to the Greenway's composite alternative, but not its primary alternative;
4. Given the range of value inputs and traffic levels in the record, TRIP II has demonstrated that the Greenway provides positive quantified net user benefits under a wide range of conditions;
5. To estimate the Greenway's user benefits, using (a) speculative projected benefit data is not required and (b) aggregate data is appropriate, if not necessary;
6. If the Commission finds that recent roadway projects designed to alleviate congestion warrant revisiting the concept of distance-based pricing, the Commission should direct TRIP II to confer further with [the Virginia Department of Transportation] to determine whether such pricing warrants further study and analysis;
7. As it has previously, the Commission can consider regression model analysis in its evaluation of the "not materially discourage" standard under Code § 56-542 D;
8. The COVID-19 pandemic made TRIP II's regression analysis in the instant case unreliable. Extrapolating the historic relationships produced by a regression model into the future depends on a future with no significant economic restructuring that substantially reduces traffic or travel patterns, as has occurred this year in Northern Virginia;
9. If the Commission prefers that future evaluations under the "not materially discourage" standard include travel demand model analysis, the Commission should direct TRIP II to conduct and file such analysis with its applications to facilitate regulatory review of such analysis;
10. TRIP II's proposed toll increases would provide no more than a reasonable return;
11. The [Reinvested Earnings Account ("REA")] balance grew significantly – from approximately \$3.0 billion to approximately \$7.5 billion – during the seven-year rate period of Code § 56-542 I that expired on December 31, 2019;
12. The REA balance is unlikely to ever be substantially recovered by equity investors;
13. While the REA has some limited ongoing value, supplemental financial measures should be used to assess the reasonableness of TRIP II's return;
14. If the Commission decides to adjust the Greenway's [Return on Equity ("ROE")] prospectively, Staff's recommended ROE range of 11-12% is supported by the record;

- 15. If the Commission agrees with the statutory findings above, the Commission should consider – absent any constitutional concerns – (a) denying the Application; or (b) deferring the effective date of the proposed toll increases until traffic on the Greenway returns to pre-COVID-19 levels;
- 16. The Takings Clauses under the U.S. Constitution and Virginia Constitution appear to protect TRIP II from confiscatory rates that do not allow TRIP II the opportunity to recover its costs;
- 17. If the Commission agrees that TRIP II's rates must provide it with the opportunity to recover its costs, the Commission should approve TRIP II's proposed off-peak toll increases for 2021, 2022, and 2023; and
- 18. While approval of TRIP II's proposed off-peak, but not peak, toll increases would lower the Greenway's congestion premium, level of service analysis and recent Greenway improvements indicate the Greenway has available peak capacity.

The Hearing Examiner recommended that the Commission adopt the findings in the Report, approve TRIP II's proposed off-peak toll increases for 2021, 2022, and 2023, and otherwise deny the Application.¹¹

On November 4, 2020, TRIP II, the Loudoun Board and Staff filed comments on the Report.

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

The Commission has fully considered the record in this proceeding, including the Hearing Examiner's detailed and thorough analysis of the evidence and the issues presented herein.¹² The instant proceeding is governed by Code § 56-542 D, which provides in part as follows:

¹¹ *Id.* at 99.

¹² The Commission has considered the evidence and arguments in the record supporting and opposing the positions of all participants. *See also Board of Supervisors of Loudoun County v. State Corp. Comm'n*, 292 Va. 444, 454 n.10 (2016) ("We note that even in the absence of this representation by the Commission, pursuant to our governing standard of review, the Commission's decision comes to us with a presumption that it considered all of the evidence of record.") (citation omitted).

...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 [1] which is reasonable to the user in relation to the benefit obtained and [2] which will not materially discourage use of the roadway by the public and [3] which will provide the operator no more than a reasonable return as determined by the Commission. (Emphasis and numbers added.)

The Commission finds that there is evidence in this record to support the conclusion that the three criteria quoted above have been met for approval of certain peak and off-peak toll increases.¹³

This finding, however, is not the end of the Commission's discretion in this matter. Code § 56-542 D does not mandate that the Commission increase toll rates if the three criteria are met. As expressly held by the Supreme Court of Virginia:

Subsection (D) does not set forth any circumstances under which the Commission is required to order the "substitut[ion]" of new toll rates. Code § 56-542(D). Rather, subsection (D) provides that the Commission "*may*" do so "after investigation" – limited solely by the condition that any new toll rates that "*may*" be set are to comply with the provision's three criteria....¹⁴

In exercising our "may" discretion under Code § 56-542 D, the Commission finds that *peak* tolls should not be increased at this time due to the changes and uncertainty brought about by the COVID-19 pandemic, as extensively addressed in the instant record.¹⁵

We further find, however, that there are offsetting considerations to support the exercise of the Commission's "may" discretion in a different manner for approval of *off-peak* toll

¹³ See, e.g., Report at 69-75, 78-79, 83-86, 88, 90. This finding includes vehicles with 3+ axles. See, e.g., Report at 75 (discussing the weighted-average benefits for all categories of users and additional benefits to vehicles with 3+ axles not captured numerically by the benefit-cost model).

¹⁴ *Board of Supervisors*, 292 Va. at 454 (emphasis in original).

¹⁵ See, e.g., Report at 31-32, 37, 47, 51; Ex. 55 (Carsley) at 25, 27; Ex. 61c (Armstrong Confidential), Appendix B at 1-9; Staff's Post-Hearing Brief at 6-9.

increases. There is evidence in this record showing that it is reasonable to reduce the differential between peak and off-peak tolls.¹⁶ In addition, the Supreme Court of Virginia has affirmed the Commission's authority to consider the Company's cost recovery in exercising our discretion under this statute;¹⁷ in consideration thereof, we agree with Staff's expert accounting witness that increasing off-peak tolls in this manner would permit TRIP II to recover operating costs and debt obligations.¹⁸ Finally, the Commission has not disregarded COVID-related changes and uncertainty in exercising our discretion herein for off-peak tolls and, indeed, has found that such consideration supports limiting approval of off-peak increases resulting from this proceeding to the proposed increases for 2021 and 2022 only.¹⁹

In conclusion, we have determined that the findings herein are within the Commission's statutory discretion, have a rational basis, and are supported by the record.²⁰

¹⁶ See, e.g., Report at 97; Ex. 55 (Carsley) at 20-23; Tr. 519-526; Ex. 56 (Dulles Greenway Service Level Designations); Ex. 57 (Average Weekday Traffic by Time of Day).

¹⁷ See, e.g., *Board of Supervisors*, 292 Va. at 459 (discussing the Commission's consideration of whether proposed tolls would permit recovery of operating costs and debt service obligations).

¹⁸ See, e.g., Ex. 63c (Dulles Greenway Projected Coverage Ratios Under Two Toll Scenarios); Tr. 570-71.

¹⁹ See, e.g., Ex. 60 (Armstrong) at 10 ("[T]he same financial impetus behind the proposed increases through 2022 does not necessarily exist for the increases proposed beyond then. Subsequent toll levels could be better evaluated at a more contemporaneous time to when new tolls would become effective and the effects of COVID-19 are abated or are better understood.").

²⁰ We also agree with the Hearing Examiner that it is reasonable to consider supplemental financial measures to assess the reasonableness of TRIP II's return. See, e.g., Report at 93. The parties may propose financial measures as alternatives to the REA in future proceedings involving a requested toll increase. In addition, although the Commission, like the Hearing Examiner, is not directing the Company to make an annual filing of a regulatory income statement, as Staff requested, the participants are free to request such in the next proceeding. Finally, to the extent that additional requests are not discussed herein, the Commission hereby exercises its discretion not to address such for purposes of this Final Order.

Accordingly, IT IS ORDERED THAT:

(1) The Company's proposed increase to the maximum off-peak tolls for the year 2021 is approved effective with the date of this Final Order.

(2) The Company's proposed increase to the maximum off-peak tolls in 2022 is effective January 1, 2022.

(3) The Company's Application is otherwise denied.

(4) TRIP II shall file forthwith a revised tariff consistent with the findings in this Final Order.

(5) This matter is dismissed.

A COPY hereof shall be sent electronically by the Clerk of the Commission to all persons on the official Service List in this matter. The Service List is available from the Clerk of the Commission.