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SENATE BILL NO. 1259

Offered January 13, 2021

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A *BILL to amend and reenact §§ 56-539 and 56-542 of the Code of Virginia, relating to Virginia Highway Corporation Act; alteration of certificate of authority; powers and duties of the State Corporation Commission.*

Patrons—Bell and Boysko; Delegates: Reid and Subramanyam

Referred to Committee on Transportation

Be it enacted by the General Assembly of Virginia:

1. That §§ 56-539 and 56-542 of the Code of Virginia are amended and reenacted as follows:

§ 56-539. Certificate of authority.

A. 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.

B. When applying to the Commission for a transfer, extension, or amendment of a certificate of authority, the applicant shall provide the Commission with sufficient information to demonstrate the financial fitness of the entity applying to operate the roadway, including:

1. The operating entity's balance sheet and income statement for the most recent fiscal year and any published financial information, including the most recent federal Securities and Exchange Commission forms 10-K and 10-Q. If such information is not available, the applicant shall submit other financial information demonstrating the financial fitness of the proposed operating entity or any other entity that provides financial resources to the operating entity.

2. Proof of a minimum bond rating of "BBB-" or higher or an equivalent rating by a major rating agency, or a guarantee with a guarantor possessing a credit rating of "BBB-" or higher from a major rating agency. If such proof is not available, the applicant shall submit similar documentation to what would be submitted to a major credit rating agency to demonstrate the applicant's creditworthiness.

The Commission shall not approve a transfer, extension, or amendment of a certificate of authority unless the Commission receives such information and determines that the entity applying to operate the roadway is financially fit to do so.

§ 56-542. Powers of the Commission.

A. As used in this section:

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

"Materially discourage use" means causing a decrease in traffic of three or more percentage points based on either a change in potential toll road users or a change in traffic attributable to the toll rate charged as validated by (i) an investment-grade travel demand model that takes population growth into consideration or (ii) in the case of an investigation into current toll rates, an actual traffic study that takes population growth into consideration.

"Real GDP" means the Annual Real Gross Domestic Product as reported by the U.S. Department of

59 Commerce, Bureau of Economic Analysis.

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

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

74 D. The Commission also shall have the duty and authority to approve or revise the toll rates charged
75 by the operator. Initial rates shall be approved if they appear reasonable to the user in relation to the
76 benefit obtained, not likely to materially discourage use of the roadway, and provide the operator no
77 more than a reasonable rate of return as determined by the Commission. Thereafter, the Commission,
78 upon application, complaint or its own initiative, and after investigation, may order substituted for any
79 toll being charged by the operator, a toll which is set at a level which is reasonable to the user in
80 relation to the benefit obtained and which will not materially discourage use of the roadway by the
81 public and which will provide the operator no more than a reasonable return as determined by the
82 Commission. *Any proposed toll rates that fail to meet these criteria are contrary to the public interest,*
83 *and the Commission shall not approve such toll rates.*

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

95 E. If a change in the ownership of the facility or change in control of an operator occurs, whether or
96 not accompanied by the issuance of securities as defined in subsection A of § 56-57 and § 56-65.1, the
97 Commission, in any subsequent proceeding to set the level of a toll charged by the operator, shall
98 ensure that the price paid in connection with the change in ownership or control, and any costs and
99 other factors attributable to or resulting from the change in ownership or control, if they would
100 contribute to an increase in the level of the toll, are excluded from the Commission's determination of
101 the operator's reasonable return, in order to ensure that a change in ownership or control does not
102 increase the level of the toll above that level that would otherwise have been required under subsection
103 D or subdivision I 3 if the change in ownership or control had not occurred. As used in this subsection,
104 "control" has the same meaning as provided in § 56-88.1.

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

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

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

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

118 1. Upon application of and public notification by the operator, filed not more often than once within
119 any 12-month period, the Commission shall approve to become effective within 45 days any request to
120 increase tolls by a percentage that (i) is equal to the increase in the CPI, as defined in subsection A,

121 from the date the Commission last approved a toll increase, plus one percent, (ii) is equal to the increase
122 in the real GDP, as defined in subsection A, from the date the Commission last approved a toll increase,
123 or (iii) 2.8 percent, whichever is greatest, which increase in the tolls approved by the Commission is
124 hereafter referred to as the "annual percentage increase."

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

130 3. Any request by the operator for an increase in the toll rates by a greater percentage than as
131 provided in subdivision I 1 shall be considered for approval by the Commission only upon presentation
132 of an independent grade traffic and revenue study and a finding by the Commission that (a) toll rates
133 subject to the preceding paragraph will not be sufficient to permit the operator to maintain the minimum
134 coverage ratio set forth in the rate covenant provisions of its bond indenture or similar credit agreement,
135 (b) such greater proposed tolls are reasonable to the user in relation to the benefit obtained and will not
136 materially discourage use of the roadway by the public, and (c) such greater proposed tolls provide the
137 operator no more than a reasonable rate of return as determined by the Commission; however, the
138 Commission shall not approve an increase in the toll rates pursuant to this subdivision that exceeds the
139 percentage increase necessary to permit the operator to maintain the minimum coverage ratio described
140 in clause (a). Such request by an operator shall not be made as a result of a change in control of the
141 operator or the project roadway. As used herein, a "change in control of the operator" means the sale or
142 transfer of 25 percent or more of the assets of the operator or the acquisition or disposal of 25 percent
143 or more of the outstanding shares of stock of the operator, if it is a corporation, or analogous interest if
144 the operator is another form of entity. *No comprehensive agreement between an operator and the*
145 *Department shall be construed to alter the duties, obligations, or powers set forth in this chapter.*

146 J. Prior to refinancing existing debt, an operator shall petition the Commission for approval to
147 refinance such debt. The Commission may approve such petition only if the operator demonstrates (i)
148 that it has the financial capability to pay off the debt incurred in the refinancing over the term of the
149 loan; (ii) that the term of the loan does not extend beyond the expiration of the operator's current
150 certificate of authority; (iii) that such refinancing is necessary to operate, maintain, enlarge, or expand
151 the roadway; (iv) that such refinancing will not increase toll rates; and (v) that such refinancing is in
152 the public interest.