

LD7128733

SENATE BILL NO. 468

Offered January 25, 1994

A *BILL to amend the Code of Virginia by adding in Title 56 a chapter numbered 21, consisting of sections numbered 56-553 through 56-574, relating to Qualifying Transportation Facilities Act of 1994.*

Patrons—Schewel, Andrews, Benedetti, Chichester, Stosch, Waddell and Wampler; Delegates: Cranwell, Giesen, Miller and Watkins

Referred to the Committee on Transportation

Be it enacted by the General Assembly of Virginia:

1. That the Code of Virginia is amended by adding in Title 56 a chapter numbered 21, consisting of sections numbered 56-553 through 56-574, as follows:

Chapter 21.

Qualifying Transportation Facilities Act of 1994.

§ 56-553. Title.

This chapter may be cited as the "Qualifying Transportation Facilities Act of 1994."

§ 56-554. Definitions.

As used in this chapter, unless the context requires a different meaning:

"Affected local jurisdiction" means any county, city or town in which all or a portion of a qualifying transportation facility is located.

"Certificate of authority" means the certificate of authority issued to an operator under this chapter that permits operation of a qualifying transportation facility.

"Comprehensive agreement" means the comprehensive agreement between the operator and the responsible public entity required by § 56-564 of this chapter.

"Operator" means the private entity that is responsible for operation of a qualifying transportation facility.

"Private entity" means any natural person, corporation, limited liability company, partnership, joint venture or other private business entity.

"Public entity" means the State and any agency or authority thereof, any county, city or town and any other political subdivision of any of the foregoing.

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

"Regulatory authority" means the State Corporation Commission.

"Responsible public entity" means a public entity that has the power to acquire, construct or improve the applicable transportation facility.

"Revenues" mean the user fees and/or service payments generated by a qualifying transportation facility.

"Service contract" means a contract entered into pursuant to § 56-558 of this chapter.

"Service payments" mean payments to the operator 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, seaport, mass transit facility or similar commercial facility used for the transportation of persons or goods, together with any other property that is needed to operate the same.

"User fees" mean the rates, fees or other charges imposed by the operator of a qualifying transportation facility for use of all or a portion of such qualifying transportation facility.

§ 56-555. Policy.

A. The General Assembly finds that:

1. There is a public need for timely acquisition or construction of and improvements to transportation facilities within the State;

2. Such public need may not be wholly satisfied by existing ways in which transportation facilities are acquired, constructed or improved; and

3. Authorizing private entities to acquire, construct, improve and/or operate one or more transportation facilities may result in the acquisition or construction of or improvements to transportation facilities in a more timely fashion, thereby serving the public safety and welfare.

B. An action, other than the approval of the responsible public entity under § 56-557 of this chapter or issuance of a certificate of authority under § 56-559 of this chapter, shall serve the public purpose of

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60 *this chapter if such action facilitates the timely acquisition or construction of or improvement to a*
61 *qualifying transportation facility or the continued operation of a qualifying transportation facility.*

62 *C. This chapter shall be liberally construed in conformity with the purposes hereof.*

63 *§ 56-556. Prerequisite for operation.*

64 *No private entity may operate a transportation facility under this chapter without first obtaining*
65 *approval of the responsible public entity, obtaining a certificate of authority from the regulatory*
66 *authority and entering into a comprehensive agreement with the responsible public entity.*

67 *§ 56-557. Approval of the responsible public entity.*

68 *A. Prior to the approval of the responsible public entity, the private entity shall provide the following*
69 *material and information with respect to the transportation facility or facilities that the private entity*
70 *proposes to operate as a qualifying transportation facility:*

71 *1. A topographic map indicating the location of the transportation facility or facilities;*

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

74 *3. The projected cost of the transportation facility or facilities and the proposed date for acquisition*
75 *of or the beginning of construction of, or improvements to the transportation facility or facilities;*

76 *4. A statement setting forth the method by which the operator proposes to secure all property*
77 *interests required for the transportation facility or facilities, including: (a) the current owners of the*
78 *property needed for the transportation facility or facilities, (b) the nature of the interest in the property*
79 *to be acquired, and (c) any property that the responsible public entity is expected to be requested to*
80 *condemn;*

81
82 *5. Information relating to the current transportation plans, if any, of each affected local jurisdiction;*

83 *6. A list of all permits and approvals required for acquisition or construction of or improvements to*
84 *the transportation facility or facilities from local, state, or federal agencies and a projected schedule for*
85 *obtaining such permits and approvals;*

86 *7. A list of public utility facilities, if any, that will be crossed by the transportation facility or*
87 *facilities and a statement of the plans of the operator to accommodate such crossings; and*

88 *8. A statement setting forth the operator's general plans for operation of the transportation facility or*
89 *facilities.*

90 *B. The responsible public entity shall grant approval if the operation of the transportation facility or*
91 *facilities as a qualifying transportation facility serves the public purpose of this chapter. The responsible*
92 *public entity shall determine that the operation of the transportation facility or facilities as a qualifying*
93 *transportation facility serves such public purpose if:*

94 *1. The application is complete;*

95 *2. There is a public need for the transportation facility or facilities of the type the private entity*
96 *proposes to operate as a qualifying transportation facility;*

97 *3. The transportation facility or facilities and the proposed interconnections with existing*
98 *transportation facilities are compatible with the existing transportation plan for the State;*

99 *4. The estimated cost of the transportation facility or facilities is reasonable;*

100 *5. The private entity's plans will result in the timely acquisition or construction of or improvements*
101 *to the transportation facility or facilities or their more efficient operation; and*

102 *6. The operator's plan for operation of the transportation facility or facilities is reasonable.*

103 *C. The responsible public entity may charge a reasonable fee to cover the costs of processing and*
104 *reviewing the request for approval.*

105 *D. The approval of the responsible public entity shall be subject to the private entity's entering into*
106 *a comprehensive agreement with the responsible public entity.*

107 *§ 56-558. Service contracts.*

108 *In addition to any authority otherwise conferred by law, any public entity may contract with an*
109 *operator for transportation services to be provided by a qualifying transportation facility in exchange*
110 *for such service payments and other consideration as such public entity may deem appropriate.*

111 *§ 56-559. Certificate of authority.*

112 *A. The application for a certificate of authority to the regulatory authority shall be accompanied by*
113 *the following material and information with respect to the transportation facility or facilities that the*
114 *private entity proposes to operate as a qualifying transportation facility:*

115 *1. A statement setting forth the operator's plan for financing the acquisition or construction of or*
116 *improvements to the transportation facility or facilities; and*

117 *2. A schedule of the revenues to be derived from the qualifying transportation facility.*

118 *B. The regulatory authority shall issue the certificate of authority if it finds that:*

119 *1. The application is complete;*

120 *2. The operator's plan for financing the construction of or improvements to the transportation facility*
121 *or facilities is based on reasonable assumptions and commercially reasonable terms and conditions; and*

3. The responsible public entity has approved the transportation facility or facilities.

C. The issuance of the certificate of authority shall be conclusive evidence that the application and accompanying material and information were duly filed and that the operator is authorized to operate the qualifying transportation facility.

D. In issuing the certificate of authority, the regulatory authority shall set forth any reports that the operator needs to file if the information or materials filed with the application change. Except for these reports, the operator shall not be required to update the information or materials filed with the application.

E. In issuing the certificate of authority, the regulatory authority shall establish a date for the acquisition of or the beginning of construction of or improvements to the qualifying transportation facility. The regulatory authority may extend such date from time to time.

F. The regulatory authority may charge a reasonable application fee to cover the costs of processing and reviewing the application.

§ 56-560. Affected local jurisdictions.

A. Any private entity requesting approval from the responsible public entity or the issuance of a certificate of authority by the regulatory authority shall notify each affected local jurisdiction.

B. Each affected local jurisdiction may submit comments relating to a proposed qualifying transportation facility to the responsible public entity or the regulatory authority.

§ 56-561. Dedication of Public Property.

Any public entity may dedicate any property in which it has an interest for public use as a qualified transportation facility if it finds that so doing would serve the public purpose of this chapter. In connection with such dedication, such public entity may convey any interest that it has in such property, subject to the conditions imposed by general law, to the operator or its designee, subject to the provisions of this chapter, for such consideration as such public entity may determine. The aforementioned consideration may include, without limitation, the agreement of the operator to operate the qualifying transportation facility.

§ 56-562. Powers and duties of the regulatory authority.

A. The regulatory authority shall approve the user fees charged by the operator when it issues the certificate of authority so that the user fees are reasonable to the users of the qualifying transportation facility in relation to the benefits obtained and are not likely to discourage materially the use of the qualifying transportation facility. The regulatory authority shall approve the user fees so that the revenues to be generated by a qualifying transportation facility will provide the operator no more than a reasonable rate of return on the operator's capital investment during the period that the qualifying transportation facility is to be operated by the operator. At the request of the operator, the regulatory authority may approve changes to the user fees imposed by the operator. In so approving user fees, the regulatory authority may, at the request of the operator, treat two or more transportation facilities as a single qualifying transportation facility. Service payments, if any, shall not require approval of the regulatory authority.

B. The regulatory authority shall review reports filed by the operator describing material contracts with affiliates to determine whether amounts to be paid pursuant to such contracts are excessive. To the extent that amounts are excessive, such amounts shall be considered a return on the operator's capital investment and shall reduce the rate of return from revenues to which the operator is entitled.

C. Upon request of the operator, the regulatory authority may approve the transfer of the certificate of authority to another private entity if the regulatory authority finds that the transfer serves the public purpose of this chapter.

D. The regulatory authority may charge a reasonable annual fee to cover the costs of the performance of its duties under this chapter.

§ 56-563. Powers and duties of the operator.

A. The operator shall have all power allowed by law generally to a private entity having the same form of organization as the operator and shall have the power to operate the qualifying transportation facility and impose user fees and/or enter into service contracts in connection with the use thereof.

B. The operator may own, lease or acquire any other right to use or operate the qualifying transportation facility.

C. Any financing of the qualifying transportation facility may be in such amounts and upon such terms and conditions as may be determined by the operator. Without limiting the generality of the foregoing, the operator may issue debt, equity or other securities or obligations, enter into sale and leaseback transactions and secure any financing with a pledge of, security interest in, or lien on, any or all of its property, including the certificate of authority, subject to the provisions of this chapter regarding transfer of the certificate of authority.

D. 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 then

183 current navigation and use of the waterway.

184 E. In operating the qualifying transportation facility, the operator may:

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

186 2. With the consent of the responsible public entity, make and enforce reasonable rules to the same
187 extent that the responsible public entity could have made rules with respect to a similar transportation
188 facility.

189 F. The powers granted to the operator in this section shall be subject to the power of the regulatory
190 authority to approve user fees pursuant to § 56-562 of this chapter.

191 G. The operator shall:

192 1. Acquire, construct or improve the qualifying transportation facility in a manner that meets the
193 engineering standards of the responsible public entity for transportation facilities operated and
194 maintained by such responsible public entity;

195 2. Keep the qualifying transportation facility open for use by the members of the public at all times
196 after its initial opening upon payment of the applicable user fees and/or service payments; provided that
197 the qualifying transportation facility may be temporarily closed because of emergencies or, with the
198 consent of the responsible public entity, to protect the safety of the public or for reasonable construction
199 or maintenance procedures;

200 3. Maintain, or provide by contract for the maintenance of, the qualifying transportation facility;

201 4. File with the regulatory authority: (a) reports describing material contracts with affiliates of the
202 operator, (b) an accurate schedule of applicable user fees and/or service payments charged for use of
203 the qualifying transportation facility, and (c) any other information required by the regulatory authority;
204 and

205 5. Cooperate with the responsible public entity in establishing any interconnection with the qualifying
206 transportation facility requested by the responsible public entity.

207 § 56-564. Comprehensive Agreement.

208 A. Prior to acquiring or commencing construction of or improvements to the qualifying
209 transportation facility, the operator shall enter into a comprehensive agreement with the responsible
210 public entity. The comprehensive agreement shall provide for:

211 1. Delivery of performance and payment bonds in connection with the construction of or
212 improvements to the qualifying transportation facility, in the forms and amounts satisfactory to the
213 responsible public entity;

214 2. Review of plans and specifications for the qualifying transportation facility by the responsible
215 public entity and approval by the responsible public entity if the plans and specifications conform to
216 standard conditions of the responsible public entity;

217 3. Inspection of construction of or improvements to the qualifying transportation facility by the
218 responsible public entity to ensure that they conform to the engineering standards acceptable to the
219 responsible public entity;

220 4. Maintenance by the operator of a policy or policies of public liability insurance, including, at the
221 option of the operator, self insurance, in form and amount satisfactory to the responsible public entity;

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

225 6. Reimbursement to be paid to the responsible public entity for its cost to provide the services
226 performed by the responsible public entity.

227 B. In the comprehensive agreement, the responsible public entity may agree to make grants or loans
228 to the operator from time to time from amounts received from the federal government or any division
229 thereof.

230 C. The comprehensive agreement shall incorporate the duties of the operator under this chapter and
231 may contain such other terms and conditions that the responsible public entity determines serve the
232 public purpose of this chapter. Without limitation, the comprehensive agreement may contain provisions
233 under which the responsible public entity agrees to provide notice of default and cure rights for the
234 benefit of the persons providing financing for the qualifying transportation facility.

235 § 56-565. Federal assistance.

236 Any State agency or the responsible public entity may take any action to obtain federal assistance
237 for a qualifying transportation facility that serves the public purpose of this chapter and may enter into
238 any contracts required to receive such federal assistance. Any State agency or the responsible public
239 entity may determine that it serves the public purpose of this chapter for all or any portion of the costs
240 of a qualifying transportation facility to be paid, directly or indirectly, from the proceeds of a grant or
241 loan made by the federal government or any division thereof.

242 § 56-566. Revocation of a certificate of authority; remedies.

243 A. The regulatory authority may revoke a certificate of authority for a qualifying transportation
244 facility if:

1. A material default in the performance of the operator's duties under the comprehensive agreement or under the service contract, if any, has occurred and is continuing; or

2. Acquisition or construction of or improvement to the qualifying transportation facility has not begun by the date established by the regulatory authority as such date has been extended.

B. Prior to any revocation of a certificate of authority the regulatory authority shall give written notice to the operator and any person providing financing for the qualifying transportation facility, including any trustee or agent for any person providing financing. The operator and the persons providing financing for the qualifying transportation facility shall be entitled to a reasonable time period to cure the event that could lead to a revocation of the certificate of authority. Prior to any revocation of the certificate of authority, the regulatory authority shall conduct a hearing to determine if revocation of the certificate of authority serves the public purpose of this chapter. Any interested party shall be entitled to participate in such hearing, subject to rules established by the regulatory authority that may limit the appearance of parties with substantially identical interests.

C. Upon the revocation of a certificate of authority, 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 it 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 operator to any person providing financing therefor and the provisions of subsection D below. Any liens on the real estate and tangible property comprising the transportation facility or facilities shall be deemed to be extinguished and shall be released on request if the responsible public entity takes over the qualifying transportation facility pursuant to this subsection C.1.

2. Any responsible public entity having the power of condemnation under applicable law may exercise such power of condemnation to acquire the qualifying transportation facility or facilities. Nothing in this Act shall be construed to limit the exercise of the power of condemnation by any responsible public entity against a qualifying transportation facility after revocation of the certificate of authority. Any person that has provided financing for the qualifying transportation facility, and the operator, to the extent of its capital investment, may participate in the condemnation proceedings with the standing of a property owner.

3. The responsible public entity may exercise all other rights and remedies which may be available to it at law or in equity.

D. In the event the responsible public entity elects to take over a qualifying transportation facility pursuant to subsection C.1. of this § 56-566, the responsible public entity shall acquire, construct, improve, operate and maintain the transportation facility, impose user fees for the use thereof and comply with any service contracts as if it were the operator. User fees shall remain subject to approval by the regulatory authority in accordance with the standards set forth in subsection A of § 56-562 and, solely for such purpose, the regulatory authority shall retain jurisdiction over the qualifying transportation facility. 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 operator's obligations to secured parties, including the maintenance of reserves. After such payments to or for the benefit of secured parties, the responsible public entity may use remaining revenues to operate and maintain the 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 such payments have been made or provided for in an amount not to exceed an amount that will provide the operator with the rate of return on its capital investment approved by the regulatory authority under § 56-562 of this chapter shall be paid to the operator over the time period that the certificate of authority would have been in place had it not been revoked. 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 operator 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 operator from sources other than revenues.

§ 56-567. Condemnation.

A. At the request of the operator, the responsible public entity may exercise any power of condemnation that is 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 operator.

B. Except as provided in subsection A. of this § 56-567, until a certificate of authority has been revoked, the power of condemnation may not be exercised against a qualifying transportation facility.

C. After the certificate of authority has been revoked, any responsible public entity having the power

306 of condemnation under law may exercise such power of condemnation as provided in subsection C.2. of
307 § 56-566 in lieu of, or at any time after taking over the transportation facility pursuant to subsection
308 C.1. of § 56-566.

309 § 56-568. Utility crossings.

310 The operator and each public utility, including railroads, whose facilities are to be crossed or
311 affected shall cooperate fully with the other in planning and arranging the manner of the crossing or
312 relocation of the facilities. Any such public utility possessing the power of condemnation is hereby
313 expressly granted such powers in connection with the moving or relocation of facilities to be crossed by
314 the qualifying transportation facility or that must be relocated to the extent that such moving or
315 relocation is made necessary or desirable by construction of or improvements to the qualifying
316 transportation facility, which shall be construed to include construction of or improvements to temporary
317 facilities for the purpose of providing service during the period of construction or improvement. Should
318 the operator and any such public utility not be able to agree upon a plan for the crossing or relocation,
319 the regulatory authority may determine the manner in which the crossing or relocation is to be
320 accomplished and any damages due either party arising out of the crossing or relocation. The
321 regulatory authority may employ expert engineers who shall examine the location and plans for such
322 crossing or relocation, hear any objections and consider modifications, and make a recommendation to
323 the regulatory authority. In such a case, the cost of the experts is to be borne equally by the operator
324 and such public utility, unless the regulatory authority determines that it would be unjust, in which case
325 the cost shall be borne as the regulatory authority decides.

326 § 56-569. Police powers; violations of law.

327 A. All police officers of the State and of each local jurisdiction, shall have the same powers and
328 jurisdiction within the limits of such qualifying transportation facility as they have in their respective
329 areas of jurisdiction and such police officers shall have access to the qualifying transportation facility at
330 any time for the purpose of exercising such powers and jurisdiction. This authority does not extend to
331 the private offices, buildings, garages and other improvements of the operator to any greater degree
332 than the police power extends to any other private buildings and improvements.

333 B. To the extent the transportation facility is a road, bridge, tunnel, overpass or similar
334 transportation facility for motor vehicles, the traffic and motor vehicle laws of the State or, if
335 applicable, any local jurisdiction shall be the same as those applying to conduct on similar
336 transportation facilities in the State. Punishment for offenses shall be as prescribed by law for conduct
337 occurring on similar transportation facilities in the State.

338 § 56-570. Termination of certificate; dedication of assets.

339 The regulatory authority shall determine the date of termination of the original permanent financing
340 and shall terminate the operator's certificate of authority on a date that shall not exceed ten years from
341 the end of the term of the original permanent financing. The regulatory authority may change the
342 termination date to take into account any refinancing of the original permanent financing, including any
343 refinancing for the purpose of expansion, or any early termination of the original permanent financing
344 to the extent that such modification serves the public purpose of this chapter. Upon the termination of
345 the certificate of authority, the authority and duties of the operator under this chapter shall cease, and
346 the qualifying transportation facility shall be dedicated to the responsible public entity or, if the
347 qualifying transportation facility was initially dedicated by an affected local jurisdiction, to such affected
348 local jurisdiction for public use.

349 § 56-571. Sovereign immunity.

350 Nothing in this chapter shall be construed as or deemed a waiver of the sovereign immunity of the
351 State, any responsible public entity or any affected local jurisdiction with respect to the participation in,
352 or approval of all or any part of the qualifying transportation facility or its operation, including but not
353 limited to interconnection of the qualifying transportation facility with any other transportation facility.

354 § 56-572. Preservation of the Virginia Highway Corporation Act of 1988.

355 Nothing in this chapter shall be construed to repeal or change in any manner the Virginia Highway
356 Corporation Act of 1988, as amended.

357 § 56-573. Severability.

358 If any provision of this chapter or the application thereof to any person or circumstances is held
359 invalid, such invalidity shall not affect other provisions or applications of this chapter that can be given
360 effect without the invalid provision or application, and to this end the provisions of this chapter are
361 declared to be severable.