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HOUSE BILL NO. 523

Offered January 8, 2020
Prefiled January 5, 2020

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

Patrons—Subramanyam, Gooditis and Reid

Referred to Committee on Labor and Commerce

Be it enacted by the General Assembly of Virginia:

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

§ 56-542. Powers of the Commission.

A. As used in this section:

"Average annual daily traffic" means the total number of users per calendar year divided by days per calendar year.

"Comparison period" means the period in which the tolls were last adjusted.

"Complaint period" means the 12-month period prior to the date at which a complaint was filed or an investigation was initiated by the Commission.

"Counties" means the counties in which the toll road operates.

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

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

"Materially discourage use" means a relative change in traffic of more than three percentage points decrease in tariff on the toll road or a relative change in potential toll users of more than three percentage points decrease in potential toll users on the toll road, which change is attributable to the rate charged.

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

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

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

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

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

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"Relative change in potential toll users" means the difference between the percentage change in average annual daily traffic on the toll road and the percentage change in weighted average adult driving population in the counties, based on the most recent information published by the U.S. Bureau of the Census. For example, if traffic during the complaint period increased by five percent over traffic during the comparison period, and such population in the counties during the complaint period increased by 10 percent over such population in the counties during the comparison period, the operator would have experienced a relative change in potential toll users of five percent.

"Relative change in traffic" means the difference in the counties between the percentage change in average annual daily traffic on the toll road and the percentage change in average annual daily traffic on major alternate routes traveling in the same directions. This measurement will be taken collectively for the entire toll road and individually at each interchange on the toll road and compared with a reasonable comparison point on the major alternate route. For example, if traffic on the toll road, either at a specific interchange or collectively, during the complaint period increased by five percent over traffic on the toll road during the comparison period, and traffic on a major alternate route traveling in the same directions at a reasonable comparison point during the complaint period increased by 10 percent over traffic at the same comparison point on the major alternate route during the comparison period, the operator would have experienced a relative change in traffic of negative five percent.

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. *The provisions of this subsection are conjunctive. Toll rates shall not materially discourage the public's use of the toll road, and the cost of operating the toll road shall be reasonably apportioned across all toll road users based on the relative distance each class of user travels on the toll road, such that the toll rates are established in a reasonable and nondiscriminatory manner in relation to the benefit obtained, and toll rates shall provide the operator with no more than a reasonable return.*

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 I 3 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 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.

J. No later than October 1, 2020, the Commission shall initiate an investigation into the tolls charged by all operators subject to this chapter. No later than April 1, 2021, the Commission shall issue a ruling on its investigation as to whether the current tolls charged by the operator comply with subsection D. To the extent such adjustments require additional investment, the Commission shall ensure that the operator has reasonable but limited time to make such investment.

K. In order to encourage operating efficiency and to provide an incentive for the operator to increase its relative utilization, to the extent the operator is in compliance with all Commission regulations and covenants established in the master agreement between the operator and the Department of Transportation, any incremental return resulting on a cumulative basis from increased traffic related to a relative change in potential toll users that is greater than zero shall not be the sole basis for finding that the operator's return exceeds a reasonable level as specified in subsection D, during any future complaint proceeding. When conducting its initial investigation pursuant to subsection J, the Commission shall develop a baseline from which it can measure the relative change in potential toll users. The incremental return shall be computed on the basis of the cumulative change from that baseline prospectively, such that any positive and negative changes will be netted after the Commission makes its initial baseline assessment. In defining and accessing the level of incremental return, the Commission shall consider the level of allowed return, as provided in subsection D, embedded in the then-current toll and the incremental traffic related to that toll on a cumulative basis, if any, above the baseline. Nothing in this subsection shall change the manner in which the Commission computes reasonable return under the requirements of subsection D, which is based on the operator's prudent investment. In addition, the operator shall not be permitted to seek a toll increase that attempts to raise its return above the reasonable level as provided in subsection D.

L. The details of any related party transactions shall be fully disclosed in public financial reports to the Commission. This disclosure shall specifically describe the nature of the services provided and contain information showing at least three separate competitive bids demonstrating that the operator could not have achieved better contract terms from a third party. Absent such a showing, any related party transactions shall be presumed to be imprudent and excluded from costs used for any purpose,

including but not limited to costs of lobbyists, excessive compensation, and entertainment expenses, and shall be excluded from any calculation of a reasonable return.

M. Nothing in this chapter shall be construed to limit the power of the Commission through the terms and conditions of any master agreement between an operator and the Department of Transportation.

2. That the State Corporation Commission, in carrying out the provisions of this act, shall have the primary duty to ensure that toll road users pay rates that comply with subsection D of § 56-542 of the Code of Virginia, as amended by this act, and shall not extend the time period during which an operator is permitted to operate a toll road.