SCC-62

COMMONWEALTH OF VIRGINIA

STATE CORPORATION COMMISSION

**APPLICATION OF**

**TOLL ROAD INVESTORS PARTNERSHIP II, L.P.**

**CASE NO. PUE-2006-00081**

**Application for an Increase in the Maximum Authorized Level of Tolls**

2007 JUN 29 P 3: 50

**REPORT OF HOWARD P. ANDERSON, JR., HEARING EXAMINER**

**June 28, 2007**

On July 19, 2006, as supplemented on August 2, 2006, Toll Road Investors Partnership II, L.P. ("TRIP II" or "Partnership"), filed with the State Corporation Commission ("Commission") its Application of Toll Road Investors Partnership II, L.P., for an Increase in the Maximum Authorized Level of Tolls ("Application") for the Dulles Greenway ("Greenway").

On November 2, 2006, the Commission issued an Order Granting Requests for Hearings and Establishing Procedural Schedule ("Order") in which it established a procedural schedule and hearing date, and assigned the matter to a Hearing Examiner to conduct all further proceedings. The Order further scheduled a public hearing on the Application for January 30, 2007, at the Loudoun County Government Center in Leesburg, Virginia, to receive comments from public witnesses.

Hearings were convened as scheduled on January 30, 2007, at 2 p.m. and 7 p.m. A total of fifty-nine public witnesses offered testimony and all but one public witness voiced opposition to the proposed toll increase. Many speakers characterized the proposed toll increase as "highway robbery."

Representative Frank R. Wolf testified that the issue of a toll increase as proposed by the Partnership is of critical importance to the thousands of people in his congressional district who use the Greenway. Specifically, Rep. Wolf stated that, if the proposed toll increase is approved, it will create a serious financial burden on the people who live west of the Washington Metropolitan area and have little choice but to depend on the Greenway for their daily commute.

If the Commission approves the requested increase, a daily commuter will pay $2,400 annually in 2012, almost triple the cost in 1995, and a 100 percent increase over the current toll rates. Rep. Wolf characterized the proposed toll increase as nothing more than highway robbery. Rep. Wolf believes the Partnership is taking advantage of the fact that the Greenway is, for many in Northern Virginia, the only alternative to gridlocked traffic. Rep. Wolf pointed out that the owners of the Greenway, Macquerie Bank of Australia, are foreign owners whose families do not have to use the Greenway.[1]

[1] Tr. 8.

Further, Rep. Wolf contended that the increased tolls would force present Greenway commuters off the Greenway, thus negatively impacting nearby neighborhoods, Route 50, and Route 7. Rep. Wolf stated that the major alternative to the Greenway is Route 7, which the Virginia Department of Transportation ("VDOT") classifies as a service Level F highway during rush hour traffic. Service Level F is defined by VDOT as "forced traffic flow in which the amount of traffic approaching a point exceeds the amount that can be served."[2] Rep. Wolf noted that Route 7 traffic is predicted to become even worse in the near future.

Rep. Wolf pointed out that the Partnership must meet three conditions before an increase in tolls can be approved. First, the increase must be reasonable to the user in relation to the benefit obtained; it should not discourage the use of the roadway by the public; and it should provide the operator with a reasonable rate of return. Rep. Wolf argues that the Partnership's request fails to meet any of these conditions.

Rep. Wolf maintained that the proposed toll increase would make the Greenway the most expensive toll road in America at $0.34 a mile if the toll is raised to $4.80. Further, Rep. Wolf pointed out the inequity of a driver having to pay the full toll even though that driver will take the first exit, thus driving on the Greenway for only one mile.

Rep. Wolf stated that the American Automobile Association, the Dulles Chamber of Commerce, the Loudoun Chamber of Commerce, and the Dulles Area Association of Realtors have publicly stated their opposition to the proposed toll increase. Further, the Loudoun Board of Supervisors ("Board"), the Leesburg Town Council ("Council"), and the Purcellville Town Council have each passed resolutions opposing the toll increase.[3]

Scott York, a member of the Board, explained that the Dulles Greenway is the only limited access highway between Loudoun County and the greater metropolitan Washington area. As such, Mr. York maintained that the proposed toll increase, especially the congestion management surcharge, places an unfair burden on Loudoun County commuters using the Greenway. Mr. York pointed out that a commuter using the Greenway fifty weeks of the year to commute to work would pay $2,400 annually, or $0.34 cents per mile, under the proposed toll rates.

Mr. York stated that the Board voted eight to one to oppose the proposed toll increase. If the Commission approves the proposed toll increase, the Board voted nine to zero to adopt a resolution to petition the Commission to allocate a portion of the increase to Loudoun County for highway construction improvements in the Greenway planning area.[4]

Steve Snow, district supervisor for the Dulles District, testified that citizens oppose the toll increase, but have no alternative means of travel such as public transportation. Mr. Snow characterized the proposed increase as arbitrary and unfair.[5]

[2]Tr. 5.
[3]Tr. 4-13.
[4]Tr. 16.
[5]Tr. 18, 19.

Bill Hatch stated that he has logged over 7,000 trips on the Greenway; he believes the owners are entitled to a fair return on their investment. However, Mr. Hatch suggested a sliding scale toll structure that would lower tolls for drivers who use the Greenway at 3 a.m. as he does.[6]

Ann Jansen voiced strong opposition to the proposed toll increases, maintaining that they are cost prohibitive. Ms. Jansen stated that the proposed increase proves that the private sector is not the answer to funding and operating our statewide road system. Ms. Jansen contended that it defies reason that a commuter using the Greenway would have to pay $2,400 a year to use a thirteen-mile stretch of road.[7]

Christine Windle, public policy director for the Dulles Area Association of Realtors which represents over 1,700 realtors, argued the Partnership has failed to meet the conditions necessary for the Commission to approve a toll increase. First, Ms. Windle maintained that the cost of using the Greenway on a daily basis outweighs the benefit to commuters. Second, Ms. Windle contended that the Partnership is taking advantage of the fact that the Greenway is the only road going east to Washington that is not clogged with traffic during daily commutes. Third, Ms. Windle stated that the proposed tolls represent almost a one hundred percent increase which amounts to highway robbery. Ms. Windle claimed that the Partnership is using the Greenway as a money-making machine at the expense of homeowners and residents.[8]

Roger Zurn, treasurer of Loudoun County, explained that when the Greenway was approved, he was a member of the Board and chairman of the Finance Committee. Mr. Zurn stated that, at the time it was approved, the Board was given full assurances that the highway would be an affordable private alternative to Route 7. Now that the Greenway has been sold and resold, Mr. Zurn maintained that the tolls have exceeded what was considered reasonable at the time and that, if the current situation had been envisioned, the Greenway would never have been approved.[9]

Katherine Mulder stated that she felt as if she were being held hostage by the Commission and the owners of the Greenway. Ms. Mulder requested that the Commission conduct a thorough audit to ensure that the proposed increase in tolls is justified.[10]

Stephen Robin, a land use attorney, stated that a set fee for use of the Greenway regardless of the distance traveled discourages people in the heavily populated eastern part of the county from using the road because they would be paying full price for a short distance traveled. Mr. Robin urged that an independent rate study be performed. Mr. Robin argued that rates should be set for a short increment of time, with the Partnership coming in to justify additional increments as time goes by.[11]

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[6]Tr. 20.
[7]Tr. 22.
[8]Tr. 24-26.
[9]Tr. 29-31.
[10]Tr. 37.
[11]Tr. 38-40

Edna Cross, chairperson of the Dulles Area Association of Realtors' Government and Political Affairs Committee, testified that commuters on the Greenway would face a serious financial burden if the proposed tolls are granted. Ms. Cross maintained that the increased tolls will hurt the local economy by increasing the cost of doing business in Loudoun County and will discourage future businesses from locating in the county. Further, Ms. Cross stated that the increased tolls would hurt property values in Loudoun County. She argued that the tolls should be staggered, based on the distance traveled.[12]

John Townsend, manager of Public and Government Affairs for AAA Mid-Atlantic ("AAA"), stated that AAA represents more than 800,000 motorists in the local area who are primarily opposed to the proposed increase in tolls. Mr. Townsend contended that the increased tolls will make the Greenway one of the most expensive toll roads in the entire nation. Mr. Townsend urged rejection of the proposed toll increase arguing it would be harmful to motorists in the area and to business in general.[13]

John Andrews, while acknowledging that the Greenway has been a great enhancement to the local road network, pointed out that the Greenway's indebtedness has spiraled out of control from $355 million in 1993 to $1.3 billion today. Mr. Andrews does not believe that the traveling public should be obligated to help the Partnership pay its way out of its current deep financial hole. Mr. Andrews requests that the Commission examine the Partnership's debt structure and make the information available to the public.[14]

Joyce Hart, a self-described soccer mom, explained that she cannot boycott the Greenway because of family time constraints. Ms. Hart stated that the back roads are slow, congested, hard on cars, and dangerous. Ms. Hart described the toll as a hardship.[15]

Stevens Miller testified that, because the alternatives to the Greenway are clogged with traffic, the proposed increase in tolls will not cause a substantial decrease in the number of drivers using the Greenway. Mr. Miller stated that people will continue to use the Greenway because they have no other choice. Mr. Miller contended that the blanket toll rate regardless of distance traveled is unfair.[16]

Kathy Yurchak, manager of the Lansdowne Conservancy, stated that if the toll increase is approved, Loudoun County residents will not be able to afford to travel on the Greenway because salaries are not increasing at the same rate, and few working families can afford such steep increases. Ms. Yurchak believes that there is a risk that employees will not be able to afford to commute to and from Loudoun County for employment. She stated that the toll charges should be comparable to other toll facilities in the country.[17]

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[12]Tr. 41-43.
[13]Tr. 44-47.
[14]Tr. 48-53.
[15]Tr. 54, 55.
[16]Tr. 58-61.
[17]Tr. 62-64.

Geoffrey Kostal characterized the tolls as a regressive tax that impacts the marginal users of the Greenway. Overall, however, Mr. Kostal believes that most drivers will continue to use the toll road. Mr. Kostal questioned whether the toll road should become a benefit that can be used only by the wealthier elements of society who value their time more than the money required for tolls.[18]

Jim Haynes, a self-described believer in free markets, explained that he takes Route 7 occasionally to save money, but when he needs to be on time, he pays the toll and takes the Greenway. Mr. Haynes stated that, when necessary, he will pay for premium services and take the toll road.[19]

Bill Thomas, a local real estate agent, explained that when the Greenway opened, the value of property in western Loudoun County went up because that part of the county became more accessible. People found that because of the Greenway, it was possible to live in western Loudoun County and commute to work in metropolitan Washington. Therefore, Mr. Thomas described the Greenway as a very valuable commodity to Loudoun County. Mr. Thomas opposed the toll increase.[20]

Bill Soltesz bluntly stated that the Commonwealth of Virginia should have built the Greenway, and now the privately-owned road has turned into a bad deal for the citizens of Virginia.[21]

Marie Williams described the proposed toll rates as ridiculously high. She testified she is constantly forced to choose between being stuck in gridlock or paying a heavy tax for living in the Ashburn area.[22]

Fernando Martinez, a member of the Council, predicted that the increased tolls will cause more people to use the already overburdened Route 7 and Route 50. Mr. Martinez stated that he and his wife use the Greenway to commute to work, and they pay about $5,000 a year for that privilege. While Mr. Martinez will be hesitant to use the Greenway if the tolls are increased, he stated that there are some people that are willing to use the Greenway regardless of the rates, but they will not be happy.[23]

Colleen Demetro testified that she uses the Greenway to visit her family in Sterling, but that she will not be able to afford the proposed increases in tolls.[24]

G.E. Corcoran, stated that all people are not rich and that the Commonwealth should buy out the Australian investors and let the state run the toll road.[25]

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[18]Tr. 68, 70.
[19]Tr. 81.
[20]Tr. 83, 86.
[21]Tr. 86, 87.
[22]Tr. 89.
[23]Tr. 93, 94.
[24]Tr. 96.
[25]Tr. 100.

Mark Winn contended that the rate of return based on the proposed tolls is not fair, and citizens are overpaying for use of the Greenway under current rates. Mr. Winn advocates denying the proposed increase.[26]

Conrad McHan stated that the Partnership made a bad deal in buying an entity that has tripled its debt. Mr. McHan does not believe the Partnership should be rewarded for making a bad deal. Mr. McHan requested that the state regain control of the Greenway and let the citizens pay the state instead of the Partnership.[27]

Lori Waters, supervisor from the Broad Run District of Loudoun County, opposed the toll increase as just another tax. Moreover, Ms. Waters thinks the tolls should be assessed based on the distance traveled on the Greenway. Ms. Waters stated that the Loudoun County Board of Supervisors passed a resolution opposing the toll increase and, if the increase is approved, part of the increase should be returned to the county to improve its secondary road system. Ms. Waters characterized the proposed toll increase as an outrageous level of taxation that constituents cannot handle.[28]

Patricia Phillips stated that the General Assembly abdicated its road-building responsibility to a private corporation, Trip II. Ms. Phillips contended that Trip II then overestimated the amount motorists would be willing to pay to use the Greenway. As a result, Trip II lowered its tolls and has been trying to rectify its mistake with subsequent toll increases. Ms. Phillips maintained that, because the General Assembly continues to refuse to build the necessary road network, the Greenway has become a de facto monopoly. Ms. Phillips concluded that the General Assembly has ignored its responsibility to address Northern Virginia's gridlock. Cost-conscious drivers will determine that the proposed tolls are too high and add to the current gridlock on the area's secondary road system.[29]

Sandra Kane testified that citizens should not be put in the position of having to pay for a bad investment by the owners of the Greenway.[30]

Michael Cerrea stated that he and his wife had to sell their house and move to another location because they could not afford the tolls on the Greenway. Mr. Cerrea explained that there was no other option than to take the toll road because of traffic gridlock. Mr. Cerrea referred to the situation as "an abuse by the toll" and stated that young people in Loudoun County can't afford the tolls.[31]

Robert Lazaro, mayor of the Town of Purcellville, read into the record the contents of a resolution in opposition to the proposed toll increase, passed by the town council. Mr. Lazaro contended that if this toll increase is approved, it will have more of a financial impact on local residents than the state income tax.[32]

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[26]Tr. 101, 102.
[27]Tr. 104-106.
[28]Tr. 107-110.
[29]Tr. 112-115.
[30]Tr. 129.
[31]Tr. 130, 131.
[32]Tr. 134, 135.

Sharon Bowen stated that, with the proposed toll increases, she will no longer be able to afford to use the Greenway and will have to find alternate routes such as Route 7 and Route 28. Ms. Bowen also requested consideration for patrons who use the Greenway for only a short distance.[33]

Jack Ryan described the proposed toll increases as "highway robbery." Mr. Ryan declared that the people of Loudoun County send millions to Richmond for roads and get nothing back in return.[34]

Mark Fordyce testified that Route 7 is not a viable alternative to the Greenway due to its traffic congestion. Furthermore, Mr. Fordyce maintained that businesses do not want to locate in areas that experience traffic gridlock. Mr. Fordyce requested that, instead of a toll increase, the Partnership should be directed to restructure its debt.[35]

Ann Bollinger echoed the opinion of many speakers when she stated that the proposed increase is unreasonable and that the citizens of Loudoun County should not be expected to pay for the Partnership's bad investment.[36]

Delegate Joe May stated that the Greenway has been a real asset to the community, but requested that the Commission explore the contention that the Greenway has always lost money. Delegate May dispelled the idea that the Greenway is part of an open market situation and fraught with risk. The only risk, according to Delegate May is whether 70,000 or 90,000 vehicles a day will use the Greenway. Delegate May described the only viable alternative, Route 7, as over capacity and no choice at all.[37]

Senator Mark Herring also spoke in opposition to the proposed toll increase, stating that the tolls were raised just last year and more increases are "too much, too soon, and it's unfair." Senator Herring maintained that the Partnership enumerated capital projects on the Greenway as support for this increase, and many of the same capital projects were used to support the last toll increase. Senator Herring concluded that further toll increases on the hard-working families of Loudoun County and Northern Virginia simply cannot be justified at this time.[38]

Delegate David Poisson observed that the Greenway is the only reasonable means available for people who commute to work, and they are faced with a choice between paying higher tolls or sitting in traffic. Delegate Poisson characterized the proposed "congestion management price premiums" as particularly galling. Delegate Poisson was clear that, while he does not oppose all revisions to the Greenway toll structure, he finds the present proposal excessive. Further, Delegate Poisson contends that the Greenway's most frequent users should be allowed a discount for using smart tags or other automatic toll collection systems.[39]

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[33]Tr. 138, 139.
[34]Tr. 140.
[35]Tr. 143, 144.
[36]Tr. 155.
[37]Tr. 157-159.
[38]Tr. 160-162
[39]Tr. 163, 164.

Scott Rifkin testified that he uses the Greenway every day, but gets off at the second exit. While Mr. Rifkin stated that he is more than willing to pay for what is fair, he is opposed to the toll increase because he considers it unfair.[40]

Kevin Wright, a member of the Leesburg Town Council, stated that the Council unanimously passed a resolution in opposition to the proposed toll increases. Mr. Wright maintained that the toll increases would seriously impact the ability of Leesburg and other communities to continue to grow their tax base and receive the benefits intended when the Greenway was built. Mr. Wright characterized the proposed toll increase as unreasonable and maintained that it would discourage people from using the Greenway.[41]

Bob Klancher, a member of the Loudoun County Planning Commission, stated that he and his wife pay more than $3,000 annually to use the Greenway and that the other options are "just miserable." Mr. Klancher believes that a toll increase would discourage businesses from locating in the area.[42]

Kelly Wing stated that what really infuriates her is that she pays the toll to use the Greenway but still has to sit in traffic.[43]

John Walker suggested that the taxes the Greenway pays to the state be used to buy the road back. He argued that further privatization of roads in Virginia is a complete waste of time and should be halted immediately.[44]

*Public Comment*

The Commission received approximately 600 written comments, the vast majority in opposition to the proposed toll increases. As in the public hearings, a significant number of individuals stated that they would no longer use the Greenway if the proposed increases were approved. Public dissatisfaction with the lack of distance pricing was a common theme, and many noted that the Pennsylvania Turnpike and the New Jersey Toll Road use distance pricing. Many characterized the proposed toll increases as excessive, and stated that they could no longer afford to use the Greenway.

As previously noted, the Loudoun County Board of Supervisors unanimously passed a resolution opposing the proposed toll increases. The Towns of Leesburg and Purcellville also approved resolutions in opposition to the proposed toll increases. Representatives Shelley Moore Capito and Frank R. Wolf wrote in opposition to and in concern over the proposed increases. State Senators H. Russell Potts, Jr. and Mark R. Herring and House Delegate David E. Poisson wrote in opposition to the proposed toll increases.

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[40]Tr. 173, 174.
[41]Tr. 179, 180.
[42]Tr. 181, 182.
[43]Tr. 184.
[44]Tr. 190.

*History and Statutory Requirements*

In 1988, the Virginia General Assembly passed the Virginia Highway Corporation Act of 1988, Virginia Code §§ 56-535 *et seq.* ("Act"), which authorized the construction of private toll roads in the Commonwealth. The Act sets forth the requirements for a proposed project and provides for regulation by the Commission, including toll rates.

By order dated July 6, 1990,[45] the Commission granted the Toll Road Corporation of Virginia a certificate to construct and operate a private toll road from Leesburg, Virginia, to the western end of the existing, state-owned Dulles Toll Road in the area of Dulles Airport.

The Dulles Toll Road is one roadway having two parts, constructed at different times, and owned by different entities. The Greenway is actually the western extension of the Dulles Toll Road, which runs east from the Dulles Airport to a point past the Beltway in Fairfax County, and was constructed and is operated by the Virginia Department of Transportation ("VDOT"). The Greenway, which was constructed, owned and operated by TRIP II, extends from the Dulles Airport west to Route 7 in Leesburg. The Commission approved certain rates of return, toll rates, and ratemaking methodologies. A $1.50 toll was approved through December 31, 1993; $1.75 for January 1, 1994 through December 31, 1995; and $2.00 for the period of January 1, 1996 through December 31, 1997.

On June 28, 1991, the Commission issued an Order Amending Certificate approving the transfer of the certificate to TRIP II.[46] The Greenway opened to traffic on September 29, 1995.

Section 56-542 of the Code of Virginia provides in part as follows:

> 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.

[45]*Application of Toll Road Corporation of Virginia, For a certificate of authority and approval of rates of return, toll rates and ratemaking methodology pursuant to the Virginia Highway Corporation Act of 1988*, Case No. PUA-1990-00013, 1990 S.C.C. Ann. Rep. 197 ("Toll Road Certificate Case").
[46]*Toll Road Certificate Case*, 1991 S.C.C. Ann. Rep. 208.

*Summary of the Hearing Record*

The evidentiary hearing was held in Richmond on March 13, 2007. Representing TRIP II were Richard D. Gary, Esquire, and Charlotte P. McAfee, Esquire. Wayne N. Smith, Esquire, and Raymond L. Doggett, Jr., Esquire, represented Commission Staff.

In its application, the Partnership proposed the toll price schedule set forth below. A congestion management toll price premium of approximately 20% would be applied to weekday peak period traffic traveling in the peak direction.

| **From date:** | **Maximum 2-axle toll for all off-peak traffic** | **Maximum congestion management toll (applicable only to weekday traffic in peak period & direction)** |
|---|---|---|
| January 1, 2009 | $3.40 | $4.00 |
| July 1, 2010 | $3.70 | $4.50 |
| January 1, 2012 | $4.00 | $4.80 |
| Note: Weekday peak period is defined as the busiest 3-hour period eastbound in the morning and westbound in the afternoon. | | |

The Partnership proposes a new truck toll price schedule as follows:

- Two-axle trucks will retain the automobile rate;
- Three-axle trucks will pay twice the two-axle rate;
- Four- to six-axle trucks will pay the three-axle rate plus an amount equal to 50% of the two-axle rate for each additional axle; and
- Vehicles with more than six axles will pay the same rate as vehicles with six axles.

The following table compares the current truck toll schedule with the proposed truck toll schedule.[47]

| **Trucks (by number of axles)** | 2 | 3 | 4 | 5 | 6 | 6+ |
|---|---|---|---|---|---|---|
| **Toll-current** | $2.70 | $5.40 | $5.40 | $5.40 | $ 5.40 | $ 5.40 |
| **Toll-proposed** | $3.00* | $6.00* | $7.50 | $9.00 | $10.50 | $10.50 |

**These rates have been approved by the Commission in the Company's prior rate case.*

The Partnership maintains that the truck toll rates will allow a more equitable allocation of maintenance costs to truck traffic, which imposes a greater burden on the road per vehicle.[48] The Partnership proposes to implement the new truck toll schedule on July 1, 2007.

[47]Ex. No. 3, at 16; Application, Exhibit B.
[48]Ex. No. 2, at 6, 7.

In support of the proposed truck schedule, Partnership witness Sines[49] testified that, based on the last eighteen months of traffic data, truck traffic on the Greenway is approximately 2.3% of overall traffic. Although this is a low percentage of overall traffic on the Greenway, Mr. Sines stated that transportation studies show a disproportionate amount of damage to the roadway is caused by truck traffic. Mr. Sines pointed out that the American Association of State Highway and Transportation Officials calculated that an 80,000 pound, five-axle truck does as much damage to the roadway as 9,600 cars.[50]

In overall support of the toll increases, Mr. Sines maintained that the financial well-being of the Greenway requires it. According to Mr. Sines, additional revenues will be needed for debt service, ongoing operations and maintenance, and capital improvements. In support of the extended schedule of toll increases, Mr. Sines contended that the Partnership needs flexibility to adjust rates without constantly applying to the Commission. Mr. Sines pointed out that since 1999, the Partnership has spent approximately $59 million on new and improved interchanges, additional travel lanes and other upgrades and additions. Mr. Sines testified that current plans for capital improvements over the next ten years amount to $200 million, subject to the availability of funds.[51]

Tom McKean, chief financial officer of TRIP II, provided a financial history and condition of the Greenway in support of the proposed toll increases. Mr. McKean pointed out that the Greenway was developed solely with private equity and debt. Initial costs to acquire right-of-ways, construct, and open the road totaled approximately $315 million. Mr. McKean explained that, due to an economic decline in 1995, it became obvious that Greenway traffic and revenue projections would not be met. Mr. McKean stated that, because of the revenue shortfalls, the Partnership was on the brink of bankruptcy, a condition which persisted for almost three years. In 1999, Mr. McKean testified that the Partnership refinanced its debt and in 2005 obtained additional debt capital by issuing approximately $390.6 million in bonds.[52]

In September of 2005, Macquarie Infrastructure Group ("Macquarie") announced its investment in TRIP II. Mr. McKean explained that Macquarie acquired a 100% interest in the general partner, Shenandoah Greenway Corporation, which had sole authority for the operation and management of TRIP II. Macquarie then made subordinated loans to the other partners (who hold an aggregate 86.6% interest in TRIP II) by means of call options that may be used to acquire this outstanding interest in the future. Mr. McKean stated that Macquarie also acquired a 13.3 % direct interest in TRIP II from Kellogg, Brown & Root in late September of 2005.

Mr. McKean testified that the Partnership's outstanding debt as of December 31, 2006, was $909 million. Mr. McKean provided the table set out below showing TRIP II's debt service requirements through 2015.[53]

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[49]Mr. Sines is the chief executive officer of TRIP II.
[50]Ex. No. 3, at 16, 17.
[51]Id. at 19.
[52]*Application of Toll Road Investors Partnership II, L.P., For approval of refinancing*, Case No. PUF-2001-00017, 2005 S.C.C. Ann. Rep. 498.
[53] Ex. No. 4, at 5.

**DEBT SERVICE REQUIREMENTS**

| Year | Debt Service Requirement |
|---|---|
| 2006 | $29,293,750 |
| 2007 | $32,093,750 |
| 2008 | $35,693,750 |
| 2009 | $33,793,750 |
| 2010 | $34,793,750 |
| 2011 | $44,393,750 |
| 2012 | $50,193,750 |
| 2013 | $53,693,750 |
| 2014 | $57,493,750 |
| 2015 | $61,493,750 |

Mr. McKean pointed out that, as evidenced by the table above, TRIP II will have significant increases in debt service costs over the coming years which, along with certain debt coverage ratio requirements, will require a steady increase in tolls.

Mr. McKean further testified that TRIP II has never operated at a profit, and he submitted the following table depicting the Partnership's loss experience.[54]

| TRIP II ANNUAL NET INCOME / (LOSS)* | |
|---|---|
| **Date of Audited Financial Statement** | **(Annual Loss)** |
| December 31, 1993 | ($3,070,804) |
| December 31, 1994 | ($12,519,718) |
| December 31, 1995 | ($20,255,803) |
| December 31, 1996 | ($49,961,308) |
| December 31, 1997 | ($38,975,586) |
| December 31, 1998 | ($40,684,074) |
| December 31, 1999 | ($51,765,097) |
| December 31, 2000 | ($31,371,032) |
| December 31, 2001 | ($32,306,923) |
| December 31, 2002 | ($33,187,826) |
| December 31, 2003 | ($29,913,338) |
| December 31, 2004 | ($21,997,426) |
| December 31, 2005 | ($41,079,249) |
| *Figures from the audited Financial Statements prepared in accordance with GAAP, and do not reflect opportunity costs. | |

[54] Id. at 6.

Finally, the Partnership presented the testimony of Ashley Yelds,[55] who was retained by TRIP II to prepare a report[56] addressing two of the statutory tests under § 56-542 of the Code of Virginia. Specifically, the report analyzes whether the proposed toll prices are reasonable to the user in relation to the benefit obtained, and whether the proposed tolls would materially discourage public use of the Greenway. Mr. Yelds' report includes the following:

- Historical traffic analysis
- Socio-economic and demographic analysis
- Value of time and time savings
- Comparative vehicle operating costs
- Accident rates and costs
- Comparative toll charges
- Elasticity to historical toll increases
- Market share of traffic flows

Mr. Yelds also addressed the decline in Greenway traffic for 2006 as shown by the following traffic history:[57]

| Year | Total Annual Traffic | % Increase Over Prior Year |
|---|---|---|
| | | |
| *1996* | 6,345,799 | ...... |
| *1997* | 8,669,851 | 36.6% |
| *1998* | 10,073,474 | 16.2% |
| *1999* | 12,390,781 | 23.0% |
| *2000* | 14,528,262 | 17.3% |
| *2001* | 16,256,595 | 11.9% |
| *2002* | 17,431,613 | 7.2% |
| *2003* | 19,079,403 | 8.6% |
| *2004* | 22,186,183 | 14.0% |
| *2005* | 22,344,095 | 0.7% |
| *2006* | | -6.5%[58] |

Mr. Yelds acknowledged that traffic levels between June 2005 and June 2006 on the adjoining Dulles Toll Road and the Greenway are slightly lower than in previous years.[59] In addition to the most recent toll increase on the Greenway (January 1, 2006), Mr. Yelds attributes the decline to additional factors, including fuel price spikes, a marked decline in Loudoun County employment,

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[55]Mr. Yelds is an economist employed by the consulting firm Maunsell as an associate director of transportation economics. Maunsell is a wholly-owned subsidiary of AECOM Technology Corporation, with headquarters in Los Angeles, California. Mr. Yelds explained that Maunsell provides planning, advisory, design, and management services in the transportation, facilities, power, and environmental markets. In particular, Maunsell has extensive experience in providing traffic and toll road analyses.

[56]The report is Exhibit A to Mr. Yelds' prefiled direct testimony, Ex. No. 5.

[57]Ex. No. 3, at 6.

[58]Id.

[59]Traffic declined on the Dulles Toll Road by 4.0% and on the Greenway by 3.5%.

and a downturn in air passenger traffic at Dulles International Airport. In addition, Mr. Yelds stated that capacity upgrades on alternative roadways were completed, just as construction on the Greenway began.[60]

On the basis of his report, Mr. Yelds concluded that Greenway customer benefits exceed current toll payments by a factor of 2.3 times.[61] Mr. Yelds stated the benefits include time savings to customers using the Greenway as compared to alternate routes, reduced vehicle operating costs, and avoided accident costs. Mr. Yelds testified that the benefits are more pronounced during peak periods, but exist for all periods of the day. Mr. Yelds maintained that, even without considering the escalation of benefits over time and inflation, the benefits of the Greenway today are in excess of the tolls proposed in this case.

Staff witness Jarilaos Stavrou, a principal research analyst in the Commission's Division of Economics and Finance, examined the Partnership's case for increased tolls including Mr. Yelds' economic study. Mr. Stavrou testified that the Partnership's methodology for estimating the economic benefits to patrons of the Greenway follows acceptable guidelines for transportation studies. Mr. Stavrou agreed with the Partnership's analysis that the proposed toll rates are reasonable in relation to the benefits provided to Greenway patrons. Mr. Stavrou further stated that Greenway patrons experience higher benefits during peak time periods, and that larger vehicles (three or more axles) receive greater benefits than smaller vehicles (two axles).

Regarding the issue of whether the proposed toll increases would discourage use of the Greenway, Mr. Stavrou noted that the recent decline in traffic growth could be an indicator of future trends and an increasing elasticity of demand. Mr. Stavrou explained that an inelastic demand would imply that higher toll rates will not unduly discourage the use of the Greenway. However, Mr. Stavrou testified that the Partnership's testimony indicating an inelastic demand for the Greenway is consistent with other toll road transportation studies and that the degree of inelasticity increases for peak period patrons.[62]

Furthermore, Mr. Stavrou agreed with the plausible causes for the recent traffic decline set forth by Mr. Yelds. Mr. Stavrou pointed out that continued population growth in Loudoun County will cause alternate routes to become increasingly congested, thereby making the Greenway a more attractive alternative. Mr. Stavrou concluded his testimony by stating that Commission Staff does not oppose the Partnership's proposed estimates of economic benefits and price elasticities of demand.[63]

Lawrence T. Oliver, assistant director for the Commission's Division of Economics and Finance, addressed the Partnership's historic financial performance, debt load and corresponding debt service obligations, and how the Greenway's current operations and debt service obligations

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[60]Ex. No. 5, at 8.
[61]Specifically, Mr. Yelds stated that, compared to the current weighted average toll payment of $2.64 per trip, the total road user benefit of $6.09 is estimated to be at least 2.3 times the current toll payment. Even during the off-peak, when total benefits are estimated to be $4.15, benefits exceed the weighted average toll by 1.6 times. Higher total benefits are derived during the peak at $9.91 per trip, or 3.7 times the weighted average toll, according to Mr. Yelds.
[62]Ex. No. 6, at 7, 8.
[63]Id. at 7-10.

impact the need for a toll increase. Further, Mr. Oliver provided a history of the Greenway and explained some of the factors that have led to the present case.

Mr. Oliver explained that TRIP II's predecessor, the Toll Road Corporation of Virginia ("TRCV"), began the approval process by filing an application with the Commonwealth Transportation Board ("CTB"). On July 20, 1989, after determining there was a public need for the roadway, the CTB approved TRCV's application to construct and operate the Greenway.

On February 2, 1990, TRCV filed an application with the Commission to construct, own, and operate the fourteen-mile Greenway. The application requested approval of proposed toll rates, projected rates of return to be earned by equity investors, and certain accounting issues.

As directed by the Commission, Staff filed its report on April 17, 1990, evaluating the cost of construction, timeline for construction, and impact on the consuming public over the life of the project. Staff projected the total cost of service to the using public over the 40-year life of the proposed project would be $894.8 million if VDOT built and operated the Greenway, and $3.5 billion if constructed and operated by a private entity. Mr. Oliver explained that Staff's conclusion was based on the following factors:

1. Debt service costs of TRCV compared to debt issued by a government agency;
2. Projected dividend payments to TRCV shareholders in excess of $1.1 billion over the life of the project; and
3. The payment of income and property taxes in excess of $785 million by TRCV that are not required by VDOT, over the life of the project.

At that time, VDOT was also considering building the Greenway extension to Leesburg. In July of 1988, VDOT retained a firm to study the financial feasibility of widening the existing Dulles Toll Road and extending it to Leesburg. VDOT took other steps that indicated it was going to construct the Greenway extension. However, by letter dated May 1, 1990, VDOT informed the Commission that "... the toll facility between Dulles Airport and the town of Leesburg Bypass is to be developed by the Toll Road Corporation of Virginia, and the Department has no plans to build this facility with public funds." Further, the Commissioner of VDOT stated that his department was in support of TRCV's application and recommended approval.[64]

By Order dated July 6, 1990, the Commission approved the application and granted TRCV a certificate to construct and operate the Greenway. The Commission approved TRCV's proposed method of financing the project through a sale and leaseback arrangement and approved the following toll rates:

- $1.50 from the opening of the roadway until December 31, 1993;
- $1.75 from January 1, 1994 to December 31, 1995;
- $2.00 from January 1, 1995 to December 31, 1997; and

[64]Ex. No. 7, at 7.

- The toll charged for a motor vehicle with six or more wheels may exceed the foregoing tolls by no more than 100%.

On June 28, 1991, the Commission authorized the transfer of the certificate from TRCV to TRIP II.[65] The Order also approved a new financing plan by which permanent funding would be obtained through bank term loans, permanent loans, and senior and subordinate deferred interest loans. Subsequent Commission Orders approved revised financing plans. On September 28, 1993, TRCV transferred the certificate to TRIP II.

Mr. Oliver testified that, although TRIP II appears to have performed well from an operations standpoint, it has not performed well financially. Specifically, Mr. Oliver testified that in the early years, income was insufficient to meet the debt service obligations. In fact, Mr. Oliver stated that TRIP II has lost money every year it has been in existence.[66]

In 2005, a series of transactions led to a change in ownership of TRIP II. Prior to these transactions, TRIP II was owned as follows:

- TRIP II's general partner, Shenandoah Greenway Corporation, owned 0.1%;
- Shenandoah Limited Partnership and Shenandoah I LLC (collectively, the "Shenandoah Partners") owned approximately 57.3%;
- AIE LLC owned approximately 29.3%; and,
- Brown & Root Toll Road Investment Partners, Inc., owned the remaining 13.3%.

In September of 2005, Macquarie Infrastructure Group ("MIG") purchased the general partner, Shenandoah Greenway Corporation, for $1 million. Furthermore, MIG provided $500 million in subordinated loans to the Shenandoah Partners and AIE LLC who service this debt solely from cash flow distributions arising from TRIP II. MIG then paid the Shenandoah Partners and AIE LLC $9 million for the option to buy the Shenandoah Partners and AIE LLC's ownership interests in TRIP II outright during some specified period of time in the future. Also, in September of 2005, MIG purchased Brown & Root Toll Road Investment Partners Inc.'s ownership interest in TRIP II for $84.5 million.

In December of 2006, MIG sold 50% of its interest in the Dulles Greenway to Macquarie Infrastructure Partners ("MIP"). MIG and MIP now jointly own approximately 13.4 % of TRIP II.[67] More importantly, MIG and MIP control 100% of the cash flow from the Dulles Greenway as a result of the purchase of Shenandoah Greenway Corporation, the general partner.

Mr. Oliver explained that TRIP II's current debt obligations play a significant role in current and future toll rate levels, because these debt obligations constitute its largest expenditure and must be satisfied from TRIP II's toll revenues. Mr. Oliver stated that, with the exception of 2006, TRIP

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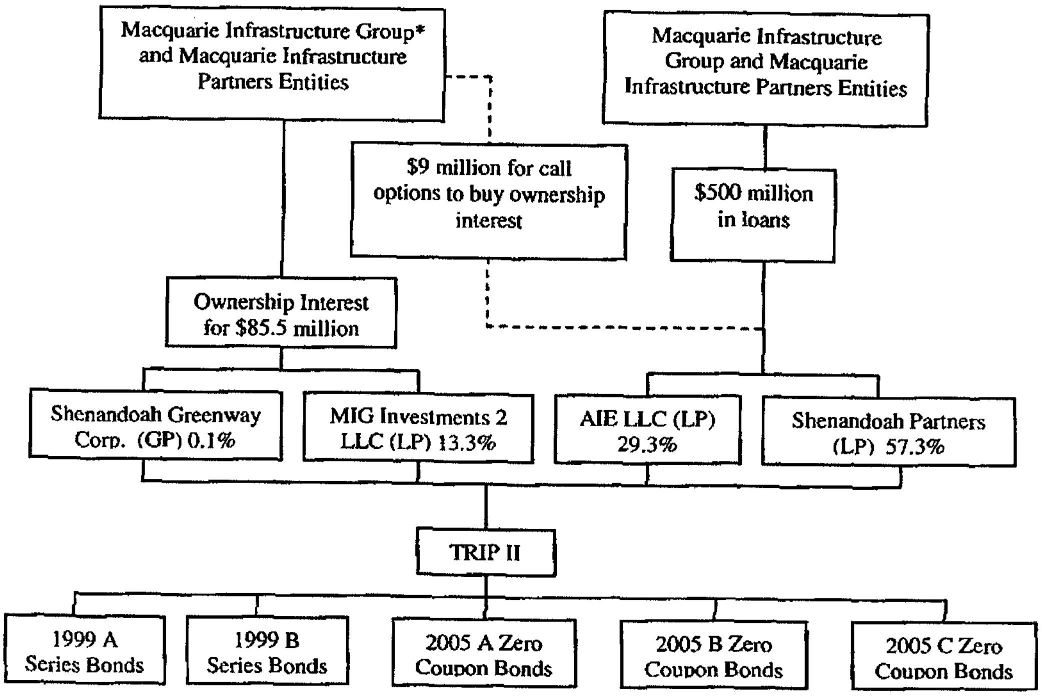
[65] *Toll Road Certificate Case,* 1991 S.C.C. Ann. Rep. 208.
[66] Ex. No. 7, at 10.
[67] The results from the purchase of Shenandoah Greenway Corporation (0.1%) and Brown & Root (13.3%).

II's interest expense has exceeded its total revenues.[68] Moreover, Mr. Oliver stated that TRIP II has never earned a positive return on its partners' supplied capital invested in the toll road. From a cash flow perspective, TRIP II only recently has had sufficient cash flow to make distributions to its partners.

Mr. Oliver set out the corporate structure and debt obligations in the following diagram:




*Although Macquaire Infrastructure Group and Macquarie Infrastructure Partners ("MIP") are the ultimate owners of both Shenandoah Greenway Corp. and MIG Investments 2, for purposes of this graph, intermediate companies between MIG and MIP and Shenandoah Greenway Corp. and MIG Investments 2 have been omitted.

Mr. Oliver testified that over the history of Greenway proceedings, no one has argued that the costs associated with any of TRIP II's debt obligations are improper or excessive in relation to the cost of the toll road and its early operating history. Moreover, the Commission has approved in formal proceedings all of the financial actions taken by TRIP II since its inception. Therefore, Mr. Oliver concludes that it is proper that TRIP II's debt service costs should be factored into the toll rates charged on the Greenway.[69] Mr. Oliver next addressed TRIP II's rate of return if the proposed toll increases are approved. Based on the Greenway's 2006 traffic totals and assuming that toll rates were already established at $4.00 for cars and $14.00 for trucks as of January 1, 2006, TRIP II's net income would have been $8,465,000, a return of approximately 0.62%. Mr. Oliver concluded that, if

[68]See table at page 17 of Ex. No. 7.
[69]A chart depicting TRIP II's debt service obligations is set out on page 12 of this Report.

the proposed toll rates are approved, it appears that TRIP II will not realize unreasonable returns through 2012.[70]

TRIP II witness Sines offered comments in his rebuttal testimony addressing the issues of congestion management toll pricing and distance-based pricing. Mr. Sines explained that TRIP II is proposing congestion pricing to encourage the redistribution of current traffic throughout the day, thereby relieving the peak-hour travel to the extent achievable without any intent to discourage overall ridership on the Greenway. Mr. Sines stated that all patrons of the Greenway should benefit from the eventual redistribution of existing traffic patterns.[71]

With regard to distance-based pricing, Mr. Sines maintained that the existing tolls do reflect some differences in distance traveled. However, Mr. Sines contended that the distance traveled on the Greenway is not necessarily the single most appropriate measure of benefit obtained by Greenway patrons. Further, Mr. Sines argued that the VDOT-approved design of the Greenway never anticipated implementation of a distance-based toll system, and consequently, expensive design changes would have to be implemented. Therefore, Mr. Sines opposed a feasibility study because the Greenway is operating consistently under the original grant of authority by the Commission and with the original design of the road.[72]

## DISCUSSION

By Order dated July 6, 2004, the Commission approved the current toll rate ceiling of $3.00. As proposed in the present case, the toll increases have been phased in over a period of several years. The General Assembly has provided three guidelines or standards contained in Va. Code § 56-542 which govern toll rate increases.

The statutory requirements contained in § 56-542 are (1) that tolls be reasonable in terms of the benefits received by road users, (2) that tolls be set at a level that does not unduly discourage the use of the toll road by the general public, and (3) that tolls be set at a level such that they provide no more than a reasonable return on investment.

Mr. Stavrou pointed out that ridership on the Greenway declined for the first time in 2006 compared to the prior year. While it is possible that the toll rate increase implemented on January 1, 2006, caused some of the decline, it would be highly speculative to attribute all of the decline on toll rates. Based on comments and testimony of public witnesses, an increase in the toll rate would discourage some use of the Greenway. It is debatable whether that decline in use will be material or even continue. It is likely that, as congestion on alternative routes increases, more and more drivers will be forced onto the Greenway.

Furthermore, there is an apparent conflict between setting rates that provide a reasonable rate of return to investors and setting rates that do not materially discourage use of the Greenway. By statute, the investors are entitled to earn a reasonable return on their investment. The primary

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[70]Ex. No. 7, at 18
[71]Ex. No. 8, at 3, 4.
[72]Id. at 7.

driver of the toll increases is the debt service that must be maintained by TRIP II. Mr. Oliver has testified that the debt incurred by TRIP II was not unreasonable and the toll rates should be set at a level that will support that debt service. Furthermore, the Commission has approved the debt incurred by TRIP II.

Although it is possible that traffic on the Greenway declined for the first time in 2006 due to the toll increase implemented on January 1, 2006, another proximate cause is the timing of construction projects on the Greenway and alternate routes. Based on the testimony of public witnesses, it does appear that future toll increases will discourage some use of the Greenway. Whether that decline is material probably depends on the degree of traffic congestion on the alternative routes. Certainly, as the alternate routes become more congested, the value of using the Greenway will increase. Further, for the motorists who will continue to use the Greenway, their perceived benefits will increase because of less congestion if fewer drivers use the Greenway. What also is clear is that without the proposed toll increases, the statutory requirement that the Greenway investors be allowed a reasonable return on their investment will not be met.

It should be remembered, that if the Commission approves the requested toll rate increases, TRIP II will have the flexibility to set the tolls below the approved maximum toll rates if necessary. This flexibility in pricing which includes the offering of discounts and congestion pricing is an important tool in responding to price signals given by the increase or decrease in use of the Greenway. The Commission previously approved pricing flexibility by TRIP II in Case No. PUA-1996-00009.[73]

*Congestion Pricing*

Congestion pricing is an innovative concept that makes economic and environmental sense. Many public witnesses described the Greenway as a "parking lot" during rush hour traffic. Congestion pricing is a management tool that should alleviate at least some of the congestion problems, since it is designed to even out and thereby improve traffic flow. Congestion pricing has been employed in the City of London and is being considered for parts of New York City. As TRIP II witness Sines pointed out in his rebuttal testimony, the U.S. Department of Transportation supports congestion pricing as a mechanism to shift discretionary rush hour travel to other transportation modes.[74] Mr. Sines pointed out that the Greenway is at maximum capacity during rush hour and that congestion pricing is designed to spread out traffic flow during peak periods.[75] I find that congestion pricing should be approved because it makes economic sense and is a reasonable concept that should improve traffic flow on the Greenway and increase value to its users.

*Distance Pricing*

Some public witness testimony and comments received by the Commission expressed displeasure with the lack of distance pricing. Many people stated that they travel only a short distance on the Greenway, yet are forced to pay the full toll. Staff is of the opinion that the

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[73]*Application of Toll Road Investors Partnership II, L.P., For an order modifying its tariff,* Case No. PUA-1996-00009, 1996 S.C.C. Ann. Rep. 153.
[74]Ex. No. 8, at 3.
[75]Tr. 258-259.

Commission's Order of July 6, 1990 in Case No. PUA-1990-00013 required that tolls be based on distance traveled.[76] In its Order the Commission stated:

> . . . these toll levels, with appropriate classifications by type of motor vehicle and *distances traveled on the road*, shall be used to establish the schedule of rates charged to the public as required by § 56-543(B)(1), provided that the toll charged for a motor vehicle with six or more wheels may exceed the foregoing tolls by no more than 100% (emphasis added).

I concur with Staff and recommend that TRIP II be required to present a feasibility study of distance-based tolls to the Commission within six months of a final order in this case. The study should detail the capital and operating costs, the revenue impacts, and the public benefits associated with distance-based toll rates for each interchange on the Greenway. The study should include consideration of using electronic systems to record distance traveled and rates charged to the public.

## FINDINGS AND RECOMMENDATIONS

Based on the testimony and evidence received in this case, **I FIND** that:

1. The Partnership should be authorized to increase the maximum toll rates as proposed and set forth in this Report;

2. The congestion-pricing model should be adopted as proposed by the Partnership; and,

3. The Company should be directed to undertake a feasibility study of distance-based pricing and present the study to the Commission within six months from the date of the final order in this case.

I therefore **RECOMMEND** the Commission enter an order that:

1. ***ADOPTS*** the findings contained herein;

2. ***APPROVES*** the toll increase, including congestion pricing, as proposed by the Partnership;

3. ***DIRECTS*** the Partnership to study distance pricing including infrastructure changes and costs necessary to implement such pricing; and

4. ***DISMISSES*** this case from the docket of active cases.

[76] *Toll Road Certificate Case*, 1990 S.C.C. Ann. Rep. 197, 199.

**COMMENTS**

The parties are advised that any comments (Section 12.1-31 of the Code of Virginia and Commission Rule 5:16(e)) to this Report must be filed with the Clerk of the Commission in writing, in an original and fifteen (15) copies, within twenty-one (21) days from the date hereof. The mailing address to which any such filing must be sent is Document Control Center, P.O. Box 2118, Richmond, Virginia 23218. Any party filing such comments shall attach a certificate to the foot of such document certifying that copies have been mailed or delivered to all counsel of record and any such party not represented by counsel.

Respectfully submitted,

Howard P. Anderson, Jr.

Howard P. Anderson, Jr.
Hearing Examiner

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