

AUG - 6 2009

Clerk, U.S. District and  
Bankruptcy Courts

Dulles Rail Federal Complaint

1 IN THE UNITED STATES DISTRICT COURT

2 FOR THE DISTRICT OF COLUMBIA/~~FOR THE EASTERN DISTRICT OF~~  
3 ~~VIRGINIA~~

4

5 Parkridge 6, LLC )

6 10740 Parkridge Blvd., Reston, VA 20191 )

7 )

8 Dulles Corridor Users Group )

9 *Some of above address*  
Plaintiffs, )

10

11 v.

Case: 1:09-cv-01478  
Assigned To : Kessler, Gladys  
Assign. Date : 8/6/2009  
Description: Admn. Agency Review

12

13 United States Department of )

14 Transportation (USDOT) )

15 1200 New Jersey Ave., SE, Washington, DC 20590 )

16 )

17 Ray LaHood, Secretary of Transportation )

18 1200 New Jersey Ave., SE, Washington, DC 20590 )

19 )

20 Peter M. Rogoff, Administrator )

21 Federal Transit Administration )

22 1200 New Jersey Ave, SE, Washington, DC 20590 )

23 )

1

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24 Jeffrey Paniati, Acting Deputy )  
25 Administrator of FHWA )  
26 1200 New Jersey Ave., SE, Washington, DC 20590 )  
27 )  
28 Roberto Fonseca-Martinez, Division )  
29 Administrator of FHWA, Virginia Division, )  
30 400 North 8<sup>th</sup> Street, Room 750, Richmond, VA 23219 )  
31 )  
32 Pierce R. Homer, Secretary of Transportation )  
33 Commonwealth of Virginia )  
34 1111 East Broad Street, 3<sup>rd</sup> Floor, Richmond, VA 23219 )  
35 James Bennett, President and CEO )  
36 Metropolitan Washington Airports Authority )  
37 1 Aviation Circle )  
38 Washington, DC 20001 )

COMPLAINT

39  
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41

**INTRODUCTION**

42 1. This lawsuit is a challenge to current plans for airport access to the two  
43 Virginia airports filed by both an affected landowner and a citizen advocacy group,  
44 and a suggestion for a new approach to some of the most vexing transportation issues  
45 in the Washington, DC Metro area.

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46 2. For more than four decades, our local highway system has been starved for  
47 investment, in part due to the insatiable appetite of the heavy rail system operated by  
48 WMATA since 1976. More than half the region's transportation dollars have been,  
49 and are currently, spent on transit. However, the demand share, measured by payload-  
50 miles (either passenger or freight) satisfied by transit is less than 3% region wide.

51 3. Despite this huge investment, the heavy rail system is falling apart and  
52 local governments have shown little inclination to stump up the maintenance money.  
53 Yet, incredibly, they want to expand the money losing operation. And they want to  
54 expand it in a way which has proven unsatisfactory. They also want to replicate the  
55 disfunctional design of inner I-66, the most troublesome highway segment of its kind  
56 in the U.S., all the way out to Dulles Airport—another 13 miles. The total corridor  
57 study area is 23 miles, but has never been systematically analyzed as needs to happen  
58 for the correct result (See Appendix A, I-405 corridor study, as an example).

59 4. On March 10, 2009, the federal government and the Metropolitan  
60 Washington Airports Authority entered into a full funding grant agreement to  
61 jumpstart the moribund Dulles Rail project, which had been kicking around for 45  
62 years. Time and technology has passed it by, and superior but unexamined alternatives  
63 are available. The full funding grant agreement has not been issued in response to a  
64 proper application of law and regulation, but in response to political pressure directed  
65 by special interests.

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66 5. The current plans will cost \$20 billion (including financing interest and  
67 operating deficit funding) over the 40 years the Federal Transit Administration uses as  
68 a useful life of such projects. According to the voluminous studies that have been  
69 done over the years, which have been formally adopted in the Final Environmental  
70 Impact Statement for this project issued in December 2004, the project will not reduce  
71 congestion on either the affected corridor (Route 267) or any of the arterial or local  
72 roads surrounding Route 267. (See Exhibit B). In fact, the latest traffic projections  
73 show that overall, combining the performance of untolled segments and tolled  
74 segments (which toll exists only to fund Dulles Rail), both the highway system and  
75 transit will perform worse than if Dulles Rail were never built. The \$20 billion, in  
76 short, is worse than a complete waste of money.

77 6. The planned travel speed for both rail and general purpose travel on Route  
78 267 are projected at 20-30 miles per hour for many hours of the day. (See Exhibit D).  
79 The rail system is projected to take one hour ten minutes to reach the edge of the DC  
80 core (a distance of 23 miles) from Dulles Airport, including the time for traveling 1/5  
81 mile from the check-in or baggage claim area at Dulles and waiting for the next train.  
82 The stop count for through travel is 15 stops to Rosslyn, the last stop prior to D.C., at  
83 which point the new Silver Line will be competing with the existing Orange and Blue  
84 Lines for the already maxed out capacity in the Rosslyn tunnel. Because the Rosslyn  
85 tunnel is already at capacity, service on the Orange and Blue lines, including rail  
86 access to Reagan Airport, will be degraded. 80 minutes for 23 miles is less than 20

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87 miles per hour. This is not competitive service by today's international airport  
88 standards.

89 7. The sole reason MWAA is involved in the project is the reluctance of local  
90 politicians to be on record in imposing the high burden of taxation on users of the Toll  
91 Road, which will average double digit figures per trip when the system is complete,  
92 and the desire by local leaders to evade the Virginia constitutional requirement to seek  
93 local voter approval for general obligation bonds for the local (Fairfax and Loudoun  
94 County) portion of the project cost. However, Virginia law prohibits the imposition of  
95 a tax on toll road users on paid projects, inasmuch as MWAA is not a local  
96 government with elective leadership which has been granted the power to levy taxes  
97 under the Virginia Constitution.

98 8. Far faster and more cost effective alternatives exist to provide superior  
99 airport service and reduce congestion for the areas surrounding the Dulles Airport  
100 Access Road and Route 267.

101 9. The failed idea behind the currently considered plan is to expand the  
102 disastrous design of inner I-66, the most poorly functioning highway segment of its  
103 type in the entire U.S. It will be even worse than the current I-66, which is hopelessly  
104 congested. The plan for Route 267 advanced by MWAA will toll all users of Route  
105 267 for all hours. (At least, I-66 is a free highway.)

106 10. Because the rail promotion has turned into a bureaucratic nightmare ,  
107 intervention of the court system to enforce the proper scope of operations of the

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108 various entities is necessary. The Commonwealth of Virginia has transferred for no  
109 consideration its easement on Route 267 to MWAA, which proposes to build a system  
110 to the specifications of WMATA, which will then operate it. All this activity must  
111 meet the lease obligations of the Federal Aviation Administration for the Access Road  
112 right of way. Fairfax County Economic Development Authority has intervened as the  
113 “guarantor” of \$1 billion in Fairfax County debt, without proper justification. The  
114 federal Fine Arts Commission will review the design of the system at the Airport end  
115 to ensure its compatibility with the Saarinen Terminal, a recognized historic  
116 landmark. The result of this review will undoubtedly be the requirement of an  
117 expensive tunnel at the airport, driving up the cost another \$1 billion. All along the  
118 way, large fees are being generated. The entire current infrastructure of Route 267 and  
119 the inner lanes (the DAAR) was put into place for less than \$200 million. More than  
120 \$220 million has already been spent just on planning for the rail project. Very little of  
121 required coordination has occurred, and the ultimate cost is huge, not just for the  
122 defined project, but in time wasted in the future due to inadequate planning. For  
123 example, no proper incident management is possible with the planned roadway  
124 configuration. Incidents account for ½ of overall highway delays on the average.

125 11. This porkfest has gone on too long by parties who have ignored the law in  
126 favor of interested parties who want to receive fees. It is time to look at a better plan  
127 for Route 267, the inner lanes, and inner I-66, so that the two Washington airports can  
128 operate as a unit, which was the purpose of setting up MWAA in the first place.

129 12. This can be done by granting plaintiff's request of injunctive and  
130 declaratory relief. At that point, access to two Virginia airports can be restudied to  
131 bring them up to the standards of its competitors worldwide. At the same time,  
132 congestion can be reduced for non airport traffic.

133 **PARTIES**

134 13. Parkridge 6 LLC is a Virginia LLC owning property adjoining Route 267,  
135 and has been paying taxes to Fairfax County generally and to the special tax district  
136 for Phase I of Dulles Rail in which it involuntarily found itself. It meets all the  
137 standing requirements normally articulated for actual injury. Parkridge 6 is being  
138 taxed at a higher rate than surrounding properties solely because of the imposition, in  
139 violation of the required procedures listed below, of the rail scheme. Its business  
140 invitees continue to pay tolls for access, despite the requirements of Virginia law that  
141 such tolls cease. This case involves a real case and controversy in that Plaintiffs are  
142 requesting refunds of taxes and the order quashing further collection of these taxes for  
143 itself and similarly situated landowners.

144 14. The Dulles Corridor Users Group is a Virginia non-stock corporation civic  
145 advocacy group set up to monitor and advance the orderly and prosperity producing  
146 development of the Dulles Corridor. The Dulles Corridor is the largest business  
147 destination in Virginia and one of the largest in the U.S. It is in danger of being taxed  
148 to death with the diversion of this tax money going to redevelop Tysons Corner. Some  
149 of the tax money will also go to subsidize the money losing rail venture. The rail

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150 venture is so uneconomic that it will account for only a 3 ½ % increase in WMATA  
151 patronage, despite adding 22% to the mileage of the system. Its projected annual new  
152 ridership is 47,800 in 2025, which is less than a just in time car sharing operation,  
153 unsubsidized by any government, carries today along the Shirley Highway (I-395  
154 south of Washington). (Since no pork is involved in ridesharing, no lobbying money  
155 is involved and this alternative was not studied.)

156 15. Dulles Airport was designed and delivered as the first planned airport for  
157 jets. That was fifty years ago. Many mistakes were made. For example, Dulles was  
158 planned with no parking! Today is a good opportunity to bring Dulles up to  
159 international standards and correct ground access to provide interconnections between  
160 Dulles and National in ½ hour by ground, any hour of the day or night, by any  
161 vehicle.

162 16. At the same time, proper leadership by MWAA and VDOT could solve  
163 the inner I-66 problem, recognized as the worst performing highway segment in this  
164 area. This result is overdue.

165 17. The story of how this region ended up with this sorry boondoggle is  
166 summarized below. It has been an interbureaucratic nightmare that has run roughshod  
167 over at least one dozen laws and regulations.

168 18. Review by the federal courts, and correction of the irregularities that  
169 have led to this situation, is necessary.

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**JURISDICTION AND VENUE**

174

District of Columbia

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19. Jurisdiction and venue in the D.C. federal courts is founded on D.C. Code §9-1004 (e) which provides that “the district courts of the United States shall have jurisdiction to compel the Airports Authority and its offices and employees to comply with the terms of the lease. An action may be brought on behalf of the United States by the Attorney General, or by any aggrieved party.”

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20. Several counts deal with violations of the 1987 lease between the Federal Government and MWA. In addition, several counts allege improper compliance with necessary federal statutes and regulations, in particular 49 U.S.C.S. § 5309, which deals with Capital Investment grants of the U.S. government for public transportation. As such, jurisdiction is allowable under 28 U.S.C. §1331 which provides that the district courts have original jurisdiction of “all civil actions arising under the Constitution, laws, or treaties of the United States.” With respect to requests for declaratory judgment, under the Declaratory Judgment Act a district court, in a case or controversy otherwise within its jurisdiction, “may declare the rights and other legal relations of any interested party seeking such declaration, whether or not further relief is or could be sought. 28 U.S.C. § 2201(a)

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191 21. With respect to the treatment of claims of disregarded Virginia state law  
192 based claims, the United States District Court has discretion to deal with these issues  
193 under the pendant issue doctrine.

194 Virginia

195 22. The Eastern District of Virginia federal court has jurisdiction and venue  
196 for all the claims made in this complaint, under the following statutes: Va. Code §5.1-  
197 173 A and D.C. Code § 9-922 (a). The language is identical:  
198 “The courts of the Commonwealth of Virginia shall have original jurisdiction over all  
199 actions brought by or against the Authority, which courts shall in all cases apply the  
200 law of the Commonwealth of Virginia.”

201 23. With respect to the claims arising under federal law and administrative  
202 procedure, again a Virginia court has jurisdiction to notice and apply non-state law to  
203 the applicable claims under the doctrine of pendent jurisdiction.

204 24. The leading case on pendent jurisdiction is United Mine Workers of  
205 America v. Gibbs, 383 U.S. 715 (1966). *Gibbs* has been read to require that (1) there  
206 must be a federal claim (whether from the Constitution, federal statute, or treaty) and  
207 (2) the non-federal claim arises "from a common nucleus of operative fact" such that a  
208 plaintiff "would ordinarily be expected to try them in one judicial proceeding."

209 25. The holding in *Gibbs* has been essentially codified by Congress along  
210 with ancillary jurisdiction in 28 USC 1367, its supplementary jurisdiction statute.

211 26. The lease of the two airports to MWAA in March, 1987 contains this  
212 language as to jurisdiction:  
213 Article 28, Law of Agreement.  
214 “This lease shall be governed by and construed in accordance with federal law. To the  
215 extent that the application of federal law requires or permits the application or  
216 consideration of state law, the parties agree that the law of the Commonwealth of  
217 Virginia is the most relevant to this lease and shall be applied or considered. The  
218 powers of the Secretary with respect to this lease shall be construed in accordance  
219 with and governed by Federal law, and the powers of the Airports Authority with  
220 respect to this lease shall be construed in accordance with and governed by Virginia  
221 law.”

222 27. In view of the multiplicity of sources for jurisdiction and venue, and  
223 mindful of the possible importance of the “home circuit rule”, this action is being filed  
224 simultaneously in the U.S. Courts in D.C. and Virginia (Eastern District).

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## **HISTORY**

227

### **Factual Background**

228 28. During the second term of the Eisenhower presidency, there was a general  
229 consensus that the D.C. area needed another airport beyond the land locked National  
230 Airport in Alexandria. A further impetus for this decision was the imminent arrival

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231 into regular service of jet aircraft. Such equipment needed longer runways for  
232 operations, and was noisier than conventional piston aircraft.

233 29. Congress passed the Washington Airport Act of 1950, providing federal  
234 backing for a second airport. After preliminary proposals failed, including one to  
235 establish an international airport at what is now Burke Lake Park, the current site was  
236 selected by President Dwight Eisenhower in 1958. As a result of the selection, the  
237 former unincorporated community of Willard which once stood in the airport's current  
238 footprint, was torn down

239 30. The western site was selected, in large part because it offered the  
240 possibility of more land for extended length runways, additional runways, and a noise  
241 buffer. Dulles, at 11,800 acres, is larger than either National (860 acres) or Baltimore  
242 Washington International Airport, at (3,200) acres.

243 31. The new airport was named after Eisenhower's Secretary of State, John  
244 Foster Dulles. The agency responsible for implementing the plan was the Federal  
245 Aviation Authority, chaired at that time by Najeeb Halaby who later became CEO of  
246 Pan American.

247 32. The land on which Dulles airport was built was almost entirely rural at  
248 that time. Those landowners who could not reach a price accommodation with the  
249 federal government were condemned out, at prices averaging \$900 per acre.

250 33. Given the rural location of the new airport, access needed to be provided.  
251 A rail link to D.C. was one option, but was ruled out because the \$150 million cost

252 was deemed excessive. This would have amounted to \$7 million per mile. The plan  
253 currently being considered carries a construction cost of about \$6 billion for 13 miles  
254 (allocating \$1 billion for the west of airport, Loudoun stops). This is \$360 million per  
255 mile to build a project which loses money at the rate of \$120 million a year from day  
256 one.

257 34. A 400 foot wide strip of land was reserved for Airport Access from the  
258 interchange with what was to become I-66 to Route 28 in Loudoun County, just east  
259 of the airport. The Dulles Airport Access Road (“DAAR”) was built as a two lane  
260 divided highway and was available when Dulles Airport opened in 1962.

261 35. On September 7, 1950, Congress passed the Second Washington Airport  
262 Act to provide for “the construction, protection, operation and maintenance of a public  
263 airport in or in the vicinity of the District of Columbia.” Ch. 905, Pub. L. 64 Stat.770.

264 36. Construction commenced on September 2, 1958.

265 37. The Federal Aviation Administration (“FAA”) and the local communities  
266 worked together to select four tentative routes for the proposed access highway. After  
267 several public hearings, the current 16-mile route from Dulles to Falls Church,  
268 Virginia was selected.

269 38. The first 13.5 miles of the access road was constructed by the FAA and  
270 opened in 1962, connecting Dulles airport to Interstate 495 (the “Beltway”). The  
271 remaining 2.5 miles, constructed under the supervision of the Federal Highway

272 Administration for the FAA, opened on November 30, 1983 connecting the airport  
273 directly to the recently completed Interstate 66 (“I-66”).

274 39. The entire 16-mile road is known as the Dulles Airport Access Highway  
275 (“DAAH”). The DAAH was originally limited to airport traffic only and had no exits  
276 west of the Beltway, other than direct access to the airport at the western terminus of  
277 the road.

278 40. The airport was completed in 1962 and dedicated on November 17, 1962,  
279 as Dulles International Airport. In 1984, it was renamed Washington Dulles  
280 International Airport (“Dulles”).

281 41. As Fairfax and Loudoun counties grew, the need for access to points along  
282 the DAAH increased, but the DAAH itself provided no access to local residents  
283 because it is restricted to airport users only.

284 42. To address this problem the United States, through the FAA, Department  
285 of Transportation, the Director of the Metropolitan Washington Airports and the  
286 Commonwealth of Virginia (“The Commonwealth”) entered into an agreement, dated  
287 July 6, 1981 (“1981 Agreement”), to construct a new outer section of the DAAH in  
288 the existing right-of-way.

289 43. Under the 1981 Agreement, the new section of the DAAH was to run  
290 from Spring Hill Road in Fairfax eastward to a point adjacent to the right-of-way for  
291 the then uncompleted I-66.

292 44. The Commonwealth also agreed to operate and maintain certain sections  
293 of the DAAH if those sections were not restricted to airport users only. In practical  
294 terms, this meant the new section of the DAAH would have exit ramps for local  
295 commuters. This new section for local users is known as the Dulles Toll Road  
296 (“DTR”) and has been operating since 1984.

297 45. The FAA agreed to grant an easement to the Commonwealth over a  
298 portion of the DAAH right-of-way, but retained title to the land. In exchange, the  
299 Commonwealth agreed to accept responsibility for all maintenance, operation and  
300 policing of the DAAH right-of-way.

301 46. A deed of easement was granted by the FAA on behalf of the United  
302 States, to the Commonwealth on January 10, 1983 (“First Easement”). The First  
303 Easement terminates by its own terms in 2082, or sooner if certain contingencies  
304 occur.

305 47. The First Easement required DTR to be three lanes in each direction  
306 between I-495 and Route 7 and two lanes in each direction between Route 7 and  
307 Route 28.

308 48. On November 23, 1983, the United States granted a second Deed of  
309 Easement (“Second Easement”) to the Commonwealth to clarify that, despite an  
310 existing dispute between the FAA and the Commonwealth over the exclusivity of  
311 legislative jurisdiction with respect to the DTR, the Commonwealth did have “the

312 requisite authority to operate, maintain and police the easement and the highway  
313 constructed in the easement.”

314 49. On December 21, 1984, the United States, through the FAA, and the  
315 Commonwealth entered into a Maintenance Agreement that outlined the  
316 Commonwealth’s responsibilities with respect to maintaining the DTR.

317 50. Shortly thereafter, the Metropolitan Washington Airport Authority  
318 (“MWAA”) was created by a compact between the Commonwealth and the District of  
319 Columbia. The Commonwealth and the District of Columbia enacted essentially  
320 identical statutes with respect to the creation of the MWAA. The code sections for  
321 these statutes are Va. Code Ann. § 5.1-152 *et seq.* and D.C. Code § 9-901 *et seq.*  
322 respectively.

323 51. Congress granted its consent to the creation of the MWAA in the  
324 Metropolitan Washington Airport Act of 1986. Title VI of Public Law 99-591,  
325 codified at 49 U.S.C. § 4901, *et seq.* (“Transfer Act”). The Transfer Act further  
326 authorized the transfer of operational responsibility of Dulles, including the DAAH,  
327 under a long-term lease to the compact.

328 52. Congress placed several conditions on the authority of the Secretary of  
329 Transportation to enter into a lease with the MWAA. The MWAA would be required  
330 to have powers granted to it by the Commonwealth and the District of Columbia, but  
331 would remain an independent political subdivision constituted solely to operate the  
332 local airports. The MWAA would have a Board of Directors [[1]]. The lease was



333 required to contain a provision providing for the annual payment of \$3 million, in  
334 inflation adjusted 1987 dollars, to the United States Treasury by MWAA. Finally, the  
335 MWAA must have a Board of Review to be comprised entirely of members of  
336 Congress.

337 53. The United States and the MWAA entered into a lease dated March 2,  
338 1987, and effective June 7, 1987 (the "Lease"), transferring operational responsibility  
339 of Dulles Airport to the MWAA. The DAAH and its right-of-way are specifically  
340 mentioned in the Lease, but the DTR is not. It is unclear whether the language  
341 pertaining to the right-of-way is intended to include the DTR.

342 54. The term of the Lease, originally fifty years from its effective date, was  
343 extended to eighty years from its effective date by an Amendment dated April 30,  
344 2003 ("Amendment No. 3"). Thus, the Lease is set to expire on or about June 7,  
345 2067. The Lease provides that upon its expiration, the MWAA will "give up,  
346 surrender and deliver to the Secretary [of Transportation] the Leased Premises  
347 together with all buildings, structures and improvements thereon (as the same may  
348 have been altered or replaced)."

349 55. The United States retains title and ownership over the land upon which the  
350 DTR is built.

351 56. By Deed of Easement dated January 9, 1990 ("1990 Easement"), the  
352 MWAA conveyed additional land to the Commonwealth to widen the DTR. The

353 DTR now consists of 4 lanes in each direction, although not built to federally  
354 compliant standards for highways of its design speed (see below).

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### **Giving Away the DTR**

359 57. On July 26, 2005, the Virginia Department of Transportation (“VDOT”)  
360 received an unsolicited proposal from the Dulles Corridor Mobility Consortium  
361 (“DCMC”) to privatize operation of the DTR. The DCMC proposal sought a  
362 concession agreement to collect tolls, operate, maintain and improve the DTR.

363 58. The DCMC proposal was submitted to VDOT pursuant to the Public-  
364 Private Transportation Act of 1995 (“PPTA”), Va. Code Ann. §§ 56-557, *et seq.* The  
365 PPTA was enacted based on the General Assembly’s finding that the timely  
366 development and operation of the Commonwealth’s transportation systems could  
367 potentially be handled more efficiently by authorizing private entities to develop or  
368 operate such systems.

369 59. Pursuant to the PPTA’s implementation guidelines, VDOT published a  
370 notice on July 28, 2005, accepting for consideration the DCMC proposal and inviting  
371 other private firms to submit competing proposals by October 28, 2005.

372 60. In response to this public notice, VDOT received four additional  
373 proposals.

374 61. On December 7, 2005, VDOT announced that four of the five proposals  
375 were selected to advance to the Independent Review Panel (“IRP”) phase of  
376 consideration, done by the Commonwealth Transportation Board.

377 62. Before the IRP could complete its evaluation of these four proposals, the  
378 MWAA submitted a proposal to VDOT. The MWAA proposal was received in  
379 December 20, 2005, well after the deadline of October 28, 2005, and was  
380 subsequently updated on January 17, 2006.

381 63. The MWAA proposal states that its proposal “is not intended to be part of  
382 the [PPTA evaluation] process: it is an alternative solution.” The MWAA’s rationale  
383 for not being subject to the PPTA process is not explained in either the December 20  
384 or January 17 proposal.

385 64. Despite the lateness of the MWAA’s submission, VDOT announced on  
386 February 8, 2006, that it was suspending evaluation of the other proposals for up to 45  
387 days to provide it with an opportunity to review the MWAA proposal independent of  
388 the other proposals.

389 65. Under the MWAA proposal, the Commonwealth would relinquish its right  
390 to control the DTR. The MWAA would then own and operate the DTR and utilize the  
391 revenue stream from the DTR to fund extension of the Metrorail system to Dulles.

392 66. MWAA and the Commonwealth, through its Secretary of Transportation,  
393 entered into a Memorandum of Understanding on March 28, 2006 (“MOU”). The

394 parties to the MOU agreed that the Commonwealth would transfer possession and  
395 control of the DTR and all its improvements to the MWAA.

396 67. The parties also agreed that the MWAA would assume all operational,  
397 maintenance, toll setting, debt and financial responsibility for the DTR. The MWAA  
398 further agreed to develop necessary agreements between it and the Washington  
399 Metropolitan Area Transit Authority (“WMATA”) to design and construct the Dulles  
400 Corridor Metrorail Project (“Project”). MWAA would also develop local funding  
401 agreements with non-federal partners and that the MWAA would be obligated to  
402 design and construct Phases 1 and 2 of the Project.

403 68. WMATA is an interstate compact created to plan, develop, build, finance  
404 and operate the regional transit system for Washington D.C. metropolitan area. This  
405 transit system, known generally as the Metro, consists of the nation’s second largest  
406 rail transit system (“Metrorail”) and the nation’s fifth largest bus network  
407 (“Metrobus”).

408 69. Phase I of the Project (“Phase I”) of the Dulles Rail project is designed to  
409 complete the first 11.6 miles of the planned extension of the Metrorail to Wiehle  
410 Avenue in Reston, Virginia. Phase I is proposed to include new stations at Tysons  
411 East, Tysons Central 123, Tysons Central 7, Tysons West, and Wiehle Avenue, and  
412 improvements to the rail yard at the West Falls Church Station. Service to Wiehle  
413 Avenue was originally scheduled to begin in 2011.

414 70. Phase II of the Project (“Phase II”) is designed to extend Metrorail’s  
415 Silver line from Wiehle Avenue westward to Route 722/Ryan Road in Loudon  
416 County. Six new stations, Reston Parkway, Herndon-Monroe, Route 28, Dulles  
417 Airport, Route 606 and Route 722, and a new rail yard on Dulles Airport property are  
418 proposed in this phase. Phase II was originally scheduled for completion in 2015.

419 71. Under the MOU, the Commonwealth agreed to transfer funds dedicated  
420 for the design and construction of the Project to the MWAA and, that as a condition of  
421 the transfer of the DTR to the MWAA, the Commonwealth also agreed to assign and  
422 transfer the revenues collected from operation of the DTR to be used in the execution  
423 of agreements related to the Project.

424 72. The Commonwealth, through VDOT and the Virginia Department of Rail  
425 and Public Transportation, further agreed to provide “services and support to the  
426 Project and other transportation improvements in the corridor on a contract basis.”

427 73. The MOU also states that revenues “collected from the [DTR] shall be  
428 used for any and all costs related to the operation, maintenance and debt service of the  
429 [DTR], and the design, construction and financing of the Dulles Corridor Metrorail  
430 Project..” After sufficient revenues have been collected for this purpose, any further  
431 revenues collected from operation of the DTR “may only be used for costs related to  
432 highway and other transportation improvements in the Dulles Corridor, and transit  
433 capital and operating expenses in the Dulles Corridor.”

434

### **Extension of Metrorail to Dulles**

435 74. The need for access to Dulles was studied as part of the original planning  
436 and development of Metrorail in the 1960s, but ultimately Metrorail access to Dulles  
437 was left out of the project. Consequently, westbound Metrorail service ends at  
438 Vienna/Fairfax, even though the median of the DAAH is reserved for access to  
439 Dulles.

440 75. In 1985, the FAA updated the Master Plan for Dulles Airport, which  
441 recommended the continued reservation of the DAAH median for future expansion of  
442 Metrorail.

443 76. In 1990, Fairfax County sponsored the *Dulles International Airport*  
444 *Access Highway Corridor Transit Alternative Analysis Study* to consider the various  
445 options for providing better access to Dulles. Some of the options considered were  
446 the expansion of the express bus service on the DAAH, construction of an exclusive  
447 high-occupancy vehicle (HOV) facility in the median of the DAAH, use of light rail  
448 and extension of the Metrorail to Dulles.

449 77. The corridor configuration now almost universally conceded to be  
450 superior for such locations—HOT lanes embedded in outer free generally purpose  
451 lanes—was NEVER considered. (This approach is now been proposed for I-495, I-95,  
452 I-395, and now I-270—just in the Washington DC suburbs.) Why was it never studied  
453 for the Dulles Corridor? The answer is that the whole review process was rigged to  
454 result in heavy rail.

455 78. That same year, the Commonwealth Transportation Board passed a  
456 resolution which led to the adoption of the Dulles Corridor Plan for transportation  
457 improvements. The Dulles Corridor Plan endorsed extending rail service to Dulles by  
458 2005. The Commonwealth Transportation Board, it must be noted, is a creature of the  
459 Virginia Executive, with all its members appointed by the Governor. Its activities  
460 imply and carry no hint of endorsement by the Virginia General Assembly, nor  
461 convey any taxing authority in contravention of the Virginia Constitution, which  
462 reserves such powers to the General Assembly.

463 79. To further evaluate the Dulles Corridor Plan, the Virginia Department of  
464 Rail and Public Transportation initiated a Major Investment Study, the *Dulles*  
465 *Corridor Transportation Study* in 1997. A supplement to this study was prepared in  
466 1999 to address, among other things, the possibility of using a Bus Rapid Transit  
467 system in the Dulles Corridor.

468 80. In June 2002, the alternatives for transit to Dulles were further evaluated  
469 in the *Dulles Corridor Rapid Transit Project Draft Environmental Impact Statement*  
470 *and Section 4(f) Evaluation* (“Draft EIS”).

471 81. Based on the Draft EIS and public comments received on the Draft EIS,  
472 WMATA Board of Directors selected the extension of Metrorail to Route 772 as the  
473 locally preferred alternative (“LPA”) for the Project in November 2002, with the  
474 Commonwealth Transportation Board doing the same in December 2002. The LPA

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475 was also endorsed during this period by the boards of supervisors of Fairfax and  
476 Loudoun counties.

477 82. Following the release of the Draft EIS, certain proposed revisions were  
478 made to the Dulles Corridor Plan, including changes to design and alignment of  
479 facilities, pushing back the timeframe to begin and complete the project, and breaking  
480 the project down into two phase. These changes are documented in the *Dulles*  
481 *Corridor Rapid Transit Project Supplemental Draft Environmental Impact Statement*  
482 *and Section 4(f) Evaluation* (“Supplemental Draft EIS”) released in October 2003.

483 83. The Commonwealth Transportation Board subsequently recommended  
484 approval of the Supplemental Draft EIS in its *Public Hearing Report for the*  
485 *Supplemental Draft EIS*, published in March 2004.

486 84. The Final EIS was published in December 2004 (“Final EIS”). Based on  
487 the Final EIS, a record of decision was issued by the Federal Transit Administration  
488 (“FTA”) in March 2005.

489 85. Because such considerations were not on the radar screen five years ago,  
490 none of the environmental impact studies reviewed the effects of the chosen  
491 alternatives on Green House Gases. Recent research has shown that constant flowing  
492 HOT/general purpose lanes produce fewer Green House Gases than the stop and go  
493 configuration proposed for the Dulles Corridor.

494 86. The FAA was involved in the review of the Project because construction  
495 of the Project would require the use of airport property for non-airport purposes. On



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496 July 11, 2005, the FAA issued a Record of Decision (“ROD”) granting conditional  
497 environmental approval of Phase I of the Project. The ROD further stated that  
498 “[u]nconditional environmental approval of and a determination that the  
499 environmental documents satisfy the requirements of NEPA... and FAA Orders  
500 1050.E and 5050.4A will be made upon receipt and review of the request for land  
501 release for the portions of Phase I located on airport property. This request must be  
502 submitted by the airport sponsor, the [MWAA], to the FAA and will be reviewed for  
503 consistency with Section VII.G of FAA’s Policy and Procedures Concerning the use  
504 of Airport Revenue (64 FR 7696-7723).[2] All appropriate determinations regarding  
505 approval to use airport property for non-aeronautical uses and unconditional approval  
506 of the changes to the Airport Layout Plan for Phase I of the project also will be made  
507 subsequent to review [for consistency with FAA policy and Procedures].”

508 87. The FTA in conjunction with the Virginia Department of Rail and Public  
509 Transportation and the WMATA, prepared the *Preliminary Engineering Design*  
510 *Refinements Environmental Assessment* (“EA”) which was released in February  
511 2006. The EA is intended to address the environmental impact of various design  
512 changes to the Project.

513 88. Unfortunately, the DAAR was built to standards which are now regarded  
514 as obsolete for limited access highways. The DAAR has only 11’ lanes, instead of the  
515 now required 12’ lanes, and has inadequate shoulders. Since the opening of the

516 DAAR, no money has been spent to modernize this highway to meet contemporary  
517 safety and design standards. It was and remains a substandard highway.

518 **The Regional Response to Growth and Its Effect on Transportation**

519 **Choices**

520 89. During the 1970's Fairfax County elected political leadership which  
521 emphasized economic development, with the goal of increasing the percentage of  
522 property taxes from non residential sources to 25%. This increase was important in  
523 that in Virginia, sources of local revenue other than property tax are limited by the  
524 Constitution of Virginia unless special powers are granted by the General Assembly.

525 90. In this effort they were successful.

526 91. At the same time, the no-growth community responded to the increased  
527 level of activity by insisting that local politicians remove road rights of way from  
528 plans and construct cul de sacs, rather than gridded arterial and collector streets, as  
529 infrastructure.

530 92. At one point, in the 1980's, there was a de facto moratorium on new  
531 development.

532 93. The anti-highway lobby was activated by the proposed construction of I-  
533 66, the only east west limited access highway in the DC area. This highway had first  
534 been proposed in 1956. A brief chronology of the I-66 saga is as follows:

535 **1956** I-66 is proposed by the Virginia Highway Commission as a 76-mile link  
536 between Washington, D.C. and another planned interstate, I-81.

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- 537 **1958** Initial I-66 hearings.
- 538 **1960** Start of clearing of houses from I-66 right-of-way.
- 539 **1966** Department of Transportation Highway Act passed requiring an inquiry  
540 regarding whether a "feasible and prudent alternative" is available before parkland is  
541 taken for a highway.
- 542 **1970** National Environmental Policy Act (NEPA) passed requiring an Environmental  
543 Impact Statement (EIS) to determine whether there are impacts "significantly  
544 affecting the quality of the human environment" on federally funded projects.
- 545 **1970** Design hearings for an eight lane I-66.
- 546 **1970** Arlington County Board lawsuit filed in U.S. District Court seeking to enjoin  
547 construction of I-266 spur through George Washington Parkway and construction of  
548 Three Sisters Bridge. This suit was dismissed when plans for I-266 and the Three  
549 Sisters Bridge were abandoned.
- 550 **1971** Arlington Coalition on Transportation (ACT) lawsuit filed in U.S. District Court  
551 seeking to block construction of I-66 through Arlington.
- 552 **1972** The 4th U.S. Circuit Court of Appeals rules in favor of ACT. All work stops  
553 pending the completion of an EIS as required under NEPA.
- 554 **1975** U.S. Sec. of Transportation William T. Coleman, Jr. rejects a revised 6-lane I-66  
555 alternative.
- 556 **1975** Virginia Governor Mills E. Godwin continues to refuse to transfer the I-266  
557 federal funding allocation for Metrorail unless I-66 is built.

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558 **1976** In order to break the I-66/Metrorail funding impasse, unprecedented hearings  
559 personally chaired by Secretary Coleman are held.

560 **1977** The so-called Coleman Decision is rendered embracing a Multi-modal  
561 Transportation Corridor compromise with Metrorail running in the median of a 4-lane  
562 I-66. Secretary Coleman later said that it was one of the most difficult decisions he  
563 had to make during his tenure as Transportation Secretary. Due to this compromise,  
564 which was an engineering disaster, Inner I-66 and traffic to and from Dulles Airport  
565 from the inner core, and to and from Dulles Airport and Washington National (since  
566 renamed Reagan), has been severely impacted.

567 **1979** Continued Action on Transportation and the Environment (CONTACT) lawsuit  
568 alleging that I-66 was being built so it could be widened contrary to Coleman  
569 Decision 4-lane limit filed in U.S. District Court.

570 **1980** The U.S. Circuit Court of Appeals rejects the CONTACT lawsuit.

571 **1982** I-66 opens to traffic.

572 **1983** Peak hour restrictions changed to HOV-3.

573 **1995** Peak hour restrictions changed to HOV-2.

574 **1999** Rep. Frank R. Wolf, R-Va. recommends widening I-66 to 3-lanes westbound  
575 from Spout Run.

576 **1999** Virginia Governor Gilmore announces his plan to widen I-66 in both directions  
577 inside the beltway.

578 94. While a number of proposals have been made to correct the obvious  
579 problems that were created by the 1977 Coleman decision which forced a bottleneck  
580 at the Dulles Connector/I-66 interchange, nothing has been done to date. Inner I-66  
581 has evolved into one of the most severely congested and dysfunctional highway  
582 segments in the U.S., constantly ranking at the top of the daily congestion hotspots,  
583 which can be accessed in real time at [www.traffic.com](http://www.traffic.com).

584 95. In particular, this interchange forces five highway lanes into two,  
585 guaranteeing a high level of congestion even off peak.

586 96. On the outer portion of I-66, the highway ranks as the #1 most overused  
587 and traffic saturated urban freeway of its design category in the entire U.S. (from  
588 AASHTO data).

589

### 590 **Roads, Airport Access, Smart Growth and the Rail Cult**

591

592 97. The mid 1970's was the time that major cities in the U.S. stopped building  
593 major highways. The impetus for this movement was the decision of the U.S.  
594 Supreme Court in Overton Park [RR], which required an alternatives analysis and  
595 environmental impact statement for highways. (In Overton, the question was whether  
596 an alternative routing which avoided construction in a local park had been adequately  
597 considered.

598 98. In Washington, the anti-highway lobby found an alternative in the new  
599 WMATA heavy rail system. It started construction in 1969. The Arlington stations  
600 opened in the late 1970's. The heavy rail routing was thru the arterial streets in  
601 Arlington instead of following the I-66 median west of Ballston. This routing was the  
602 result of a political decision by Arlington to emulate the underground location of their  
603 stations instead of putting the rail system on the median of I-66 as occurred west of  
604 Ballston, for 9 miles to the Vienna terminus. This decision was an early example of  
605 the enthusiasm that greeted the delivery of the WMATA heavy rail system by the anti  
606 highway forces and the hope that such a system would relieve congestion

607 99. This enthusiasm was led by certain officials in Arlington County, which  
608 has always marketed itself as a superior example of urban design. The idea was to  
609 take available money from roads and put it into then- fashionable ideas, such as the  
610 heavy rail WMATA system.

611 100. For an amusing parody on Arlington's "vision" for themselves and other  
612 "smart growth" areas, see:  
613 <http://www.youtube.com/watch?v=4T1RMuoQnKo>

614 101. It's a futuristic planner's dream offering typical smart growth "choice",  
615 a 1,200 s.f. depression area house, or a 1,200 s.f. condominium, either for \$600,000.  
616 There is also a marvelous selection of Starbucks outlets for \$4 coffee.

617 102. Washington, D.C.'s then mayor, Marion Shepelov Barry, had the same  
618 idea when he stopped the completion of interstate highways in the District and used

619 the money for the initial rail system instead. That is why limited access highways in  
620 D.C. stop onto local arterials for no obvious reason (I-495), unconnected as they need  
621 to be, and why New York Avenue has never been modernized.

622 103. The idea behind heavy rail was to make it easier to suburbanites to  
623 commute to the center city. Of the major US cities, only Atlanta (MARTA) and San  
624 Francisco (BART) followed suit. The assumed planning model was for the wife to  
625 drive the husband to a nearby kiss and ride stop at the Metro station while she  
626 returned home to take care of the house and children.

627 104. This model soon revealed its deficiencies. First, the kiss-and-ride wife  
628 joined the workforce and bought her own car. The Washington DC area has one of the  
629 highest rate of female participations in the labor pool of any US city.

630 105. Second, the District began losing population. In 1970, when the system  
631 was just open, the population of the District was 756,510 . In 2008, the last measure, it  
632 was 591,833, per US Census Bureau.

633 106. Third, the growth of jobs in the suburbs was much faster than in the inner  
634 core, which Metro was designed to serve. Every year, the suburbs took another 1%  
635 market share of the overall employment market.

636 107. The result is that travel patterns became a spider web of point to point  
637 travel that had very little to do with the planned Metro in-and-out-at-rush hour design.  
638 Because of this, Metro ridership never reached the projected numbers (1,300,000  
639 heavy rail projected for 1980; the real number today is about 750,000) and large

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640 annual operating deficits appeared. The DC area has never agreed on any common  
641 way to deal with these deficits.

642 108. The heavy rail system was initially promoted at a \$3 billion total cost. Its  
643 funding was taken by referendum to all local jurisdictions that permitted such citizen  
644 approval (all localities except the District of Columbia and Alexandria). It was  
645 projected to generate a small operating profit.

646 109. That was the idea. Unfortunately, reality turned out to be far different.

647 110. The initial cost ended up at about \$10 billion, and actual ridership was ½  
648 the projections.. These ratios are consistent with urban rail promotions worldwide,  
649 according to Bent Flyberg, author of Megaprojects and Risk. His studied all urban rail  
650 promotions worldwide where publicly available data was available. His conclusion:  
651 such projects were only started after official “lying.” Their average cost effectiveness  
652 was ¼ of that projected. Half of this underperformance was from cost overruns, half  
653 from patronage over-optimism.

654 111. Lying and subterfuge has been a feature of the Dulles Rail promotion as  
655 well. The cost of Phase I is officially set by the FTA at \$3.1 billion, yet the promoters,  
656 on their web site, quote \$2.5 billion. (The cost submitted to the Fairfax landowners in  
657 their petition for a special transportation district in 2004 was \$1.8 billion). This  
658 “growth” has occurred in only 5 years, and there is no guarantee that more is not to  
659 come.



660 112. What is even more significant is that MWAA refuses to advertise and  
661 justify the toll structure that would provide 75% of the costs of Phase I and Phase II.  
662 (The share was originally 25%). Originally the statement was that tolls would increase  
663 only at the inflation rate. That assertion is now “non-operative” in the best  
664 Washington tradition of spending other people’s money without accountability  
665 between promise and performance.

666 113. We know now that urban areas that devote substantial money to  
667 expensive rail projects suffer from increased congestion compared to cities without  
668 expensive rail projects to support. The story is summarized in the graphic (Exhibit F).

669 114 It also turned out that the main impact of the radial design was for those  
670 sharing carpools in and out of the city (at no cost to any government, totally  
671 unsubsidized) took the Metro instead. Single occupant vehicles increased. Overall  
672 surface congestion continued to worsen.

673 115. At the same time, commuters resented the forced travel by extended  
674 Metro lines. They did not want to either drive and park at outlying stations, or take the  
675 bus to a Metro station and then switch to rail. On the Shirley highway, the region’s  
676 most heavily used corridor, the “slug” system sprang into existence. Sluggers now  
677 account for 44,000 daily trips, totally unsubsidized. This is obviously a bargain since  
678 the Silver Line is projected to add only 47,800 new system riders (2 ½%) to the  
679 WMATA system, and that is in 2030! Consult [www. Slug-lines.com](http://www.Slug-lines.com) for current  
680 practice.

681 116. Yet, slugging was never considered as a serious option for the Dulles  
682 Corridor. In fact, the EIS reported in writing that the slug system would never be  
683 considered seriously by any responsible local government! A clearer example of the  
684 rail orientation of the promoters can hardly be imagined. The thrust of local  
685 politicians, many of whom are financially conflicted, was to end up with an expensive  
686 heavy rail solution. The Environmental Impact Statement process was just a cover for  
687 a predetermined solution. (According to the FTA, \$220 million has already been spent  
688 on the Silver Line and it has not even broken ground!)

689 117. It also turned out that this region, while enthusiastic about the shiny new  
690 rail cars as long as the Federal Government was providing 90% of the capital cost,  
691 was not prepared to pay for the deferred maintenance and operating deficits these  
692 systems entail. The federal government does not make grants for operating cost  
693 deficits. To this day, WMATA has no dedicated source of income to cover its deferred  
694 costs, which have been variously estimated at \$3 billion to \$12 billion. The reason is  
695 that politicians know that local approval of such a dedicated tax is not likely to be  
696 popular since rail is elite travel for commuters and otherwise is used mostly by  
697 tourists downtown.

698 118. Local jurisdictions have adopted the practice of making large annual  
699 contributions to fund the Metro deficit. They have in effect starved their road  
700 programs for this annual contribution.

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701 119. To this day, Fairfax has devoted more than 80% of its available  
702 transportation dollars to the WMATA system and some local, often non unionized bus  
703 service. This is despite the fact that in Fairfax during this period, transit  
704 accommodated no more than 3% of passenger mile trips, with the percentage  
705 declining each year. Fairfax has only 3 heavy rail stops out of the 75 in the entire  
706 WMATA system. Meantime, vehicle use has continued to increase.

707 120. The current share for transit in Virginia's latest statewide budget is 30%  
708 of the transportation total. This is for a mode whose market share is less than 2%, in a  
709 state which is predominantly rural. This represents a 15:1 misallocation of capital.

710 121. This misallocation compares with that of the Metropolitan Washington  
711 Council of Governments, whose 25-year constrained long range plan calls for \$53  
712 billion out of \$93 billion to be spent on transit. This is 60% of the total for a mode  
713 where their own projections show is 4% declining to 2.7% in 25 years.

714 122. The same officials who have misallocated the available money are crying  
715 poor that there is not enough for new road construction. Indeed, they complain that  
716 they barely have enough for repairing pavement and shoring up failing bridges. Their  
717 road show is not credible in that they studiously avoid any accurate calculations of  
718 cost effectiveness for new construction. The reason for this is simple: many of them  
719 are rail cultists, and these rail projects fail any rational cost effectiveness test.

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720 123. Talking about transportation “alternatives” does not cure this analytical  
721 deficiency. Helicopters, jet packs, and maglev lines running everywhere are possible  
722 alternatives too, but they don’t make economic sense.

723 124. At the same time, while politicians were happy to attend ribbon cutting  
724 services, they were not anxious to fund operating deficits and the ongoing capital cost  
725 of maintaining WMATA’s assets. While most transit systems must be subsidized to  
726 some extent, WMATA has not been a standout in any respect. Estimates of  
727 WMATA’s cost to enter a “state of good repair” is \$7 billion over a ten year period  
728 (FTA estimate). There are no credible plans to raise this money locally and the federal  
729 government traditionally does not fund repairs and maintenance. Wouldn’t it make  
730 more sense to take care of what you already have (and can’t maintain) rather than add  
731 on more obligations which embed operating deficits and capital replacement  
732 requirements we know are being shirked? In recent months, this deferred  
733 maintenance has resulted in 9 deaths from railcar crashes.

734 125. The bias towards rail and against highways is even reflected in salaries  
735 paid public officials and the employment overhead. Neil Pederson, who heads  
736 Maryland’s Highway Department, a job with immense responsibilities, is paid  
737 \$165,000 a year. At the same time John Catoe, who is head of WMATA, with a far  
738 smaller market share, is paid \$330,000 plus a fancy benefit package. WMATA has  
739 about 11,000 average employees, each of which has an average fully burdened cost of

740 over \$100,000 per year. This personnel burden of over \$1 billion per year is one  
741 reason why WMATA is constantly feeding at the public trough.

742 126. Drivers and car poolers are happy to arrange transportation at their own  
743 cost, without subsidies. The federal department of transportation has issued many  
744 studies showing that roads pay for themselves, while transit and rail are heavily  
745 subsidized, on the order of 50 cents per passenger mile.

746 127. The anti-highway lobby seized on a philosophy of “smart growth” as a  
747 way to justify their opposition. The idea behind “smart growth” is that ordinary U.S.  
748 citizens cannot be trusted to live and work as they see fit. It is necessary to invoke the  
749 aid of theorists who know how to do workplaces and housing better than the private  
750 sector. The fact that the theorists simply talk, as opposed to the private development  
751 community which has money on the line in every new project, seems irrelevant to the  
752 smart growers. When it is suggested that the smart growers develop their ideas  
753 themselves in the real world—no special license being needed to produce buildings—  
754 they retreat into their studies. Smart growth has produced academics and consultants  
755 who are paid to proselytize for a better world without ever having to test their ideas  
756 with the public.

757 128. Smart growth, the anti-highway lobby, and the rail cultists soon found  
758 themselves and formed a de facto alliance. Their joint promotion was something  
759 called “transit oriented development” A better description is “subsidized  
760 development”, since transit is always subsidized (in the U.S. at least).

761 129. Transit Oriented development is promoted as “allowing” the construction  
762 of denser than average development around “transit stops.” Often, parking is  
763 restricted, on the theory that people will take transit if they can’t park their car nearby.

764 130. It is entirely debatable whether this vision of a better world actually  
765 passes the real-world test. True transit oriented development has been a financial  
766 failure wherever it has been tried. When developers are required to restrict parking to  
767 below traditional levels, their projects have failed (Beaverton, Oregon is just one  
768 example).

769 131. Note that in the Washington, DC area no local government has had the  
770 courage to restrict parking near “transit stops.” Developers just won’t build under  
771 these circumstances, nor could they obtain financing.

772 132. Examples cited in this area for successful “smart growth” are Bethesda  
773 and Arlington/Ballston. Out of 75 stops, these are very few. These are close-in, high  
774 income areas which would have succeeded under any set of circumstances. Forcing all  
775 new development into rings around Metro stops, while forbidding development  
776 elsewhere, does not demonstrate the success of “smart growth.” This same pattern of  
777 artificial growth areas can be found in suburban San Francisco and Atlanta and many  
778 other cities.

779 133. The one city that has eschewed this “guided development” of the smart  
780 growers is Houston, which has limited zoning (and higher construction costs for  
781 housing than elsewhere due to a high water table, hurricane and flooding). On an after

782 tax and after cost of living adjustments, Houston is the wealthiest city in the U.S. This  
783 achievement is notable in that Houston does not have a higher gross level of income  
784 than comparable cities. It is the low real estate prices resulting from the absence of  
785 Smart Growth that has made Houston wealthier than Washington, D.C., where the  
786 workers have higher pre-tax incomes.

787 134. Other destinations, like all those in PG County, and Wheaton, Rockville,  
788 and Silver Spring in Montgomery County, have all failed to produce viable new  
789 construction.

790 135. Instead of acknowledging the failure of smart growth, the suburban  
791 counties have expanded the concept into de-facto urban growth boundaries.  
792 Montgomery County has announced that only about 10% of its “undeveloped” space  
793 is available for new construction. South of the Potomac River, Loudoun County has  
794 its “agricultural” district where minimum lot sizes are 40 acres! Prince William  
795 County has its “rural crescent.” The result of such large lot zoning, in the name of  
796 open space preservation, is the movement of those who can’t afford mansion sized  
797 houses and the accompanying monumental mortgages into the panhandle of West  
798 Virginia and across the Mason Dixon line into Pennsylvania.

799 136. The failure of “smart growth” has been demonstrated on an international  
800 scale with the recent collapse in housing finance. “Smart growth”, manifesting itself  
801 in a myriad of restrictions on new development (away from a few preferred locations  
802 with high construction costs), drove up the price of housing so high that creative

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803 financing was necessary to afford it. This hyperescalation due to smart growth was  
804 most notable coastal California, Florida, and Boston. Washington, DC was affected,  
805 but not as much.

806 137. The same house that you could buy in Houston for \$180,000 was \$750,  
807 000 in coastal California.

808 138. When the bubble burst, the collateralized debt obligations that were the  
809 end product of too-high mortgages due to too-high housing prices became “toxic  
810 assets.” The result was a worldwide panic and the spread of counterparty risk that  
811 ended up as liquidity crises of the first magnitude.

812

813 **Federal Highway Activity following the I-66 construction**

814 139. As a follow on to the I-66 construction, in 1981 the Federal Aviation  
815 Administration agreed to construct, at its own expense, a “New Section” between I-66  
816 at the start of the DAAR at the Capital Beltway (Route 123) and I-66 at West Falls  
817 Church. Part of the agreement between the Federal Aviation Administration and the  
818 Virginia Department of Highways and Transportation (now the Virginia Department  
819 of Transportation, or VDOT) was that “the new section of the Access Highway is to  
820 be constructed to the standards and specifications for the Interstate System as  
821 approved by the Secretary of Transportation in cooperation with VDHT. Following  
822 construction by the FAA, responsibility for operation, maintenance, and policing of  
823 the New Section passed to VDOT.



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824 140. This New Section was built, two lanes in each direction, on a 400' right  
825 of way. It is congested for miles during rush hours due to the skimpy laneage,  
826 consuming only 48' (four lanes at 12') of the 400' available.

827 141. As part of the agreement, the FAA agreed to open up traffic on the New  
828 Section to all traffic. The only airport-restricted traffic was to be the original 10-mile  
829 Dulles Airport Access Road between the Capital Beltway and Dulles Airport, at Route  
830 28.

831 142. No toll has ever been charged on the New Section. No toll has ever been  
832 charged on I-66, either inside or outside the Beltway.

833 143. The agreement was signed on behalf of the FAA by James Wilding,  
834 whose title was Director, Metropolitan Washington Airports, a sub agency of the  
835 Federal Aviation Agency.

836 144. Due to pressure from landowners which received no access from the  
837 large 400' right of way owned by the FAA, the latter agreed, in January 1983, to grant  
838 an easement of 250' (125' on each side) to VDOT to construct a highway usable by  
839 the general public. The agreement was again signed by James Wilding, acting as  
840 agent of the Department of Transportation, Federal Aviation Administration.

841 145. The Commonwealth of Virginia did not feel like funding this project  
842 (later named the Dulles Toll Road), and Northern Virginia's local politicians proved  
843 inept at obtaining state transportation dollars from Richmond. The latter did agree  
844 however to the construction of the highway. The expectation at the time was that once

845 the bonds necessary to pay off construction of the Toll Road built in the FAA  
846 easement had been repaid, the tolls would be removed. The precedent was a number  
847 of projects around Virginia where this pattern had been respected, including a toll of  
848 I-95 just north of Richmond.

849 146. Indeed, state law at that time, which has not been repealed, required  
850 removal of tolls from state bonded road projects.

851 147. In 1987 the federal government leased to a new entity, the Metropolitan  
852 Washington Airports Authority, the two Washington airports and such ancillary  
853 facilities as the Dulles Airport Access Road (the 400' right of way from I-66 to Dulles  
854 Airport). This lease was accomplished by two parallel and almost identical statutes,  
855 current Va. Code §5.1-154 et seq., and D.C. Code §§. 9-901 et seq.

856 148. In the "WHEREAS" clause of the agreement and deed of lease between  
857 the Federal Government, "acting by and through the Secretary of Transportation", the  
858 purposes of the lease and transfer was declared as follows:

859 "The Congress declared its purpose to be to authorize the transfer of operating  
860 responsibility under a long-term lease of the Metropolitan Washington Airport  
861 properties as a unit, including access highways and other related facilities, .... In order  
862 to achieve local control, management, operation, and development of these important  
863 transportation assets. [emphasis supplied].

864 149. Plaintiffs herein contend that MWAA has failed to operate the two  
865 airports as a unit, thereby violating the terms of the federal government least on

866 March 2, 1987, which has not been amended. In particular, the total neglect of  
867 uncongested ground access between the two airports has eliminated the considerable  
868 advantage enjoyed by air travelers who enjoy speedy access to a much wider range of  
869 air travel alternatives. Inasmuch as Dulles and National operate at about the same  
870 level of passenger load, prudent facilities management would arrange guaranteed  
871 direct travel time by car, taxi, van, bus, or limousine of no more than ½ hour for the  
872 23 miles separation of the two airports. This is the type of choice and speed that  
873 today's experienced air traveler has come to expect. For example, ½ hour connections  
874 are possible between Miami International and Fort Lauderdale airports, and LAX and  
875 Orange County airports.

876 150. In August 1987 the new Airports Authority re-executed a grant of  
877 easement in favor of VDOT, which was operating the Toll Road. That agreement was  
878 again signed by James Wilding on behalf of MWAA, now acting as general manager  
879 of MWAA.

880 151. Route 267, the Toll Road built in the FAA easement area, was expanded  
881 twice, in 1995 and 1999, and is now four lanes throughout. Unfortunately, again, the  
882 expanded lanes were not built to the limited access standards required by the federal  
883 government. The initial four lanes, and the added four lanes, are all 11' wide, instead  
884 of 12', and lack the shoulder dimensions (10' inner and 6' outer) required for a limited  
885 access highway of that design speed. Some of the shoulders are less than 2' wide,  
886 creating a hazardous condition for all motorist and periodic tie ups of the highway for

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887 miles when cars break down. Even more seriously, heavy concrete Jersey barriers  
888 were put up between the inner lanes (the DAAR) and the tolled outer lanes. This  
889 makes proper incident (accident) management impossible since it is impossible to tow  
890 away cars breaking down in the fast lanes.

891 152. In addition, the bridges built as part of the initial DAAR/Toll Road  
892 construction were not designed to allow compact rail service in the center. Thus,  
893 although there is sufficient right of way for heavy rail pursuant to a dedicated guide  
894 way, the bridge structures will have to be rebuilt, at enormous cost and inconvenience  
895 to the traveling public.

896 153. Plaintiffs are unable to locate any required waiver of federal and  
897 AASHTO design standards for the initial construction the two inner lanes of the  
898 DAAR, the initial four lane construction of the Toll Road, or the two dual lane  
899 expansions in 1995 and 1999.

900 154. As of today, the entire 400' right of way from the Capital Beltway to  
901 Dulles Airport is a substandard highway. Plaintiffs maintain that all segments, inner  
902 and outer, must be brought up to current federal interstate standards and that it is  
903 improper to use federal money for any improvements that do not result in a highway  
904 built to federally mandated contemporary standards.

905 155. The current plan is even worse than described above. A study in 2007  
906 commissioned by MWAA concluded that it would be impossible to construct a third  
907 inner lane in the DAAR without violating road design parameters for most of the

908 highway. Accordingly, despite the most generous 400' right of way inherited from the  
909 Federal Government, current plans call for level of service F (stop and go) for six  
910 hours a day, with the corridor operating at an average 35 mph both for rail and  
911 roadway. In other words, travel time either along the DAAR or the Toll Road will  
912 continue to deteriorate, and the expensive frill of a money losing rail system will  
913 make no difference in surface congestion or travel times (see Exhibit B).

914 156. This plan is not what was envisioned by Congress when it set up MWAA  
915 to do a better job of operating the two airports "as a unit."

916 **Virginia Involvement in the Federally Leased Land**

917 157. At all times during this narrative the operation of the Dulles Toll Road,  
918 State Road 267, was subject to the provisions of state law with respect to the use of  
919 toll revenues. Virginia Code § 33.1-287 provides as follows:

920 § 33.1-287. Cessation of tolls

921 "When the particular revenue bonds issued for any project or projects and the  
922 interest thereon have been paid, or a sufficient amount has been provided for their  
923 payment and continues to be held for that purpose, the Board shall cease to charge  
924 tolls for the use of such project or projects and thereafter such project or projects shall  
925 be free; however, the Board may thereafter charge tolls for the use of any such project  
926 when tolls are required for maintaining, repairing, operating, improving, and  
927 reconstructing such project, when such tolls have been or are pledged by the Board to  
928 the payment of revenue bonds issued under the provisions of the article for another

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929 project or projects on approval of the General Assembly or when such tolls are  
930 designated by the Board to be deposited into the Transportation Trust Fund. But any  
931 such pledge of tolls of a project to the payment of bonds issued for another project  
932 shall not be effectual until the principal and interest of the bonds issued for the first  
933 mentioned project shall have been paid or provision made for their payment”.

934

935 The foregoing provisions shall also apply to tolls on projects constructed pursuant to  
936 the acts incorporated by reference by § 33.1-253 (Chesapeake Bay Bridge and Tunnel  
937 District), and § 33.1-320 (Richmond Metropolitan Authority), provided their  
938 governing bodies have acted as set forth in subdivision 4 of § 33.1-23.03:1.

939 158. It is manifestly the case that diversion of excess Toll Road funds was  
940 never made by the General Assembly.

941 159. If funds were in fact deposited into the Transportation Trust Fund, these  
942 funds could not be used for other projects either presently, nor in the future.

943 Accordingly, all such excess revenues generated by the Toll Road should be used first  
944 to operate and repair the road, second to pay off the bonds, and third, retire the tolls  
945 and tear down the toll plazas.

946 160. This was never done.

947 161. In the early part of this decade, prior to the refunding of the outstanding  
948 bonds, the Commonwealth Transportation board voted to apply the “surplus” funds  
949 from the Dulles Toll Road to the “Dulles Corridor Rapid Transit Project.”

950 162. The Commonwealth Transportation Board is a creature of the Executive  
951 Branch of the Virginia Government, with all its members being appointed by, and  
952 serving at the pleasure of, the Governor. Accordingly, under the Virginia constitution  
953 it is a separate branch of government with no unique and exclusive powers on matters  
954 of taxation, which is reserved to the General Assembly (see Marshall v. NVTA, 275  
955 Va. 419 (2008)).

956 163. It is admitted by MWAA and VDOT that \$133 million of surplus Toll  
957 Road (Route 267) money has been diverted to fund rail operations to date.

958 Accordingly, any purported diversion of funds contrary to the statute quoted above  
959 exceeds the constitutional power of the Executive Branch or any agency thereof.

960 Because of this, all funds collected that are not needed for the operation and  
961 maintenance of the Toll Road and the repayment of bonds need to be returned to the  
962 taxpayers. This is exactly the remedy ordered by the Virginia Supreme Court in  
963 another tax case, involving the purported delegation of tax power by the General  
964 Assembly contrary to the Virginia Constitution; see Marshall v. NVTA, 275 Va. 419  
965 (2008).

966 164. In 1995 Virginia passed a law known as the Public Private Partnership  
967 Act. This law was enacted to enable Virginia to take advantage of the newly  
968 discovered availability of private capital to help support new infrastructure. The idea  
969 was that private companies would co-invest along with the public sector according to  
970 a lengthy and fully negotiated contract, extending far into the future (often 80 years).

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971 This process would produce more capital and thus a faster construction time than  
972 relying on pay-as-you-go projects, the financial practice of Virginia since the days of  
973 Harry Byrd. The appeal of this arrangement was particularly strong in Northern  
974 Virginia, where development had far outstripped the ability of the State Government  
975 to provide suitable roads. (As mentioned above, local money from taxes and bond  
976 issues went mostly into transit, which has proven to do nothing to relieve surface  
977 congestion).

978 165. In the late 1990's the Federal Transit Administration advanced the  
979 concept of demonstration projects of a "new" technology, Bus Rapid Transit ("BRT").  
980 The federal government would provide 90% of the cost such projects, which had the  
981 advantage of cheaper equipment, faster service, and more flexible schedules because  
982 buses can operate a few seconds of travel time apart, instead of minutes with heavy  
983 rail. These systems have been successful wherever they have been tried.

984 166. Due to work by our congressional delegation, the Dulles Corridor was on  
985 track to be one of the 10 BRT demonstration projects.

986 167. In April 1991, the Commonwealth Transportation Board codified the  
987 regulations by which it would consider Public Private Partnerships, under the title  
988 "Implementation Guidelines.

989 168. About this time, with the demonstrated financial success of the Dulles  
990 Toll Road, the owners of large blocks of land in Tysons Corner saw an opportunity to  
991 have others pay for the public infrastructure that would undergird their efforts to



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992 upzone their properties in Tysons Corner. That is, instead of defining Tysons Corner  
993 as a Community Investment zone which would finance its own redevelopment under  
994 the most favorable tax laws possible, the owners instead pursued a special tax district  
995 that would raise a small portion of the necessary redevelopment funds and look to the  
996 County and State to provide the rest of the infrastructure.

997 169. In this regard they had an important political supporter, Gerald Connolly  
998 who represented the Tysons landowners on the Board of Supervisors. Mr. Connolly  
999 later became Board Chairman and then congressman from Virginia's 11<sup>th</sup> district.

1000 170. Large infrastructure companies were looking to do public private  
1001 partnerships, including a subsidiary of Raytheon and Bechtel. The latter, fresh from its  
1002 "success" in Boston's Big Dig and Portland's light rail airport extension, was hungry  
1003 for new business.

1004 171. (The "success" referred to was that of Bechtel, which generated large  
1005 profits, some of which have been subsequently forced to be returned. The projects  
1006 themselves were failures.)

1007 172. At the direction of the Commonwealth Transportation Board, the  
1008 competing bidders for the Bus Rapid Transit project were asked to combine forces.

1009 173. Then an amazing event happened, one which plaintiffs have never been  
1010 able to document.

1011 174. In a secret, undocumented meeting, without advance notice, minutes, or  
1012 recorded votes, all such practice being contrary to Virginia Open Meeting laws (Va

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1013 Code §2.2-3700 et. seq.), the Bus Rapid Transit plan was thrown out, and it was  
1014 overnight replaced by a Heavy Rail project, at ten times the cost.

1015 175. The Tysons landowners set up a controlled group, called LEADER  
1016 (Landowners for the Economic Development of Rail to Dulles). They hired former  
1017 governor Linwood Holton and ex senator Chuck Robb. (Linwood Holton's daughter is  
1018 current Virginia governor Tim Kaine's wife, making the Dulles Rail promotion a  
1019 multigenerational family affair). Kaine is a confirmed rail-o-holic whose latest state  
1020 budget (2010) calls for 30% of the Virginia transportation budget to be spent on cost-  
1021 ineffective transit projects, in a state where transit is less than 2% of overall demand.

1022 176. LEADER's pitch was that for \$30,000 a year, you would get "a seat at  
1023 the table." No pay, no play, a very comprehensible system to politicians and special  
1024 interest groups alike. And that's what happened.

1025 177. In 2001 The Tysons landowners got their local representative in the  
1026 Virginia House, Vince Callahan, to introduce and pass legislation authorizing the  
1027 formation of Special Transportation Districts. Such districts were to be formed by the  
1028 affirmative approval of more than 50% of the affected landowners whose contiguous  
1029 properties were industrially or commercially zoned.

1030 178. Callahan thought it was a good idea to differentially tax commercial and  
1031 industrial owners, despite the limitations of the Virginia Constitution, Article ,  
1032 Section . It is acceptable conventional wisdom among traffic engineers that each new  
1033 residential unit generates 10 new road trips per day. There has never been a showing

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1034 that commercial and industrial landowners are specially benefited by a transportation  
1035 tax more than any other class. The General Assembly and Fairfax County have made  
1036 no effort to justify this differential, so wisely prohibited by the writers of the Virginia  
1037 Constitution.

1038 179. The LEADER group mentioned above then proceeded with a massive  
1039 petition for a transportation district extending all the way from Tysons Corner to  
1040 Route 28 in Loudoun and Fairfax Counties. Such a transportation district, however,  
1041 required the approval of the Town of Herndon, which voted down the idea 6-1 in  
1042 November 2003.

1043 180. At about the same time, the Federal Transit Administration, which was  
1044 being petitioned for \$600 million in "New Starts" grant (49 USC 5309), informed the  
1045 promoters that the project needed to be split into two parts to have any hope of federal  
1046 funding. The western terminus of the first phase was to be at Wiehle Avenue and the  
1047 Toll Road.

1048 181. The promoters scrambled around and presented an amended petition to  
1049 the Fairfax Board of Supervisors, which rubber stamped it. The public hearing held  
1050 February 23, 2004 was in fact completely scripted by Hunton and Williams, the  
1051 lobbying law firm representing the pay-to-play LEADER insiders. In their hurry, the  
1052 promoters did not follow proper state procedure in announcing meetings that would be  
1053 descriptive of the tax proposed. Nor did their public notices, newspaper ads in the  
1054 *Washington Times*, describe with any specificity the properties to be affected.

1055 182. What was left of the original tax district along the Dulles Corridor was a  
1056 scattering of properties between Hunter Mill Road and Wiehle Avenue. These  
1057 properties were more than three miles from the nearest boundary of the tax district in  
1058 Tysons Corner.

1059 183. Since this activity occurred in 2004, the Virginia Supreme Court has  
1060 come out with two opinions which nullified this sloppy procedure. In the Gas Mart  
1061 case, Record No. 041455, March 3, 2005, the Virginia Supreme Court disallowed the  
1062 Loudoun County downzoning due to insufficiently precise notice. In the Allfirst case,  
1063 record no. 032554, September 17, 2004, the Virginia Supreme Court threw out a  
1064 utility district which had the same 50% approval requirement, on the grounds the  
1065 properties supposed to be affected were not contiguous.

1066 184. Based on the revised standards on these two issues, as decided by  
1067 Virginia's highest court, and based on new standards decided after the establishment  
1068 of the Special Tax District, the status of the Dulles Corridor portion of the  
1069 transportation district is now under court review in the state court system.

1070 185. In addition, the entire Special Transportation District has been attacked  
1071 on the grounds that it establishes a differential tax rate for classes of properties, a  
1072 distinction not permitted by the Virginia Constitution.

1073 186. Both these cases are now pending before the Virginia Supreme Court.

1074 187. In 2002, the rail promotion, then under the management of the  
1075 Department of Rail and Public Transport in Richmond, was the subject of a Draft

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1076 Environmental Impact Statement. In 2004 the Final Environmental Impact Statement  
1077 was issued.

1078 188. These Impact Statements required 1) a comprehensive alternatives  
1079 analysis, and 2) the selection of a Locally Preferred Alternative.

1080 189. The Comprehensive Transportation plan for Tysons Corner contained a  
1081 total of three proposed rail stops. When the issue of the locally preferred alternative  
1082 came up before the Fairfax Board, Chairman Connolly, hired three weeks before as a  
1083 public relations officer with SAIC, a large government contractor, added a fourth stop,  
1084 at the doorstep of his employer and its 18 acres of suddenly much more valuable land.

1085 190. On information and belief, the addition of the Connolly rail stop  
1086 increased the cost of the project more than tunneling the entire Tysons segment, and  
1087 alternative which was periodically rejected as being "too expensive."

1088 191. The petition for the Transportation tax district contained a drop dead date  
1089 for the issuance of a federal Full Funding and Grant Agreement (FFGA) of December  
1090 21, 2006. That date came and went. The original petition also mentioned that the cost  
1091 of the initial project would be \$1.6 billion, 25% of which would come from the  
1092 special transportation district. Only 25% was supposed to be needed from the Toll  
1093 Road securitization.

1094 192. These figures are now, as of mid 2009, total project cost of \$3.1 billion,  
1095 of which the local tax share is \$400 million/\$3.1 billion or 12%. The proportion of the  
1096 total cost needed to come from the Toll Road is now 75%, not 25%.

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1097 193. In 2006, in view of the escalating costs, a political decision was made in  
1098 Richmond to offload this turkey of a megaproject to an outside source. While there  
1099 were several private parties interested in buying the Toll Road (subject to large  
1100 increases in the tolls), MWAA, a convenient entity which conflicted politicians saw as  
1101 a plausible vehicle for avoiding required general assembly or local voter approval for  
1102 tax increases, was induced to take over construction. They would issue revenue bonds  
1103 for the construction, 75% of the security for which would come from higher taxes on  
1104 toll road users. The cost of these bonds would be higher than the cost of capital for the  
1105 Commonwealth of Virginia, either by direct infusion, or via state sponsored debt.

1106 194. Neither Bechtel, the private contractor, nor MWAA is proposing to put a  
1107 dime into the project we contest. MWAA has proposed a token contribution to Phase  
1108 II (from Wiehle Avenue to the Airport and beyond to Loudoun County), but such  
1109 money will come from airline ticket surcharges, which will be borne by local airport  
1110 users.

1111 195. MWAA has no experience with building urban rail, and no experience in  
1112 surface transportation nor access corridors. Former Secretary William Coleman, the  
1113 federal Transportation Secretary in the 1980's, has called them "incompetent."

1114 196. Various reviews by the professional staff at the Federal Transit  
1115 Administration have given the Dulles Corridor heavy rail project a low rating over the  
1116 years. As recently as April of 2008, the project was effectively dead at the federal  
1117 level. FTA administrator James Simpson exercised correct management judgment in

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1118 turning down the 23 mile (22%) extension of the basic WMATA heavy rail system  
1119 (for a projected 3.5% increase in system use, in 2025!) until WMATA had figured out  
1120 how to keep the basic system in repair.

1121 197. In May of 2008, according to documents which have had their dates  
1122 mysteriously deleted, Transportation Secretary Mary Peters gave into the political  
1123 pressure and approved a \$900 million FFGA (of which \$220 million has already been  
1124 spent). She, and others, at the outgoing administration, were not anxious to make heroic  
1125 stands in the midst of a job change for the outgoing political appointees.

1126 198. Another unfortunate Virginia precedent appeared in 2008 while the  
1127 federal jockeying was going on. In a landmark case, Marshall v. NVTA, 275 Va. 419,  
1128 the Virginia Supreme Court declared that the imposition of taxes could only be  
1129 undertaken by the affirmative recorded vote of a majority of elected officials. The  
1130 attempted delegation of tax authority to the members of the Northern Virginia  
1131 Transportation Authority was declared void.

1132 199. The NVTA decision makers, in fact, were a far more representative  
1133 group than the Board of Directors of MWAA, all of whom by statute must not hold  
1134 elective or appointive office.

1135 200. The Supreme Court ordered the refund of taxes previously paid to  
1136 NVTA, which was done. Plaintiffs herein request the same remedy, the refund of  
1137 taxes on road users from the time they were surplus to the maintenance and financing

1138 needs of the Toll Road (Route 267). The approximate amount to be refunded is  
1139 \$300,000,000.

1140 201. Plaintiffs also request an injunction against further taxation of toll road  
1141 uses, and a declaratory judgment that MWAA may not impose any further taxes on  
1142 Toll Road users absent the approval of the General Assembly.

1143 202. The taxes proposed by MWAA to finance 75% of the cost of the rail  
1144 promotion are actually, by design, worse than the NVTAs taxes that were struck down.  
1145 The NVTAs tax enabling legislation contained a constrained range with minimum and  
1146 maximum tax rates.

1147 203. In contrast, MWAA is contemplating “hell or high water” bond language  
1148 which would give it the unilateral authority to raise taxes on toll road users as high as  
1149 necessary to satisfy the coverage requirements of the bond underwriters. No one  
1150 knows that rate of taxation would be necessary. MWAA has refused to publicize any  
1151 proposed numbers. Instead, they have embarked on a public relations campaign for  
1152 2009 designed to promote the idea that higher taxes are a good idea at a time of  
1153 economic collapse, when the vacancy rates in the Dulles Corridor are at an all time  
1154 high, and higher than any other area of our regional economy.

1155 204. Once this mischievous language is embedded in a trust indenture, it will  
1156 be impossible to moderate the taxes imposed on toll road users.

1157 205. The tax that MWAA is proposing would be the highest in the history of  
1158 Virginia. The numbers are 75% of the total initial construction cost of \$6 billion. The



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1159 \$6 billion figure is given without allowance for interest costs during the 40 year life of  
1160 the project. If financing costs and operating deficits are added, the latter of which will  
1161 be paid by local taxpayers (the federal government does not subsidize operating cost  
1162 deficits), the total cost will be \$20 billion, of which all but the \$900 million federal  
1163 grant will come from local sources.

1164 206. Phase II of the proposed rail scheme will cost at least as much as Phase I,  
1165 being the same length (11.5 miles) and having a mile-long tunnel underneath the  
1166 airport in front of the terminal. This tunnel would be necessitated by the required Fine  
1167 Arts review that mandates that the profile of any structures near the iconic Saarinen  
1168 terminal be non obtrusive. This tunnel will cost more than the Tysons corner tunneling  
1169 proposed and not studied. It will also be an enormous security risk. Bombing the  
1170 entrance or the interior of this tunnel is so easy to plan that safeguarding this risk will  
1171 cost a fortune.

1172 207. It must be noted that current plans call for major construction by MWAA  
1173 more than 1 mile from the nearest point on the Dulles Access Road. This is not  
1174 “airport property” or “airport facilities” as defined in the enabling legislation  
1175 establishing MWAA in the first place. In terms of the cost of Phase I, 75% of it will  
1176 be incurred on on-airport property and non-airport facilities property, on private land  
1177 in Tysons Corner, to benefit not the airport nor its travelers, but private landowners in  
1178 Tysons.

1179 208. It would be a much greater benefit to airport patrons to bypass the four  
1180 stops in Tysons. These Tysons stops now include, as mentioned above, the  
1181 Connolly/SAIC stop that inflated the construction cost so much.

1182 209. The rail plan is for local service only, unlike many airport rail  
1183 connections around the world. Accordingly, even without wait times at the origin  
1184 (Dulles Airport) and a core destination (downtown DC), travel time will be over an  
1185 hour—not competitive. There will be 17 stops between Dulles Airport and Metro  
1186 Center, D.C. With properly designed ground access, travel time from Dulles to the  
1187 Inner Core OR Washington Reagan airport should be ½ hour. The distance to both  
1188 destinations is only 23 miles.

1189

### 1190 **Transportation Technology**

1191

1192 210. The die was cast in 2001 when the secret vote in Richmond morphed a  
1193 practical and inexpensive Demonstration Project for Bus Rapid Transit into an  
1194 expensive heavy rail boondoggle.

1195 211. Meantime, corridor technology was advancing.

1196 212. The most notable new technology was variable priced, open road tolling.  
1197 This idea, long favored by economists, saw its first US implementation in California.

1198 213. Opening in 1995, the 91 Express Lanes was the first privately-funded  
1199 tollway built in the United States since the 1940s, and the first fully automated

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1200 tollway in the world. Tolls are collected when a vehicle carrying a transponder  
1201 mounted on the inside of the vehicle's windshield passes beneath the toll 'booth'  
1202 (actually a transceiver array above the toll lanes that is located at about the five-mile  
1203 (8 km) point of the toll road). Other characteristics of the toll road include: variable  
1204 toll based on traffic volume (i.e. variable congestion pricing) with road signs alerting  
1205 users to the toll to be paid; an alignment contained entirely within the median of the  
1206 existing Riverside Freeway with two lanes in each direction; limited access provided  
1207 only at the east and west ends of the toll road (where the toll lanes become regular  
1208 carpool lanes; and separation between the regular, main lanes of the Riverside  
1209 Freeway is provided by reflective yellow, 3 ft (0.91 m) high, plastic lane markers (as  
1210 opposed to concrete barriers or a similar solid barrier)).

1211 214. The spectacular success of this highway attracted worldwide attention.  
1212 The road, costing \$120 million all-in, or \$3 million a lane mile, proved to carry more  
1213 traffic on four congestion managed lanes than occurred on the outer eight general  
1214 purpose lanes.

1215 215. Variable priced tolling served two purposes. First, it raised revenue,  
1216 enough to justify private investment, although the highway itself was done by a public  
1217 authority (and was sold to the Orange County Transportation Authority a few years  
1218 after it opened for \$210 million). Orange County, unlike MWAA, or even VDOT, has  
1219 extensive experience in building and operating toll roads.

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1220 216. The concept behind the Riverside Freeway was robustly tested in other  
1221 locations: I-5 north of San Diego, I-25 in Denver, I-394 in Minneapolis, and most  
1222 recently the renovated I-10 (Katy Freeway) in Houston.

1223 217. What these projects demonstrated was that congestion managed lanes  
1224 could operate at least at Service Level C (45 mph) and carry transit vehicles at the  
1225 same speeds, with excess capacity for private drivers that could be “sold” for  
1226 guaranteed travel times.

1227 218. I-10 east of Los Angeles (the “El Monte”) is as heavily traveled a  
1228 highway as exists anywhere in the world, with daily use of 400,000 vehicles a day.  
1229 Congestion managed lanes permit a mix of express and local buses to travel at open  
1230 road speeds.

1231 219. It turns out that the demand for transit vehicles in major urban corridors  
1232 has never exceeded 100 vehicles per hour. (An exception would be the Lincoln  
1233 Tunnel Busway which is a dedicated single lane highway, one way from 6 am to 10  
1234 am, which handles several hundred vehicles per hour). Since the capacity of a single  
1235 highway lane is for 60 mph service is about 1,500 vehicles per hour, shared  
1236 guideway—an unregulated mix of vehicles, all of whom pay for the privilege of  
1237 guaranteed travel time—has proven a far more cost effective corridor design than  
1238 fixed guideway, which is the plan for Route 267 east of the airport.

1239 220. In practice, the maximum demand for transit in any corridor in the U.S.  
1240 is 100 vehicles per hour—about 8% of the capacity of a single lane. Rubber tired

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1241 vehicles are less expensive to buy, per vehicle and per seat, and require less energy  
1242 per passenger mile to operate, over uncongested roads.

1243 221. The official adopted plan for Route 267 is for the corridor to operate at  
1244 35 mph with very high embedded expenses.

1245 222. Auto tolls will have to be \$5-7 per trip one way. MWAA has not  
1246 publicized the number, since it is so embarrassing, but the arithmetic is obvious. At  
1247 75% of \$4.5 billion cost for both phases of Dulles Rail, the \$4.5 billion will entail an  
1248 annual debt service of about 7% of this debt or \$300 million. Add the debt service  
1249 coverage (the safety factor) of 20% or \$60 million, the costs to operate the toll  
1250 collections (another \$30 million), the annual revenue from taxes of the Toll Road  
1251 must be at close to \$400 million per year.

1252 223. In transportation studies the usual denominator is 290, to reflect a mix of  
1253 weekday and weekend traffic. So the daily cost just for the Toll Road operations will  
1254 be about \$1,300,000 a day. Divide this number by the number of daily users (200,000)  
1255 and you have \$6.50 per trip, one way.

1256 224. We know the tax on toll road users will have to be at least at this level.  
1257 The Dulles Greenway, which is a privately funded road west of Route 267, but whose  
1258 cost of capital is no higher than will be the case with Route 267 revenue bonds,  
1259 charges up to \$4.80 per trip during rush hour.

1260 225. The Greenway's patronage is about 80,000 users per day, versus the  
1261 200,000 projected for Route 267. But it needs to service only \$600 million in cost (the

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1262 purchase price paid by McQuarrie, which in retrospect appears to have been an  
1263 overpayment). Seven times the financial burden divided by 2.5 times the patronage of  
1264 the Greenway shows a multiplication factor of at least 2.5. This simple arithmetic  
1265 demonstrates that Route 267 will inevitably be priced at a higher level than the  
1266 Greenway WITH NO GUARANTEE OF IMPROVED TRAVEL TIME

1267 226. Route 267 patronage has been approximately constant since 2002.  
1268 Several projections put the rate of growth in the future at less than ½ of 1% per year.  
1269 This is hardly the explosive growth pictured by the rail promoters. Higher traffic  
1270 increases are projected for many other highways further west, where residents and  
1271 businesses both are migrating.

1272 227. Indeed, the plan being promoted by MWAA is for Route 267 to operate  
1273 like inner I-66, with inadequate capacity for general purpose traffic, and an inefficient  
1274 heavy rail transit link in the center whose right of way could be better used for rubber  
1275 tired vehicles.

1276 228. In fact, Route 267 is being set up to operate like inner-I-66, only with  
1277 high full time tolls.

1278 229. The planned travel speed is 30 mph for both the rail and road portion.  
1279 Projected level of service for Route 267 is F, stop and go, the worst possible, for most  
1280 of the day. This is the picture of continued deterioration, despite spending all this  
1281 money. It is, in fact, planning our way into regional decline.

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1282 230. Congestion is projected to be the same on Route 267 and the arterials  
1283 surrounding it whether or not the rail is actually built.(Source: 2004 Final  
1284 Environmental Impact Statement).

1285 231. As for airport access, no investigation has occurred about the spillover  
1286 effect of high taxes on toll road users on the outer lanes and high congestion, versus  
1287 free and fast passage in the inner lanes. (As noted above, expansion of the inner lanes  
1288 without severe compromises for road design is not possible according to all current  
1289 studies).

1290 232. Given the choice between free and fast versus expensive and slow, many  
1291 through drivers will choose the inner lanes and simply drive around the airport arrival  
1292 or departure areas. This drivearound will add 5 minutes to the 10 mile through trip,  
1293 but traveling at 60 mph in the DAAR versus 30 mph on the outer lanes will produce a  
1294 travel time of 15 minutes versus 20 minutes, saving the user time. Air pollution will  
1295 also be lower as these drivers operate their cars at a constant speed with no stop and  
1296 go acceleration, and constant braking.

1297 233. Also the DAAR, the inner lanes, are theoretically reserved for airport  
1298 traffic, in practice it will be impossible for MWAA to determine who is and who is  
1299 not a legitimate airport visitor. Ticketless travel is here to stay, and printing out bogus  
1300 boarding passes is child's play.

1301 234. The problem that MWAA is creating for itself with the current  
1302 promotion is that its implementation will actually make Dulles Airport more

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1303 congested and harder to access. No airport in the world has been able to improve on  
1304 the somewhat chaotic find-a-slot system of drivers picking up airline passengers  
1305 somewhere along the arrival curb. With more drive around traffic, the system will  
1306 become even more chaotic and frustrating.

1307 235. What MWAA should be doing is what every other airport in the world  
1308 does. That is providing a high speed uncongested highway to the airport, and charge  
1309 users for it. The current “free” design is actually counterproductive.

1310 236. No other airport in the world provides free airport access while taxing  
1311 and tolling its general purpose users. There is a reason for it: it’s a stupid approach.

1312 237. At the same time as MWAA charges for airport access, like every other  
1313 airport in the world, it can “sell off” its surplus inner lane capacity and generate even  
1314 more money. Make the user fees variable with time to make sure access is unimpeded,  
1315 following pricing formulas that have proven their effectiveness everywhere else in the  
1316 world they have been tried.

1317 238. Dulles Airport was a pioneering effort. Like most pioneers, it made some  
1318 serious mistakes in retrospect.

1319 239. First, Dulles was planned without parking! Currently parking demand  
1320 and revenue is so high, that MWAA would not be able to finance its operations, or  
1321 appeal to the public, without it.



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1322 240. Second, the mobile lounges pioneered by Dulles have been proven to not  
1323 work as well as longer walks to terminal fingers. Fifty years after they were  
1324 introduced, there are still no plans to completely replace them.

1325 241. Third, the access system from the East (DAAR and Route 267) operates  
1326 on a flawed model that no modern airport has followed (as with the first two  
1327 mistakes). Modern technology has demonstrated that it is possible to make money on  
1328 airport access, which users are happy to pay for to reduce the time uncertainty for  
1329 their flights. At the same time, selling off surplus capacity will generate additional  
1330 revenue and make local users happy, in that they also enjoy guaranteed travel times at  
1331 a price which they can elect either to pay or not pay every time they use the corridor,  
1332 at their choice. This, finally, is not a tax, since it is a real-time user choice. Taxing the  
1333 corridor all day, everyday is a tax in that there are no practical alternatives to using  
1334 Route 267 for those living and working in the area.

1335

1336

### **Dulles Greenway**

1337

1338 242. In 1995, the privately financed 12.5-mile Dulles Greenway opened to  
1339 link the Loudoun County capital town of Leesburg to the western terminus of the  
1340 Dulles Airport Access Road (the two inner lanes) and the Dulles Toll Road (the outer  
1341 two lanes, since expanded to four lanes). At a reported construction cost of \$350

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1342 million, the road cost \$25 million a mile or \$6 million per lane mile, including all  
1343 bridges and other structures.

1344 243. The completed road was later sold to the Australian infrastructure  
1345 company Macquarie at a \$600 million price. At its main toll plaza it reported at  
1346 78,000 average daily traffic count in 2005. Toll increases have held per vehicle counts  
1347 steady or lower since then.

1348

1349

**I-495 HOT Lanes**

1350

1351 244. The 14 mile project, at a projected cost of \$1.8 billion but likely to cost  
1352 \$2 billion or more, is a true PPP with Fluor-Daniel (Transurban). It has a pair of  
1353 congestion tolled inner lanes, the preferred configuration for the Dulles Corridor, but  
1354 one never studied because the alternatives analysis was dominated by those who had a  
1355 preconceived idea that only heavy rail do. This interest was stimulated by the \$500  
1356 million in private fees and commissions for the rail project (of which \$220 million has  
1357 already been spent). This enormous “skim” compares with the \$53 million all-in cost  
1358 for the original four lanes of Route 267, with no more than \$100 million invested later  
1359 in expansion and improvements.

1360 245. It is the huge guaranteed fees and political novelty of these heavy rail  
1361 projects which underline their popularity. Take the money now, and pass the bill on to  
1362 succeeding generations.

1363 246. In contrast, competitive PPP's and highway projects, the latter of which  
1364 are subject to the Public Procurement Act, generate far lower levels of fees. So, they  
1365 are not promoted as much by money hungry consultants and their political supporters.  
1366 Studies of such proposals as the Honolulu heavy rail project along H-1 in Hawaii have  
1367 shown that a few percent of these fees end up back into the campaigns of the  
1368 supporting politicians, although they are so carefully disguised that the actual sums  
1369 are impossible to trace.

1370

1371

### **The Asian Airport Experience**

1372

1373 247. Most of the new airports in the world are being constructed in East Asia.  
1374 It is the stated desire of state transportation officials to "keep up with the Joneses"  
1375 with respect to airport access.

1376 248. It is true that new airports in Beijing, Seoul, Shanghai, Hong Kong,  
1377 Guangzhou, and Singapore have formal rail links with the core city. That does not  
1378 mean that the rail is well utilized or a sensible use of resources. In fact, for all the  
1379 stated new terminals, rail access takes twice as long point to point than the superb  
1380 coach express these state of the art airports offer. These facilities are built with new  
1381 access roads for which tolls are charged for airport access, instead of providing free  
1382 access as does Dulles. None of them have an inner free core with tolls charged on  
1383 commercial general purpose lanes, as does Dulles.

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1384 249. Not only are the coach services faster, they are less expensive than the  
1385 rail alternative, with access from the terminals much more convenient than walking  
1386 1/5 mile to the train depot, often with heavy luggage.

1387 250. That fact is also true even for Narita airport near Tokyo, which has the  
1388 most extensive rail connections of any international airport in the world. The  
1389 coach/express bus, source to airport, is faster and cheaper.

1390 251. The Virginia politicians and rail cultists claim that the currently  
1391 promoted Dulles Airport access system “keeps all the money in the corridor.” To  
1392 begin with, this is false. Phase I spends 75% of the money raised in Tysons Corner,  
1393 while being paid for 75% by Route 267 users. The Tysons promoters, who benefit  
1394 from this misstatement, often say that Tysons is equivalent to the 12<sup>th</sup> largest office  
1395 center in the country. If this is true, the Reston/Herndon/Route 28 Dulles Corridor  
1396 area must rank higher, as it has twice the general commercial buildout than Tysons,  
1397 and ten times the residential population.

1398 252. If it were in fact true that the money raised from the continued taxes on  
1399 Route 267 were to stay in the corridor, it would be better spent paving a hiker biker  
1400 trail with gold. For one thing, gold is likely to increase in value over time, as opposed  
1401 to pavement which deteriorates. Second, a gold-paved hiker biker trail would  
1402 engender no annual operating deficits, which in the case of the Silver Line are  
1403 projected to be \$120 million per year. No source for these annual deficits is being  
1404 proposed, other than out of general tax revenues.

1405 253. The express coach system so successful in new international airports has  
1406 never been considered in MWAA. Indeed, the entire thrust of the discredited  
1407 Environmental Impact statements which disregarded express bus services was that  
1408 inasmuch as West Falls Church metro stop could not handle any increased transfers  
1409 (not true in itself), only heavy rail should be considered. The experience of existing  
1410 express service, such as line 5A (Dulles to L'Enfant Plaza in 43 minutes) was  
1411 completely disregarded.

1412

### **Personalities and Conflicts**

1413 254. How can such a counterproductive waste of money, and a \$20 billion tax  
1414 increase, have gotten so far? A review of the personalities involved offers some clues.

1415 255. Tim Kaine is currently the Governor of Virginia. It was mostly Kaine  
1416 who arm twisted former Secretary of Transportation to approve the FTA full funding  
1417 grant agreement as one of her last official acts. The project had been rated  
1418 unacceptable during countless prior reviews. Our FOIA request for a before and after  
1419 comparison of the switch revealed no objective rationale for the approval.

1420 256. Tim Kaine is married to the daughter of former governor Linwood  
1421 Holton, who has been paid six figures to lobby for Dulles Rail (although he never  
1422 registered as a lobbyist). It's never a good idea to offend one's father in law.

1423 257. Gerald Connolly, former Fairfax Board Chairman, is now congressman  
1424 for the 11<sup>th</sup> district of Virginia. Connolly's political career has been financed largely

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1425 by the Tysons corner billionaire landowners, who stand the most to gain from this  
1426 project. (Outside Tysons, the project has never received popular support).

1427 258. Connolly was conveniently appointed Public Relations Officer by SAIC  
1428 three weeks before a critical vote on the alignment of the rail project thru Tysons.

1429 Connolly, who ran the Board with an iron fist, added a fourth stop to the officially  
1430 approved three stop alignment, conveniently at the foot of SAIC's 18.4 acre campus  
1431 in Tysons. The comprehensive plan was later amended, in retrospect, in secret.

1432 Accordingly, the current alignment is not conforming with the Virginia Special  
1433 Transportation District law which requires conformity with the master plan when  
1434 formed.

1435 259. Pierce Homer, Secretary of Transportation. Homer's giveaway of the  
1436 Route 267 easement without consideration was one of the most outrageous acts ever  
1437 committed by a Virginia public official. Homer now spends time traveling the state  
1438 pleading for more money for VDOT. His reception has been chilly due to too many  
1439 poorly conceived projects like Dulles Rail. Why give money to an agency when they  
1440 conspire to raise taxes behind your back and promote boondoggles. Homer has  
1441 admitted that he has no idea how to improve inner I-66, the key to better airport  
1442 access between Dulles and Reagan. The best solution is shown in Exhibit C, which  
1443 has never been properly studied by VDOT.

1444 260. Frank Wolf, congressman, 10<sup>th</sup> District. Mr. Wolf complains repeatedly  
1445 about raising tolls to \$5 on the Dulles Greenway, a privately funded road whose costs

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1446 have not been paid off, but apparently thinks it's a great idea to raise tolls to \$12 one  
1447 way on a highway which has already more than been paid for.

1448 261. James Bennett, chairman of MWAA. Mr. Bennett is a typical bureaucrat  
1449 interested in expanding the scope and power of his agency and in obtaining resources  
1450 for the two Virginia airports from outside sources, if possible. Unfortunately, his  
1451 agency was not set up to operate toll roads, build urban rail systems, or tax the general  
1452 business community to benefit the airports. It is arguable that Dulles Rail even if built  
1453 is a net negative to the airport since the currently vacant midfield is better utilized for  
1454 premium parking and rental cars, the way almost every other airport in the world  
1455 operates. If built, patronage at the Dulles Rail station is projected at only 5,000 users a  
1456 day, in 2030. This is less than the currently least utilized station in the entire 103-stop  
1457 Metro system, in 2009.

1458 Meanwhile, owners of commercial properties, whose oxen are being gored, are  
1459 typically foreign institutions (such as REITS) that are so traumatized by the current  
1460 recession, they have no change to review the future. With an average holding period  
1461 of 5 years, these institutions don't look far into the future. Real estate is just another  
1462 asset class, with properties to be bought and sold like baseball cards.

1463 262. Promoters of boondoggles typically try to work through shells, in order  
1464 to insulate elected officials from having to raise taxes. This game plan is being  
1465 followed by MWAA, instead of the State of Virginia or the proper PPTA  
1466 concessionaire, and in the case of Fairfax County, by the Fairfax Economic

1467 Development Authority, which states that its alter ego, the County of Fairfax, is not  
1468 responsible for the failure of bond issues.

1469 263. The drill involves wrapping up all the important details in a bond  
1470 indenture sold up front, so that future changes become difficult to make (e.g. the  
1471 current housing finance crisis). Instead of allowing the details of the program to be  
1472 understood by the taxpaying public, with review and comment periods, the promoters  
1473 rush thru the financing process, using their newfound “independence” to circumvent  
1474 normal review and voter approval processes. The fact that at \$20 billion it’s the  
1475 largest tax increase in the history of Virginia seems to make no difference. It’s most  
1476 effective when this pattern occurs in midsummer when many critics are on vacation.

1477 264. In sum, MWAA is a shell for Virginia and Fairfax EDA is a shell for  
1478 Fairfax County. This structure was set up by the promoters to avoid normal approval  
1479 processes involved in public finance. It is a modern version of the techniques  
1480 perfected by Robert Moses of New York and chronicled in Robert Caro’s book The  
1481 Power Broker.

1482 265. Another part of the shell game is the back end loading of the financing.  
1483 The idea is to indebt the taxpayers for the indefinite future through a bond indenture,  
1484 which circumvents the anti-deficiency rules for public bodies. Make the tax increases  
1485 small at the start and then go up when all current players have been retired and the  
1486 pain falls on others. This is dishonest public administration and is similar the federal  
1487 government’s passing off on future generations thru high and chronic current deficits.



1488 266. With respect to infrastructure, this country has been built on self  
1489 amortizing 30 year revenue bonds (retired at the end of that period) or general taxes  
1490 approved by the public in a referendum. Public votes, typically of regional sales taxes,  
1491 has been the way financing has happened for rail projects in Los Angeles, San Jose,  
1492 Portland, Seattle, Phoenix and many other cities. It is historically unprecedented to  
1493 impose the cost of a regional facility on general business taxes in one restricted area.  
1494 So the Dulles Rail financing scheme, illegal as it is, has been proven a poor way to  
1495 build infrastructure.

1496 **COUNTS AND REMEDIES**

1497 **COUNT I**

1498 **FAILURE TO CONDUCT A PROPER ALTERNATIVES ANALYSIS**

1499 **UNDER 49 USC 5309**

1500 **(Against Federal Transit Administration)**

1501 267. The Dulles heavy rail proposal is proceeding with federal money  
1502 supplied under 49 USCS 5309. Section ( d), the “New Starts” program. It is required  
1503 for this money that the applicant, under (A)(1) (A), conduct an alternatives analysis.  
1504 which includes (A) an assessment of a wide range of public transportation alternatives  
1505 designed to address a transportation problem in a corridor or subarea.” Among the  
1506 subfactors required to be addressed under (d)(2)(D) is “(i) congestion relief, ii)  
1507 improved mobility, (iii) air pollution, and (v) energy consumption.

1508 268. The most effective way to reduce congestion is via a shared guideway  
1509 congestion managed surface lanes with variable pricing. These designs have proven to  
1510 increase thruput wherever they have been tried. The current design of the DAAR and  
1511 Route 267 is ideally suited for inexpensive implementation of this approach (see  
1512 Exhibit C ). A third pair of inner lanes could be added and tolled for congestion  
1513 relief, and to generate income to MWAA. This alternative has never been considered.

1514 269. Is this a crazy approach? It is being used on the Capital Beltway for 14  
1515 miles (I-495) and will likely be implemented along I-95 south of DC (53 miles). If it a  
1516 good idea for these corridors, why not study it for the Dulles Corridor?

1517 270. Maryland has just issued an alternatives analysis for a similar highway,  
1518 I-270 in Maryland. That study indicated that HOT/general purpose lanes, as outlined  
1519 in Exhibit B herein, is superior to simply extending the existing Red Line in that  
1520 corridor. Consult <http://www.i270multimodalstudy.com/environmental-studies/aaea>  
1521 for more details.

1522 271. Another alternative, not studied as part of the DEIS, is formalized just in  
1523 time ridesharing. Currently such a system carries 44,000 people a day in the Shirley  
1524 Highway/I-95 corridor, at a zero cost to the government or the taxpayers. Since the  
1525 projected net add of new riders on the WMATA system after the super expensive  
1526 construction on the Silver Line in 2030 is only 46,800, it is obvious that this  
1527 alternative be studied.

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1528 272. Instead, the project team brushed off the idea, stating that “no  
1529 responsible transit agency would endorse such a risky approach.” This is the same  
1530 approach that has worked flawlessly in the Shirley Highway corridor without incident.  
1531 However, there are no large engineering nor public relation fees associated with  
1532 implementing just in time ridesharing on a better planned basis than the ad hoc system  
1533 along the Shirley Highway. (consult [www.slug-lines.com](http://www.slug-lines.com) for current information).

1534 273. It is obvious that the entire study of the Dulles Corridor was done in  
1535 order to justify a predetermined result, that heavy rail with its huge costs and fees was  
1536 the best alternative.

1537 274. In fact, the forecasts by MWCOG (Metropolitan Washington Council of  
1538 Governments) indicate that only 1,300 passengers per day would use a Dulles Airport  
1539 station in 2030, out of a total 238,000 trips to the airport—about 1 in 200.

1540 275. 1,300 passengers are equivalent to about 40 bus trips. 40 bus trips  
1541 accommodate about 7% of the capacity of a single expressway lane in one hour,  
1542 which is 600 buses or 2,000 cars/lane/hour.

1543 276. This ridership at 1,300 passengers is lower (in 2030) than the counts at  
1544 any of the current 75 or so Metrorail stations including the notoriously little used  
1545 Arlington National Cemetery station, about which it is joked that only ghosts get in  
1546 when the doors open.

1547 277. 17 stops are planned between Dulles Airport rail station and Metro  
1548 Center in Washington, DC. Airport travelers typically have luggage and the Metro

1549 system with long escalators and turnstiles is likely to be shunned. As at most airports  
1550 with rail links, the main users are airline employees shuttling to their car parking  
1551 places.

1552 278. All the evidence we have from around the world shows that the best  
1553 alternatives were never studied.

1554 279. In terms of Bus Rapid Transit, the DEIS posited the usual BRT strawman  
1555 typical of these rail oriented studies and discarded it because it stated that “the transfer  
1556 system at West Falls Church would not accommodate the influx of buses destined for  
1557 rail use.”

1558 280. With this simple and misguided goal, the study team simply ignored the  
1559 possibility of direct bus service that did not tie into the rail system at all. Examples of  
1560 successful services like this are the 5A bus from Dulles Airport which goes directly to  
1561 the Pentagon and L’Enfant Plaza in 40 minutes, despite the congestion along inner I-  
1562 66.

1563 281. Indeed, the slug system along the Shirley Highway exists because  
1564 WMATA tried to force corridor commuters into transferring from bus to rail at  
1565 Springfield, instead of one-stop trip to downtown DC and the Pentagon. Instead,  
1566 commuters set up a private system which was much faster on a door to door basis. It  
1567 bypassed the heavy rail system entirely, which was bad for WMATA patronage and  
1568 revenue, but it was good for users.

1611 288. Under (d)(2)(D) (iii), air pollution, the current Environmental Impact  
1612 Statement does not take into account the source of the energy. When the source of the  
1613 electricity (coal) for heavy rail is examined for its impact on air pollution, versus  
1614 tomorrow's fuel efficient vehicles, several eminent scholars have concluded that fixed  
1615 guideway, lightly used, heavy rail will worsen air pollution over modern vehicles  
1616 flowing smoothly over congestion managed lanes.

1617 289. The effect of both rail and highway traffic in the Corridor must be  
1618 measured, operating together. The Environmental Impact Statements only considered  
1619 rail operating on its own, not as part of a mix, which is the way the corridor operates  
1620 now and in the future.

1621 290. None of the various environmental impact statements have examined the  
1622 Green House Gas issue for the entire 23-mile Dulles Corridor (Dulles Airport to  
1623 DC/Reagan Airport). This is an unacceptable oversight.

1624

1625 **Remedy Requested.**

1626

1627 291. A declaratory judgment that the Alternatives Analysis required under 49  
1628 USC 5309 (a)(1) was insufficient as a matter of law and must be broadened to include  
1629 shared guideway congestion managed lanes and a formal just in time ridesharing  
1630 program. Which would improve mobility (under (d)(3)(d)(2) far more than fixed  
1631 guideway rail.

1632 292. An order than the existing Environmental Impact Statement be updated  
1633 to 1) include in the energy calculation the energy cost to build the rail system in the  
1634 first place, 2) to reflect the energy cost and comparison with today's mandated use of  
1635 fuel efficient vehicles.

1636 293. An injunction against further disbursement of funds under the Full  
1637 Funding Grant Agreement between DOT and MWAA dated March, 2009 until the  
1638 deficiencies in the Environmental Impact Statement have been corrected.

1639 294. An injunction against further expenditures on this project until a full  
1640 corridor analysis has been done of all alternatives running from Dulles airport to  
1641 Reagan airport.

1642 **COUNT II**

*Counts*

1643 **INJUNCTIVE AND DECLARATORY RELIEF FOR IMPOSITION OF**  
1644 **TAX BY A BODY OF NON-ELECTIVE OFFICIALS, IN VIOLATION**  
1645 **OF THE VIRGINIA CONSTITUTION**

1646 **(Against MWAA)**

1647 295. In reviewing this case, it is important to understand why the parties lie in  
1648 their current positions

1649 296. Urban rail projects such as the proposed Silver line have had an  
1650 unfortunate history in terms of delivery and cost effectiveness. In general, these  
1651 projects cost twice as much as originally proposed, and carry half the passenger load,  
1652 making the cost effectiveness one-quarter of that proposed by the promoters. Even

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1653 fans of the Simpsons television series understand this. The episode where Marge  
1654 challenged a thinly disguised promoter of the Bechtel school was the fifth most  
1655 popular episode in that history's series. Marge was insisting that town fix potholes in  
1656 Main Street rather than build a fancy new rail system. It was entitled Marge and the  
1657 Monorail. Marge won.

1658 297. Recently, a spate of scholarly analysis of such projects have appeared.  
1659 One of the authors, Bent Flyberg, analyzed the economics of all urban rail projects for  
1660 which projections and actual results have been reported. His conclusion, reported in  
1661 the book Megaprojects and Risk, stated that "lying" was the only explanation for the  
1662 existence of several of these projects.

1663 298. Even if you don't believe that actual lying has occurred in the Silver Line  
1664 promotion—and with the emergence of video and UTube out front, lying has become  
1665 more difficult for politicians—the agreed upon numbers speak for themselves.

1666 299. There will be no reduction in congestion either on Route 267 or any  
1667 adjacent highways.

1668 300. The proportion of the total project cost to be financed with taxes on toll  
1669 road users (the mislabeled "state share", which is really a local share) has gone from  
1670 25% to 75%.

1671 301. The budget for Phase I has gone from \$1.6 billion to \$3.1 billion in five  
1672 years, with no guarantee it won't go higher.

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1673 302. Phase II will not receive any federal money, so it will depend even more  
1674 heavily on taxes on toll road users.

1675 303. Cost comparison of comparable megaprojects.

1676 Panama Canal: went to national referendum, doubling capacity approved at an  
1677 advertised \$5.1 billion cost for 50 miles of waterway, or \$100 million per mile.

1678 Llasa-Golmud railway\

1679 1,142 km. 33 billion yuan cost (\$4-5 billion), or less than \$10 million per mile.

1680 Highest station 5000 meters.

1681 20,000 workers. – at \$20 k per year, 100,000 man hours, built over

1682 Five years. \$2 billion labor, \$2 billion material (roughly)

1683 Hangzhou Bay Bridge

1684 22 miles, \$1.4 billion. This is the longest over water span in the world. Cost:

1685 \$130 million per mile.

1686 Subway tunneling in Shanghai-- \$100 million per mile

1687 Katy Freeway in Houston—about \$120 million per mile.

1688 304. It must be understood that the sole reason that MWAA is involved in this  
1689 project in the first place is that nervous politicians tried to hide the ball from their tax  
1690 shy constituents. Their way out was to pass the hot potato to an unelected authority,  
1691 which had absolute authority to jack local taxes as high as they needed to avoid  
1692 putting in any MWAA money. That was the whole idea. It was just a scheme to



1693 insulate the politicians from the effects of inevitable tax increases resulting from this  
1694 boondoggle.

1695 305. Unfortunately for the promoters, since the transfer (for no  
1696 consideration!) of Route 267 to MWAA in 2006, the Supreme Court of Virginia has  
1697 invalidated such a financing approach based on their interpretation of the Virginia  
1698 Constitution. Since the Virginia constitution is the highest authority that exists in  
1699 Virginia, the Supreme Court's decision is Marshall et al. V. Northern Virginia  
1700 Transportation Authority (NVTA) et. al, 275 Va. 419 (February 2008) must be  
1701 respected.

1702 306. That opinion states that Section 11 of the Virginia Constitution means  
1703 what it says: "No bill which... imposes, continues, or revives a tax, shall be passed  
1704 except by the affirmative vote of a majority of all the members elected to each  
1705 house...."

1706 307. Article VII, Section 7 provides: "No ordinance... imposing taxes... shall  
1707 be passed except by a recorded affirmative vote of a majority of all members elected  
1708 to the governing body."

1709 308. The NVTA, whose activities were enjoined with respect to imposition of  
1710 taxes, consisted of the chief elected officers of the governing body for each named  
1711 county and city, two members of the House of Delegates appointed by the Speaker of  
1712 the House, one member of the Senate appointed by the Senate Committee on Rules,  
1713 and two citizens appointed by the Governor. The Virginia Supreme Court declared

1714 these individuals non elected and powerless to enact taxation on their own.

1715 309. The NVTB composition was much more representative of actual  
1716 political reality than is the case with the MWAA Board. The latter is composed of  
1717 individuals who are specifically required not to hold elective or appointive public  
1718 office (Va. Cod§5.1-155 (B)). As such, they are not “members elected to [a] governing  
1719 body’ within the meaning of the Virginia Constitution according to that Court’s ruling  
1720 in the Marshall case.

1721 310. The court goes on to state” We view these provisions of the Constitution  
1722 with special regard for the detailed and explicit oversight that the framers provided  
1723 regarding the General Assembly’s exercise and delegation of its legislative power of  
1724 taxation... We observe that Article IV, Section 1 places the legislative power of the  
1725 Commonwealth in the General Assembly... In fact, greater *restrictions* are placed on  
1726 the taxing power than are placed on the exercise of most other types of legislative  
1727 power.”

1728 311. Their holding was that “we conclude that the Constitution, in keeping  
1729 with rights enumerated in Article I, section 6 of the Constitution’s Bill of Rights,  
1730 clearly contemplates that taxes must be imposed only by a majority of the elected  
1731 representatives of a legislative body with the votes cast by the elected representatives  
1732 being duly recorded.”

1733 312. MWAA’s imposition of the rail tax totally violates this constitutional  
1734 requirement. It makes no difference that MWAA may have been established with

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1735 concurrent (and identical) statutory authority by the District and Virginia. Off airport  
1736 property and away from “Authority facilities”, such as Tysons Corner, MWAA has no  
1737 ability to establish a rail tax and promote it as a user fee. For reasons stated below, the  
1738 costs of Route 267 have long been paid for, and any further collection of revenues  
1739 from Route 267 is a tax that simply cannot be imposed by a nonelected group such as  
1740 MWAA.

1741 313. The brazen attempt by an unholy coalition of good old boys in Richmond  
1742 with conflicted public officials in Fairfax County has resulted in an end run around the  
1743 requirement for projects of this sort to receive public approval in an open referendum.  
1744 The increase in per transaction fees along the Dulles Toll Road is obviously a tax in  
1745 that the proceeds of such enhanced revenues are not being spent for the purpose for  
1746 which the original fees were intended. The purpose of the original fees as stated above  
1747 was to build a highway, finance it with bonds, and pay off the bonds and remove the  
1748 fees as soon as possible. This is what happened to several such tolls in the Richmond  
1749 area, including one at an exit ramp from I-95. (Traffic congestion in Richmond  
1750 consists of a few cars in front of you at a stoplight at rush hour).

1751 314. The last such attempt at circumventing voter approval of such a tax was  
1752 the financing for the Fairfax County Parkway. The history of this effort was  
1753 summarized in the second Virginia Supreme Court opinion in Dykes v. Northern  
1754 Virginia Transportation District Commission, 242 Va. 357 (1991). The first appeal of  
1755 the Virginia Supreme Court resulted in a decision that the convoluted process set up

1756 improperly violated the constitutional procedure of Article VII, 10 (b) that required  
1757 that “no debt shall be contracted by a county except as authorized by the General  
1758 Assembly and that the General Assembly shall not authorize any such debt unless the  
1759 issue is submitted to the voters.” In that instance, a Commission was set up,  
1760 authorized and created by statute, comprised of three cities and four counties. This  
1761 commission was the issuer of \$330 million in bonds. After an initial disapproving  
1762 ruling, the court reversed itself and declared this subterfuge legal because the debt was  
1763 not the legal obligation of any one county—the payment obligation was moral  
1764 obligation only. The dissent stated: “Never before has this Court validated a bond  
1765 issue like the one in question. I find the scheme employed by the County to be a  
1766 shocking, patent attempt to circumvent and nullify the requirement of voter approval  
1767 contained in § 10 (b).

1768 315. The sums involved in Dykes was \$330 million. The revenue bonds  
1769 proposed by WMATA will exceed \$4 billion. Does it really make any difference  
1770 whether the bonds are the moral or official obligation of a city or county? Whatever  
1771 the hair splitting, both the General Assembly and the voters affected must approve the  
1772 imposition of the tax. With the Dulles Rail promotion, neither the General Assembly  
1773 or any local elected government has formally approved these taxes, nor have the  
1774 voters and Dulles Corridor businessmen and residents been asked to approve.

1775 316. The reason is simple. If the voters had the choice between: No rail and  
1776 no tolls forever, and Rail and higher tolls forever. Most would choose the former, as

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1777 the drafters of the Virginia Revenue bond statute . If that happened, what becomes of  
1778 the embedded pork?

1779 317. The contempt shown by conflicted local leaders in Northern Virginia has  
1780 an even earlier example. The Loudoun County administrative building in Leesburg  
1781 was contracted for without voter approval.

1782 318. It is apparent from reading the proposed bond prospectus dated July 21,  
1783 2009 that MWAA has taken the position that it can raise taxes along the Dulles  
1784 Corridor to any level it pleases. Indeed, in the traffic study accompanying the  
1785 prospectus, the highest revenues are achieved at a main plaza rate of \$12 per trip—15  
1786 times the current level. See Exhibit H for MWAA’s brazen assertion that it has the  
1787 power to raise tolls along Route 267 to any level it pleases, regardless of the damage  
1788 inflicted on the surrounding, non-airport property. Their response to the pain will be  
1789 “it is required under our bond indenture that this money be raised”: \$1,500,000 a day  
1790 from the commercial users of surrounding property, to start.

1791 319. Nowhere has any legislative body given MWAA the ability to raise taxes  
1792 to an unfettered degree, free from any oversight or constraint.

1793

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1798

**Count III**

1799

**AGAINST FTA BECAUSE LOCAL FUNDING AGREEMENTS HAVE NOT**

1800

**BEEN RATIFIED**

1801

320. The FTA requires periodic assessments of various phases of “New

1802

Starts” projects as they progress through the application pipeline.

1803

321. One of the weaknesses of the Dulles Rail plan has always been the state

1804

of the state and local support. This phase of the project has always received a low-

1805

medium rating (until the final score sheet of May 2008, when the rating was jacked up

1806

one notch for reasons that FOIA requests have failed to find justified in any FTA

1807

analysis—it was a pure political sop).

1808

322. According to all the financing documents, and agreements between

1809

MWAA and the FTA as a condition for receiving \$900 million in federal money, the

1810

project sponsors (now MWAA) have promised that Fairfax County will come up with

1811

16.1% of the total money. Since the total cost of both phases is certain to exceed \$6

1812

billion, Fairfax would have to commit to almost \$1 billion in guarantees. They have

1813

agreed to do so at various times.

1814

323. However, these general obligation bonds must, under Virginia law, be

1815

approved in a local referendum after authorization by the General Assembly. This

1816

simply has not happened.

1817

Dulles Rail Federal Complaint

1818 324 Fairfax is attempting to surtax certain properties with a maximum cap of  
1819 \$400 million. It has thus secured sources other than from general revenue of less than  
1820 ½ its total obligations.

1821 325. Even this targeted surtax, in the form of a surtax on properties designed  
1822 in the Dulles Special Rail Transportation District (Phase I), has been challenged in  
1823 court with two separate lawsuits. There is no guarantee at this point that Fairfax will  
1824 derive any money for its 16.1% share other than general tax revenue.

1825 326. Accordingly, until the local share is on firmer footing, the FTA needs to  
1826 suspend further payments under the FFGA until this situation is resolved.

1827

1828 Remedy requested

1829 327. An injunction against further payouts of federal money from the FTA  
1830 under the FFGA until Fairfax has properly secured approval to pay its obligated share  
1831 of 16.1% of the total project cost.

1832

1833

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**COUNT IV**

1840

**BREACH OF LEASE BETWEEN FAA AND MWAA**

1841

**(Against FAA and MWAA)**

1842

328. Breach of lease between FAA and MWAA in that MWAA in its corridor

1843

design fails to operate the two airports (Washington National and Dulles “as a unit”,

1844

as required by the terms of the 1983 lease between the FAA and MWAA. This

1845

purpose is specifically mentioned in D.C. Code §9-905 (a) in the purposes section:

1846

“for the purposes of acquiring, operating, maintaining, improving, promoting and

1847

protecting Washington National Airport and Washington Dulles International Airport

1848

together as primary airports for public purposes serving the metropolitan Washington

1849

area....” (emphasis supplied).

1850

329. The equivalent cite in the Virginia Code is §5.1-156.

1851

330. Another statement of the necessity to review MWAA funded

1852

improvements is found on page 7 of the March, 1987 lease of the two airports to

1853

MWAA. The language reads as follows:

1854

1855

“The Secretary, on behalf of the United States of America, hereby demises and

1856

leases to the Airports Authority the two Metropolitan Washington Airport

1857

properties as a unit, including access highways.... (emphasis supplied).

1858

331. It is worth noting that MWAA rests its authority on the lease. The

1859

federal government did not grant the “authority facilities” in fee simple, but leased



Dulles Rail Federal Complaint

1860 them pursuant to the March, 1987 lease. This is evidence of the desire for the federal  
1861 government to control the operation and development of the two airports, and their  
1862 access, more closely than would be possible with a grant in deed, even one with  
1863 recorded covenants.

1864 332. It is simply suboptimal to have two large airports near one another and  
1865 not have them complement their services to benefit the traveling public. One airport or  
1866 another gets shut down with accidents, weather, or bomb threats. Having a nearby  
1867 airport with backup service is highly desirable, but the advantage is theoretical if  
1868 travel time between the two is so uncertain as currently exists.

1869 333. With sufficiently convenient and predictable ground access, for the  
1870 traveling public, it's like having one larger airport with 40 million passengers a year.

1871 334. The way to make this happen is for the region to get together and solve  
1872 the inner-I-66 problem, which has bedeviled all of us for the past three decades. This  
1873 can be done by conducting a proper "corridor" analysis, the corridor being defined as  
1874 Dulles Airport to Reagan Airport. An example of such a study, which should have  
1875 been required by the FTA as part of the alternatives analysis, is that done for I-405,  
1876 east of Seattle. (See Exhibit A).

1877 335. This is possible with vertical construction. Stacking transportation modes  
1878 on top of each other has now become popular with modern equipment. The most  
1879 prominent current example is the Tampa Skyway, an elevated three lane highway east  
1880 of Tampa, whose direction changes to follow rush hour traffic.

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1881 336. The inner I-66 implementation would be either to elevate or depress the  
1882 current Orange Line west of Ballston. With the 60' of right of way thus saved at the  
1883 surface, 4 freeway compliant lanes (at 12' federally mandated widths), 4 additional  
1884 lanes could be constructed.

1885 337. These lanes could be time of day tolled. At the prices projected to  
1886 support time savings, each roadway lane thus produced would have a value of \$9  
1887 million per mile. 4 lane miles times 9 miles of thus recovered right of way would  
1888 enable \$250 million of value created and paid into by the private sector.

1889 338. Another alternative, still more cost effective, would be to terminate  
1890 Orange Line service at the last underground stop in Ballston and offload all  
1891 passengers to local and express buses. These buses would use the congestion managed  
1892 lanes and would operate at 60 mph, versus the 35 mph that the Orange Line currently  
1893 achieves.

1894 339. This solution would obviate any necessity to buy more rail cars, at \$2.4  
1895 million per car, and reduce the cost to renovate the Orange Line, which would now be  
1896 much shorter.

1897 340. Examples of this type of transfer can be found in the underground bus  
1898 tunnels in Seattle and Harvard Square in Cambridge, Mass.

1899 341. In short, the Dulles to Reagan corridor needs to be studied as a whole  
1900 (23 miles), not just the DTR section (10 miles). An excellent example of such a study

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1901 has just been finished in the I-405 corridor study for north south transportation just  
1902 east of Seattle.

1903 342. In Maryland, the state has just announced a \$4.2 billion proposal to add  
1904 HOT lanes to the inside of I-270. The I-270 corridor is a close analog of the Dulles  
1905 Corridor. The solutions are similar. Virginia has begun building a network of HOT  
1906 lanes, and the DTR segment needs to be a part of it. A properly designed HOT lane  
1907 configuration will avoid a catastrophic breakdown of the I-495/DTR interchange, as  
1908 will inevitably happen with present plans (see illustration).

1909 Remedy Requested:

1910 343. Injunction against MWAA to spend money until it has proposed and  
1911 justified a way of operating the two airports as a unit.

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**COUNT V**

1923

**IMPROPER USE OF FEDERAL MONEY IN VIOLATION OF FEDERAL**

1924

**HIGHWAY STANDARDS FOR FREEWAYS OF THE DESIGN SPEED FOR**

1925

**ROUTE 267**

1926

**(Against FHWA, MWAA)**

1927

344. It is simply intolerable to have the main access between the international

1928

airport of the nation's capital and its downtown core served by a highway segment

1929

which is of substandard design and construction.

1930

345. If the Silver Line uses any federal money in a corridor which is owned

1931

by the Federal Government, and has been built with federal money, then it needs to

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comply with current federal standards for Interstate Highways. These standards have

1933

been followed with the 1984 construction of the New Segment between I-495 and I-

1934

66. Federal standards have been followed on I-495 and I-66 themselves.

1935

346. If for some reason MWAA wishes to continue in its corridor

1936

development role, a role for which it has no training nor expertise, then it needs to

1937

obtain a waiver of federal highway design standards from the FHWA.

1938

347. There is no question that VDOT must certify to the appropriate branch of

1939

FHWA that the proposed transit use will not preclude future highway improvements

1940

or plans. Part of these plans is the standards complaint expansion of the inner lanes

1941

(the current DAAR), which, as stated above, is impossible with the train right of way

1942

taking so much land. Federal law requires such a certification before FHWA will

1943 grant permission to use the highway right of way for other than highway uses, such as  
1944 transit. This certification has neither been requested nor received.

1945 **Remedy Requested:**

1946

1947 348. An injunction against further expenditure of federal money within the  
1948 400' strip of land leased from the FAA absent approval of highway improvement  
1949 plans by the FHWA, or a waiver by the FHWA if such a waiver is found to be in the  
1950 public interest.

1951

1952

**COUNT VI**

1953

**IMPROPER OPERATION AND ACTIVITY OF MWAA BEYOND THE**

1954

**PERMITTED SCOPE OF ITS ACTIVITIES**

1955

**(Against MWAA)**

1956 349. Improper operation and activity of MWAA beyond the permitted scope  
1957 of its activities, which are confined to the 250' strip of tolled highway known as  
1958 Virginia Route 267, and the 150' strip of nontolled highway known as the Inner  
1959 Lanes. In particular, 75% of the expenditure of Phase I of the currently planned Dulles  
1960 is planned outside the scope of its permitted activity.

1961

1962 350. The current plans call for most of the cost of Phase One of the Silver  
Line to be incurred on private land far from the 400' strip of land leased to MWAA.

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1963 351. In fact, substantial construction will occur 1 mile away from this 400'  
1964 right of way.

1965 352. While MWAA has the right to condemn private land, it has not done so,  
1966 and does not propose to do so.

1967 353. In the absence of condemnation, MWAA is bound by its enabling statute,  
1968 which permits MWAA activity only on “airport property” (Virginia Code §5.1-156  
1969 (2), “to construct or permit the construction of commercial and other facilities  
1970 consistent with the purpose of the purposes of this act upon the airport property....”)  
1971 or improve “authority facilities” which is defined in Va. Code §5.1-152 as “any or all  
1972 airport facilities now existing or hereafter acquired or constructed by the Authority...  
1973 including the existing Dulles Airport Access Road and its right-of way....” .” The  
1974 equivalent statutory references in the D.C. Code are §9-905 (12) and 9-901 (1).

1975 354. MWAA was never set up to operate the Dulles Corridor as a mixed use  
1976 corridor, nor to construct and urban railway on private land 6 miles from the nearest  
1977 airport. It must respect its statutory authority.

1978 355. The state of Virginia, which gave away the easement and improvements  
1979 known as Route 267 for nothing, is quite incorrect when they state that the money  
1980 raised in the corridor will stay in the corridor. Tysons Corner is not part of the FAA  
1981 owned right of way leased to MWAA, and never will be.

1982 356. In recent statements, James Bennett, MWAA chairman, has stated that  
1983 he intends to use bond proceeds from securitizing Toll Road debt to fund

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1984 improvements in Route 606, which provides airport access from the west. This land,  
1985 as well, is beyond the scope of MWAA's permitted activity. MWAA is not a  
1986 substitute general purpose Highway or Rail agency and has no authority to do  
1987 anything outside "Airport Property", as formally defined by statute.

1988 357. In Boston, a similar situation has arisen with respect to the use of tolls on  
1989 the Massachusetts Turnpike Extension (I-90 east) to fund improvements just to the  
1990 east, incurred from the Big Dig, which operates toll free (other than the bridges and  
1991 tunnels). There, more than half the toll revenues from paying customers of the Mass  
1992 Pike go to subsidize the free trips on what is now I-93 (replacing the Southeast  
1993 Expressway). The total diversion to date is about \$400 million, on par with the past  
1994 diversion of excess Route 267 tolls to fund rail studies. Consult  
1995 [www.tollequitytrust.com](http://www.tollequitytrust.com) for latest developments and the discussion on the tax/toll  
1996 distinction.

1997 358. If the Route 267 tax is allowed to continue and be increased, the total  
1998 diversion will be on the order of \$4 billion (75% of the total cost of Phase I and Phase  
1999 II).

2000 359. A group of plaintiffs have formed what they call the Toll Equity Trust  
2001 and are challenging this diversion in court. It is a very similar situation: toll payers on  
2002 a highway west of the property benefited are having most of their toll revenue spent to  
2003 benefit property east of the taxed/tolled highway.

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2004 360. In the situation in Tysons, 80% of the traffic entering and exiting Tysons  
2005 will be from the east, north, and south, or from the west, free, via Route 7. Yet, 75%  
2006 of the cost of rebuilding the Tysons infrastructure is coming from tolls/taxes on Route  
2007 267. This is an even more extreme fact situation than that being addressed in Boston.

2008 361. Also, in Boston, the legislature had given the Massachusetts Turnpike  
2009 Authority over both the taxed/tolled I-90 and the nontaxed I-93. An editorial in the  
2010 Boston Globe summarized the situation: “Motorists coming from west of the city and  
2011 from the North Shore pay dearly while those from the south get a free ride. Just how  
2012 heavily can drivers at the Weston and Allston-Brighton tolls be expected to subsidize  
2013 the rides of other drivers passing along the Central Artery from the Southeast  
2014 Expressway?”

2015 362. Replace the Boston highway names with I-495 and the (free) FTA-  
2016 constructed connector road between I/495/Route 123 and I-66 (all free) and the  
2017 analogy is exact.

2018 363. It must be noted that MWAA has no institutional experience with urban  
2019 rail nor highway corridors. Its board consists of part time appointed officials, and any  
2020 expertise outside airport operations must be hired. William Coleman, the former  
2021 federal Secretary of Transportation, called MWAA “incompetent” for this task.

2022 364. In sum, MWAA has no authority to tax the general public for activities  
2023 not having any connection with Airport operations (DTR toll payers). Furthermore,  
2024 MWAA has no authority to spend money, within or without airport property, for non-



2025 airport purposes. 75% of the cost of Phase I of the Silver Line is proposed to be raised  
2026 from taxing the general public using the DTR for normal commercial purposes (since  
2027 MWAA proposes to exempt airport users from any access fees, unlike almost all other  
2028 airports around the world). 75% of the expenditure at the same time will be on  
2029 property away from airport property and the DAAR (namely, in Tysons Corner).  
2030 MWAA simply has no general powers to tax and operate outside of Airport property  
2031 and for the use and benefit of airport operations.

2032

2033 **Remedy Requested:**

2034 365. A declaratory judgment that MWAA be confined in its construction  
2035 activities to “airport property” or “airport facilities” as defined in the enabling statutes,  
2036 Va. Code §5.1-152 and DC Code §9-901.et seq.

2037 366. An injunction against expenditure of money by MWAA outside of  
2038 Airport Property and away from Authority Facilities, as such terms are defined in the  
2039 enabling statutes.

2040

## **COUNT VII**

2041 **IMPROPER OPERATION AND ACTIVITY OF MWAA IN BUILDING AN**

2042 **URBAN RAILWAY SECTION NOT RELATED TO ITS STATUTORY**

2043 **PURPOSE UNDER ITS ENABLING LEGISLATION**

2044

**(Against MWAA)**

Dulles Rail Federal Complaint

2045 367. Improper operation and activity of MWAA in that building an urban  
2046 railway, in some cases one mile and more beyond the physical limits of the DAAR.

2047 368. The current plans are beyond the permitted scope of MWAA which is  
2048 limited to “airport activity”. The western terminus of the proposed Phase I is 6 miles  
2049 away from Dulles Airport.

2050 369. The situation contrasts with the construction of the Automated People  
2051 Mover at Dulles, the cost and use of which is entirely contained within Airport  
2052 Property. No general tax revenues are involved, nor is construction taking place away  
2053 from Airport Property.

2054 Remedy Requested:

2055 370. An injunction against any construction approved or authorized by  
2056 MWAA as the project sponsor outside the 400’ boundaries of the original FAA lease  
2057 for the Dulles Airport Access Highway.

2058

2059

**COUNT VIII**

2060

**VIOLATION OF THE OPEN MEETING AND FOIA REQUIREMENTS**

2061

**WITH RESPECT TO OPERATION OF ANY AGENCY OR AUTHORITY IN**

2062

**VIRGINIA**

2063

2064

**(Against Virginia Department of Transportation)**

2065

Dulles Rail Federal Complaint

2066 371. Violation of the open meeting and FOIA requirements with respect to the  
2067 operation of any agency or authority in Virginia. In particular, MWAA has  
2068 consistently hidden the reality that its current financial plan calls for 75% of the cost  
2069 of Dulles Rail, Phases I and II, to be generated from continued escalation of tolls on  
2070 Route 267. They have hidden the fact that the level of tolls necessitated will constitute  
2071 a crippling burden of taxation that will permanently impair the economic growth and  
2072 prosperity of the Dulles Corridor.

2073 372. The enabling legislation established that MWAA could sue and be sued  
2074 in its name. This conclusively establishes that MWAA could not operate in secret and  
2075 claim sovereign immunity over any challenges to its activities as *ultra vires*, or for any  
2076 other reason.

2077 373. Va. Code § 5.1-173 provides in (A) that “The courts of the  
2078 Commonwealth of Virginia shall have original jurisdiction of all actions brought by or  
2079 against the Authority, which courts shall in all cases apply the law of the  
2080 Commonwealth of Virginia.” This paragraph strongly implies that MWAA enjoys no  
2081 exemption from the public information requirements of Virginia FOIA (Va. Code  
2082 §2.2-3700 et. seq.). As such, it needs to provide current information to those who have  
2083 properly requested it at the same time it is made available to MWAA staff or board  
2084 members.

2085 374. Much of the information on which this complaint is based has been  
2086 obtained from third parties, instead of from MWAA as required by FOIA law. For

2087 example, the bond rating information organized by Morgan Stanley, the lead  
2088 underwriter, has just been released and not analyzed. This combination of rush-rush  
2089 tactics in the middle of the summer, and inadequate review time, will necessitate the  
2090 filing of an amended and restated complaint once the inconsistencies between the  
2091 various documents have been reviewed (such as the overall budget, showing a \$500  
2092 million discrepancy; see Exhibits I and J.

2093 **Remedy requested:**

2094 375. A declaratory judgment that MWAA is subject to federal and Virginia  
2095 FOIA laws.

2096 376. An order requiring that all prior, current, and future documentation and  
2097 records regarding the taxing and construction involving Route 267 be provided any  
2098 person properly requesting the same.

2099

2100 **COUNT IX**

2101 **THE IMPOSITION OF THE VIRGINIA PUBLIC PRIVATE PARTNERSHIP**

2102 **ACT IN THIS APPLICATION IS INCORRECT**

2103 **(Against Virginia Department of Transportation)**

2104 377. The imposition of the Virginia Public Private Partnership Act in this  
2105 application is incorrect, in that the State has engineered a sole source, noncompetitive  
2106 contract with a private entity without the requirement of the private entity putting up  
2107 any capital nor sharing any risk in terms of cost overruns or operational deficits.

2108 378. Virginia, and VDOT, will maintain that the MWAA proposal is not a  
2109 PPTA. However, if it is not, then the transfer of valuable state property out of the  
2110 ownership of the Commonwealth requires the approval of the General Assembly. This  
2111 has never occurred.

2112

2113 Remedy Requested:

2114

2115 379. Rebid the project on a competitive basis, unless and until a contracting  
2116 party agrees to put up capital or otherwise share the risk of the venture either for  
2117 delivery cost or operating results. Toll any activity on the DTR easement portion until  
2118 proper compensation has been received, again after proper approval by the Virginia  
2119 General Assembly.

2120

2121

**COUNT X**

2122

**VIOLATION OF THE VIRGINIA PPP ACT (1995)**

2123

**(Against Virginia Department of Transportation)**

2124 380. Violation of the Virginia PPP Act of 1995 and the associated regulations  
2125 (Implementation Guidelines, 2001) in hiding the vote and reasons therefore which  
2126 justified the sudden burial of an already approved Bus Rapid Transit project in favor  
2127 of a speculative rail venture.

Dulles Rail Federal Complaint

2128 381. The Public-Private Transportation Act of 1995 (Virginia Code §§56-556  
2129 et seq.) was adopted for the purpose of fulfilling “a public need for timely acquisition  
2130 or construction of and improvements to transportation facilities within the  
2131 Commonwealth...” (§56-558(1))

2132 382. The Act contemplated private entities obtaining approval of the  
2133 Commonwealth to “acquire, contract, improve, maintain and/or operate a  
2134 transportation facility.” (§56-560)

2135 383. The Commonwealth Transportation Board (hereafter “CTB”) through its  
2136 Commissioner promulgated “procedural guidelines... to guide the selection of  
2137 projects under the purview of the Virginia Department of Transportation (VDOT) and  
2138 the Virginia Department of Rail and Public Transportation (DRPT).” These  
2139 guidelines were revised in April 2001, but the pertinent applicable provisions are the  
2140 same as were in effect in 1999.

2141 384. Although under the Public-Private Transportation Act (“PPTA”) the  
2142 process of selecting private entities for projects is not subject to the Public  
2143 Procurement Act, VA. Code § 2.2-4300 et seq., selection procedures must be  
2144 consistent with that Act’s requirements for either procurement through competitive  
2145 bidding or procurement of other than professional services as set forth under § 2.2-  
2146 4301. As to unsolicited project proposals, therefore, the IG provide that once an  
2147 unsolicited submission by a private entity is determined to meet the initial criteria for

2148 a project, the agency must provide notice of the proposal and solicit competing  
2149 proposals before further consideration of the project. (I.G., p. 3)

2150 385. The procedures adopted to approve, reject, or choose a proposal from a  
2151 private entity, and thereafter to build and operate a transportation facility, after public  
2152 notice, is a four phase process; (see incorporated Exhibit 1)

2153 First Phase: The conceptual proposal is  
2154 submitted for pre- qualification review by the Initial  
2155 Review Committee “which will determine in its sole  
2156 discretion in writing whether the one or more  
2157 conceptual proposals are complete, whether the one  
2158 or more proposers are qualified, and whether the  
2159 project as proposed appears in one or more cases  
2160 technically and financially feasible. The Initial  
2161 Review Committee will forward only those  
2162 proposals satisfying its standards to the  
2163 Commonwealth Transportation Board.” (IG p.18 –  
2164 19)

2165 Second Phase: Review and  
2166 approval/rejection by the Commonwealth  
2167 Transportation Board. (IG p. 19)

2168                                    Third Phase:            Submission of proposal for  
2169                                    evaluation and recommendation of the Public-  
2170                                    Private Transportation Advisory Panel. (IG p. 19 –  
2171                                    20)

2172                                    Fourth Phase:            Final selection of the  
2173                                    successful proposer by the Commonwealth  
2174                                    Transportation Commissioner. (IG p. 21)

2175        386.            In December 1998, Raytheon Engineers and Contractors submitted an  
2176        unsolicited PPTA proposal for Bus Rapid Transit “(BRT)” on mostly existing  
2177        highway lanes with build-outs of stations along the route for the plan known as the  
2178        “Dulles Corridor Rapid Transit Project.” The stations could later be used for rail if  
2179        financing became available. In January 1999, the Tysons-Dulles Corridor Group  
2180        (i.e. primarily Bechtel and West Group, corporations which own and develop land  
2181        at Tysons Corner) submitted a competing rapid transit proposal which was for  
2182        heavy rapid rail.

2183        387.            These two proposals were submitted to the Initial Review Committee  
2184        for the required First Phase review and action in accordance with the  
2185        Implementation Guidelines adopted and published for that purpose.

2186        388.            In July of 1999, the Initial Review Committee approved Raytheon’s  
2187        Bus Rapid Transit approach over the “rail only” proposal of the Dulles Corridor



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2188 Rapid Transit Project on a 6-1 vote. The BRT proposal was thereby advanced to  
2189 the CTB for Phase Two of the IG process. (See incorporated Exhibit 2)

2190 389. In August 1999, the Dulles Corridor BRT project was selected as one  
2191 of the Federal Transit Administration (hereafter "FTA") Bus Rapid Transit (BRT)  
2192 Demonstration Projects.

2193 390. FTA's BRT Demonstration Program is intended to foster the  
2194 development of BRT systems in the United States, address BRT planning,  
2195 implementation and operational issues, and evaluate system performance in a wide  
2196 range of operating environments.

2197 391. Thereafter significant appropriations (\$90.93 million through Fiscal  
2198 Year 2001) were made available and considerable federal funding was  
2199 contemplated each year thereafter.

2200 392. In August 2000, the CTB formally advanced the BRT proposal to the  
2201 PPTA Advisory Panel which is required for Phase Three consideration under the  
2202 Implementing Guidelines (IG).

2203 393. Following CTB action, Raytheon and the Tysons-Dulles Corridor  
2204 Group combined efforts to jointly develop a PPTA rail proposal.

2205 394. The Washington Group acquired Raytheon Engineers and Contractors  
2206 from the parent Raytheon Corporation. Thereafter, the new PPTA partners  
2207 (Bechtel, Washington Group, i.e. Raytheon, and West Group) formed a limited  
2208 liability company called Dulles Transit Partners.

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2209 395. In October 2000, Dulles Transit Partners submitted its first detailed  
2210 proposal to the Commonwealth. This proposal was essentially a detailed version of  
2211 the rejected heavy “rail only” proposal, not of the approved conceptual bus rapid  
2212 transit proposal which had received approval for federal funding and which  
2213 provided, as distinguished from the rail only concept, an immediate and less  
2214 expensive solution to the Dulles Corridor transportation needs.

2215 396. In February 2001, the PPTA Advisory Panel recommended that DRPT  
2216 proceed to negotiate a comprehensive agreement with the Dulles Transit Partners to  
2217 develop a financing plan and perform engineering based on the heavy “rail only”  
2218 proposal. As a result, notice was never given of, and competitive proposals were  
2219 never solicited for the “rail only” proposal, as clearly required under the PPTA and  
2220 IG in order to avoid the statutory requirement of a PPTA procedural substitute for  
2221 soliciting competitive bids under the Procurement Act.

2222 397. The Dulles Transit Partners new proposal; submitted after First Phase  
2223 IRC approval of BRT and rejection of the rail only proposal, was not the Bus Rapid  
2224 Demonstration Project under the FTA New Starts program, which has received  
2225 previous approval and appropriations, but instead constituted an extension of  
2226 obsolete rail technology and design embodied in the original Metro “kiss-and-ride”  
2227 1960’s model. The new proposal, supported by defendant Fairfax County, is an  
2228 outdated, expensive heavy rail transit plan which would, at a huge cost to the  
2229 taxpayer far larger by multiples than by that of BRT, mostly benefit the vested

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2230 interests primarily of West Group, the primary owner, builder, and operator of  
2231 buildings in Tysons Corner, and its public and private affiliates, consultants,  
2232 landowners and allies – including the Washington Metropolitan Area Transit  
2233 Authority (“WMATA” also known as “Metro” ) which operates the current  
2234 metropolitan rail system.

2235 398. In early spring of 2001, the General Assembly passed legislation,  
2236 supported by Fairfax County, and later signed by Governor, which permitted the  
2237 creation of a special tax district by the county to partially fund its share of a  
2238 transportation project. See Virginia Code § 33.1-4 et seq.

2239 399. The DRPT decided the new plan must include the entire Dulles  
2240 Corridor as per the scope of the originally approved BRT Demonstration Project,  
2241 and it therefore required a series of financing and implementation studies to be  
2242 completed.

2243 400. On May 31, 2002, Dulles Transit Partners revised its rail proposal and  
2244 submitted it to the current Secretary of Transportation. The new rail-only proposal  
2245 was not sent back for procedural Phase One review.

2246 401. The Secretary appointed another PPTA Advisory Panel to make  
2247 recommendations to the DRPT Director on whether and how to negotiate a  
2248 comprehensive agreement with Dulles Transit Partners.

2249 402. On December 5, 2002, this new panel issued its final  
2250 recommendations to the Director of the DRPT to proceed with the project and to

2251 negotiate a comprehensive agreement with Dulles Transit Partners. This decision  
2252 was made in spite of the glaring procedural flaws alleged herein. Nor did the rail  
2253 proposal meet the requirements of Virginia Code § 56-506 ( C ) (2) and (3) that it be  
2254 compatible with state and local plans and that the estimated cost be reasonable in  
2255 relation to similar transportation facilities.

2256 403. This activity was coincident with the start of the administration of newly  
2257 elected Governor Mark Warner, who was in a hurry to stamp his ideas before lame  
2258 duck status caught up with him, as it does quickly with every Virginia Governor  
2259 (due to the one-term limit).

2260 404. BRT is much faster completion, economical and “on line” expedient  
2261 and is the only properly approved transit plan by the Initial Review Committee  
2262 (IRC) under the PPTA’s Implementation Guidelines.

2263 405. The BRT that was initially evaluated was a fixed-guideline project (no  
2264 shared use). That was consistent with the process for the FTA’s New Starts  
2265 program, which, due to the transit lobby, was reserved for expensive, fixed  
2266 guideway projects.

2267 406. Since 2001, it has become apparent with the success of dozens of  
2268 shared guideway projects around the world, that fixed guideway for either rail or  
2269 bus is an obsolete concept. Because a single congestion managed highway lane can  
2270 accommodate the maximum demand for transit with 8% or less of the vehicle  
2271 capacity, it has proven possible to finance this guideway by “selling” guaranteed

2272 travel time to non-transit vehicles. This effectively delivers the right of way at 60  
2273 mph for free to a transit agency and all other competing users (if the transit agency  
2274 does not enjoy a legislated monopoly for transit users). With congestion managed  
2275 fixed lanes, not only are they effectively delivered “free” to service providers, they  
2276 offer guaranteed travel time of 45-60 mph, as compared with the 25-30 mph of rail,  
2277 either light rail or heavy rail. Furthermore, shared congestion managed guideways  
2278 permit a mix of express and local service.

2279 407. Even the most expensive and “modern” rail projects in the country—  
2280 such as the Second Avenue Subway project in New York, at \$1 billion capital cost  
2281 per mile—are local only. This “best we can do as a practical matter” subway line  
2282 will operate at only an average speed of 30 mph, given the inevitable acceleration,  
2283 deceleration, and dwell time involved in local train service.

2284 408. In contrast, the newly delivered express lanes on the rebuilt Katy  
2285 Freeway (I-10) west of downtown Houston offer bus service at a guaranteed 45  
2286 mph, and actual speeds can be considerably higher.

2287 409. None of these better alternatives has been examined by Virginia in its  
2288 PPTA process. Instead, we are stuck with a sole source noncompetitive contractor  
2289 (Bechtel) fresh from their fiascos at Boston’s Big Dig and Portland’s light rail  
2290 airport extension.

2291 410. The rail plan, which was rejected by the IRC in the first phase of the  
2292 necessary process and which was thereafter improperly reincarnated at a later state

2293 of the process, is not the plan approved by the IRC; in fact the IRC rejected it. It  
2294 was not even submitted for IRC reconsideration after this initial IRC rejection.  
2295 These facts are fatal to the project since the Commonwealth's own project approval  
2296 and award procedures necessary to avoid the normal competitive bidding  
2297 requirements of the Procurement Act were violated.

2298 411. The Commonwealth, aided and abetted by the County defendant,  
2299 violated the PPTA statute and IG by circumventing the requirements for seeking  
2300 competitive proposals by allowing a proposal switch from BRT to rail, and by  
2301 approving the detailed plan for the rejected conceptual proposal without either  
2302 again soliciting competitive proposals for that project under the Public Procurement  
2303 Act, or by recourse to the established procedures that should have been followed  
2304 for the new rail proposal and commencing again with Phase One of the  
2305 Implementing Guidelines under the PPTA/IG. No action now by defendant County  
2306 in furtherance of the rail project is valid or authorized without the Commonwealth's  
2307 submission of the rail plan to the full IG process and compliance with its terms.  
2308 That means that plan must commence with the Initial Review Committee (IRC),  
2309 where there may be public input on the rail proposal, and proceed through each of  
2310 the four-stage process.

2311 412. With the abrogation of its own procedures for adoption of the rail  
2312 project, the Commonwealth created substantial doubt in the integrity of its  
2313 decisions as it proceeds to impose an enormous burden on its citizens, businesses

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2314 and taxpayers. By violating the statutory mandates, and its own rules adopted  
2315 pursuant to statute, the people's government became one of men and not of law. Its  
2316 actions were unlawful and not to be relied upon by others, including Fairfax County  
2317 Board of Supervisors and its administrative agents.

2318 413. The question arises as to why were the rules not followed? The  
2319 answer is that after the IRC approved bus and rejected rail, vigorous lobbying by  
2320 vested interests acting outside the formal review process resulted in: (a) the de facto  
2321 nullification of the IRC deliberative process and vote; and (b) the political forced  
2322 resignation of the Director of the Department of Rail and Public Transit.

2323 414. These vested interests include self-interested profiteers and developers  
2324 such as West Group, WMATA, and WMATA's engineers and consultants who  
2325 conducted the feasibility and environmental impact studies which supported the  
2326 heavy rail plan sought by those who paid for their supposedly "independent" expert  
2327 advice. Many of these persons and entities shared offices together on the third floor  
2328 of 1550 Wilson Blvd. in Rosslyn, Virginia. At minimum, the appearance of  
2329 conflict forfeited for them any presumption of independent judgment. These  
2330 closely aligned governmental and private entities concluded, without even studying  
2331 all alternative and less expensive transportation possibilities, that there is no other  
2332 reasonable and feasible alternative to heavy rail which satisfies the Dulles Corridor  
2333 transportation needs. These conclusions are unsupported by any investigation of  
2334 BRT which, unlike the railroad plan whose first passenger won't be served for

2335 many years, would be an almost immediate and less costly palliative to the  
2336 gridlocked commuter. (See Exhibits 3 and 4)

2337 415. The Tysons Corner promoters benefit from heavy rail in several ways.  
2338 The value and use of their private land holdings are favored by the routing of heavy  
2339 rail through their developments. Also, WMATA has traditionally severed existing  
2340 popular bus routes in order to meet its rail ridership projections. Here, instead of  
2341 allowing Dulles Corridor patrons to access the Orange line and downtown D.C.  
2342 directly as they do now via the non-stop express Dulles Toll Road which bypasses  
2343 Tysons Corner, a train ride would force passengers to exit cars or buses at Wiehle  
2344 Avenue, the new Phase One “Western Terminus” of the heavy rail system, and pass  
2345 through the center of Tysons Corner and there wait at four time-consuming stops  
2346 prior to arriving at West Falls Church. Non-stop bus service will be largely non-  
2347 existent. Such forced transfer at Wiehle, necessary to make plausible patronage  
2348 projections needed to attract federal funds for the heavy rail scheme, will degrade  
2349 the quality of existing transit service to the District of Columbia, Maryland, and  
2350 other locations in Northern Virginia. For most transit patrons who do not desire a  
2351 Tysons Corner destination, service will take longer and involve more congestion,  
2352 more stops, and degraded service.

2353 416. As alleged, the promoters propose to build rapid rail through “non-  
2354 competitive negotiation” by an end run around the formal process adopted by the  
2355 Commonwealth pursuant to the PPTA. The PPTA allows an inherent opportunity



2356 to structure much larger construction and management fees paid by the taxpayer—  
2357 such unreasonable fees are more difficult to obtain under the competitive Public  
2358 Procurement Act. Therefore, it is even more important the procedures for approval  
2359 of the process are followed.

2360 417. The CTB never formally rescinded the decision of the Initial Review  
2361 Committee, but instead changed direction at the behest of outside lobbyists with  
2362 private interests, to proceed on a materially altered project from that approved by  
2363 the IRC and by Fairfax County agents as will appear hereafter. The Bus Rapid  
2364 Transit Demonstration Project morphed into an extension of the WMATA heavy  
2365 rail system, at greatly increased cost. Instead of a Bus Rapid Transit system  
2366 approved by the IRC costing a few hundred million dollars, the CTB improperly  
2367 backed an unlawful scheme costing ten times the capital required for BRT and  
2368 projected annual operating deficits of over \$100 million by year 2025. The  
2369 immensely expensive rail plan will be no greater public benefit than the Bus Rapid  
2370 Transit plan which is the only plan properly approved by adherence to required  
2371 procedures.

2372 418. While the current plan may not in itself be a PPTA, the defective  
2373 current plans reflect the improper truncation of proper alternatives analysis and  
2374 improper procedure of executive branch behavior prior to the time that MWAA  
2375 surfaced. MWAA is not the answer to a plan that was flawed due to failure to  
2376 follow proper analytical procedure.

2377

Remedy Requested:

2378

419. An injunction against further proceedings on the current Dulles Rail plan

2379

until the Commonwealth has properly and fully complied with its requirements under

2380

the state PPTA and its currently adopted implementation guidelines. Among the

2381

concepts to be solicited are proposals for a true PPTA with private entities putting

2382

their own capital at risk (including the cost of operating the completed project). The

2383

PPTA program scope should be opened to shared guideway congestion managed lanes

2384

in conformity with successful projects of this type all around the world. There are now

2385

at least a dozen competent contractors and more than a dozen infrastructure funds

2386

that would provide private capital and a level of sophistication and design excellence

2387

that far surpasses MWAA's.

2388

420. As part of this process, the Commonwealth should insist on open

2389

competitive procurement to the extent that any public money, or assets, other than the

2390

right of way and existing improvements, are involved. The only exception to the

2391

Virginia Public Procurement Act, which mandates competitive bidding, is the Public

2392

Private Partnership Act, which MWAA and VDOT maintain does not apply to this

2393

project.

2394

**COUNT XI**

2395

**VIOLATION OF VIRGINIA CODE §33.1-287 WITH RESPECT TO**

2396

**THE CESSATION OF TOLLS**

2397

2398 **(Against MWAA, Virginia Department of Transportation))**

2399 421. That statutory provision required that tolls SHALL cease on projects  
2400 which have been paid for. The only condition for the diversion of such excess  
2401 revenues are if so approved by the General Assembly with respect to a new use, OR  
2402 placed into the Transportation Trust Fund, in which case they would require General  
2403 Assembly authorization to be spent for another purpose.

2404 422. Route 267 was set up under the provisions of the Revenue Bond Act of  
2405 the Virginia Code, §33.1-287 et seq. As such, all funds in excess of that required to  
2406 pay off the revenue bonds must be deposited in the Commonwealth Trust Fund, where  
2407 the money stays until other use is justified by the General Assembly.

2408 423. The attempted diversion of excess revenues from Route 267 to prefund a  
2409 rail project simply on the say-so of the Commonwealth Transportation Board (a  
2410 creature of the Executive Branch, whose members are ALL appointed by the sitting  
2411 Governor) is simply improper. As indicated in the Marshall case, either the General  
2412 Assembly must approve a tax, or a majority of elected officials in a local jurisdiction  
2413 in a duly reported vote, if authority for such action had previously (and specifically)  
2414 been delegated by the General Assembly, as was attempted in the proposed NVTA  
2415 taxing authorization later disapproved by the Virginia Supreme Court. The only other  
2416 way to impose a tax is by following the provisions of the Public Finance Act, Va.  
2417 Code §15.2 2607-2611, which requires the approval of the governing body of any

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2418 locality, “subject to the approval of a majority of the qualified voters of the locality  
2419 voting on the issuance of such bonds ...”

2420 424. Such a diversion of excess revenues by the Executive Branch for a  
2421 purpose not explicitly approved by the General Assembly violates 33.1-287.

2422 425. The total revenues (stated in thousands) of the Dulles Toll Road from its  
2423 inception in 1984 are approximately as follows (the State’s reported numbers are not  
2424 always consistent):

2425	<b>Year</b>	<b>Revenue</b>	<b>Op and Maint</b>	<b>Net Rev</b>
2426	1985	7,309	102	7,207
2427	1986	11,250	2,170	9,080
2428	1987	13,705	3,861	10,844
2429	1988	15,505	6,452	9,058
2430	1989	17,936	3,480	14,456
2431	1990	21,875	4,725	17,150
2432	1991	20,771	4,782	15,989
2433	1992	20,243	5,791	14,452
2434	1993	22,769	7,179	15,590
2435	1994	24,748	6,917	17,831
2436	1995	27,468	9,647	17,821
2437	1996	28,834	8,748	20,086
2438	1997	32,817	8,391	24,426

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2439	1998	34,352	9,503	24,849
2440	1999	35,530	13,230	22,300
2441	2000	41,170	13,525	27,645
2442	2001	41,965	13,530	28,435
2443	2002*	34,916		
2444	2003*	34,605		
2445	2004*	41,176		
2446	2005*	44,805		
2447	2006*	65,439		
2448	2007 est	65,000		
2449	2008 est.	65,000		

2450 Total opening thru fiscal 2008:

2451 769,000 216,000

2452 \*-- figures for these years are without miscellaneous revenue and interest income

2453 -- 2006 figures reflect a toll increase implemented on May 22, 2005.

2454 -- 2007 and 2008 figures are expected to be close to 2006 as the number of  
2455 transactions has stayed the same as 2006 (within  $\frac{1}{4}$  of 1%) and the fare structure has  
2456 not changed.

2457 426. The initial cost of Route 267 was \$53,000,000. Approximately  
2458 \$150,000,000 in capital improvements have been spent to widen the road on two  
2459 occasions.

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2460 427. Debt service has consumed \$135 million from 1985 to 2001. Assuming  
2461 a constant rate from 2001 to 2008, another \$78 million in debt service has been  
2462 consumed.

2463 428. Summary:

2464	Sources 1985-2008:	\$769,000,000
2465	Cost and Cap Improvement	203,000,000
2466	Debt Service--	135,000,000
2467	Operating and Maintenance	216,000,000

2468 429. Surplus of Revenue over costs  
2469 (2008)-- \$215,000,000.

2470 430. Much of the operating and maintenance costs could be reduced if tolls  
2471 were removed from Route 267 as soon as the financing could have been paid off.  
2472 Smart Tag collection costs are considerable and could be saved in their entirety.

2473 431. The rail promoters admit they diverted \$183,000,000 to fund rail  
2474 expenses as of 2008 .

2475 432. Since the outstanding total of revenue bonds outstanding as of 2008 is  
2476 only \$65,000,000, if the State had operated Route 267 in accordance with the Revenue  
2477 Bond Statute and the terms of the bond indentures for the various tranches of  
2478 financing, the state could have, and should have, eliminated all tolls early in the  
2479 decade of the 2000's.

2480 433. Instead, the State illegally diverted surplus revenue to uses unauthorized  
2481 by the General Assembly, such as heavy rail studies. Neither this diversion, or the  
2482 secret switch by the Commonwealth Transportation Board, which is totally under the  
2483 control of the Virginia Executive, was done according to applicable law.

2484 434. It is important to recognize that MWAA's rights only derive from  
2485 whatever authority or position existed prior to the transfer. Since Virginia was already  
2486 in violation of the Revenue Bond act, MWAA acquired no new rights from the  
2487 Transfer Agreement than Virginia possessed. Prominent among these non-rights is the  
2488 ability either to raise tolls or to avoid the refund of tolls paid in the past in excess of  
2489 the amounts required to fund the construction and operation of the Dulles Toll Road

2490 **Remedy Requested**

2491 435. An order requiring the refund of all excessive Route 267 revenue beyond  
2492 that needed to pay off the construction cost, expansion costs, and financing costs of  
2493 the improvements to date. The estimated surplus can be calculated from the figures  
2494 above, and add up to about \$400 million:

2495 436. The appointment of an independent outside auditor to calculate the  
2496 proper refund, as occurred with the Northern Virginia Transportation Authority tax  
2497 (about \$110 million) and is occurring in Boston with the overcharges on the  
2498 Massachusetts Turnpike Extension (see [www.tollequitytrust.com](http://www.tollequitytrust.com) for the latest  
2499 details.)

2500 437. A declaratory judgment stating that the Permit and Operating  
2501 Agreement, as now constituted, as interpreted by MWAA under this scheme,  
2502 constitutes, as a matter of constitutional and statutory law, a Terminating Evert under  
2503 that Agreement, invalidating the transfer to the Airports Authority of the Dulles Toll  
2504 Road, thereby preventing the Airports Authority from financing or constructing the  
2505 Dulles Metrorail Project or operating the Dulles Toll Road, except in conformance  
2506 with the provisions of the Virginia Revenue Bond Act.

2507

2508

**COUNT XII**

2509 **LACK OF COMPLIANCE WITH THE LEASE OF THE AIRPORTS IN 1987**  
2510 **IN THAT MWAA HAS NEVER COMPLETED ITS DULLES MASTER PLAN**

2511

**(Against FAA, MWAA)**

2512 438. Lack of compliance with the lease of the Airports in 1987 in that MWAA  
2513 has never completed its Dulles Master Plan. In fact, the delivery of rail service to the  
2514 midfield area in front of the existing terminal will adversely affect the operation and  
2515 development of another terminal at some future date. Airports have shown a tendency  
2516 to construct what are in effect new terminals once a centralized terminal has reached  
2517 the 25 million or so annual passenger load which Dulles is nearing.

2518

2519 439. Article 12.A of the 1987 lease reads as follows:



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2520 “Master Plans. The Airports Authority shall assume responsibility for the Federal  
2521 Aviation Administration’s Master Plans for the Metropolitan Washington Airports.,  
2522 including the adoption of the Dulles Master Plan and the completion of a Master Plan  
2523 for Washington National Airport, and may revise such Master Plans from time to time  
2524 or adopt subsequent Master Plans for the development of the Airports. Major  
2525 improvements to the Airports shall be consistent with the most recently adopted  
2526 Master Plans.

2527 440. A properly conceived Master Plan would devote the current midfield in  
2528 front of the Saarinen terminal to express parking, as does every other modern airport  
2529 in the world. Connections between airport segments would be provided by frequent  
2530 and convenient bus service, again as is done by every other major airport in the world.

2531 441. It is apparent from the experience of other airports that building a new  
2532 terminal plays havoc with access from a previously fixed infrastructure, such as rail.  
2533 Buses are much more flexible. Examples of this are Beijing terminals 1 and 2 and 3  
2534 and the five terminals at Heathrow, both of which have crippled their access due to  
2535 inadequate advanced planning.

2536 Remedey requested:

2537 442. An injunction against MWAA’s spending of their money for the Dulles  
2538 Rail link until it is shown that it complies with a properly studied and properly  
2539 adopted Master Plan.

2540

2541

**COUNT XIII**

2542

**VIOLATION OF THE VIRGINIA CONSTITUTION IN THAT THE**

2543

**DEBT TO BE PROPOSED BY MWAA HAS NOT BEEN APPROVED**

2544

**BY THE AFFECTED VOTERS**

2545

**(Against MWAA, Virginia Department of Transportation)**

2546

443. Article VV, q 10(b) of the Virginia Constitution provides as follows:

2547

“No debt shall be contracted by or on behalf of any county or district

2548

thereof.... Except by authority conferred by the General Assembly by

2549

general law. The General Assembly shall not authorize any such debt ....

2550

Unless.... Provision be made for submission to the qualified voters of the

2551

county or district thereof.... For approval or rejection by a majority vote of

2552

the qualified voters voting in an election on the question of contracting such

2553

debt. Such approval shall be a prerequisite to contracting such debt.

2554

444. The Route 267 debt being proposed is in effect a Fairfax County debt,

2555

despite being structured as a revenue bond. The reason is that 95% of the tolls on the

2556

DTR are from local drivers. The County has already indicated its intention to finance

2557

part of the structure, a \$90 million parking garage, solely out of general tax revenues.

2558

445. The promoters of the rail scheme have advertised the toll securitization

2559

part as a “state share,” This is *mistalk*. The Dulles Toll Road was financed by tolls

2560

paid for by locals, and more than \$800 million of revenue has been collected to pay

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2561 off no more than \$200 million in construction costs. Fairfax County put into the initial  
2562 construction \$5 million of County money, which has still not been repaid.

2563 446. Between the 75% share paid for by taxes on toll road users (obviously a  
2564 local share) and the 15% proposed to be paid for by the Special Transportation Tax  
2565 districts, 90% of the cost of the Silver Line will be paid for by Fairfax County workers  
2566 and residents.

2567 447. With megaprojects of this magnitude, throughout the country these  
2568 projects are routinely put to referendum for popular approval. About 75% of the time,  
2569 such projects have been voted down. But the important factor is that this type of  
2570 massive tax increase—the largest in Virginia history, and one borne almost  
2571 exclusively by Fairfax workers and residents—needs popular approval.

2572 448. The last major Fairfax County road improvement financed locally was  
2573 the Fairfax County Parkway. There, as here, the politicians thought up a scheme to  
2574 finance the project and bypass voter approval. On appeal to the Virginia Supreme  
2575 Court, the bypass of local voter approval was disapproved. On rehearing, the Supreme  
2576 Court changed its mind.

2577 449. The case is reported as Dykes v. Northern Virginia Transportation  
2578 District Commission, 242 Va. 357 (1991).

2579 450. The fact pattern here is somewhat different from Dykes and the amounts  
2580 are much greater: \$4.5 billion here versus \$330 million in Dykes. Yet the principal is  
2581 the same: the voters must approve, both the MWAA debt and the Fairfax County debt.

2582 451. Another difference is that in the Fairfax County Parkway case, the  
2583 General Assembly authorized the financing. Here, the General Assembly has not  
2584 authorized any debt, approved by the locals or not.

2585 452. There is nothing in the enabling legislation for MWAA that would  
2586 exempt it from the local approval requirements of the Virginia Constitution, in that  
2587 collecting tolls after more than enough has been paid to refund all construction bonds  
2588 constitutes a tax under standard municipal financing law.

2589 453. Therefore, under the Virginia Constitution, MWAA is not authorized to  
2590 issue any debt. Such debt, being issued by a non-exempt entity, (see Va. Code  
2591 §Section 15.2-2600 et. Seq.), must be authorized by the General Assembly, and it has  
2592 not.

2593 454. In view of the strength of the dissents in Dykes, and the Supreme Court's  
2594 new found appreciation of the limitation of the alleged powers of non-elected groups  
2595 to impose taxes, as illustrated by the holding in the Marshall case, the Dykes case  
2596 might well turn out differently today. As it was, the initial reaction of the Supreme  
2597 Court—that the procedure invented by Fairfax to finance the Fairfax County  
2598 Parkway—was an illegitimate end run around the Constitution's insistence on local  
2599 approval.

2600 455. Again, the General Assembly has not authorized any debt, to be  
2601 approved by the voters or not.

2602 456. And, the General Assembly has not approved the 2006 transfer of Route  
2603 267 to MWAA without consideration. That was the forfeiture of a valuable state asset,  
2604 paid for by Fairfax County and Fairfax County business and residents, for nothing. As  
2605 argued below, this is also a violation of current federal regulations regarding tolled  
2606 facilities.

2607 457. The proposition to be put before the voters is very simple. No rail equals  
2608 no taxes forever (and no future tolls). Rail equals higher taxes forever. That is a  
2609 simple proposition that is well suited to a popular vote.

2610 Remedy requested:

2611 458. A declaratory judgment that no debt may be contracted by Fairfax nor  
2612 MWAA as its de facto representative and agent without “a majority vote of the  
2613 qualified voters voting in an election on the question of contracting such debt.”

2614 459. Also, an injunction against issuance of any Fairfax County or Fairfax  
2615 County agency debt without a prior affirmative vote by qualified voters in Fairfax  
2616 County in accordance with Virginia statutory and constitutional law.

2617 **COUNT XIV**

2618 **REVOCATION OF THE TRANSFER OF ROUTE 267 TO MWAA**  
2619 **WITHOUT QUALIFYING WITH THE LATEST ADMINISTRATIVE**  
2620 **RULES, CODIFIED AS 23 CFR PARTS 620, 635, 636, AND 710**

2621

2622 **(Against MWAA, FHWA)**

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2623 460. In December of 2008, the Federal Highway Administration required a  
2624 market value appraisal for any state reorganization or transfer of authority for  
2625 operating public toll roads. The market value process would determine what private  
2626 entities would bid for operating the road under a private concession agreement. The  
2627 state would be required to charge that market-determined value to the public entity,  
2628 regardless of whether this is better for the public. (This summary is taken from  
2629 transportation news).

2630 461. The purpose of this regulation, which is now in effect, is to stop the self  
2631 dealing between public agencies, most of which are controlled by the executive  
2632 branch of state governments. Despite inbreeding, cronyism, and corruption in insider  
2633 trading of public assets there now is mandated a transparent process to make sure the  
2634 public is receiving prior compensation for the “reorganization or transfer of authority”  
2635 of such facilities as Route 267.

2636 462. Route 267 is built on federally owned land with the land originally  
2637 purchased at public expense by the US government. There is no reason to exempt the  
2638 route 267 transfer from the Commonwealth of Virginia to MWAA from this  
2639 regulation.

2640 463. As stated elsewhere, the entire purpose of the MWAA transaction was to  
2641 take the state away from its required responsibility to deliver good transportation  
2642 infrastructure at an acceptable cost. It was a blatant attempt to pass the buck to an

2643 incompetent organization (MWAA) with no experience in building and operating a  
2644 corridor or urban railway away from airport property.

2645 464. It was precisely to avoid this self dealing by the Virginia executive  
2646 branch that the regulations were passed. Virginia at the moment is not an elected  
2647 autocracy.

2648 Remedy requested:

2649 465. An injunction against any change in the toll structure or operation of  
2650 Route 267 by MWAA or VDOT unless and until the completion of a market  
2651 validation process that would set the proper price for the transfer from VDOT to  
2652 MWAA of this valuable property.

2653 **COUNT XV**

2654 **COMPLIANCE WITH VA CODE §33.1-287 WITH RESPECT TO**

2655 **REPAYMENT OF BONDS FROM THE FIRST AVAILABLE**

2656 **SURPLUS REVENUES**

2657 **(Against MWAA, Commonwealth of Virginia)**

2658 466. Plaintiffs are owners of several of the outstanding series of revenue  
2659 bonds used to finance Route 267. As such, the court has jurisdiction under Va. Code  
2660 §33.1-290 to enforce the provisions that require that revenue bond receipts not be  
2661 misapplied in direct contravention of Va. Code §33.1-287, and instead be used to pay  
2662 off the bonds as promptly as possible.

2663

Dulles Rail Federal Complaint

2664 Remedy Requested:

2665 467. Immediate repayment of outstanding revenue bonds prior to any other  
2666 expenditure of funds along Route 267 or Tysons Corner.

2667

2668 Respectfully submitted,

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2670

2671 Dulles Corridor Users Group

2672 Parkridge 6, LLC

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By counsel



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