



State of New Jersey
Commission of Investigation

E-ZPass

The Making of a Procurement Disaster

June 2004



State of New Jersey
Commission of Investigation



E-ZPass

**The Making of a
Procurement
Disaster**

28 West State St.
P.O. Box 045
Trenton, N.J.
08625-0045

609-292-6767

www.state.nj.us/sci





State of New Jersey
COMMISSION OF INVESTIGATION
PO Box - 045
TRENTON, NEW JERSEY 08625-0045
Tel (609) 292-6767
Fax (609) 633-7366

Francis E. Schiller
Chair
W. Cary Edwards
Joseph R. Mariniello, Jr.
Kathy Flicker
Commissioners

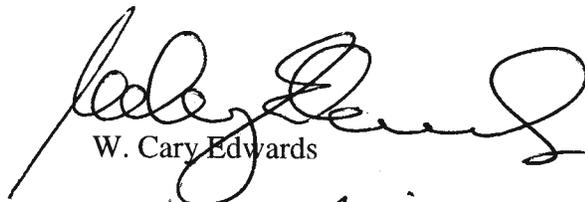
June 2004

Governor James E. McGreevey
The President and Members of the Senate
The Speaker and Members of the General Assembly

The State Commission of Investigation herewith formally submits, pursuant to N.J.S.A.
52:9M, a final report of its investigation of the E-ZPass electronic toll collection system
procurement and financing.

Respectfully,


Francis E. Schiller


W. Cary Edwards


Joseph R. Mariniello, Jr.


Kathy Flicker



TABLE OF CONTENTS

<i>Executive Summary</i>	1
Introduction	1
Summary of Key Findings	3
<i>Mismanagement and Manipulation of the Procurement</i>	11
Who Was in Charge?	13
Wilson’s “Recusal”	24
Flawed RFP/Flawed Methodology	36
Vendor Performance Problems: Known but Minimized	47
Vendor/Agency Complaints	51
A Questionable Evaluation	55
A Web of Connections	70
The Lockheed Protest	85
<i>Obstruction/Avoidance of Financial Due Diligence</i>	89
No Independent Financial Evaluation	90
Risks Disguised	103
Exclusion, Manipulation and Intimidation of Turnpike Personnel . . .	107
Vendor Warnings Minimized	128
Frustration of Private-Sector Scrutiny	134
<i>Referrals and Recommendations</i>	141
<i>Appendix</i>	A-1



Executive Summary

Introduction

On March 10, 1998, a consortium of public transportation agencies formally executed a contract for the design, installation, operation and maintenance of an electronic toll collection (ETC) system that would link New Jersey to the regional network known as E-ZPass.¹ The contract was unique in a number of aspects, not the least of which was that it formed the basis for the largest, most complex ETC system ever proposed. Toll collectors and coin machines on some of the nation's busiest highways, bridges and tunnels, north to New York and south through Delaware, would be replaced by high-tech transponders, sensors, fiber optics, cameras and computers to handle millions of transactions daily. Further, the plan called for the system to pay for itself – no money down and no payments by the Consortium – with revenue to be generated by two primary sources: fines against E-ZPass scofflaws and the commercial leasing of fiber-optic telecommunication cable. Though the contract expressly called for the Consortium members to cover any losses incurred at the end of the ten-year contract term, no such deficit was projected.² Indeed, the system was promoted as one that actually would yield a hefty surplus, notwithstanding substantial up-front indebtedness in the form of \$300 million in taxable, interest-bearing bonds issued via the New Jersey Economic Development Authority for capital construction and operation.

¹ Established in 1995, the Consortium initially consisted of the New Jersey Turnpike Authority, the former New Jersey Highway Authority (operator of the Garden State Parkway) the Port Authority of New York and New Jersey, the South Jersey Transportation Authority (operator of the Atlantic City Expressway). The State of Delaware Department of Transportation joined in 1996. The New Jersey-based entities jointly accounted for 83 percent of the project.

² During the initial phases of the procurement, prior to the selection of a vendor, the Consortium considered an eight-year contract term but later established a 10-year term.

Once the contract was executed, however, the project immediately began to unravel, and the fallacies of the self-funding plan became publicly apparent.

The contractor team led by MFS Network Technologies (MFS) of Omaha, Nebraska, fell behind on construction and installation. As technicians struggled to make the new system operational after many delays, machinery and software malfunctioned or failed altogether. In many instances, the equipment simply could not distinguish legitimate customers from violators. Both the Customer Service Center and the Violations Processing Center – “back-office” administrative components critical to the program’s operational and financial viability – became hopelessly mired in a data swamp. Amid a cascade of consumer complaints and burgeoning deficit projections, questions arose over the system’s fundamental integrity. In early 2002, the New Jersey Assembly Transportation Committee held public hearings on a range of matters related to the E-ZPass controversy. On July 10, 2002, the panel issued a report recommending, among other things, that the Legislature formally ask the State Commission of Investigation to conduct an independent probe. The Commission, acting on its own statutory volition, adopted a resolution on October 9, 2002, authorizing an investigation as follows:

Whether the laws of New Jersey have been faithfully executed and effectively enforced in connection with the process leading to and resulting in the financing of the E-ZPass regional electronic toll collection system; whether public officers and employees and officers and employees of public corporations and authorities faithfully and properly discharged their duties in connection therewith, and whether the laws of New Jersey pertaining to the award of public contracts are adequate to protect the interests of the State.

Through this report, the Commission makes public its findings and recommendations.³

³ As with all of its investigations, the Commission utilized its statutory subpoena power to obtain thousands of pages of documentary materials and summoned 29 witnesses for sworn executive session testimony.

Summary of Key Findings

The E-ZPass contract was the product of an ill-advised, inappropriate procurement process that lacked proper safeguards to ensure accountability and to protect the public's interest. In essence, a major capital project of unprecedented scope and technical complexity was removed from the sphere of normal competitive bidding and treated for procurement purposes as a contract for professional service. Professional-service contracting, however – typically employed by government to negotiate and retain private engineering, legal or other expertise – was not designed, and was never intended, for use in procurements as unique and massive as E-ZPass. Its injudicious use in this instance constituted the foundation of an administrative and financial debacle of immense proportions, a debacle that laid bare serious gaps in the laws governing public-project contracting in this state.

The Commission also found that once the professional-service approach was chosen, the process of carrying the procurement to completion fell prey to human error, and to obvious mismanagement and manipulation by senior personnel at the New Jersey Department of Transportation (NJDOT) and the New Jersey Turnpike Authority.

Procurement documents were vaguely written, and the solicitation and evaluation of vendor proposals were rushed, in some instances unreasonably so. Members of the vendor evaluation team complained that they were given insufficient time to review the proposals prior to making a contract-award recommendation and that their requests for additional time and information were rejected. Further, every member of the evaluation team testified under oath that, as a group, they were instructed by a ranking NJDOT official to score the vendor proposals at least twice. Team members testified that this

occurred during a confidential, late-night session. This unusual exercise boosted the final numerical ranking of MFS's proposal vis-à-vis that of competing bidder Lockheed Martin IMS Corp. (Lockheed).

Further, the Commission found that the procurement unfolded against the backdrop of events and circumstances that evidence the taint of multiple conflicts of interest. On one level, then-NJDOT Commissioner Frank J. Wilson engaged in private-sector employment discussions with companies doing business with the state, including two with corporate links to the procurement, one of which hired Wilson. Though he signed a letter purportedly recusing himself from the procurement process at the time, an examination of the full record suggests he violated the terms of that recusal at a critical stage in the vendor-selection process. The Commission also examined the activities of a private consultant hired initially by NJDOT, and later by a Consortium contractor, to provide advice on fiber-optic technology and other matters. This consultant, Kingston Cole, had a pre-existing professional relationship with Wilson, who sought no-bid state contracts for Cole and who served on an evaluation committee that chose Cole's firm for NJDOT work. Cole and Wilson conferred regularly prior to the award of the E-ZPass contract. Cole also met privately with representatives of the vendors competing for the contract, including MFS, and played an active role in final negotiations leading to the preparation and submission by the vendors of their best and final offers. During this process, Cole authored a confidential strategy memorandum suggesting that MFS's chief competitor, Lockheed, be misled as to how prospective vendors were to address the issue of fiber optics in their project proposals.

Also at issue behind the scenes were questions regarding MFS's true agenda in the E-ZPass procurement. The firm had limited experience in electronic-toll projects; rather, it was a specialist in a narrower array of systems integration services, primarily the installation and marketing of fiber-optic telecommunications networks for commercial gain. In the months immediately following the award of the E-ZPass contract, a top Consortium official expressed concern that MFS's goal was to structure the deal in such a way as to maximize its potential profit from a fiber-optic network that, as an adjunct to the primary E-ZPass initiative, was to be of greater significance to the MFS team. This official pointed out that the fiber array here would complete a larger regional fiber network already installed by the firm.

On another level, the Commission found that when it came to the conduct of public-sector due diligence in this matter, thoroughness was sacrificed for expediency. No comprehensive independent study was ever undertaken by or on behalf of the Consortium or the toll-paying public to determine whether the E-ZPass revenue projections, and the assumptions which lay beneath them, were reasonable, realistic and attainable – particularly in the context of possible vendor performance failures. No serious or extensive consideration was given, prior to the award of the contract, to possible alternatives to the self-funding approach – even though both prospective vendors advocated such alternatives. Ultimately, while the prevailing vendor, MFS, undertook appropriate private-sector due diligence to protect its own financial position and fashion a contract proposal to avoid risk, the Consortium's public toll authorities did not. They agreed to assume full liability for an untested and uncertain funding strategy, despite the scope and imminence of the associated risk.

In essence, the Consortium agreed to participate in a thoroughly lopsided public/private partnership in which the vendor was authorized to share in the profits if the project yielded a surplus but would bear none of the loss in the event of a deficit.

It is especially noteworthy, and quite revealing, that during this investigation, no one stepped forward to claim credit and/or responsibility for the primary revenue component underlying the purported self-funding approach – the self-defeating idea that hundreds of millions of dollars could be collected from E-ZPass toll cheats.

According to evidence and sworn testimony, the lack of concern for fiduciary duty during this procurement approached the status of deliberateness. Internal and external warnings of possible financial problems were actively and repeatedly minimized, or ignored altogether, and efforts by skeptical mid-level officials to paint an accurate picture of cost and revenue projections were actively and repeatedly frustrated. Indeed, it is striking that throughout the key phases of this procurement, over the course of more than a year, the purported merits of the project's funding strategy repeatedly were touted, without qualification, in the Consortium's public press releases and pronouncements despite what can only be characterized as a relentless tide of internal skepticism, highlighted by these milestones:

- Although the Turnpike Authority officially was designated the Consortium's lead agency, the Authority's own finance personnel were cut out of the evaluation process in the months leading to the award of the contract. Nonetheless, the Authority's Chief Financial Officer was pressured, virtually at the last minute, to sign off on the purported accuracy of cost and revenue projections underlying the MFS proposal as

presented to the Authority's governing board for approval. She refused to do so because the numbers were not verified.

- When personnel at another Consortium entity, the New Jersey Highway Authority, raised serious questions in a confidential memorandum prior to the contract award about the viability of fundamental violation-revenue estimates, their concerns were set aside, as was their recommendation that a major accounting firm be retained to conduct an impartial analysis.
- Several months before the contract was finalized and executed in March 1998, persistent concern prompted John J. Haley, Wilson's successor as NJDOT Commissioner, to empanel a task force to examine the project's financial structure. This group's work, however, was limited in scope and amounted to little more than an academic exercise in the face of bureaucratic and political momentum to get the deal done.

• • •

The Commission's investigation shows that the E-ZPass project was plagued from the start by a financial shortfall that has only mushroomed with time. As of the end of 2003, nearly \$575 million had been spent on E-ZPass while total revenues from the two primary projected sources – administrative fees collected from E-ZPass violators and commercial leasing of fiber-optic cable – barely topped \$100 million. Further, the bulk of this \$100 million – \$84.5 million – was derived from commercial leasing of the fiber-optic network installed along the toll-road rights-of-way. While it is true that fiber-optic revenue initially tracked original projections, this component was never anticipated to

account for more than one-fourth of the E-ZPass system's overall revenue requirements under the contract.⁴ The lion's share of revenue was to have been drawn from violation fees. Through the end of 2003, the violation-fee revenue was projected to total more than \$311 million. In reality, it came in at less than \$20 million – approximately 6 percent of the target. Meanwhile, the system's overall cost continues to mount and is expected to exceed \$1.2 billion when the current contract expires in 2012.⁵

• • •

If some of the essential issues in this report carry an air of familiarity, it is because they mirror those which arose previously in the Commission's inquiry into the state's enhanced motor vehicle inspection contract.⁶ Both procurements embodied assiduous efforts to privatize portions of key public services; both, for their type, were unprecedented in scope and cost; and both, once executed, provided a framework for operational failure and profound financial exposure for similar reasons – lack of due diligence, flawed contract documents, manipulation of the bid evaluation process and failure to heed reasonable warnings.

⁴ The total fiber-optic revenue projected through 2008, the original contract expiration date, was approximately \$118.5 million based upon long-term commercial leases that produced the bulk of their yield at lease inception. Thus, even if fiber-optic revenues were to be fully realized as projected, only \$20 million remain to be realized through 2008. This represents an insignificant offset to the burgeoning costs of the toll collection system.

⁵ This overall cost projection is conservative and was derived from the sum of the following key elements: \$574.6 million in E-ZPass construction and operating costs through December 15, 2003; \$450 million in projected contractual payments to ACS State and Local Solutions, the current E-ZPass system operator, going forward until the year 2012 at an annual rate of \$45 million; \$205 million in estimated additional interest expense, through 2019; and \$33.3 million in estimated costs associated with various debt refinancings. Additionally, a new contract will have to be negotiated with a vendor to operate the system after the present contract expires in 2012. Further, these estimates do not take into consideration the need for physical improvements, application of new technologies, replacement equipment or further potential refinancing.

⁶ See Commission report, *N.J. Enhanced Motor Vehicle Inspection Contract*, March 2002.

Given the enormous amounts of time, money and resources wasted as a consequence of these misbegotten procurements, it is imperative for those in authority to undertake the corrective legislative and regulatory reforms necessary to prevent similar momentous blunders from occurring in the future, starting with an overhaul of the public-project contracting system.

In order to prevent problematic and inappropriate use of the negotiated, professional-service procurement structure, as occurred with E-ZPass, the definition of what constitutes a professional service under the law must be clarified and made explicit.

Further, the combined history of the emissions-inspection and E-ZPass contracts makes plain the inadequacy and ineffectiveness of the existing system for fairly and rationally promulgating and administering public project procurements on that scale. The state, therefore, needs to develop a new system to deal with those unique procurements that, owing to their enormity, their technical complexity, their extreme cost and a host of imponderable issues they present at the outset, require custom treatment and careful oversight. The Governor and the Legislature should establish a special task force to develop such a system and to recommend a practical methodology for implementing it.

Finally, the citizens of New Jersey will have little reason to place full confidence in the integrity of the state's public-project procurement system unless and until the state establishes a central mechanism for applying proper financial and programmatic oversight of the essential contracting process. Under the current configuration of state government, oversight responsibilities for public-project procurements are fragmented among several agencies. The Governor and Legislature should review this structure and either reorganize it or create an independent auditor/comptroller with authority to

establish a centralized system for auditing, monitoring and certifying such complex procurements. The level of mismanagement and manipulation that occurred during the course of both the emissions-inspection and E-ZPass procurements is the best evidence that New Jersey must establish this type of due-diligence watchdog to act in the public's interest.

Mismanagement and Manipulation of the Procurement

The regional Consortium's E-ZPass project was the largest, most complex initiative of its kind ever attempted in the United States. Many witnesses told the Commission that, as such, it would have presented its architects with daunting challenges even under the most ideal of circumstances. Five large toll-collection bureaucracies with different agendas and priorities spanning the boundaries of three states were thrust into an artificial alliance, some quite reluctantly.⁷ Once there, they confronted a tangle of communication, coordination and technical issues that had to be overcome in order to achieve a collective, unprecedented goal. Given the political sensitivity of the toll-paying public to two perennial sore points – cost and convenience – the pressure was on to get the job done, swiftly and economically.

Thus, on the theory that it would bring flexibility and efficiency to a complex, highly technical undertaking, it was determined that the E-ZPass procurement would be treated uniquely, not as a run-of-the-mill capital project, but rather as an integrated set of professional services. This meant that the selection of a vendor could lawfully proceed beyond the normal bounds of competitive public bidding. Interested vendors were

⁷ Members of the New Jersey Turnpike Authority, the then-New Jersey Highway Authority and the South Jersey Transportation Authority, as well as the Commissioner of the New Jersey DOT are all appointed by and serve at the pleasure of the Governor of New Jersey. The appointment of members to the Port Authority of New York and New Jersey is split between the Governors of New York and New Jersey.

According to sworn testimony and documentary evidence, the Port Authority and the then-Highway Authority, operator of the Garden State Parkway, were hesitant to join the Consortium for a variety of reasons. At the time of the Consortium's formation, the Port Authority was already proceeding with its own E-ZPass procurement for bridge and tunnel crossings with Lockheed as the prime contractor. Highway Authority officials, meanwhile, feared their agency would suffer a financial penalty with installation of an electronic system because its toll collection already was heavily dependent upon efficiencies wrought by wide usage of automated toll collection machinery. The South Jersey Transportation Agency, operator of the Atlantic City Expressway, also had unilaterally engaged a vendor (MFS) to install electronic tolls, but SJTA officials nonetheless viewed membership in the Consortium as an opportunity to take advantage of economies-of-scale associated with a larger, centralized back-office administrative operation.

required to fulfill certain benchmarks routine for public procurements, including pre-qualification and submission of responses to a formal Request for Proposals (RFP). But the actual contract award occurred through a hybridized process built around certain practices typical of the private sector, a process in which vendors formulated “best and final offers” (BAFOs) through confidential negotiations with public officials. In the end, the lowest responsible bid was not the principle determinant.

This approach was designed to foster a creative, streamlined contracting process, presumably to the Consortium’s advantage. Instead, driven by an unrealistic schedule and by a single-minded commitment to the notion that E-ZPass could be achieved at no cost – and turn a profit – the negotiated procurement method utilized in this instance became the framework for mismanagement and manipulation. It served to concentrate undue power and discretion over every major activity – from enforcing the schedule to briefing the decision-makers to hammering out the final contract terms – into the hands of a few individuals with little accountability. On another level, it virtually guaranteed that the conduct and substance of meetings, discussions, correspondence and other contacts between public officials, consultants and vendor representatives were veiled from public view. Further, the actual procurement documents were loosely worded on the key issue of funding, the lines of governmental authority over the process lacked clarity, and vendor evaluations were rushed and manipulated.

Ultimately, this procurement was approached in such a way that the combined absence of oversight and transparency produced a contract award recommendation under circumstances that strongly suggest malfeasance.

Who Was in Charge?

As the E-ZPass procurement got under way in late 1995, it was agreed that the New Jersey Turnpike Authority would serve as lead entity on behalf of the regional Consortium. Each member agency would maintain statutory autonomy, devote staff to various advisory committees and participate in an Executive Council established to ensure shared policy-making, but the Turnpike Authority was to be in charge of designing, awarding, implementing and administering the actual contract.⁸

In reality, however, the lines of control over the process were substantially bifurcated and fraught with bureaucratic friction. For significant periods of time – including a critical juncture that produced the contract-award recommendation – the procurement was directed, not by the Turnpike Authority, but by senior officials at the New Jersey Department of Transportation.

The key figure at the outset was then-NJDOT Commissioner Frank J. Wilson. An aggressive manager with extensive experience in public transportation, Wilson joined Governor Christine Todd Whitman's Cabinet in April 1994 from San Francisco's Bay Area Rapid Transit (BART) system, where he had served as General Manager since 1989. When Wilson arrived in Trenton, the subject of upgrading and modernizing toll-collection operations already had been a topic of discussion and study in New Jersey for a number of years. By mid-1994, however, the issue had acquired new urgency. Other states in the northeast corridor, including New York and Massachusetts, already had taken steps to deploy electronic-toll networks, and individual toll authorities closer to

⁸ See Appendix at p. A-5 for letter and formal resolution referencing formation of the Consortium and the Turnpike's participation. The ETC Executive Council consisted of the executive directors of all participating agencies, or his/her designee. Further, the Turnpike Authority Chairman designated one

home, including the Port Authority of New York and New Jersey and the South Jersey Transportation Authority, had embarked on unilateral procurements. Wilson concluded that a broad-based electronic toll project was ripe for development and implementation, and he took the lead in organizing a regional, multi-agency approach to the task.⁹ In sworn testimony before the Commission, Wilson validated the accuracy of statements he made before the Assembly Transportation Committee, to wit:

. . . [T]his project appeared to have all the signs of a project that was ready to go. So we looked at what would be required to take it from the development stage and the demonstration stage to the actual implementation stage. . . . I had a hand in making that decision. . . [and] I took the lead in the outreach to these other entities.

Wilson's involvement, however, was more extensive than merely lining up members of a regional consortium. Prior to public release of the Consortium's RFP in April 1996, the Commissioner met privately and separately with prospective vendors. He told the Assembly Committee and the Commission:

I think I spoke with a number of those bidders who came by and wanted to talk to me about their interest in the project, the program, who they were, what they were doing, and to let me know that they were going to be participating in this pre-qualification process . . . which was pretty typical of people who wanted to do business with the state. Letting the Commissioner know that they are interested in the program and wanted to participate.

Wilson also acknowledged a direct role in shaping the RFP. He advocated the negotiated procurement approach and provided advice and direction on the issue of how

Turnpike Board member, other than the N.J. Commissioner of Transportation, to serve on the Council in a policy oversight role. The N.J. Commissioner of Transportation served as Chairman of the Council.

⁹ Wilson's efforts in this regard were facilitated by the fact that in his position as New Jersey's DOT Commissioner, he was not only Chairman of the ETC Executive Council but also a member of the governing boards of all regional and in-state toll authorities that were to make up the Regional Electronic Toll Collection Consortium, with the exception of the Delaware Department of Transportation.

the document should be structured and presented with regard to cost and funding. He told the Assembly Transportation Committee:

*What I asked was that we make sure the RFP included an opportunity for the bidders to be **as creative as they could be and innovative in terms of how they would price the project.** (emphasis added)*

Wilson said he did so because early in his tenure, he came to believe that the E-ZPass procurement embodied a unique and potentially lucrative money-making opportunity for both the private and public sectors. At the core of this view was recognition that the Regional Consortium, taken as a whole, accounted for more than 40 percent of all tolls paid nationally. Wilson told the committee:

Because the market was never faced with an opportunity to do a program that would embrace 40 percent of all tolls taken in the nation . . . the general feeling was that that should present some opportunity for vendors to reap rewards that weren't typical from other projects. And the notion was that if those vendors were willing to share that with the state, then we would be able to discover that as part of this procurement. So rather than using the low bid procurement, this was a negotiated procurement, so that conversation could happen around that notion [T]he message would have been is there any way to share the benefits of doing that with the state or with the consortium?

The objective, Wilson stated,

. . . was to allow the bidding community to be able to openly present to us options that were available to us. Rather than be prescriptive and tell the vendors how to bid the job, it was done in reverse . . . Here is the technology we want. You tell us what it is going to cost and any other creative, innovative approaches that you have that would either lower the cost or raise the revenue.

Wilson told the Commission in this regard:

It was a conscious decision not to dictate terms to the marketplace . . . I made that decision.

Top officials of Consortium member agencies who participated in the early phases of the procurement confirmed Wilson's direct involvement from the start. Lewis B. Thurston III, Executive Director of the New Jersey Highway Authority, told the Commission that the notion that the system could pay for itself "was the brainchild of Commissioner Wilson."¹⁰ Wilson made it plain, Thurston testified, that the Whitman administration's goal was to undertake E-ZPass without a toll or tax increase:

I recall him using the phrase 'Trust me' they would find a way to fully fund the project without a need for an increase in tolls. I believe he said, 'I will find a way.'

James A. Crawford, Executive Director of the South Jersey Transportation Authority, echoed Thurston, telling the Commission in sworn testimony that "self-funding was Frank Wilson's idea." Wilson denied making such a statement to Crawford but conceded that he did make a "commitment" to Thurston to achieve the project without cost to the Consortium agencies, collectively or individually. Wilson testified:

Yes, that was my commitment to him.

Wilson also participated at various junctures in the hiring and assignment of certain individuals who assumed key roles in the E-ZPass procurement. A former colleague of Wilson's at BART, Thomas E. Margro, was hired as Chief Engineer of the New Jersey Turnpike Authority in 1995 – at the strong urging of Wilson, according to former Turnpike Authority Commission Chairman Frank X. McDermott. Wilson

¹⁰ The Commission reviewed contemporaneous notes made of discussion during a December 8, 1995, meeting conducted by Thomas E. Margro, then the Turnpike Authority official in charge of the procurement. The notes were made by Francis K. O'Connor, a Turnpike employee assigned to the project. In those notes, O'Connor recorded, "Wilson feels no [A]uthority pays."

acknowledged putting forth Margro's name for consideration for the job, and as Chief Engineer, Margro's domain was widened to included the task of managing the nascent electronic-toll procurement.¹¹

The BART connection surfaced again when NJDOT early in Wilson's tenure retained the services of a California-based consulting firm, Kingston Cole & Associates, to provide advice on transportation issues and initiatives, particularly in the area of advanced technology related to telecommunications and fiber optics. During Wilson's employment at BART, Cole had been hired as a paid consultant to that transit system, and, in one notable project there, helped to broker a deal in which fiber-optic cable was deployed along BART's right-of-way. The private sector partner in that transaction was MFS Network Technologies, which installed the fiber under terms of a capitalized lease program at no upfront cost to BART. MFS ultimately became the successful vendor in the Consortium's E-ZPass procurement based upon a similar \$0-down financing structure funded, in part, by the commercial leasing of fiber-optic cable installed along toll-road rights-of-way. In sworn testimony before the Commission, Cole stated that he was brought to New Jersey at Frank Wilson's behest "to look for ways to make money for the state," particularly in the realm of telecommunications and fiber optics. He stated that Wilson was particularly interested in testing the feasibility of applying the BART model in New Jersey and that he, Cole, traveled the state touting the merits of the public/private partnership approach. As Cole put it in his testimony:

. . . I was . . . trying to give these guys advice, saying here's what's going on in the country. Here's what the technologies are. Here's how you can do these kinds of deals. . . . Now, when they sat down, whoever they were in the room, certainly enough of them that had

¹¹ Margro served as the Turnpike's Chief Engineer until September 1996, when, in the midst of the E-ZPass procurement, he resigned to become General Manager of BART, the same post previously held by Wilson.

talked with me at length realized that there is some gold in them there hills. That there's a way to make this thing work and get our system built and pay for part of it. So I was the preacher. So I preached and they listened.

* * *

Q. *How did you become associated with the [New Jersey] Department of Transportation?*

A. *He (Wilson) brought a team of people out to BART to look at things. And part of that was BART was so proud of their new public right-of-way partnership deal, that they decided to brief their old leader. And I sat down with staff, and we took them through it. And when it was all said and done, he said, "You know, you ought to think about coming back to New Jersey."*

Cole's business relationship with the NJDOT began with the receipt by his firm of small, non-competitive, sole source contracts. As time went on, however, Cole was positioned for much larger contracts awarded ostensibly through competitive bidding. As the E-ZPass procurement unfolded, his role evolved from conceptual advocate to hands-on mechanic, as he was assigned to assist in the final negotiations leading to a contract-award recommendation.¹²

The hiring of Margro and the retention of Cole were among a chain of events that defined bureaucratic ownership by NJDOT of substantive elements of the electronic-toll procurement. Indeed, Edward Gross, the then-Acting Executive Director of the Turnpike Authority, testified he had no hand in bringing Cole or Margro into the project, or in the hiring of Margro to be Chief Engineer of Gross' own agency. Further, in terms of the line of authority with regard to matters involving E-ZPass, Margro reported, not to Gross or to the Turnpike Authority's governing board, but directly to Wilson. The Turnpike's

¹² For a more detailed examination of the links between Wilson, Cole and MFS, see the section of this report entitled *A Web of Connections* at p. 70.

existing staff was bypassed again when Margro hired Paul A. Carris, a Port Authority transportation engineer and planner, as his top lieutenant in the procurement. Cole testified that he brought Carris' availability to Margro's attention through Wilson.

In September 1996, Margro announced his intention to resign from the Turnpike to accept an offer to return to BART as General Manager, the post formerly held there by Wilson. Margro was replaced by a career toll-road employee, but with that appointment, the Chief Engineer's job description no longer encompassed the E-ZPass procurement. That responsibility instead was transferred directly inside NJDOT and assigned to David M. Mortimer, one of Wilson's top aides.

A former businessman and Sussex County Republican Party leader, Mortimer had no professional expertise in engineering or accounting, no higher education degree, no experience in toll-road operations and had never administered a large organization. Indeed, when he joined NJDOT as a policy liaison in early 1994, Mortimer's prior government experience consisted of a stint as supervisor of the New Jersey General Assembly's legislative bill room. Several months after Wilson arrived as Commissioner, however, he elevated Mortimer into one of the agency's most senior positions – Chief of Staff – with direct responsibility over the day-to-day operations of one of New Jersey's largest state-agency bureaucracies.

In September 1996, the scope of Mortimer's duties was expanded still further when Wilson assigned him to replace the departing Margro as chairman of the E-ZPass project's core procurement mechanism – the Multi-Agency Evaluation Team (MET), a unit established by the regional Consortium to assess and score vendor proposals and to

make a contract-award recommendation. Wilson testified that he selected Mortimer, in part

[b]ecause he had the same qualities and abilities to administer – he had the same capabilities that Tom Margro did in terms of administrative capabilities to keep a project like this intact and moving. . . . I wanted to be sure that now that we [were] in the middle of this program with Tom leaving that I had someone whose ability I could rely on and I knew would carry it out.

With Mortimer's transition into the role of MET Chairman, the procurement entered a critical phase on a fast track. The two Turnpike Authority staffers who had been assigned primary roles in the project to date – Carris and Francis K. O'Connor, a Turnpike Authority employee assigned to the ETC project under the title of Special Project Control Administrator – were abruptly transferred to NJDOT's Ewing Township headquarters outside Trenton. Written guidelines were issued establishing the Consortium's clear preference for contract proposals that would enable E-ZPass to pay for itself. With Mortimer presiding, Consortium officials met privately and separately with representatives of the vendor teams led by MFS and Lockheed to formulate and revise best and final offers. Then, just hours after their receipt by the MET team, the vendors' final offers were evaluated under Mortimer's supervision at a scoring session held in a conference room adjoining the Commissioner's suite of offices at NJDOT. MFS emerged as the winner.¹³ The date was October 10, 1996. Thus, within barely three weeks of Mortimer's first official day as the MET chairman – September 20 – the evaluation team delivered a contract-award recommendation. Subsequent to the MET recommendation, Mortimer also served as the lead figure in a series of presentations to

¹³ For a detailed examination of the circumstances surrounding the vendor evaluation and scoring process, see the section of this report, *A Questionable Evaluation*, at p. 55.

the Consortium's Executive Council and to various governing boards of the Consortium's member authorities. These presentations, highlighted by a PowerPoint computer slide show, delineated the purported merits of the MFS offer versus that submitted by Lockheed and served as a basis for the ultimate contract award.

• • •

It is noteworthy that although the Commission confirmed through documentary evidence and sworn testimony from multiple witnesses that NJDOT eclipsed the Turnpike Authority in this critical phase of the E-ZPass procurement, several of the key players – Mortimer and Wilson on one hand and Gross on the other – provided thoroughly contradictory sworn testimony.

Mortimer told the Commission at various junctures that during the period in question, September-October 1996, he and Gross

. . . had frequent contact, and it was of substantive matters.

* * *

. . . I would talk to Ed about time lines. I would talk to him about issues that were being . . . raised among the Consortium members and how they were being disposed of.

* * *

. . . Ed was the guy I would go to and talk to and strategize with about how do we address this issue, what do you recommend, what other issues; so it would have been about equipment, about structure, about schedule, about budgets . . .

Wilson testified:

. . . Ed Gross had a little more responsibility for the day-to-day business of the transaction that was going forward principally because his organization, agency, was going to lead the Consortium.

Gross, meanwhile, swore that he played no “substantive” role in the procurement until after November 15, 1996. On that date, Gross issued a written opinion setting aside an administrative protest that had been filed by Lockheed challenging the MFS contract-award recommendation. Until then, Gross testified,

I did not play a role whatsoever in the terms and conditions of the procurement, in the process of review, and in the scoring. The only thing I did was I was supportive. You know, as the staff was needed to support the process . . . the Turnpike staff was always available to perform whatever was needed for the review committee, but I did not do anything of a substantive nature.

* * *

I don't even recall having a conversation with Dave Mortimer in connection with the procurement process other than I think he was the one that called me and told me that in 24 hours he wanted Paul Carris and Fran O'Connor to leave the Turnpike offices and temporarily go to the DOT facility and work out of there.

* * *

Q. . . . [B]etween . . . August of '96 . . . and October or November 1, '96 . . . do you remember having any conversations with Dave Mortimer other than the one you testified to about moving Carris and O'Connor; conversations related to soliciting your opinion or input on any decisions that he made or that were made during that time period in relation to the procurement?

A. Absolutely not. It didn't happen.

• • •

Gross further testified it was his belief that Mortimer's assignment as MET Chairman, along with the transfer of Carris and O'Conner to NJDOT, was part of a concerted strategy to "make sure that I didn't get involved in the procurement process" Gross stated that he and Wilson "didn't have a very good professional relationship" at the time due, in part, to a dispute over privatization. According to Gross, the Commissioner had proposed expanding the procurement to include turning over the entire toll-collection operation to one or more private vendors, something Gross opposed. Gross stated he took the matter to the Governor's Office where Governor Whitman, after listening to both sides, vetoed the plan. With that, Gross testified, Wilson "hardly talked to me from that day on."

In his testimony, Wilson recalled "discussion" surrounding this issue of toll-collection privatization but could not remember if he attended a meeting on the issue with Gross and Governor Whitman. As to Gross' claim that he had little to do with the E-ZPass procurement process leading to the contract-award recommendation in the fall of 1996, Wilson testified:

Q. Would it surprise you to learn that Ed Gross informed the Commission that he had no active role in the procurement of E-ZPass until the Lockheed protest of November of 1996?

A. The question is would it surprise me?

Q. Yes.

A. I'd be surprised.

Wilson’s “Recusal”

One extraordinary and untoward event that occurred during Wilson’s watch as NJDOT Commissioner was his acceptance of a job offer from an engineering company that not only had done considerable business with the State of New Jersey in its own right, but was also a corporate relative of a firm that was part of the original MFS contracting team. The firm that hired Wilson – Daniel, Mann, Johnson and Mendenhall (DMJM) – was one of several private-sector concerns with which Wilson engaged in employment discussions during the E-ZPass procurement.¹⁴ The circumstances surrounding these discussions, particularly with regard to Wilson’s purported recusal from the procurement process at a critical juncture, raise serious questions about the integrity of that process and the manner in which it was administered.

• • •

On August 19, 1996, Wilson told staff of the Executive Commission on Ethical Standards (ECES) that he had been approached by several firms inquiring about his availability for possible employment. He was instructed by ECES to notify his supervisor, Governor Whitman, of the identity of the companies and to specify that henceforth he would recuse himself from any involvement with them. In a letter dated August 20, 1996, Wilson identified the firms in his letter as “AECOMM”, Booz, Allen & Hamilton and Dames & Moore and advised Whitman that, effective immediately, he intended to avoid any business dealings with them, “including but not limited to actions,

¹⁴ In April 1996, DMJM was awarded a primary engineering consulting contract from NJ Transit for the Southern Jersey Light Rail Transit System. This contract, including additional work orders subsequently approved by NJ Transit, eventually was worth more than \$90 million. At the time of the award, Wilson, as NJDOT Commissioner, was a member of the NJ Transit Board.

decisions, considerations, discussions etc.”¹⁵ At the same time, he designated Deputy Transportation Commissioner Sharon L. Landers to handle any matters that might arise concerning the firms. Because Wilson, as NJDOT Commissioner, also served on the governing boards of NJ Transit, the Port Authority of New York and New Jersey, the New Jersey Turnpike Authority, the New Jersey Highway Authority and the South Jersey Transportation Authority, he sent identical notices to those agencies.

In his letter of recusal, however, Wilson did not mention any subsidiaries of the listed companies. Besides Booz, Allen & Hamilton the firms that had approached him about possible employment were DMJM, part of the AECOM corporate group, and the firm of O’Brien-Kreitzberg and Associates (OBK), a subsidiary of Dames & Moore. At the time, all had active contracts either with NJDOT or with other agencies of government with which Wilson was affiliated as Commissioner. Further, DMJM was a corporate sibling of Frederic R. Harris Inc., another AECOM subsidiary that was, at the time, a subcontractor on the team assembled by MFS to seek the regional Consortium’s E-ZPass contract.¹⁶ Meanwhile, Booz, Allen & Hamilton was associated with the Lockheed team in the E-ZPass procurement.

When he appeared before the Commission under oath during this investigation, Wilson testified that he used the names of holding companies rather than subsidiaries in his letter of recusal on the theory that it would provide the broadest notice of his intent to

¹⁵ See Appendix at p. A-8 to review a copy of Wilson’s recusal letter. In it, he erroneously identified as “AE Comm” the firm with which he intended to avoid business dealings. The correct firm was AECOM, whose full corporate name was AECOM Technologies Corp. AECOM and AE Comm are separate and unrelated business entities.

¹⁶ On November 26, 1996 – after a formal recommendation had been made to award the E-ZPass contract to MFS – MFS advised the Consortium that its engineering subcontractor, Frederick R. Harris, Inc., voluntarily withdrew from participation in the procurement. Frederick R. Harris, Inc. and Daniel, Mann, Johnson and Mendenhall (DMJM) have since merged as a single entity within the AECOM corporate group.

avoid even the appearance of any conflicts of interest. Wilson stated that persons familiar with the transportation and infrastructure engineering industries would know the component companies associated with AECOM and Dames & Moore. He testified:

Q. . . . [W]hat caused you to [cite] the parent company as opposed to writing the parent company and all the subsidiaries that are part of that parent company in your recusal letter?

A. . . . I was talking to one company, DMJM. If I had written DMJM down, that meant I could have dealt with any issues dealing with the other subsidiary companies because I didn't recuse myself from them. So I felt the broader recusal was to list the parent company which would embrace all the companies that are under them. I mean, I never gave it a thought to list 10 operating companies here, nine of which I wasn't talking to at the time.

Q. But those nine operating companies could be having contact with the DOT during this time period. . . . [W]hat caused you to write . . . AECOM . . . instead of AECOM subsidiaries . . . [and] put people more on notice of what companies you are recusing yourself from?

A. It just – you know, I felt I was doing that by listing the parent company.

Q. But . . . [do] you think Governor Whitman, use her as an example, Governor Whitman knew that Daniel, Mann was a subsidiary of AECOM?

A. I don't know what Governor Whitman knew or didn't know.

Q. . . . Do you think anyone reading this letter would know that Daniel, Mann was a subsidiary of AECOM?

A. Yes.

Q. They would?

A. Yes.

Q. How would they know that?

A. People in the business know who owned companies. I mean, it may not be common knowledge to a layperson, but people in the industry certainly know who owns whom.

Wilson testified that he did not become aware of links between any of the firms listed in his recusal letter and the E-ZPass procurement until September 3, 1996 – two

weeks after circulating the document. On that date, he attended a meeting with the three officials then engaged in central roles in the procurement: Margro, Carris and Mortimer.¹⁷ According to the participants, the session opened with a discussion of the schedule and timeline for the procurement and then turned to the fact that two vendor proposals had been received by the Consortium. Although these proposals had been submitted more than one month prior to this meeting, Wilson testified that he, as NJDOT Commissioner – with his own agency orchestrating the procurement and Margro reporting directly to him – was not aware at the time of the vendors’ identities or any terms of their proposals. Wilson stated that only when the names were mentioned during this meeting did he realize that the E-ZPass procurement fell within the scope of his recusal. With that, he testified, he abruptly terminated his involvement in the meeting, told the others that henceforth he was not to be involved in the process and left the room. Mortimer testified that, despite his role as a top aide to Wilson, this was the first time he learned of his boss’ recusal. According to Carris, the meeting unfolded as follows:

. . . We were going to be updating Mr. Wilson on the status of the procurement, on the – where we were schedule-wise. I had prepared a document which was a comparison of the proposals which had been done to date that was by no means complete, with the intention of going through that. We got to the meeting and after discussing the process issues, schedule issues, when I got to the point of going into that presentation I was – Commissioner said, I can’t look at this, and basically the meeting was concluded so I never got to share the material.

¹⁷ Wilson could not recall whether the venue for this encounter was a meeting or a telephone conference call. Mortimer, Carris and Margro each recalled a meeting held at NJDOT headquarters.

The Commission's investigation shows that subsequent to the September 3 meeting, Wilson continued to engage in contacts and discussions with individuals directly involved in the E-ZPass project on matters that bore directly upon the procurement.

One such contact occurred during the week of September 16, 1996, when Wilson participated in a conference call with Mortimer, Margro and Carris. It is not clear who initiated the call. Mortimer told the Commission that during this conversation, Wilson was briefed on the status of the procurement schedule and on the preparation of guidelines that were to be issued by the Consortium for use by the vendors in preparing best and final offers (BAFOs). The participants testified that the discussion also dealt with the prospect that the project could generate revenue and the possibility that it could pay for itself. As it turned out, the BAFO guidelines – issued just four days after this conference call – informed the vendors that the Consortium's preference was for contract proposals that would enable the E-ZPass project to be self-funding.

When Mortimer appeared at the November 1996 Lockheed protest hearing, he testified that on September 16, 1996, he, Margro and Carris spoke to Wilson in a telephone conference. During the call, they briefed Wilson on the time-line schedule and the BAFO guidelines that were being prepared for distribution to both Lockheed and MFS. They advised Wilson that they believed the procurement could be self-funding and might even generate revenue to the Consortium. According to Mortimer, Wilson responded to the effect – go for whatever you can get.

Carris testified:

. . . I remember Wilson using words very carefully that could easily allow someone to say, Oh, he wants zero down, zero payment, and no cost. But he did not use words that explicitly said that.

- Q.** *What do you mean when you said he used his words very carefully?*
A. *That's that – I was listening very carefully and what came out of that was is, he never actually said or directed us to make it zero cost.*

* * *

- Q.** *Do you remember Wilson making a statement, “Go for whatever you think you could get,” during this telephone call?*
A. *Yeah, okay. Yes.*

In his testimony, Wilson stated the call was initiated by Mortimer, Margro and Carris. He stated he was under the impression at the time that the purpose of it was to update him on the procurement schedule and to discuss process issues related to the MET chairmanship transition from Margro to Mortimer. Wilson testified he did not know that the issue of self-funding would arise. Indeed, he testified that, despite his then-longstanding belief that the project should not cause the Consortium agencies to incur any direct upfront costs – this was “the first time I heard the notion that this thing could be self-financed . . .” :

That I wanted it, that I demanded it, well, then, that's the message that they took from it; but I was advised that based on the work of this procurement, not vendor specific, not time specific, not terms and conditions here; but it appears as if under this option approach . . . that this could be self-funding. That's the first time I heard of the concept of we can get it all paid for. I said if you are able to that, well, then, fine, you know, get the best deal you can for the consortium.

Carris interpreted Wilson's comment to be of a discretionary, not mandatory, nature. Carris, using his own interpretation, drafted the September 20, 1996 BAFO language as follows:

Based upon discussions and interaction with the MFS/Chase Team over the last several weeks, it is the opinion of the Consortium that this program will be self-funding by the proposer. The Consortium believes that the system and services it seeks to acquire will be provided at no

*cost to the Consortium and may, in fact, generate revenue in excess of costs based on the composition and structuring of your BAFO.”*¹⁸

Carris’ interpretation, however, was not shared by his colleagues. Mortimer and, to a lesser extent, Margro, criticized the language. Carris testified that Margro and Mortimer both believed the proposal had to be self-funded. Further, Carris categorized Mortimer as a “hard-liner” when it came to the \$0 down, \$0 payment approach. Carris opined that Mortimer based his opinion on his interpretation of the Wilson conversation. Prior to releasing the guidelines, Carris also sought the opinion of Ed Gross, who agreed with the language.

Wilson testified that his participation in this discussion was proper because it dealt with the overall programmatic aspects of electronic toll collection – something that, despite his recusal, he had a continuing obligation to monitor as NJDOT Commissioner – and not with the specifics of the procurement *per se*. Wilson testified:

*. . . [M]y recusal, in my view, and hopefully the view of everyone involved in the process [was] that I’m not to be involved in the selection, ranking, scoring and award of the contract to any of these vendors, but it did not include [abrogation] of responsibilities for schedule policy issues, I retained that. And I thought I did an adequate job in telling people what I was involved in and why, and what I was not involved in and why.*¹⁹

The record reflects that Wilson again participated in discussions relative to the procurement schedule in early October, just days before the vendor proposals were to be scored. In this instance, a portion of the discussion was initiated by Wilson himself,

¹⁸ Lockheed Martin received identical September 20, 1996 BAFO language. See Appendix at p. A-12.

¹⁹ In his appearance before the Assembly Transportation Committee on June 10, 2002, Wilson testified that he understood that his recusal meant, “... I at that point could not have any further conversations with anybody directly involved with that, including people on my staff.”

although in sworn testimony before the Commission, he sought to leave the opposite impression:

Q. . . . [W]ould it have been appropriate for you actually to actively participate in making calls yourself asking about procurement schedules and deadlines?

A. No.

* * *

I don't recall ever making any calls, because I thought I adequately described to everyone involved that I simply needed to know, as a default mechanism, when you're off track, let me know. If we're on track, fine, then I'm working with the schedule that we have and I'll operate against that. So there is no reason for me to be calling in and asking, you know, these questions routinely

On October 8, 1996, Wilson placed a telephone call to Mortimer at the behest of a Lockheed executive, Amy Rosen, who at the time was serving as a member and Vice Chair of the NJ Transit Board of Directors. The call coincided with a meeting scheduled the same day between Lockheed representatives and Consortium officials to set the stage for submission of a final E-ZPass proposal. A similar meeting was to be held the following day, October 9, 1996, with MFS executives. On October 10, both vendor proposals then were subjected to final evaluation and scoring by the MET team. Wilson testified that he reached out to Mortimer

. . . because it was a very pointed question that I was asked about the schedule and whether or not it was being delayed. And I had no knowledge or any awareness that there was a delay, but I couldn't be sure, and maybe there [were] things happening that I was not aware of. So it was just a call, I asked my [office] to find Mr. Mortimer . . . and simply asked him whether the program was going ahead according to schedule that I had. And he indicated that it was.

* * *

Q. . . . Who raised the question of the schedule with you that caused you to make the phone call?

A. It was an executive from Lockheed.

Q. Why is the executive from Lockheed contacting you?

A. I have no idea.

* * *

Q. Amy Rosen is the vice chairman, New Jersey Transit board of directors?

A. That's correct.

Q. She's also an executive from Lockheed?

A. Correct. I thought it was strange.

Q. Okay, so what happened in this conversation?

A. [She] simply said we are meeting today and is the schedule – some material change in the schedule, is my recollection. And I thought she asked are we meeting today, like the Transit Board. And I said, no, we don't have a meeting today. Can you please check, I'm missing this point. I think the procurement group is meeting today. And I had heard that we've got a problem with the schedule. I said, I'm not aware of it, I have no knowledge of it. I assume the schedule is okay, but I'll check on the schedule. That was the reason for the call to Mr. Mortimer.

Q. Well, certainly, Ms. Rosen knows she is the executive of Lockheed, correct?

A. I think so.

Q. And she, certainly, knows that Lockheed is involved in the E-ZPass procurement, correct?

A. I think so.

Q. And you already said she had a copy of this August 20 [recusal] letter?

A. I think so.

* * *

Q. . . . [D]id you think [it] inappropriate that she's contacting you directly inquiring about anything about E-ZPass after receiving this letter from you?

A. My initial reaction was once I understood the meeting she was referring to was not us meeting at the Transit Board, you know, this

happens in an instance when she's asking about a meeting of the group was to be a little concerned; but then as soon as she said why she was calling, I didn't have any issues. She was just asking is the schedule being materially [a]ffected. And I didn't ask her why she wanted to know or what the purpose was. It was a schedule issue, fine, I'm dealing with it. I told her I didn't know about any schedule problem, of any delay or acceleration, but I'll check. And then she said, fine, thank you, good bye. And hung up.

Q. *Did she attempt to call Ms. Landers prior to calling you?*

A. *I don't know.*

Q. *Did you at any time during that conversation indicate to her that she should be contacting Sharon Landers on these issues?*

A. *On the issue of scheduling, no, I did not.*

Q. *Your testimony is that any conversation relating to scheduling or deadline is not part and parcel of your recus[al]?*

A. *I didn't believe so.*

• • •

During the period in which these contacts occurred, Wilson engaged in out-of-state employment interviews with the firms whose recruitment efforts had prompted his purported refusal. Following an initial meeting in Los Angeles on August 26, 1996, with the president of DMJM and the chief executive officer of its parent company, AECOM, Wilson traveled again to Los Angeles for a September 18 meeting that focused on prospective job responsibilities and compensation. Subsequently, in a letter dated October 24, 1996, DMJM sent Wilson a letter formally extending a job offer. During the same period, Wilson traveled to Virginia to meet with executives of Booz, Allen & Hamilton and to Los Angeles for discussions with representatives of OBK/Dames & Moore. Wilson turned down subsequent employment offers from those firms. On November 21, 1996, he accepted the DMJM offer. Wilson officially resigned his post as NJDOT Commissioner on December 27, 1996.

Wilson's August 20, 1996 recusal letter clearly designated Deputy Commissioner Landers to act in his stead with regard to the companies linked to his job search. Landers, however, told the Commission that she did not participate in matters related to the E-ZPass procurement, including the vendor evaluation process. Moreover, Landers stated that between the critical period of late September and October 10, 1996 – when a contract-award recommendation was made – Mortimer would have been on his own reporting directly to the Consortium. Landers stated that she had general supervisory responsibility for

some of the things Dave might have done, but I don't, I never got involved in the procurement. So, I basically, I would say he was, he was in charge of that aspect of it reporting directly to the Consortium at that point.

• • •

Wilson's selective treatment of his own recusal is troubling in its own right, but it is part of a broader area of concern with regard to real and potential or perceived conflicts of interest involving top officials of state government. In this instance, New Jersey's chief transportation official placed himself in a position that ultimately required him to resign and walk away, in midstream, from the largest and most complex transportation project in the state's history – following closely on the heels of the project's senior manager, Thomas E. Margro. As a vivid illustration of how his own abrupt departure may have affected the course of the E-ZPass procurement, the Commission noted Wilson's own testimony before the Assembly Transportation Committee on June 10, 2002. During that appearance, Wilson expressed an opinion about the importance of risk

assessment and of securing a proper public/private balance in the assignment of risk in procurements. He stated:

We heard a lot of testimony this morning about a private sector vendor coming to the state and saying it needed to accept risk. Well, you can just as easily turn that around. The bidders that bid to us were considerable bidders with considerable resources. And the state could easily have said to them, you accept the risk. It's your balance sheet exposed.

And so if you are uncertain about – if you really are uncertain about what you've just been offered, then you simply say to the vendor, if you are that secure in what you've offered, then you step up and take the revenue risk or the cost risk.

And those things are done routinely in many agencies that I have been in. And currently, clients will do that to us. Because whether they have questions or have doubts or not, they will put the risk on the private sector.

* * *

I personally would never have taken that kind of risk, give me a guaranty.

Wilson then responded specifically that he would not have approved the shift of the vendor risk to the state:

Q. . . . *[I]f you were approached or if you were asked to approve something that required a guaranty, you would have said no. Is that correct?*

A. *Absolutely correct.*

In this instance, however, the Commission's investigation shows that the financial risk associated with the E-ZPass project was specifically shifted by MFS to the Consortium in late September and early October 1996, while Wilson was Commissioner of Transportation.²⁰ Accordingly, had he not "recused" himself during a critical juncture

²⁰ See Appendix at p. A-9 to review a copy of October 10, 1996 letter faxed from MFS in which the firm stated that the Consortium would need ". . . to provide assurance that it will underwrite its financial performance over the project life."

in the procurement, this shifting of the full risk to the Consortium may, based upon his own words, never have come to pass.

The fact that this occurred at all – let alone amid circumstances suggesting a conflict of interest on Wilson’s part – demonstrates the need for statutory and/or regulatory mechanisms to ensure proper oversight and accountability by government agencies whose top officials, through their own actions, place personal ambition potentially at odds with the public interest.

Flawed RFP/Flawed Methodology

The E-ZPass procurement was built around a formal Request for Proposals (RFP) issued by the Consortium on April 12, 1996. The intent behind this voluminous document was to give the vendor community a clear picture of the nature and scope of the electronic toll project and to set forth guidelines and specifications for the development and submission of contract proposals. At its root, the E-ZPass RFP was framed as a “performance-based” or “functional” procurement document, meaning that rather than delineating with great specificity how the actual job should be done, vendors were given flexibility to devise strategies for accomplishing key goals according to a fixed procurement schedule.

According to the official who supervised production of the RFP – Paul A. Carris, the ETC Program Manager for the New Jersey Turnpike Authority – the ambitiousness of that schedule was exemplified by a stringent deadline imposed for issuance of procurement materials by his office. Carris testified that when he took the assignment in early January 1996, he received unusually blunt instructions to issue a Request for

Information/Request for Qualifications (RFI/RFQ) within four weeks for consideration by prospective vendors. In his testimony, Carris could not recall why there was such a rush, but he did manage to issue the RFI/RFQ on January 29, 1996. These documents preceded the RFP, and were used to help draft it. The Commission found that even before the RFP hit the street, however, questions arose about its structure and clarity. Also, subsequent to its release, the document was altered in a number of substantive ways by a series of amendments adopted by the Consortium even as prospective vendors worked to finalize their proposals in response to it. Further, as ultimately written, the RFP afforded little protection against, and indeed may actually have provided a basis for, mismanagement and manipulation of the procurement process.

• • •

During group meetings prior to the issuance of the RFP, some vendors and Consortium personnel expressed concern that the project appeared, at least in outline form, to be so large as to make a single procurement both untenable and unmanageable. It was suggested during these discussions that the procurement be broken into pieces so that vendors with particular expertise in discrete areas – construction, systems management, administrative operations and others – could bid separately and selectively on contracts governing each component. As ultimately structured, however, the RFP – calling as it did for a singular “DBOM,” or design, build, operate and maintain package – effectively required vendors to form teams because none had the capability or wherewithal to submit a credible response unilaterally. Charles D. McManus, then-Chief Engineer of the New Jersey Highway Authority and a member of the vendor

evaluation team, was among those who worried that this approach would squelch vendor participation, particularly in light of the ambitious schedule laid out – vendor responses were to be due within 90 days. McManus testified:

My suspicions were aroused by the minimal competition caused by the size of the bid request. I thought that was crazy.

Of approximately one dozen pre-qualified vendors who attended the initial pre-RFP meeting in January, only three actually submitted bids: Chase Manhattan Bank N.A., Lockheed Martin IMS Corp. (Lockheed) and MFS Network Technologies (MFS). Ultimately, Chase Manhattan joined the MFS team, which, along with a separate group put together by Lockheed, were the only vendor teams to prepare and submit proposals.²¹

• • •

Just weeks prior to the proposal submission deadline for vendors, the RFP was altered in a number of crucial areas, including the criteria to be used by the Consortium in the vendor evaluation process.

In its initial rendering, the RFP ranked technical skill as the foremost evaluation criterion, followed by experience, cost, management, personnel and facilities, in that order. On July 5, 1996 – three weeks before the July 26th submission deadline for vendor proposals – the order of importance of these evaluation criteria was abruptly reshuffled. An addendum elevated “cost” from third to first, followed by technical skill and so on.

²¹ Lockheed’s team consisted of Syntonic Inc.; Parsons Brinckerhoff; Booz, Allen & Hamilton; Daidone Electric; RBT/Strum; First Union Bank; Bell Atlantic ; Alphatech; AAA (NJ Clubs); and NJMTA. The MSF team consisted of Fredrick R. Harris Inc., Chase Manhattan Bank, Vollmer & Associates, U.S. Public Technologies Inc., and TMCS Inc.

According to Carris, this change was imposed from the top down under the direction of Wilson and Margro and had a significant impact on the procurement because the central focus was now shifted from nuts and bolts to money. Carris testified:

Q. As a participant in the process, did you have an issue or a problem with elevating cost at this point?

A. I did. I had an issue with just changing the criteria midstream, because I wasn't clear how we were going to make this happen without problems.

Q. How do you think it affected the procurement?

A. Significant way.

Q. How significant?

A. It shifted the emphasis from the technical solution, which the engineers were more concerned about, to the creativity of the options. And it also then put us in a position of having less apples to apples comparison.

Q. So obviously then it became more subjective when you're saying less apples to apples.

A. Yes.

Even as cost emerged as the chief criterion upon which vendor proposals were to be evaluated and scored, the RFP remained vague as to how the issue should actually be approached and framed. Consistent with the fundamental notion advanced early on by Wilson that the E-ZPass procurement be exploited, if possible, for revenue to the benefit of both the public and private sectors, vendors merely were instructed to be creative on financing and to be open to the prospect of negotiating the final terms of their proposals. A key section of the RFP, entitled "Proposal Procedures, 1.0 – Requirements and Conditions for Proposals," stated, in part:

The procurement of the new toll collection systems and customer service center operations will be a multi-step, negotiated procurement

process where technical experience and competence will be evaluated in conjunction with the price for the work under this Contract. Furthermore, the procurement process will include evaluation and negotiation of proposed financial and work scope options and innovations or other business opportunities presented by the Proposers that make their Proposal more attractive to the Consortium. These options can take the form of added value, revenue that offsets capital and operations costs associated with the services and materials provided under this Contract, or other initiatives that could produce revenue opportunities for the Consortium.

At Section 9.07, prospective vendors were urged to develop “options” that would bring “creative financial innovations” to the performance of the contract:

Proposal options shall be prepared and submitted to reflect any financial alternatives that may be proposed to provide ‘added value’ to the [Consortium]. Such financial alternatives can include, but are not limited to, financing options, public/private partnership, surcharges and other creative financial innovations.

This section further stated, again in general terms:

The Proposer may offer technical options that, in general, provide ‘added value’ to the [Consortium] for this project. ‘Added value’ can include offsets to the project capital and/or operational costs, cost savings for materials or services, revenue generation, and similar financial returns while maintaining the core project elements and specified functionality and performance criteria.

Beyond this language, the RFP specified only one mandatory option that prospective vendors would be required to submit as part of their proposals – a so-called “Smart Card” component. Various witnesses told the Commission that this requirement was inserted at Wilson’s insistence on the theory that Smart Card technology, designed to provide consumers with a single credit-card-type transaction device to handle everything

from electronic tolls to banking and shopping, eventually would become a substantial revenue generator for the state.²²

Beyond Smart Card, however, the RFP spelled out no explicit standards against which individual vendor proposals could be measured on cost and financing, no objective means to gauge the reasonableness and suitability of funding options and no methodology to ensure that the proposals could be accurately and meaningfully compared to one another. Carris told the Commission the RFP was drafted in such a way as to make it “very challenging” because it contained no mechanism to ensure that competing vendor responses could be subjected to a clear “apples to apples” comparison. Carris stated “there was a lot of judgment trying to decipher what we were getting and then balancing that against the other proposals.” Further, the RFP was silent as to how risk and liability would be apportioned between the Consortium and the vendors if a given funding strategy collapsed. All of these matters were left to be defined through negotiations, an exercise marked by extensive behind-the-scenes revision and recalculation that continued, literally, until just hours before the vendor proposals were scored and a contract-award recommendation was made.

After submitting initial proposals, representatives of the MFS and Lockheed vendor teams made oral presentations and then met separately and privately with Consortium officials during the first two weeks of September 1996. No official record of these discussions exists because no minutes were kept, but participants told the Commission that the Consortium, through the person of its lead negotiator, David M. Mortimer, was increasingly insistent that the proposals be structured in such a way as to

²² At the time, Smart Card technology was still in its infancy.

minimize up-front costs and maximize long-term revenues. Pursuant to those goals, the sessions focused heavily on two options that had already been topics of informal discussion within the Consortium for months: the possibility of drawing substantial revenue from toll violators and from the sale or lease of fiber-optic cable installed along the toll-road rights-of-way.

In sworn testimony before the Commission, Donald E. Mauer, then-Chief Engineer of the South Jersey Transportation Authority and a member of the Consortium's vendor evaluation team, summarized the evolution of this unique process:

The original offerings from MFS and Lockheed said here's the cost to build this. And then discussions and negotiations ensued, and then we called it a best and final offer and then a revision to that best and final offer. Each time those revisions occurred, the concept was to go from the [Consortium] paying the cost of the job to this new theme of some type of creative financing that would allow the [Consortium] not to pay the cost of the job, and ultimately never to pay the cost of the job because it was self-funded.

So the first offering that came from the vendors was conventional. Build this, give me this much money for it. The second offering came in with an additive of fiber optic revenue and the additive theme of violation enforcement, administrative penalty collection. Fiber optics was an add-on. There was no fiber optic [leasing] in the core bid. There was a communication link [to] all the toll plazas . . . but never a fiber optic communication backbone for revenue resale.

. . . So they were brand-new concepts. They showed up during the period of time after the original proposal was received but during the course of the evaluation by the MET team that these were revenue enhancers.

On September 20, 1996, MFS and Lockheed were formally advised that self-funding was to be considered the favored approach as each prepared a best and final offer (BAFO).²³ According to the text of a letter bearing that date to both vendors from Carris,

²³ See Appendix at p A-12.

The Consortium believes that the system and services it seeks to acquire will be provided at no cost to the Consortium and may, in fact, generate revenue in excess of the costs based on the composition and structuring of your BAFO.

This document, which set forth official “BAFO guidelines” to be followed, triggered a flurry of facsimile exchanges, telephone calls and meetings as the vendors amended and re-amended their proposals amid consultations with the small group of Consortium officials led by Mortimer. At one point in this frenetic process, according to witnesses, the thickening alphabet soup of acronyms became a source of some amusement as BAFOs, upon revision, came to be referred to by the participants as BARFOs, or “Best and Really Final Offers.”

It is noteworthy that even after the Consortium, through Carris’ September 20, 1996 letter, had put in writing its clear preference for a project framed in such a way as to pay for itself at no cost to the toll authorities, neither of the two prospective vendors advocated a self-funding approach. Indeed, Lockheed never submitted a proposal built completely around self-funding; the firm, even in its BARFO, adhered to the notion that the Consortium would have to invest at least some money at the outset in order to make the project viable. As to MFS, although the firm ultimately did propose a financing structure designed to meet the \$0 down, \$0 payments goal – and won the contract largely as a result – its representatives repeatedly advised the Consortium that they preferred an alternative that would provide “budget certainty” via some level of expenditure by the toll authorities in the early years of the project.²⁴

²⁴ See Appendix at p. A-14.

Early in October 1996, after it became apparent that neither vendor's BAFO satisfied the Consortium's zero-cost mandate, their representatives were summoned to separate private meetings and told to re-visit their drawing boards to crunch the numbers one more time. On October 8, 1996, with Mortimer presiding, Lockheed executives were instructed to submit final revisions no later than midnight. The following day, again with Mortimer in charge, representative of MFS received similar instructions. The following morning, MFS faxed a final offer that incorporated a new series of "expanded service options" dramatically boosting the revenue projections associated with the firm's initial contract proposals. Virtually overnight, the MFS net revenue projections for violation fees, fiber optics and other options for the proposed contract grew from approximately \$59 million to \$297 million, an increase of \$238 million, or more than 400 percent. This revision was significant in the procurement because MFS was now positioned more positively than Lockheed. Only days earlier, as of the October 2, 1996 BAFOs, Lockheed had projected combined net revenues of approximately \$150 million compared to \$59 million from MFS. By October 10, Lockheed's revenue projection had only increased to approximately \$196 million.²⁵

The dramatic increase in MFS's revenue projection was subjected to no meaningful scrutiny by the Consortium. Carris testified that "outside of just a general discussion, I don't believe there was any extra effort made to vet these numbers." Moreover, although the MFS proposal included \$148 million in additional revenue projected via an expanded fiber-optics option, the proposal was not forwarded to the Consortium's fiber-optics consultant for comment. MFS's revised final offer also

²⁵ See Appendix at p. A-3 for chart depicting the dramatic shift in vendor revenue projections.

substantially boosted proposed revenue from the “Smart Card” option. In its October 2, 1996 submission, MFS had included no potential revenue for this option. However, within the firm’s revised final offer, the value of this component was abruptly inflated to \$67 million – half of which (\$33.5 million) was to be destined for the Consortium’s coffers. Not only was this presumed revenue source not vetted or evaluated prior to the selection of MFS as the E-ZPass contractor, it was arbitrarily reduced to an \$8 million item by the MET team – but only after the selection of the vendor. For its part, MFS was careful to qualify the presumed significance of the Smart Card option. At one point late in the process, for example, MFS stated:

We have included a Smartcard options statement in this clarification document. At this time, we are proposing that the Consortium and the MFS team develop a Smartcard strategu (sic) by the first quarter of 1998. At this time, there is no financial impact of the Smartcard option on this project. (emphasis added)

Louis A. Fuertes, the then-Business Development Manager of the Corporate Strategy and Development Group of Chase Manhattan Bank, testified as to his recollection of the purpose of the October 9, 1996, meeting between MFS representatives and Consortium staff:

Q. *[D]uring that meeting were you asked to submit additional revenues and which turned out to be this out-of-system revenue during that meeting?*

A. *Yes.*

Q. *Who asked you to submit that?*

A. *I remember Dave Mortimer playing a prominent role in this meeting. I don’t know if he was the individual who requested this, but we left that meeting with this as a deliverable. I don’t recall exactly whether he was the first person or the last person to request it, but I know he requested it at some point.*

- Q. Again, exactly what was requested of Chase or Chase/MFS at that 10-8, 10-9 meeting, in relation to the out-of-system revenues?*
- A. To develop an estimate for what those might mean for the consortium.*

* * *

- Q. All the documents submitted to the consortium at that point indicated, with designated parameters, that there would have been a projected shortfall at the end of the eight years to the consortium, is that correct?*
- A. That's correct.*
- Q. And then, at the 10-8 or 10-9 meeting, Chase Manhattan/MFS was instructed by the consortium to provide estimates on what eventually gets culled out of system revenues, is that correct?*
- A. Right. If I could just expand on that, fiber had been involved in the prior estimates. Fiber is involved again in the out-of-system estimates, but on a more expanded basis, so fiber is a little bit of a funny one because it was in the numbers before and it's in these expanded ones, it continued forward, but on a broader basis.*

Significantly, MFS' revised final offer also set forth a twist to the cost picture: the concept that a self-funded E-ZPass program could only be achieved if the Consortium would agree to underwrite the financial performance over the life of the project. This language eventually became the basis for what was later termed the "True-Up" agreement under which the Consortium members ultimately assumed full responsibility for any shortfall associated with E-ZPass revenue projections and which set forth a formula in which each member would be assessed a share of the cost. It is noteworthy that this lopsided risk formula ran completely counter to the thinking that had prevailed within the ranks of the Consortium early on in the procurement. According to Thomas E. Margro, the former Turnpike Authority Chief Engineer who was first in charge of the E-ZPass procurement, the early expectation was that the overall project risk ultimately would be

shared with whatever vendor was selected. Further, when the MET team accepted MFS's revised final offer, and thus gave an official imprimatur to the shifting of the risk entirely to the Consortium, it was done in an *ad hoc* manner and not pursuant to any specifications, process or technical language drawn from the RFP or any other procurement documents.

Vendor Performance Problems: Known but Minimized

During the course of the E-ZPass procurement, Consortium officials were informed that MFS had experienced technical problems in connection with the deployment of two smaller but concurrent electronic-toll ventures in this region. In the wake of one of these instances, the Consortium was urged to include in its RFP a requirement that all prospective vendors demonstrate technical proficiency through on-site testing as part of the evaluation process prior to the award of the contract. That suggestion, however, was set aside.

• • •

In 1995, before joining the Consortium's regional effort, the Port Authority of New York and New Jersey pursued a separate procurement, competitively bid, to install electronic tolls at its Hudson River bridge and tunnel crossings. In addition to preparing detailed written proposals, qualified vendors were required by the RFP – at their expense – to demonstrate technical proficiency in test lanes as part of the evaluation process. Walter A. Kristlibas, then-Manager of the Port Authority's electronic-toll unit and an overseer of the demonstration tests, described the agency's motivation:

We thought, for purposes of the Port Authority being able to select the technology, that [a pre-proposal test] was something that would give us an opportunity to really get beyond the fuzzy edges of the glossy pieces of paper that typically come in a proposal and really see if the rubber hits the road, and that's the way we ran the procurement.

Two vendors ultimately submitted proposals – MFS and Lockheed. MFS utilized a test lane at a toll plaza in Mays Landing, Atlantic County, that was operated and maintained by the South Jersey Transportation Authority. Lockheed carried out its test on the George Washington Bridge between New York and New Jersey. In each instance, the test called for a fully operational toll-collection regime in which actual vehicles would pass through the toll gates in a real-time exercise observed and evaluated by Port Authority personnel.

Two Port Authority officials who participated in the evaluation told the Commission that MFS performed poorly in these lane tests. Walter A. Kristlibas testified that the firm demonstrated a “lack of coordination” in carrying out the test requirements and failed in a number of instances to accurately record toll transactions. Further, Kristlibas stated that MFS provided the test monitors with no guidance as to its test sequence. He described it as “*ad hoc*.” “We had been told by MFS that this was a mature test site. In fact, they had worked on it for two years” Kristlibas testified. “. . . [B]ut it was obvious to myself and our people that were with me from the Port Authority that [MFS] wasn’t quite ready for prime time”

Commission staff also interviewed Andrew Fogel, who at the time of these tests was Kristlibas’ deputy on the project. Fogel stated that MFS conducted the test in a way that was “difficult to follow” and the lane “didn’t do what it was supposed to do.” He

stated, “Overall, they (MFS) didn’t show us much.” Fogel stated that the firm and its technicians were “ill-prepared for the test and the results were indicative of that.” By contrast, according to Kristlibas and Fogel, Lockheed satisfied most of the test requirements and, in large part as a result of that, ultimately was awarded the agency’s electronic-toll contract.²⁶

The Port Authority lane tests were conducted and completed in May 1996, approximately one month after the Consortium’s own electronic-toll RFP had been issued. Kristlibas, who also participated in that procurement as the Port Authority’s representative on the Consortium’s vendor evaluation team, told the Commission that he related his concerns about MFS’s test-lane performance to Consortium officials, including his colleagues on the evaluation team.²⁷ MET team members Mauer, Carris and McManus confirmed that they were aware of the lane-performance testing, and were kept informed of the results by Kristlibas. Kristlibas further testified that he also urged the Consortium to revise or amend its RFP to include a similar pre-proposal test requirement for prospective vendors, but that his suggestion was rejected:

Q. At what point in the [Consortium] evaluation process did this [test] proposal come up?

A. Well, at the very beginning while we were putting the RFP together. The Port Authority [said] we think that for us it worked and we think that it would probably be something that would benefit New Jersey, also.

Q. So you wanted to actually incorporate that [test] requirement into the RFP?

A. Yes, sir.

²⁶ A written record of these tests no longer exists. As far as the Commission was able to determine, it was among the multitude of documents destroyed in the September 11, 2001 terrorist attack on the World Trade Center, the Port Authority’s headquarters.

²⁷ Kristlibas was appointed chief of E-ZPass operations at the New Jersey Turnpike Authority in June 2002 and currently holds that position.

* * *

[T]here was a discussion initiated by the Port Authority, and that was rejected.

• • •

In another electronic-toll procurement that overlapped the Consortium's regional initiative, the South Jersey Transportation Authority (SJTA) in late 1994 hired MFS to upgrade toll machinery along the Atlantic City Expressway. The SJTA project, initially targeted for completion in 1997, did not become operational until some three years later due to problems encountered by the firm during construction and installation. According to Donald E. Mauer, then the Authority's Chief Engineer, MFS "struggled to put the proper resources on the job so they could execute the daily work in a daily fashion. . . . Construction went off very slowly and then it continued to get slower." Once installation of the system was finally completed in early 1997, Mauer testified, the firm had difficulty achieving a satisfactory level of performance during pre-operational testing. "They struggled with it," Mauer stated. "When they said it was ready to go out there and tested it . . . their ability to pass the test was difficult. There were many interruptions to the test. There were many or numerous errors that were found that during beta testing you can find, identify and try to correct. . . . It did progress over a long period of time." The SJTA testing occurred at approximately the same time that the Consortium awarded its own ETC contract to the firm in March 1997. Crawford sent material to the Consortium related to these problems but with no change in the ultimate result.

In the end, the contract award to MFS was reduced by \$323,413.78 for work on the project that was to be completed by another vendor.

Crawford stated the reaction from Gross was to the effect that the SJTA as a small agency had not applied the proper level of oversight to ride herd on the vendor and that he planned to take action that would prevent similar problems with the Consortium's procurement. He stated that Mortimer's reaction was that there were no problems. Kathleen M. Sharman, SJTA's Director of Finance, told the Commission that ". . . [M]y impression was that they (Consortium staff) thought it was because we didn't know what we were doing. And the contractor was . . . right and it must be something we were doing wrong."

Vendor/Agency Complaints

After the release of the RFP on April 12, 1996, at least one team of prospective vendors and one Consortium toll-road authority separately expressed concerns that, given the complexity of the project, the procurement was proceeding along an overly ambitious schedule. Requests for additional time in which to prepare responses to the RFP, however, were denied, even amid the abrupt change in evaluation criteria.

In a letter dated June 4, 1996, to ETC Program Manager Paul A. Carris at the Turnpike Authority, an executive of Valley National Bank complained that the RFP was replete with "many gray areas . . . which prevent us from providing a response."²⁸ Peter J. Southway, the bank's First Senior Vice President, told Carris – in language which, in

²⁸ Valley National Bank of Wayne, N.J., was one of the four pre-qualified vendors in the E-ZPass procurement. Its team consisted, among others, of International Business Machines, EDS, ISYS, MasterCard, Waring LaRosa, O'Brien-Kreitzburg and Louis Berger & Associates.

retrospect, seems prophetic – that his firm “will not participate in a program that is not clearly developed” and warned that unless vendors were given more time to complete proposals, the Consortium was risking long-term operational problems. Indeed, Southway cited “the current debacle” involving difficulties associated with installation of an E-ZPass system on New York’s Metropolitan Transportation Agency (MTA) network.²⁹ He added, “As the old adage of haste makes waste seems to remarkably carry true in history, we are asking that the [C]onsortium carefully review our correspondence and commence discussions in order to develop a positive resolution.” Southway explicitly requested that the deadline for submission of vendor responses to the RFP be extended by approximately 2 1/2 months, from July 12, 1996, until October 1, 1996. Valley National Bank later amended its request for an extension to September 15.

In addition to his letter, Southway took the unusual step of attaching for Carris’ review a copy of an internal corporate memo, marked HIGHLY CONFIDENTIAL, to Southway from Valley National Senior Vice President Edward L. Lawrence. The memo states, in part:

Peter, following some very technical and business oriented discussions between our current, prospective and possibly former team members it had become evident that the size and scope of the Consortium proposal does not allow enough time to respond in the manner in which we feel would be a) accurate b) credible. Although team members realize that this particular proposal will be one of negotiated procurement none can really assess their full costs and/or risks and are not willing to rely on the fact that all will be taken care of within the process. We have been building a team based upon our own VNB values and I believe it is a winning one, however, after reviewing the O’Brien-Kreitzberg oversight report` relative to the MTA project it is clearly evident that if we follow down the current

²⁹ Southway was referring to traffic chaos, highly publicized at the time, that attended the introduction of E-ZPass on the Throgs Neck Bridge linking the boroughs of Queens and The Bronx in New York City.

path we and our team members could be part of a similar carnage in the future. None of the team members including VNB wish to have that type of recognition.

Let me be as clear as I can in my next remark, IT IS MY RECOMMENDATION THAT IF AN EXTENSION IS NOT GRANTED THAT VNB NOT PROCEED IN THE BIDDING PROCESS. This is a disappointing conclusion however our reputation and those of our team members are an overriding facet of this process.

Lawrence's concerns were echoed in the text of a June 5, 1996 letter to him from an official at IBM, one of Valley National's putative E-ZPass partners. Kathy Daw, IBM's Northeastern Area Government Practice Leader, wrote that it is "not unusual" in such procurements for vendors to be given as much as five months to prepare responses once the RFP has been issued and vendor teams have been established. In this instance, Daw observed the proposal submission deadline was approximately two months away. "Our primary concern is one of time," she told Lawrence. "There is simply not enough time to put together a thorough and comprehensive proposal for a project of this magnitude and complexity requiring the skills of numerous team member firms."

Approximately three weeks later, similar time-related concerns were expressed by Lewis B. Thurston III, Executive Director of the New Jersey Highway Authority. In a June 27, 1996 letter to NJDOT Commissioner Wilson, Thurston observed that the original RFP had been amended twice to date and that a third addendum was in preparation. He also cautioned against taking steps that might diminish the already-small pool of interested, pre-qualified vendors, thus stifling competition. Thurston wrote, in part:

It is my understanding that several of the lead vendors have requested further extensions of 45-60 days to submit their proposals, and that one vendor indicated that without the extension they would not be able

to submit a proposal. From the outset of the RFP process we have felt that the schedule was unduly tight in a number of respects, including the time for vendors to respond to the RFP. Additionally, we are not aware of non-changeable deadlines in the schedule which necessarily would require rejection of extension requests. Accordingly, we are not opposed to extensions of time up to 45-60 days for vendors to submit their proposals, particularly if the effect of rejection of the request is to eliminate a vendor proposal, thus reducing competition.

Ultimately, either no extension, or one of only a matter of a few weeks, was granted, and the Valley National team withdrew. In a letter to then-ETC Project Manager Margro dated July 1, 1996, Lawrence stated that “based upon the advise (sic) that an extension is only available through 4:00 p.m., July 26, 1996, Valley National Bank will not be submitting a proposal as a pre-qualified proposer for this contract.”

Thurston testified that he and others at the Highway Authority continued to voice concern that the procurement schedule was unreasonably ambitious even after vendor proposals were received and evaluated leading to a contract award recommendation in October 1996:

- Q.** . . . *[D]id you experience any kind of time pressure that would have a detrimental effect on the procurement?*
- A.** *Yes, we did. . . . [W]hen the proposals came in and when particularly the best and final offer and revised best and final offers came in, there was a schedule set for that that was basically dictated by the Department of Transportation. And our feeling at the Highway Authority was that that schedule was too tight, there wasn't sufficient time for full evaluation, and we requested additional time to do that, which was not granted.*

• • •

Looking back on these events, particularly the unsuccessful requests for additional preparation time, the Commission is constrained to point out that, as it happened, nearly 11 months transpired between issuance of the E-ZPass RFP and the

actual award of the contract. Further delays caused yet another year to pass before the contract was actually executed on March 10, 1998. In total, approximately 23 months went by between the release of the RFP and the actual launch of the E-ZPass program.

A Questionable Evaluation

The task of assessing and scoring the substantive merits of the competing MFS and Lockheed proposals fell to a “Multi-Agency Evaluation Team” (MET) established for that purpose pursuant to the RFP. The team consisted of five members, one each from the participating Consortium entities: Paul A. Carris, the Electronic Toll Collection Program Manager employed by the Turnpike Authority; Charles D. McManus, Chief Engineer of the New Jersey Highway Authority; Donald E. Mauer, Chief Engineer of the South Jersey Transportation Authority; Walter A. Kristlibas, Chief of ETC Operations for the Port Authority of New York and New Jersey; and Howard R. Giddens Jr., Assistant Deputy Director for the State of Delaware Department of Transportation.

Aside from Giddens, none of MET members was experienced in public- or private-sector finance, despite the fact that cost had been elevated by the Consortium to be the criterion of foremost importance in the evaluation process.³⁰ Thus, as a team, they were heavily dependent upon the purported accuracy of financial information and data provided by others, primarily the vendors and the various Consortium agencies. Further, the team was not administered from among its own, but from without, first by Turnpike Authority Chief Engineer Thomas E. Margro and later, beginning in September 1996 – as

³⁰ Giddens testified that he previously worked for E.I. DuPont de Nemours Co. for approximately 15 years in various financial management positions, two or three years in business management capacities and seven years with DELDOT.

the procurement entered the crucial phase in which vendor offers were negotiated, evaluated and scored – by NJDOT Chief of Staff David M. Mortimer. The Commission determined that under Mortimer’s direction, the vendor evaluation process was thoroughly manipulated.

In sworn testimony before the Commission, Mortimer, individually, and the MET members, as a group, were completely at odds in recounting core aspects of the evaluation process and the nature of their relationship. Mortimer described his role as chairman *ex officio* as one in which he served merely as a “conduit” and a “moderator,” stating, “I didn’t wield omnipotent power there.” According to MET members, however, Mortimer actively lobbied for the self-funding approach to the exclusion of any other. Under his direction, they testified, the evaluation process devolved into a rush-job in which artificial deadlines prevented adequate analysis of key documents, including those dealing with financial risk to the Consortium. They testified that questions were discouraged and that Mortimer denied requests for additional time in which to conduct the review. They testified that they were instructed by Mortimer to score the vendors’ final proposals within hours of the receipt of those documents by the group and that when the numerical difference between the point totals turned out to be quite narrow, Mortimer ordered a second round of scoring in which MFS emerged as the clear winner. One MET member whose individual score favored Lockheed told the Commission that he received a veiled threat from Mortimer. Ultimately, notwithstanding these issues and concerns, the vendor evaluation unfolded as it did in this instance because the MET members were compliant in the face of Mortimer’s purported authority over them and over the process.

There is no evidence to suggest that, at the time of these events, they brought any such complaints to a higher level of government authority.

• • •

On October 10, 1996, Mortimer, the MET members and assorted staff from the various Consortium entities gathered in a conference room in the Commissioner's suite of offices at NJDOT. Earlier that day, a revised final offer had been received from MFS incorporating a detailed series of new cost and revenue estimates. A similar "BARFO" had been received less than 24 hours earlier from Lockheed. As the day unfolded, the team members were told by Mortimer that the time had come to score the vendor proposals. Aides and other Consortium agency officials were told to leave the room, and the scoring session proceeded late into the night. According to the New Jersey Highway Authority's Charles D. McManus, the events of that evening were the culmination of "an intensive, ugly process" that was rushed to a premature conclusion:

Q. Prior to the scoring . . . did you believe that the MET team had adequate time to review all the proposals and ask all the questions?

A. No, we were pushed. No.

Q. Who was pushing you?

A. David Mortimer was pushing.

* * *

Q. . . . [I]s it fair . . . to say that you went to the MET team scoring . . . a lot of questions remained unanswered, but at the same time you were asked to score the vendor proposals?

A. Yes . . . [T]he whole process was an expedited process. From beginning to end, it was a push.

McManus and other MET members testified that they were particularly troubled to find that they would be required to score the vendor proposals on the same day that MFS's final offer had been received. This document, which had been faxed to Carris at approximately 8 a.m. the morning of October 10, contained a host of new revenue estimates, none of which had been subjected to careful scrutiny. Carris testified that outside of a "general discussion," there was no extra effort made to vet the proposed additional revenue. The MFS final offer also contained a major caveat: the company's firm position that the self-funding approach would be viable only if the toll authorities comprising the Consortium assumed the full burden of risk. McManus testified:

Q. Is this the first document [you saw] at least in written form that indicates the shifting of risk from MFS to the Consortium?

A. The first one I saw.

* * *

. . . This is very, very detailed and, you know, to properly [review] it, it should probably have been circulated to a number of staff people to really go through it carefully. So, I mean, obviously this document is much more detailed than one day would permit you to digest . . .

Q. So you're saying you didn't have adequate time, preparation to review that document prior to the second MET vote?

A. That's probably fair.

Q. Again, you believed there was a topic of discussion by the MET team members after seeing that document that they wanted more time to digest what was presented [by] MFS instead of voting that same day?

A. I'm sure I felt uncomfortable voting at that time. . . .

The Port Authority's Kristlibas testified that the MET team collectively was startled by the terms of MFS's final offer because for the first time "it became crystal

clear” to the group that the vendor was not willing to share any portion of the risk for a funding approach that the vendor itself believed was problematic. Kristlibas testified:

Q. . . . Isn't it a fact that MFS was telling the Consortium at this point, "We want a zero down, zero payment scheme, but we really don't think it's going to be attainable?"

A. Yes, sir.

Q. Is this the first time that was formally put in writing to the Consortium, do you know?

A. Yes.

Q. Did that cause any discussion by the MET team members after reading that?

A. Yes, sir.

Q. Did that cause the MET team members to – well, how did the MET team members react to that after reading that?

A. It was almost as if they were struck blind by lightning, because all along we were led to believe that MFS would syndicate some of the risks going forward, and this was the first time that I recall seeing in writing that they would assume none of the risks and, in fact, are saying to us that, based on what David Mortimer had laid out to them as the going-forward plan, they didn't think that this project would – can be – can go forward with it.

* * *

Q. Do you recall if, during any of these discussions that occurred that evening, whether any member of the MET team asked Mr. Mortimer or the group as a whole for more time to conduct the evaluation, that they were concerned it was being too abrupt?

A. Yes, sir.

Q. And what do you recall about that?

A. [We were told] No, you are not leaving this room until the final vote is taken.

Q. Who raised those concerns?

A. Several members, including myself.

Q. And what did you say?

A. That the members here are very tired, that we've gone without sleep for a very long time . . . [t]hat we've been here for a very long time,

that we've gone through two straw polls and that this is way too important a process for us to undertake at this point without getting some rest.

- Q.** *Did anybody ask for a specific amount of time extension?*
A. *A couple of days.*

* * *

- Q.** *What reason did he give you not to grant the extension?*
A. *That we've received all of the information that we're going to receive, that each member had the opportunity to ask all the questions that they wanted to ask and, if you hadn't already asked it, there is no other opportunity now to ask it. That essentially we've exhausted our time in which to query either one of the vendors. It was put in those terms.*

Donald E. Mauer, then-Chief Engineer of the South Jersey Transportation Authority was one of several MET members who testified that the team was rebuffed when it sought more time to review and evaluate an alternative financing approach proposed by MFS – a so-called “budget certainty” approach that would have required the Consortium to put some money down in the early years of the project:

- Q.** *So the MET team thought the second approach of MFS in their September 27th letter warranted further consideration?*
A. *Yes.*

- Q.** *Who didn't believe it warranted further consideration?*
A. *Mr. Mortimer.*

- Q.** *And what did he base that on?*
A. *I recall a statement . . . something to the effect that it's his belief, if you look at what's coming from the vendor community, that this job can be self-funded and we need to pursue that line.*

Carris testified that Mortimer discouraged the group from any focus or analysis on the second approach:

- Q.** *How much consideration did the MET team give to Approach No. 2?*

A. I don't remember a lot of discussion on it. I do remember Dave Mortimer focusing on one and wanting to go in that direction.

Q. Do you remember Mr. Mortimer stating words to the effect, "We've got what we want in Approach No. 1. We're not going to consider Approach No. 2?"

A. Yeah, I think I do remember – I do remember something to that effect.

Q. So is it fair [for] us to rely upon that at this time Mortimer decided or at least voiced his decision to the MET team that you're not going to consider Approach No. 2?

A. Yes.

* * *

Q. . . . What statement do you remember now that he made?

A. That the zero down, zero payment gives us what we need and there's no reason to consider the other one.

According to Kristlibas, Mortimer expressed anger with MFS for submitting the second approach they way they did:

Q. How do you know he was angry?

A. He expressed more than disappointment in having received and read this, in the manner in which MFS had articulated it, and I recall general statements being made on his part that, "No way could New Jersey possibly pursue this kind of an option, and [MFS executive] Bill Thompson knows better than that."

Mauer testified that he and his MET colleagues also were restricted throughout the evaluation as to whom they could consult about the procurement, particularly when it came to contacting NJDOT personnel and expressing skepticism over the viability of the self-funding approach. Mauer testified:

Q. Did you ever express your skepticism to Mr. Mortimer or others on the MET team?

A. Yeah. In writing no. In a conversation, yes.

Q. All the way up through the process that the MET team scored the proposals?

A. Yeah, uh-huh.

Q. What was Mr. Mortimer's reaction when you voiced your skepticism to him?

A. I didn't say I got brushed off, but I got a very cursory, you know, don't worry about it. You know South Jersey's [SJTA] a small deal. There's a bigger picture out there. You know, it will work. Don't worry about it.

Q. How about other members of the Department of Transportation, did you ever voice your skepticism to them?

A. Never really had an opportunity to speak to anybody else at the DOT. Dave was the face of the department. . . .There were very few people brought to the table from the department during the MET [process]. . . .

MET members described the actual scoring of the vendor proposals as a laborious process that dragged well past midnight on October 10, 1996. Thick packets of detailed scoring sheets were distributed separately for the MFS and Lockheed packages. Divided according to the core evaluation criteria, these forms contained dozens of discrete categories to which each evaluator had to attach a numerical score. MET members told the Commission that they were under the impression going in that this would be the only scoring exercise of the evening. Once they finished, however, Mortimer collected sheets, left the room for a period of time and then returned to instruct the group that the proposals would have to be scored again. Although their recollections differ as to the timeframe in which this occurred, each of the MET members testified that a second round of scoring did indeed occur and that Mortimer stated it was necessary because the margin of difference between the point totals tallied for each proposal was narrow.

Mauer testified:

Q. Who tells you you're going to [score] it again?

A. *Mr. Mortimer. He says that the – he had reviewed the results and it was necessary for us to score again.*

Q. *Did he tell you why it was necessary for you to score again?*

A. *I believe the phrase he used was the spread wasn't big enough, the margin of – you know, the difference between the two vendors.*

Q. *Did he tell you which vendor received the most amount of points the first time?*

A. *No, he did not. He did not say that. He just said the spread wasn't big enough.*

Q. *What relevance was the fact that the spread wasn't big enough?*

A. *To me, none. . . . [I]n the world that I practice, competitions are based upon the merits. If you are the number one score-getter, then you're the number one score-getter. The size of the spread after the process you follow doesn't make much difference. . . .*

Q. *So after Mr. Mortimer made this comment to you, what discussion did the MET team have with Mr. Mortimer about the reasons why they had to re-score . . . ?*

A. *I don't remember a whole lot of specifics about the conversation. I do remember a lot of grumbling, a lot of concern that we've already scored once, what's the purpose in the second score if there is a clear winner and a clear loser? The magnitude of the spread, again, is not germane to the discussion because there is a winner and a loser. It's not a tie. After a couple of hours it was all fruitless. We were going to do it again and that was it.*

* * *

Dave's mind was made up and he wasn't going to change it. We were going to re-score again. We were going to submit a second set of score sheets.

Carris testified that after the initial round, he confronted Mortimer, complained that the group had not had enough time for an adequate review and asked that they be given additional time. He stated that Mortimer was non-responsive and left the room to have the scores tallied. Upon returning, Mortimer informed the team that it would have to rescore. Carris testified:

Q. *What's the significance of [the call for a re-score] in your mind?*
A. *That was information I didn't need to hear.*

Q. *Why not?*
A. *Because it could sway people.*

Q. *Did [Mortimer] tell you who received the higher point total?*
A. *That I don't remember.*

According to the sworn testimony of various participants, the point differential between the two vendors increased as a result of the re-scoring. However, since no agency was able to locate and produce to the Commission the first set of scoring sheets, the exact point totals and the results of the first scoring are unknown.³¹ Giddens testified that he scored the proposals differently the second time. He stated, "I believe that – I don't remember it being significant, but I do have an impression . . . that my MFS score went up slightly, but I'm not sure. I think my differential changed, that was what I remember, and I don't remember if it was MFS went up a little bit or Lockheed went down a little bit, and I certainly don't remember why." McManus also testified that he changed his score the second time, "Yes, but I chose not to change anything except for the one area which was on the revenue side." Carris testified that he also changed his scores in the second round. He said he did so not because anyone explicitly asked or ordered him to but because during the interval between the two scorings, he briefly reviewed the documents and concluded that, on the merits, MFS deserved a higher score in several categories:

³¹ The final evaluation scores for the proposals were 4538.75 points for MFS/Chase and 4004.75 for Lockheed Martin IMS. The Final Average Weighted Score was 907.75 for MFS/Chase and 800.95 for Lockheed.

Q. . . . [H]ow did you change your score from the first time you did the evaluation to the second time you did the evaluation?

A. I went back and reviewed the documents, and if I felt that I had a better understanding of where – what we were getting, I adjusted the score and I adjusted it – it did not change my initial selection, but it did, in effect, give a broader range between a winner and a loser.

Q. And your initial selection was whom?

A. MFS.

Q. So . . . you didn't change the final result of your scoring, you still remained consistent with MFS –

A. Yes.

Q. – but you increased the point total so MFS would have a higher point differential looking at your evaluation sheet.

A. . . . [Y]es.

Q. What transpired between your first scoring session and your second that would justify increasing the point differential between the MFS proposal and the Lockheed proposal?

A. Being able to go back and review the documents where I had questions in my mind, and meet the deadline that was imposed on us.

Q. And the deadline was imposed by Mortimer?

A. Yes.

Q. Other than yourself, did any other MET team members ask for additional time to review the documents prior to scoring?

A. I might have been the only one to actually go to Dave and say that I felt we collectively needed more time.

Q. Were you acting as a spokesman for the group?

A. Yes.

Q. And until he saw the scoring himself, he didn't think that was a good idea; is that correct?

A. That's correct.

* * *

Q. Did Mortimer ever attempt to have you change your point total?

A. Outside of making the statement to the group, no.

Q. . . . Did he ever [imply] in one way or another that your point total should be greater between the two proposals?

A. *To me directly, no.*

Q. *How about indirectly?*

A. *Outside of his statement to the group, no.*

* * *

Q. . . . *[D]id you think you had enough time to review the proposals prior to your scoring on that evening?*

A. *No.*

* * *

I just know that as a group we were pretty burned out and resented the fact that we were still sitting there at that hour of the morning.

Q. *Did he give you any reason why he needed that scoring done that particular night as opposed to coming back the next day?*

A. *No.*

Kristlibas told the Commission that when it became apparent that he, on behalf of the Port Authority, had given higher scores overall to Lockheed, Mortimer called him aside for a private meeting punctuated by pressure and by what Kristlibas interpreted as a thinly veiled threat:

Before the final scoring . . . the Port Authority was really a minority vote, and that was pretty obvious to all of the evaluators before the final scoring was done, so Mr. Mortimer asked to speak with me privately, and I remember going into an office outside of the commissioner's area, and his [Mortimer's] approach with me was more along the lines of why was I being so stubborn. [Mortimer said] it was very clear that MFS is the better choice for New Jersey, offering greater revenue benefits, and it's very clear that I was opinionated and that, for reasons unknown to him, I was voting for Lockheed Martin, and he wanted to know if [the] reason could possibly have been that, during the Port Authority procurement we had selected Lockheed Martin as opposed to MFS, and I recall responding to him that it has nothing to do with the prior selection by the Port Authority. I'm going simply by this RFP, I'm going by the proposal and I'm going by the revenue projections that each vendor was presenting, and added to that evaluation is some knowledge of the capability and performance of each, and that I cannot, in all good conscience, vote for MFS.

At that point he – he asked me whether I had considered the effects of my vote on my career, and I remember responding to him, by body language, surprise. I asked him, “What did you mean by – what do you mean?” he says, “Well, you know, you’ll be the minority vote, you are obviously going to ask questions, you know, why didn’t you see it the same way. It certainly would be better for all of us if we had a unanimous vote, unanimous approach on this.” I said, “I wish I could see it your way, but I can’t. I’m not going to change my vote.”

He then said something like, “I think you are being very stubborn about this. I like you, but you are really being very stubborn about this.” And there might have been another exchange between he and I, I don’t remember the exact words, but I then left the room.

* * *

Q. *My question is, how did you interpret his statement to you?*

A. *He was attempting to speak to me in a Dutch uncle fashion, that he was more experienced, I was kind of rough around the edges, not quite as politically attuned as, perhaps, I should have been. My interpretation was not that it was any kind of physical threat in any way or that I would be summarily fired upon my return, but images of Commissioner Wilson, being a very powerful commissioner with the Port Authority, certainly were dancing in my head, and I think, whether he intended it or not, that’s the image that I got.*

• • •

Mortimer testified that he had no recollection of such an encounter and strenuously denied making any threatening statements related to Kristlibas’ career:

Q. *Kristlibas has told us that during the scoring that night you asked him into a private room to have a private discussion with him about his opinion on the procurement. Do you remember a private conversation with Kristlibas in a private office at DOT?*

A. *I don’t.*

Q. *How about a statement that you told him, you ought to think about your career going forward?*

A. *I wouldn’t say that to anybody under any circumstance.*

* * *

I have no recollection of any of those statements at all. The one I would flatly deny is ever saying to somebody you got to think of your career.

Mortimer acknowledged that as the non-voting chairman of the MET team, he never reviewed the substance of the vendor offers and proposals. As to statements by Carris, Mauer, McManus and Kristlibas that they asked for more time to examine the vendor, Mortimer testified that he had no recollection of such requests. Indeed, it was Mortimer's testimony that the time allotted for the evaluation was more than sufficient:

Q. Do you believe that there was an adequate time frame between receipt of the best and really final offers and the evaluation for the MET team to digest all the material?

A. Yes, because it was an incremental process. It wasn't like you were getting all of it at once. They had digested huge amounts of information over an extended period of time, so . . . what they needed to focus on between the BAFO and the BARFO was finite, in terms of information.

Mortimer denied having been the force behind the self-funding approach and testified that he could not recall what attention was given to an alternative suggested by MFS that would have required the Consortium to invest funds in the project during its early years:

Q. Did you ever say words to the effect that you wanted a no-cost deal from either vendor?

A. I don't believe I ever used the words "I want." I'm not trying to be literal. I'm trying to understand the intent of your question.

Q. How about the intent of the –

A. I believe that . . . at discussions subsequent to a lot of input that was taken that the statement was made that the consortium believed that this – there was an opportunity for it to be a no-cost proposal for the state – for the consortium.

* * *

Q. [What,] if any, consideration did the consortium give to the second approach?

A. I don't have a specific recollection of what consideration was given it.

Q. . . . [O]ther people told us that Approach 2 really was not considered. . . . Can you tell us . . . how did it happen or why did it happen?

A. I don't have a recollection of that happening, and I don't know . . . what consideration it was or wasn't given. I just don't recall.

* * *

Q. Do you remember if Mr. Carris brought Approach Number 2 to your attention . . . ?

A. I don't remember that he did or he didn't. He may have and he may have brought it up amongst a group. I just don't recall that.

Q. . . . Do you remember a discussion within the MET team about Approach Number 2?

A. I don't remember whether there was or there wasn't.

* * *

Q. The MET team has universally told us that it was your decision to reject Approach number 2; do you have any comment on that?

A. I wasn't in a position to reject it.

Q. Why weren't you in a position to reject it?

A. I had no vote.

Q. . . . [T]hey were told not to consider Approach number 2 by you and that's why it wasn't considered?

A. I don't have any recollection of making that statement, nor do I have any reason to believe I would.

As to the contention by every member of the MET that he instructed them to score the vendor proposals twice because the initial margin between them was too narrow, Mortimer testified:

Q. How many scorings were there?

A. How many scorings?

Q. *Yes.*

A. *Oh, one, I would guess. I can't think of another one.*

* * *

A. *As I said, I'm unaware of more than one scoring of the proposals.*

* * *

A. *I only have one recollection – I only have a recollection of one scoring being done.*

* * *

Q. *... Every MET team member has indicated to us that they scored the proposals more than once?*

A. *I don't have a recollection of that.*

Q. *As a matter of fact, they also said they're universal in why they re-scored because a statement was attributed to you that the point differential between the two vendors was not substantial enough, and that's why they were asked to re-score. Do you have a comment on that.*

A. *I find it difficult to believe.*

* * *

... I have no reason to think that I would do that, because it doesn't matter whether it's one point or a thousand points, so I have no reason to understand why that would be said.

Q. *Well, doesn't it matter if you are concerned about a [vendor] protest?*

A. *No. As I said to you before, I operated from the premise that this was going to be protested, because procurements can be protested no matter what it is.*

A Web of Connections

The E-ZPass procurement, in addition to unfolding amid then-NJDOT Commissioner Wilson's private-sector employment discussions, occurred against the backdrop of a broad web of connections involving Wilson; NJDOT; a California-based

fiber-optic consultant, Kingston Cole; and the prevailing vendor, MFS Network Technologies. In summary, the Commission found:

- During Wilson's 30-month stint as head of NJDOT, the agency paid Cole more than \$257,000 for consulting services on a range of matters related to fiber-optic technology, including the electronic-toll procurement.
- Wilson and Cole had a pre-existing professional relationship. During Wilson's earlier tenure as head of San Francisco's Bay Area Rapid Transit (BART) system, Cole was retained as a BART consultant on at least three separate occasions.
- While working for BART, Cole brokered a public/private partnership between the transit system and MFS for installation of a fiber-optic network along BART's right-of-way. This type of partnership later served as a model for the Consortium's E-ZPass procurement as awarded to MFS.
- In seeking NJDOT contracts, Cole submitted a resume that identified Wilson as a reference.
- Wilson sought to have Cole retained as an NJDOT consultant without competitive bidding. Wilson also served on a vendor evaluation committee that recommended the award of a state contract to Cole's firm. Wilson's Chief of Staff, David M. Mortimer, also served on an NJDOT evaluation committee that awarded work to Cole's firm.

- Cole participated in private discussions and negotiations with representatives of the two finalists in the Consortium's E-ZPass procurement, MFS and Lockheed.
- Cole authored a confidential memorandum recommending a strategy to mislead Lockheed on the issue of whether the vendor proposals should include a fiber-optic component.
- In a written evaluation submitted immediately prior to the scoring of Lockheed and MFS proposals, Cole recommended that the Consortium accept the MFS proposal.
- Payments to Cole were made through NJDOT until September 1996, when his firm was abruptly retained as a subcontractor to the Consortium's "special services consultant," Phoenix Planning and Evaluation Ltd. During this period, which coincided with Wilson's purported recusal from matters related to the procurement, Cole's firm received approximately \$20,000 in payments from Phoenix.³²

³² In examining the connections between MFS, Cole and Wilson, the Commission received sworn testimony from numerous individuals and conducted an exhaustive review of documentary materials. Those materials included records obtained from NJDOT, Kingston Cole & Associates, the Turnpike Authority and other governmental agencies, including the New Jersey Executive Commission on Ethical Standards (ECES), which conducted a confidential inquiry into alleged conflicts of interest related to personal employment discussions pursued by Wilson with firms identified as NJDOT vendors while serving in Governor Whitman's Cabinet. The ECES inquiry, which tangentially involved certain aspects relevant to the E-ZPass procurement, was closed in May 1997 based upon a settlement – "Administrative Disposition by Mutual Consent" – in which Wilson agreed to pay a \$1,200 penalty despite no finding by the ECES of an actual impropriety under the express terms of New Jersey's Conflict of Interest statute. Wilson resigned as NJDOT Commissioner effective December 1996 to take employment as Vice President of the firm Daniel, Mann, Johnson & Mendenhall (DMJM) of California, a NJDOT contractor and sister firm of a company, Frederick Harris Inc., that at the time of his employment discussions was slated to be an MFS subcontractor on the E-ZPass project. DMJM and Harris have since merged as one of a number of subsidiaries of AECOM. Wilson went on to become President of another subsidiary, AECOM Enterprises Inc., based in Los Angeles. In May 2004, he returned to the public sector as President and Chief Executive Officer of the Metropolitan Transit Authority of Houston, Texas.

• • •

Wilson was sworn in as NJDOT Commissioner on April 6, 1994. Prior to that, he had served as General Manager of San Francisco’s BART system for approximately five years. In July 1992, BART hired Cole’s firm, Kingston Cole & Associates of San Raphael, Calif., to study how to generate revenue by exploiting the market value of BART’s right-of-way. A year later, BART retained Cole to work on renewal of its pay-telephone concession. In 1994, Cole again was hired by BART, this time as a consultant on a proposed revenue-sharing partnership between the transit system and MFS/NT.³³ The goal of this initiative was the design and installation of a multi-duct, fiber-optic telecommunications system along BART’s right-of-way. Under terms of the deal, MFS retained Pitney Bowes Corp. to arrange a capitalized leasing program to finance some \$40 million worth of hardware and construction. This approach enabled the transit agency – with no money down – to pay off the capital cost of the network over time with revenue from the leasing of the fiber cable to commercial interests.

Cole, an attorney, former California political operative and former Pacific Bell executive, founded his consulting firm as a sole proprietorship in 1987. According to a “Statement of Qualifications” submitted to NJDOT, Kingston Cole & Associates claims a clientele drawn exclusively from the public sector and boasts of “expertise in creating public/private partnerships.” The Statement advised that the firm uses “a dynamic process that recognizes and blends the needs of the private sector to make a profit and the public

³³ MFS/NT, or Metropolitan Fiber Systems/Network Technologies, was formed in 1988, a subsidiary of Peter Kiewit Sons Inc., a telecommunications/construction/energy company in Omaha, Nebraska. In August 1996, MSF was acquired by WorldCom, which spun the firm off to Georgia-based Able Telecommunications 18 months later in July 1998 as New Jersey struggled to get its MFS-operated E-ZPass system up and running. In February 2000, MSF changed its name to Adesta Communications, which was acquired in December 2000 by Bracknell Corp. Adesta declared bankruptcy in September 2001.

sector to generate revenues” and further advised that the firm “advocates the use of flexible Requests for Proposals (RFPs) that include functional bidding requirements and innovative proposal evaluation processes.”

In October 1994, some six months after Wilson became NJDOT Commissioner, he met with Cole in New Jersey. In a follow-up letter to Wilson dated October 11, 1994, Cole wrote, “Thank you for the opportunity last week to discuss the revenue and telecommunications needs of the State of New Jersey. Per our conversation, a proposal is enclosed with terms and conditions necessary to begin working with you on the development of the Department of Transportation’s rights of way.” Cole further wrote that he had already begun to review vendor proposals and “. . . would like to begin negotiations with Cellular One (and other potential cellular firms) as soon as possible. I have enclosed a draft letter of authorization for my firm that will allow me to begin the process. Please execute the letter, subject to any corrections or amendments, and I will contact Cellular One immediately. I have reserved the week of October 24th through the 29th for another trip to New Jersey.”

The Commission’s investigation revealed that this was the beginning of a lucrative consulting relationship from which Cole’s firm netted \$257,800.53 in contract payments from NJDOT between October 1994 and January 1997.

• • •

Records reflect that during that 27-month period, the state issued four separate purchase orders for Cole’s services. The first two were “DPAs,” or Direct Purchase Authorizations, awarded without competitive bidding in the amount of \$5,000 each. The

initial DPA, earmarked “CONSULTANT SERVICES FOR TELECOMMUNICATIONS SERVICES FOR EVALUATION OF ROW,” was paid based upon an invoice submitted by Cole dated October 16, 1994. The second \$5,000 DPA, for “CONSULTANT SERVICES – EVALUATE FIBER OPTIC DEVELOPMENT/ROW (PHASE 2),” was paid to Cole through his invoice dated December 10, 1994. Cole, in sworn testimony, characterized these initial contracts as of the same pattern used to develop his firm’s relationship with BART. Kingston Cole & Associates initially was awarded two sole source contracts with BART prior to winning three contracts that were competitively bid by the transit agency.

Over the next three months, Cole’s involvement with NJDOT grew appreciably. On March 15, 1995, the state issued a third purchase order – in the amount of \$190,000 – again retaining Cole’s firm, in this instance to assist the agency in planning for ways to draw revenue from the leasing of highway rights-of-way to telecommunications companies.³⁴ Although this consulting contract ultimately was awarded through competitive bidding, events and circumstances suggest the process was manipulated.

Records examined by the Commission show that Wilson initially attempted to secure a sole source waiver exempting the contract from competitive bidding. Wilson testified that he did so “because the belief was that we were going to take a quick and inexpensive look to see if there were any opportunities that existed in New Jersey state market to work in sort of a partnership with them.” The New Jersey Treasury Department’s Bureau of Purchase and Property refused to grant the waiver, however, and

³⁴Material submitted to NJDOT by Cole in pursuit of this consulting contract included a list of 11 professional references, all of whom were based in California – with one exception: “Mr. Frank Wilson, Commissioner, New Jersey Department of Transportation.”

the proposal was advertised for bids. Five firms, including Cole's, responded to an RFP designed to solicit proposals for a consultant to assist the NJDOT in a planning effort to maximize revenue from leasing Rights-of-Way spaces to telecommunications firms. The five-person vendor evaluation committee consisted of Wilson himself, Deputy NJDOT Commissioner Sharon L. Landers, NJDOT Director of Procurement John Naiman, Jr., Deputy State Treasurer James Archibald and Supervisor of Purchasing Enrico G. Savelli. The committee unanimously recommended the contract be awarded to Cole's firm, which offered a bid of \$164,000. The low bidder, Goodkind & O'Dea Services at \$119,985, was bypassed by the evaluation committee on technical points. Treasury awarded \$164,000 for a combination of fixed-fee and hourly tasks; ultimately, the total award was boosted to \$190,000 based upon a \$26,000 allowance for optional work under certain hourly tasks. Between March 29, 1995, and September 4, 1996, Cole submitted 14 invoices and was paid a total of \$187,457 on this contract.

Lana Sims, the then-Director of the Division of Purchase and Property, told an investigator for the Executive Commission on Ethical Standards that, "in general, the Purchase Bureau does not like to have a commissioner or a deputy commissioner sit on (vendor) evaluation committees. She (could) not recall any other instances where a commissioner, during Sims' tenure, sat on an evaluation committee." However, Sims told the ECES that Wilson and Landers "were on the committee because they wanted to be ... and there was nothing to prohibit it." Sims also told ECES that "Cole's practice of using Frank Wilson as a reference on Cole's proposal is exceptional and extraordinary." Wilson was also questioned by the SCI as to why he served on the evaluation committee

given the fact that initially he wanted to award the contract to Cole's firm using a no-bid sole source approach. Wilson testified that he saw nothing improper.

• • •

The fourth purchase order, dated May, 23, 1996, was for work by Cole on a request for proposals pursuant to the development of NJDOT and toll authority rights-of-way for telecommunications purposes, including a fiber-optic cable network. Procurement documents examined by the Commission suggest another effort to manipulate the competitive bidding process in Cole's favor.

NJDOT initially sought to award this work via a change order for Cole's existing \$190,000 contract. At the agency's request, Cole submitted a "Change Order and Related Scopes of Work" document, estimating therein that the total dollar value of the change order was not to exceed \$396,000. Agency officials subsequently prepared a requisition, along with a "Request For Waiver of Advertising," for the work in the total amount of \$396,000. Treasury, however, rejected the waiver request and directed that the contract be advertised for bids. A subsequent RFP sought a "marketing and telecommunications consultant to take the lead in the development and preparation of a request for proposal for the use by the Department of Transportation (NJDOT) and various New Jersey toll road authorities to solicit innovative partnership proposals from the telecommunications systems industry which meet NJDOT's and the authorities' functional requirements while developing business arrangements to maximize revenue to NJDOT and the authorities for use of their respective rights of way for a fiber optic background system." Three prospective vendors responded: Kingston Cole & Associates, Edwards & Kelcey and

Universal Field Services, Inc. Following a preliminary evaluation, two of the bidders – Cole and Edwards & Kelcey – were scheduled to make oral presentations on March 14, 1996. However, citing “business reasons,” Edwards & Kelcey abruptly withdrew its bid, and the presentations were cancelled, leaving Cole and Universal in the running. On March 22, 1996, the evaluation committee unanimously recommended that the contract be awarded to Cole, which offered a total bid price of \$223,440. Universal, the low bidder at \$147,800, was bypassed due to low technical marks in scoring by a six-person evaluation committee, which included three senior NJDOT officials – Chief of Staff David M. Mortimer, Assistant Commissioner Stanley G. Rosenblum and Executive Director of Aeronautics, John S. Penn. The other members of the evaluation committee were Associate Deputy State Treasurer John Ekarius, Acting Administrator of OTIS Ron Maxson and State Supervisor of Purchasing Enrico G. Savelli. Mortimer, then the Chief of Staff, was specifically selected by Wilson as an evaluator. When questioned by the Commission if he had ever served as an evaluator of any kind of contract proposal submitted by Kingston Cole, Mortimer initially testified, “I was never an evaluator on any contract in my services to state government.” Under further questioning, however, Mortimer later acknowledged that he did serve as Cole’s evaluator on this occasion.³⁵

³⁵ The Commission reviewed documents that revealed Mortimer also served as an evaluator on at least two other occasions. One involved a \$563,603 contract awarded to O’Brien-Kreitzberg and Associates (OBK) on May 23, 1995, to examine NJDOT’s organizational structure, project-delivery capacity and management system. The second contract, also involving OBK, was awarded on November 22, 1995, totaling more than \$5.8 million to assist NJDOT in the implementation of a project management and control system that evolved from recommendations contained in a report prepared by OKB under the previous contract. In addition to Mortimer, Frank J. Wilson and Sharon L. Landers were members of the vendor evaluation committees for both of these contracts.

Ultimately, Treasury approved an award of \$270,000 to cover a combination of fixed-fee and per-hour tasks, and NJDOT issued a purchase order in the same amount. Cole submitted eight invoices between June 4, 1996, and January 3, 1997, and was paid a total of \$60,427.50.

On January 13, 1997, Cole was directed by NJDOT to suspend work because of a dispute over legislation authorizing NJDOT to proceed with commercial fiber-optic development of highway rights-of-way. In October 1997, the agency took action to cancel the contract because it still lacked statutory authority to proceed and because it had, by then, sufficient internal expertise to eliminate the need for an outside “fiber optics market specialist.”

• • •

Records examined by Commission staff show that beginning at least as early as the first quarter of 1995, Kingston Cole was becoming a key behind-the-scenes player, not just in cell tower right-of-way issues, but in the Whitman administration’s emerging plans for an electronic toll-collection and telecommunications system along the regional interstate highway system. Indeed, in March 1995, Wilson relied on Cole for the preparation of a presentation to the Governor on this issue. Also, a NJDOT memorandum dated September 19, 1995, refers to Cole’s involvement in “developing requirements, soliciting proposals, evaluating responses, and negotiating resultant agreements or licenses for two RFP processes.”³⁶ The memorandum further states, “The timeliness . . . was brought to bear in the past week with the announcement by the Governor that she wants to move ahead with electronic toll collection implementation.

³⁶ See Appendix at p. A-18.

Commissioner Wilson has announced that a consortium of New Jersey transportation agencies will be moving full speed ahead to install electronic toll collection.” According to this memo, one result of Cole’s work was a recommendation to Wilson that two RFPs be issued on parallel tracks. The first would package all rights-of-way in various transportation agencies’ domains and offer the full array through a bidding process to qualified vendors to construct, operate, maintain and market a fiber-optic system. The second RFP would solicit proposals to construct, maintain and operate an electronic toll collection system along the rights-of-way. The recommendation for this pair of RFPs called for them to be “functional in nature, inviting creative proposals to develop the business relationship between public and private sectors.” The memorandum further stated, “Based upon the feasibility research from the Kingston Cole & Associates contract, Commissioner Wilson has recommended that a public/private approach is the method to use, rather than just building everything entirely with state or federal funds.” Wilson testified that Cole’s recommendation that the ETC procurement proceed as a public/private partnership was not accepted, but he acknowledged that the RFP did allow for vendors to submit options to help finance all, or parts of, the system.

Invoices submitted by Cole show that throughout 1995 and into 1996, he met on numerous occasions with Wilson and other senior NJDOT officials, and with representatives of various vendors, including MFS and Lockheed. By mid-1996, with the electronic toll procurement well under way, Cole characterized himself in a June 6, 1996, memo to Sharon L. Landers and Stanley G. Rosenblum as “the Commissioner’s liaison to the Authorities for the ETC project on two basic different (sic) levels: As the person who can assist them in determining the value . . . for fiber optic components of the various

[vendor] proposals now due on July 12th,” [and] “As a facilitator to mitigate and assuage any potential problems, tensions, etc., that may develop among the various Authorities and the NJDOT during negotiations.”

A review of billing invoices submitted by Cole to the NJDOT for payment revealed he began formal work on the electronic-toll project as of May 29, 1996. From that date through June 12, 1996, he billed the agency for 6.75 hours of work. On June 18, 1996, however, Cole sent a letter to Thomas J. Calu, Project Manager of the NJDOT, notifying the agency of a professional relationship between himself and the engineering firm of Fredrick R. Harris, Inc. Cole indicated that Harris intended to be a subcontractor on the MFS electronic-toll vendor team. Subsequent to submission of this letter, all billing by Cole to NJDOT on ETC-related work ceased. Around this same period, Cole testified, Wilson informed him that he, Cole, would no longer be involved with the procurement but gave no reason other than stating, “I want you out of there.” Cole’s invoices, however, show that he resumed work related to the electronic-toll procurement on August 19, 1996, and billed NJDOT for 41.5 hours through August 31 of that year. Less than one week later, on September 5, 1996, Cole was instructed via NJDOT to submit his invoices under “other arrangements with the Turnpike.” The “other arrangements” were that Cole abruptly became a subcontractor to the Turnpike’s special services consultant, Phoenix Evaluation and Planning Ltd. Margaret Melhem, that firm’s Vice President, testified that she could not expressly recall how Cole came to be paid through Phoenix’s contract with the Turnpike Authority, but she acknowledged that the Turnpike asked Phoenix to “run him through our contract.” Melham testified:

Q. Did you in any way vet Mr. Cole?

A. *No.*

Q. *Did you know his quality of work?*

A. *No.*

Q. *So, essentially, you were asked by the client to put someone on under the contract and you, through your company – or your company said yes.*

A. *(Witness nods.)*

Q. *Without trying to be ridiculous, he could have been a guy off the street? You wouldn't have known, correct?*

A. *I do not know – it was not my – in the line of my responsibilities, so I really don't know what, if any, discussions were had about Mr. Cole.*

• • •

Witnesses told the Commission that Cole was present at and participated in meetings between Consortium officials and vendor representatives leading to the preparation and submission of best and final offers for the electronic-toll contract. He was identified to the other participants as the “fiber expert.” Kristlibas testified that Cole was introduced at MET team meetings by Mortimer on behalf of Wilson as the person who would “lead us through the maze of fiber talk.”

In a document dated September 3, 1996, and prepared by Cole as a “Memorandum for File” re: “Initial Negotiating Positions for Fiber Optic Network/ETC,” he stated, “MFS has clearly presented a better proposal in this area.” Cole further wrote, “The Lockheed offer on the table is clearly unacceptable. In both sets of interviews, their personnel were told informally that the offer was not enough, i.e. just putting fiber on the Turnpike and ignoring the needs and revenue potential of the other Authorities is unacceptable.” Cole stated that his “recommended strategy” at this stage in the ETC

procurement would be to “see if” Lockheed and its partner, Symphony Management, have

*gotten the message to seriously amend their proposal. If not, we should consistently tell them that winning the ETC portion of the RFP does not include any type of fiber optic system. (Emphasis added) The Consortium, or its various members, reserve the right to seek an alternative approach to building a State-wide system exclusive of the ETC project.*³⁷

Carris testified that he became angry and upset upon reading Cole’s recommendation. Carris stated that, “he (Cole) was drawing conclusions on things that none of us had gotten to that point yet, and he had a lot of other information he was putting into this to draw his own conclusions for his own reasons that did not seem to be in sync with where we were going with the process and investigation of getting information from the vendors.”

Kristlibas recalled reviewing the memorandum at the time and discussing what he felt were its potential implications with Carris:

Q. *And what opinion did you give Mr. Carris?*

A. *Something along the lines of, it looks like this is stacking the deck.*

Q. *In what way? What do you mean, “Stacking the deck?”*

A. *It was clear to me, before September 3rd, that Lockheed Martin was not going to up the ante on the fiber. That was made pretty clear in their presentations to the evaluation team, and I saw no opening in their position to suddenly begin, you know, . . . putting more chips on the table.*

I got a message from the position that they were taking that they were not going to engage in . . . the type of increase in projected revenues from fiber. They stopped beyond a point and they refused to go any higher, and I certainly had the impression that MFS every day saw new and better opportunities for increasing fiber revenue and, so, their presentations just continued to show higher and higher net revenues . . .

³⁷ See Appendix at pp. A-24 through A-31.

There were so many documents that went back and forth that Kingston Cole, I think, was quite aware that Lockheed simply didn't have the fiber strength, background, infrastructure that MFS did, and, therefore, it couldn't possibly compete in a fiber arena as opposed the purely systems integration and back office services for electronic tolls.

* * *

My intuition told me that was the case, and that was based on the language that he used, which was relatively derogatory, relative to Lockheed not getting the message, they really are not into fiber, really don't have the background, their sub[contractor] is really not a player in the game.

I fairly quickly formed the opinion that, not only was Lockheed Martin not going to take a different position substantially than one they already had on the issue of fiber, but that Kingston Cole's opinion of Lockheed Martin, especially on the fiber side, was not going to change.

Cole testified that the tone and tenor of his September 3, 1996 memorandum was to give his client “some hard edge, push the edge of the envelope, push back at these guys, see what best deal we can get.” Cole stated that the strategy was to “be tough with them.”

On October 9, 1996 – the day before the final MET team scoring of the vendor proposals – Cole submitted a memorandum to Carris analyzing the fiber-optic elements of the proposals submitted by both MFS and Lockheed. Cole concluded that the Lockheed offer was “fundamentally flawed” while the proposal from MFS was “fundamentally sound.” He stated, “We recommend that the Consortium seriously consider this [MFS] option, despite our reservations concerning construction and maintenance costs. Any final terms and conditions should be fully scrutinized and negotiated to the Consortium's maximum advantage.” This memorandum was submitted to Carris the day before the MET team convened to undertake a final scoring of the vendor proposals.

The Lockheed Protest

On October 21, 1996, 11 days after MFS prevailed in the evaluation team's scoring of vendor proposals, Lockheed filed an administrative protest. The thrust of the firm's complaint was that the Consortium unfairly and improperly altered the RFP immediately prior to the due date for vendor proposals and misled Lockheed about revenue options during the phase in which best and final offers were formulated. The firm also charged that MFS was privy to inside information via Kingston Cole that fiber would be wrapped into the E-ZPass project and that Frank J. Wilson had participated in job-search discussions with companies that were members of both vendor teams. On October 25, 1996, the presiding officer in the protest – Acting Turnpike Authority Executive Director Edward Gross – served notice that a hearing would commence two-and-a-half days later. He rejected Lockheed's request seeking a one-week adjournment to "conduct discovery and prepare its presentation of the protest." In a written opinion issued November 15, 1996, after a six-day evidentiary hearing, Gross denied Lockheed's protest and determined that the procurement process should proceed.

On April 1, 1997, a week after the Turnpike Authority's governing board voted to award the contract to MFS, Lockheed filed a second protest. Gross recused himself, and the job of hearing officer fell to Diane Scaccetti, then the Turnpike's Deputy Executive Director. A limited hearing was held and in an opinion issued May 2, 1997, Scaccetti denied Lockheed's request to cancel the contract and re-issue the RFP. The findings and results of both proceedings were upheld on June 12, 1997, by the Appellate Division of State Superior Court.³⁸

³⁸ Nachtigall v. N.J. Turnpike Authority, 302 N.J. Super. 123 (App.Div. 1997)

• • •

The Commission is constrained to question the legitimacy of the overall process utilized in the Lockheed protest because neither the hearing officers nor the court were aware at the time of their deliberations of the unusual circumstances under which the vendor proposals were evaluated and scored by the MET team; the full extent of the relationship between Frank J. Wilson, Kingston Cole, and MFS; the full scope of Wilson's contacts with procurement officials after his purported recusal; and the existence of Cole's memorandum in which he posited a strategy to mislead Lockheed at a critical juncture.

Sworn testimony by witnesses in this investigation also raises questions about whether the administrative proceedings were properly and thoroughly conducted. For example, a number of individuals privy to the vendor selection process did not testify in either of the protest proceedings. The absentees included the entire MET proposal evaluation team with the exception of Paul Carris, who did testify.

Further, Scaccetti told the Commission that she had little familiarity with key aspects of the E-ZPass procurement and no experience as a hearing officer in administrative proceedings. She testified that she reluctantly agreed to preside in the Lockheed matter at the behest of Gross and Turnpike Authority Chairman Frank X. McDermott. Scaccetti also testified that she received inadequate legal counsel and found herself relying on attorneys for the involved parties:

Q. *Did you have difficulty with that assignment?*

A. *Yes, I did.*

Q. *What was that?*

A. *. . . I didn't have, what I considered, to be adequate [legal] counsel. I'm not an attorney, and I knew that it would be . . . unfriendly. This was the second time that Lockheed was protesting. They had hired attorneys out of New York as well as attorneys out of Trenton. And, again, . . . Mr. Gross did not provide the counsel that I had asked for; so, yes, I was uncomfortable with the assignment.*

Q. *Did you voice these concerns to Mr. Gross?*

A. *Yes, I did.*

Q. *What was his response?*

A. *You get what you get.*

Q. *You get what you get?*

A. *That's it, I got in-house counsel from the Turnpike, one of our staff attorneys who did not have a lot of experience or any experience in the conduct of a protest hearing. I had no experience in the conduct of a protest hearing, so we were walking into what I considered to be a dark closet.*

One result, Scaccetti testified, was that she lost control of the proceedings:

I had a hearing that was run like a zoo, because there was a lot of – obviously a lot of antics going on. They [participants] knew this was my first hearing. I had a lot of misbehaving in the room where I couldn't hear what was being presented to me. It was an experience I would prefer never to repeat.

Scaccetti acknowledged that her lack of experience and knowledge of the procurement may have resulted in some issues being overlooked, such as information related to the peculiar way in which the MET scoring had been conducted:

. . . [T]his was something that had gone on for 18 or 19 or 20 months by that point in time with RFIs and RFPs and proposals and BAFOs and second BAFOs and documents just too voluminous for me ever to go through in what was, for me, a very short period of time. . . . I had 30 days . . . to get their briefs, look at what they presented, conduct the hearing, analyze the results from the hearing, and issue a report . . . but in hindsight, it may very well have been relevant. At that moment

of time my lack of overall knowledge of that project probably wasn't to my benefit in terms of knowing what to ask for to make those evaluations . . . [G]oing in hindsight, it [the full record of the MET proceedings] may have been a very important thing to ask for.

Obstruction/Avoidance of Financial Due Diligence

When the E-ZPass contract was signed and formally executed on March 10, 1998, it was advertised as a zero-cost express lane to the high-tech future of toll collection. Start-up costs were to be covered by substantial borrowing via a \$300 million bond issue under the imprimatur of the New Jersey Economic Development Authority. But the bonds and the interest on them would be repaid with revenue drawn primarily from fines against E-ZPass violators and the leasing of fiber-optic telecommunications cable installed along the toll-road rights-of-way. Indeed, it was announced that the project not only would break even but would actually make money: projections showed more than \$608 million in revenue over the eight-year contract period against some \$573 million in estimated overall costs, for a net profit of \$34.9 million. This unique financing structure was the centerpiece of an effusive outpouring of rhetoric for public consumption that accompanied the project's official launch. "It is a unique public-private partnership that advances our goal of a seamless, regional electronic toll system that will unify the northeast under one integrated system," Governor Whitman declared. "It also means that Garden State motorists will soon be able to reap the benefits of advanced technology at no cost to the taxpayers." In the same press release, Turnpike Executive Director Edward Gross characterized the financing plan as "21st century thinking for 21st century technology."

Amid the hubbub, however, a dark financial cloud already loomed.

In the months preceding the launch, unpublicized internal recalculations of the cost and revenue projections, primarily with regard to violation-fee revenues, along with

revisions of the proposed contract term, combined to reveal a decline of nearly 80 percent in the estimated profit – falling from \$159 million at the time the Turnpike Authority’s governing board had awarded the contract to \$34.9 million when the contract was executed, a drop of more than \$124 million.³⁹ As events soon showed, that trend would continue unabated. By early 2002, not only had the malfunctioning E-ZPass system failed to net a single dollar, it produced a deficit approaching \$500 million – missing its launch-date profit target by more than 1,400 percent.

The Commission examined a wide range of events and circumstances surrounding the E-ZPass procurement and found that the financial collapse should have come as a surprise to no one, least of all those in charge of orchestrating it. Normal and reasonable due diligence was obstructed or avoided altogether, known risks were minimized, warnings of potential fiscal peril were set aside and key personnel were ignored.

No Independent Financial Evaluation

The Commission found that prior to the award of the E-ZPass contract, no comprehensive, independent study was undertaken by or on behalf of the Consortium to test the validity of key assumptions upon which the MFS revenue projections were based. The failure to exercise appropriate public-sector due diligence in this matter occurred despite deep skepticism that permeated the ranks of Consortium personnel, including those at a senior level. Executive Directors of two of the five participating toll authorities, members of the vendor evaluation (MET) team, finance department staffers in various agencies – including the Turnpike Authority itself, the lead entity – all testified

³⁹ The \$159 million includes fiber-optic revenue projections over 20 years. The \$34.9 million contains a 10-year revenue projection for fiber.

under oath that, prior to the contract award, they expressed serious reservations, to those in charge, over whether E-ZPass could ever pay for itself or generate a profit. Indeed, this tide of doubt continued throughout the months leading up to the project's launch in March 1998.

Much of this internal, unpublicized skepticism centered on the self-funding strategy's primary underpinning – a plan to raise hundreds of millions of dollars through fines levied against motorists caught cheating. The system was to work like this: Vehicles passing through the new toll gates without proper E-ZPass registration would be identified by a photographic image of the license plate. The plate numbers then would be processed through a vast motor-vehicle database, and violators each would be assessed a \$25 “administrative fee.” Total proceeds from this component alone were projected in the range of \$400 million – fully two-thirds of the total E-ZPass gross revenue stream that was anticipated over the term of the contract.

But reliance on scofflaws as the main funding source for an initiative on the scale of a regional electronic-toll system had never been attempted in the United States, and some in the Consortium questioned whether the violation system could ever be effectively enforced. Others worried that as more and more motorists signed up for E-ZPass amid a concerted promotional effort planned by the Consortium, the pool of violation revenue would diminish more rapidly than anticipated. Further, at the time of the contract award to MFS in March 1997, legislation to authorize the monitoring, photographing and processing of license numbers had not been enacted.

Among those who vocalized doubts about the violation-funding approach was James A. Crawford, Executive Director of the South Jersey Transportation Authority.

Crawford told the Commission that he and his colleagues at the SJTA harbored serious reservations throughout the procurement and that he personally conveyed the agency's concerns on numerous occasions to Consortium officials, including Mortimer and Gross. Crawford said that even after summary presentations were made by Mortimer that the funding structure under the MFS proposal would yield a substantial surplus, he, Crawford, advised his agency's governing board that a deficit was just as probable. As a result, the SJTA determined at an early stage that it would be prudent to establish a reserve account that could be drawn upon to cover the agency's share in anticipation of a revenue shortfall.⁴⁰

Kathleen M. Sharman, the SJTA's Director of Finance, told the Commission, "I was very skeptical that the projected revenue would be forthcoming." Speaking of her interaction on this issue with personnel at other member agencies of the Consortium during this period, Sharman testified, "We all thought it was a little bit crazy."

Separately, top personnel at the New Jersey Highway Authority, operator of the Garden State Parkway, developed similar concerns. Heavy reliance on violators for funding was a major issue for the Highway Authority because the Parkway was to account for approximately \$244 million in violation revenue over eight years – fully three-quarters of the total projected for the entire Consortium. Lewis B. Thurston III, the Highway Authority's Executive Director, testified:

I was always skeptical. I tried to be optimistic as a member of the Consortium team and the administration team, but I was always skeptical that . . . sufficient revenue could be realized.

* * *

⁴⁰ Despite such concerns, the SJTA continued to participate in the Consortium effort because it still offered the agency an opportunity to take advantage of a centralized back-office administrative operation for customer service and toll violations processing.

This was somewhat uncharted waters. No agency, no transportation agency had done something similar. So it was difficult for anybody to point to experience, either to say that it was going to work or not going to work and revenue would be sufficiently realized. So we were all somewhat speculating.

Thurston and other Highway Authority officials told the Commission that they raised doubts verbally in various Consortium meetings throughout the summer and fall of 1996. By December, their core concerns crystallized in the form of a written memorandum produced by Budget Officer Thomas F. Butler and signed by him and two other Authority officials, Charles D. McManus and Stanley Ciszewski. The memorandum, dated December 27, 1996, suggested that based upon the Highway Authority's own calculations, no more than approximately \$20 million – less than one-tenth of the vendor's projection – would be derived from Parkway E-ZPass violations, even if the system functioned optimally. The analysis was based upon data showing that most Parkway toll violations were committed by a relatively small core of regular transgressors. Highway Authority officials concluded that in all likelihood, this pool – and the revenue generated by it – would only decline over time. They recommended the Consortium retain a major accounting firm to conduct an independent analysis. Thurston forwarded the document to Mortimer and Gross under a cover letter, stamped "CONFIDENTIAL," dated January 8, 1997:

Throughout the procurement process our representatives have been concerned and have expressed these concerns about public acceptance of the massive enforcement effort necessary to attempt to deal with all violators and the reliability of revenue to be derived from the administrative fee associated with the violations. We continue to have these concerns.

Because of the tightness and intensity of the procurement schedule, it was not possible to do as much analysis of the revenue potential to

verify the vendors (sic) assumptions, as we might have liked. Because of the recent delays in the process, our staff has had an opportunity to do some further evaluation relative to this concern.

Enclosed is a copy of an evaluation report which our three principal project representatives have submitted to me which includes some analytical data and a recommendation to have an independent firm do further analysis. [Highway Authority] Chairman [Joseph] Buckelew and I have reviewed this and feel we should share this information with you at this time so that you, as the lead persons and agencies in the consortium, may have the benefit of it. We believe it would be beneficial to have further analysis done and I will be glad to discuss with you the appropriate manner in which that should be done both for the consortium and for the Highway Authority.

I look forward to discussing this matter with you after you have had a chance to review the enclosed information.⁴¹

Although the issues raised in this document went to the very heart of the proposed self-funding approach, Gross and Mortimer both swore to the Commission that they could not recall seeing it.

Subsequent to this communication, Butler and McManus told the Commission they were summoned to a meeting at Turnpike Authority headquarters to discuss the Highway Authority's concerns. In sworn testimony, both expressed vivid recollection of this session and identified the other attendees as Paul A. Carris of the Turnpike, the ETC Program Manager; Francis K. O'Connor of the Turnpike, at the time ETC administrative manager; and Carol Ann Hollows, an aide to Mortimer at NJDOT. Carris, O'Connor and Hollows all testified that they could not recall this meeting. No representatives from the other Consortium agencies were invited or formally notified of the Highway Authority's memorandum.

⁴¹ See Appendix at pp. A-32 through A-41 to review confidential Highway Authority memoranda and the response of Turnpike Authority consultant Phoenix Planning and Evaluation Ltd..

On January 17, 1997, a firm that had been hired by the Turnpike Authority to serve as a “special services consultant” during the procurement – Phoenix Planning and Evaluation Ltd. of Maryland – submitted a memorandum critiquing the Highway Authority’s evaluation. In this same document, however, Phoenix conceded that “violation rates [projected for] post ETC implementation are difficult to predict.” In light of that, the firm seconded the Highway Authority’s suggestion that an independent review be conducted.

The Commission found no evidence to show that any such review, either in response to concerns expressed by the Highway Authority or by Phoenix, was carried out prior to the award and execution of the E-ZPass contract.

• • •

A number of witnesses in this investigation referred to Phoenix as the Consortium’s “financial adviser.” But Margaret Melhem, who served at the time as the firm’s principal representative to the Consortium, told the Commission that that term was inaccurate and inappropriate.

Melhem testified that Phoenix had no prior experience in electronic-toll collection, had never worked in conjunction with toll authorities and performed no evaluations in fundamental areas related to the E-ZPass project’s financial assumptions and underpinnings. At the time, according to Melhem, the firm employed a staff of approximately 12 to 16 individuals serving government clients primarily in the area of “electronic benefit transfer” systems related to the administration of food stamp and cash-welfare benefit programs. Melhem testified that Phoenix was not hired by the

Consortium as an instrument of due diligence and was not asked to evaluate the feasibility of the self-funding approach. Further, she testified that the firm did not assess the reliability of the violation-revenue projections. Moreover, because Phoenix lacked expertise in fiber-optics, it deferred to another consultant – Kingston Cole & Associates – when it came to the issue of estimating revenue from the lease of fiber-optic cable along the toll road rights-of-way. Melhem stated that Phoenix engaged in no independent data-gathering, and did not evaluate the cost and revenue projections submitted by either Lockheed or MFS.

Phoenix was selected through competitive bidding by the New Jersey Turnpike Authority under terms of a \$150,000 contract in April 1996.⁴² Other bidders included the major accounting firms of Deloitte & Touche, which withdrew its proposal prior to evaluation, and Coopers & Lybrand, L.L.P., which was disqualified based upon a determination that it had an existing auditing relationship with one of the pre-qualified vendors vying for the overall electronic toll collection contract. Prior to its disqualification, Coopers had finished a close second – 135 points behind Phoenix, based upon a possible total of 4,000 – in the evaluation scoring. Documents reviewed by the Commission show that officials of the Highway Authority expressed a preference for Coopers based on the view that the firm possessed greater experience in matters related to toll collection.

Melhem described Phoenix’s role as one that evolved over time, starting with an explicit focus on two areas: development of formulas for allocating costs among the

⁴² Phoenix was hired as the Consortium’s “special services consultant” based upon a \$150,000 contract executed on August 7, 1996. Through the fall of that year, Phoenix was paid a total of \$225,750, which included fees for additional services rendered.

Consortium members, and assessing the functionality of the ETC program’s back-office, or “clearing-house,” operations (i.e. the Customer Service Center and Violations Processing Center.) Melhem testified that upon reviewing the E-ZPass Request for Proposals (RFP), Phoenix found it unduly vague in specifying the operational requirements of these clearing-house functions. The firm requested a clarifying amendment. Melhem testified that the request was denied by Consortium officials on grounds that “there was a timeline.” Melhem addressed a number of key issues in her sworn testimony:

Q. Was Phoenix ever asked to evaluate the feasibility of the self-financing approach?

A. No.

* * *

Q. How about, were you ever asked by the consortium to evaluate the underlying premise that administrative fines assessed to toll violators could be or would be sufficient as a funding mechanism for the entire project?

A. No.

* * *

Q. Would Phoenix be considered the financial consultant to the Consortium during the procurement? I should say, financial advisor to the Consortium.

A. No, No. We were primarily looking at the clearinghouse operations and then helping them run some models based on the data that we were given, but, I mean, again, toll roads are not our area of experience, so we, you know, never represented ourselves as such.

As the procurement entered the best-and-final-offer stage in October 1996, Melhem testified, Phoenix undertook some limited modeling work to examine the potential effects of different E-ZPass violation rates and market penetration rates.

However, she stated that the firm relied solely on data provided by the Consortium entities and the bidders, and that Phoenix was never asked to assess the validity of the operational assumptions upon which these numbers were based.

Beyond Phoenix, in the months prior to the contract's execution in March 1998, the Turnpike Authority retained Public Financial Management Inc. (PFM) as a general financial advisor. However, at no time was PFM asked to provide any advice to the Consortium relative to the actual E-ZPass procurement. In a July 17, 1997, letter to Gross, the firm stated:

While PFM currently serves, and has served in the past, as the general Financial Advisor to the New Jersey Turnpike Authority..., PFM has not been asked to provide advice to the Authority or any Consortium member for the ETC project up to this point. PFM has not been involved in structuring the Financing Plan. All information received by PFM regarding the Project has been obtained over the past eight days.

The scope of PFM's assignment has been limited to the tasks outlined above [i.e. the role of Newcourt Capital as financial advisor to MFS and the appropriateness of lender rates and fees]. Furthermore, given the accelerated deadline of nine days for PFM's review, we could not provide you with comfort, if asked, that a thorough evaluation of the financing structure of the Financing Plan could be completed. Any conveyance of PFM's opinions contained herein by the Authority to the consortium represents tacit agreement by the Authority, acting as the lead agency to the Consortium, as to the limited nature of PFM's scope of work.

• • •

During the summer and fall of 1997 – after the contract was awarded but before its formal execution – then-NJDOT Commissioner John J. Haley raised questions and concerns related to various aspects of the deal, including the revenue projections.⁴³ At

⁴³ Haley succeeded Wilson as NJDOT Commissioner in early 1997.

the time, personnel at the Port Authority were questioning the projected rate of E-ZPass violators, contending that the Consortium estimates were overly optimistic. In late September, Haley empaneled a special “Working Group” to review key aspects of the procurement to that point. However, not all agencies were asked to participate; indeed, three of the Consortium’s five entities were left out, including the Consortium’s lead entity – the Turnpike Authority – and the two agencies that had consistently raised questions about the projected revenue streams, the New Jersey Highway Authority and the South Jersey Transportation Authority. Further, the work of this group was curtailed after about two weeks, sufficient time to produce a cursory report but not to conduct an in-depth review with independent data testing the revenue assumptions.⁴⁴

Notably, Gross testified that he only became aware of the existence of Haley’s task force after the fact. Gross stated that Haley put the group together “behind my back.” Gross also testified that had he been aware of the plan, “I would have been opposed to it” on the grounds that it contributed to a delay in the completion of the procurement.

• • •

Another opportunity for public-sector due diligence presented itself during the weeks immediately preceding the formal execution of the contract when the New Jersey

⁴⁴ Members of the “Working Group” were Carol Ann Hollows of NJDOT; Steven Peyser of Public Resource Advisory Group Inc.; Karen A. Antion and Charles F. McClaffery of the Port Authority of New York and New Jersey; Howard R. Giddens, Jr. of DELDOT; and James Poole of the N.J. Department of Treasury.

Economic Development Authority (EDA) was asked to play a central role in raising start-up capital for the project.

In early February 1998, EDA Chief Executive Officer Caren Franzini received an unsolicited telephone call from the State Office of the Treasurer. On the other end of the line was James Poole, Director of the Division of Public Finance, who informed Franzini that an application for financing soon would be submitted to EDA in connection with the E-ZPass procurement. Franzini testified that the caller conveyed a clear sense of urgency and made it plain to her that “they wanted to get it done right away.” EDA records show that an application for the issuance of \$300 million in taxable EDA bonds was submitted by the Consortium’s chosen vendor, MFS Network Technologies, on February 23, 1998. The application received both preliminary and final approval 16 days later on March 10, 1998 – the same day of the contract’s formal execution. Between the date of its receipt and its unanimous approval by the EDA’s governing board, the MFS application – in accordance with the agency’s statutory obligations and its standard operating procedure in such matters – was subjected to minimal scrutiny.

According to Franzini, the proposed financing package was already structured when it reached EDA for consideration, and the agency played no role in designing it, evaluating its underlying assumptions or lining up prospective investors. The sole purpose of EDA’s involvement was to act as a “conduit” for the issuance of bonds on behalf of the Consortium, given the fact that no individual member of that regional group possessed unilateral legal standing to borrow for the whole. Although it is not unusual for EDA to serve as a lending conduit, this instance was unique in at least two respects, according to Franzini. It was the agency’s first involvement in issuing bonds for

multiple toll authorities grouped as a single unit, and the relative speed with which this particular financing was handled was “the exception rather than the norm” for typical EDA projects.

Franzini testified that the EDA’s overriding concern with the MFS application was two-fold: that buyers of the bonds be protected against potential loss and that EDA itself be indemnified. She said EDA officials were satisfied that an appropriate level of investor security would be provided by the financing proposal’s so-called “True Up” Agreement, which obligated the Consortium members to pay off the bonds with attendant interest if insufficient revenue were generated during E-ZPass operations. As to the issue of safeguarding EDA’s position, Franzini testified that she was assured by Gross that an indemnity clause would be written into the final bond documents prior to closing. EDA also secured a legal opinion from the Office of the New Jersey Attorney General to the effect that EDA’s participation in the proposed financing fell within the confines of its operating statute. Franzini told the Commission that beyond this level of analysis, the financing application generated little discussion among EDA staff and essentially received *pro forma* approval from the agency’s governing board based upon a four-page summary memorandum prepared at her behest by Lawrence Cier, the EDA’s Director of Investment Banking.

Franzini testified that EDA’s review did not include an evaluation of the financing proposal’s underlying revenue and cost assumptions. “We relied on the toll roads and their expertise,” she stated. Absent the True Up Agreement, she noted, her agency most likely would have carried out an analysis of “the primary sources of revenue.” But for EDA’s purposes, “it didn’t matter.” With the True Up, “we were relying on the strength

of the toll roads.” She stated that it was not unusual for proposed financing packages to arrive at EDA fully structured, thus requiring minimal staff attention before presentation to the agency’s governing board. In such instances, EDA often relies on outside entities, such as the applicant’s financial adviser, to have already conducted an expert analysis and evaluation. In the case of E-ZPass, the agency relied upon representation made by the Consortium as well as paperwork submitted by Newcourt Capital Inc., the financial adviser to MFS. When the application was presented to the EDA Board for final consideration on March 10, 1998 – the same date as the formal execution of the E-ZPass contract by the Consortium – Franzini said there was virtually no discussion before it received unanimous approval. With regard to the selling of the bonds, Franzini stated this was the sole responsibility of Newcourt Capital, the placement agent for the bond issue. The E-ZPass bonds required the firm to locate particularly sophisticated investors due to the complexity of the financing arrangement and the fact that it involved multiple public entities.

The bond counsel was selected by MFS from a list provided by EDA and received a lump-sum payment for services rendered of \$100,000 at the Consortium’s expense. She testified that the E-Z-Pass vendor, MFS Network Technologies, did that in connection with its financing application for \$300 million in taxable bonds:

Q. Who would be the person who would have selected the bond counsel?

A. MFS.

Q. . . . Just [what is] the process of how normally bond counsel would have been assigned to this issue?

A. The borrower would select bond counsel off of our approved list. Bond counsel would submit a fee, and that would be approved by the Attorney General’s Office.

Q. So in this case, MFS looks at the approved list of EDA bond counsel, and in this case, they would have selected this law firm of Whitman [no relation], Breed, Abbott & Morgan, correct?

A. Correct.

• • •

During her sworn appearance before the Commission, Franzini was questioned about documents received by the Consortium from MFS and the firm's E-ZPass financial adviser, Newcourt Capital. The MFS document was an October 10, 1996 letter to Paul Carris wherein MFS opined that the self-funding approach might not be attainable. The Newcourt Capital document was a July 24, 1997 letter to Gross in which the firm characterized the potential revenue stream as speculative. Franzini testified:

Q. Were you ever aware that . . . in written correspondence to Ed Gross, [Newcourt Capital] informed Ed Gross that they believed that the revenue stream would be speculative?

A. I have no knowledge of any letters to Ed Gross, Newcourt Capital.

Q. Would that be something that you or EDA would want to consider at the time where the financial advisor or a principal involved in the issuance of the bonds themselves is saying that the revenue stream is speculative?

A. That's a very important piece of information that we would have – I should have known and we should have divulged to our board members if that was being represented.

Risks Disguised

During the summer and early fall of 1996, representatives of Chase Manhattan Bank, a primary MFS partner in the procurement, staged a series of presentations to instruct Consortium officials about the intricacies of violation-revenue projections. These projections were based upon the effect of three factors working in concert with one

another: the market penetration rate, or the overall level of E-ZPass usage by motorists; the violation rate, or the percentage of all users who were violators; and the violation collection rate, or the percentage of total violations resulting in actual fines paid. To illustrate the full range of possible outcomes from interaction between this trio of changeable criteria, Chase constructed a matrix that came to be known internally as “the magic cube.”

Witnesses to these presentations, including Carris, Mortimer and members of the MET evaluation group, told the Commission in sworn testimony that Chase officials made it plain that the components of the magic cube were extremely volatile and that even relatively minor changes in one or all of the factors could have a drastic impact on the bottom-line revenue picture. Donald E. Mauer, then-Chief Engineer of the South Jersey Transportation Authority and a member of the MET, testified:

Q. . . . Is it fair to assume that Chase Manhattan Bank during those presentations did not hide the fact that slight changes in various parameters could have drastic effects in the revenue projections?

A. They were very up front. [T]he presentation was very tedious, because . . . it was formula driven. A lot of formulas had to be vetted against different parts of the industry. . . It was a long presentation, but the thing I remember most about it is there [were] 900 and some points of entry into this cube, and anyplace you go in, you could come out in a drastically different place and the swing was hundreds of millions of dollars.

* * *

They [Chase] wanted to present it to anybody who was willing to listen. They really believed in what the cube did, [but] they really wanted everybody to understand how many multiple possibilities there were.

More than half of the magic cube configurations showed that at the end of the originally proposed eight-year contract, the Consortium would either just break even or sustain a deficit of increasing size depending upon the actual magnitude and mixture of the three criteria. In instances where administrative fines could be collected against 50 percent of all violations, the Consortium would stand to make a profit only if the actual violation rate remained above 1 percent, according to the Chase analysis.

Similar calculations were conducted by Lockheed, whose analysis showed an even more limited array of profit-making options under the violation-revenue approach. Among other things, Lockheed told the Consortium that the violation collection rate would need to exceed 70 percent to make this approach effective as a generator of substantial revenue.

According to various witnesses in this investigation, the data utilized by each vendor in making these calculations were provided by the Consortium. Louis A. Fuertes, the lead Chase official at the time, told the Commission that Consortium officials, during the negotiating process, singled out one set of criteria to be used by the vendors as the basis for preparing offers. The numbers specified by the Consortium were:

- 35 percent penetration rate
- .93 percent weighted violation rate
- 50 percent collection rate

As a result, the violation revenue projections submitted by both Lockheed and MFS at the time were similar in scope and magnitude.

During meetings and in the exchange of correspondence with representatives of MFS and Lockheed in late September and early October 1996, the Consortium received

multiple warnings with respect to the volatility of the revenue projections.⁴⁵ Indeed, during the course of preparing final offers in October 1996, MFS submitted violation-revenue projections for the overall project that fluctuated between an estimated surplus of \$8.5 million and a deficit of approximately \$12 million at the end of the contract.

The inherent uncertainty of this violation-revenue picture, however, was never adequately conveyed to those formally charged with the responsibility of voting to award the contract, that is, the Turnpike Authority's Board of Commissioners. According to Frank X. McDermott, the then-Chairman of the Turnpike Authority's Board, and Commissioner Joseph P. Miele, who served on the Consortium's Executive Council, the Turnpike's Board was never apprised of the full scope of the risk and volatility associated with the revenue projections, particularly as illustrated by analytical tools like Chase's magic cube. Indeed, there is no evidence to show that the Turnpike Board was ever presented with data suggesting that the two revenue streams upon which Consortium would be most reliant – fees from E-ZPass violators and the leasing of fiber-optic cable – could easily drain away into a deficit depending on the variables.

The Board's vote to award the contract to MFS was based primarily upon a summary PowerPoint presentation by Mortimer purporting to show that the self-funding approach was entirely viable and that the MFS offer would produce a surplus of \$159 million compared to a \$22 million deficit with Lockheed.⁴⁶ No such presentation was

⁴⁵ See section entitled *Vendor Warnings Minimized* at p. 128.

⁴⁶ The Commission sought but was never provided with, and thus could not ascertain, supporting data for these projections, which differed substantially from projections made by the vendors in their best and revised final offers.

conducted in order to provide the Turnpike Board with the full panoply of potential risk and the volatility of the revenue factors.

Exclusion, Manipulation and Intimidation of Turnpike Personnel

As lead agency for the regional Consortium, the New Jersey Turnpike Authority was assumed by many who participated in the E-ZPass procurement to have brought substantial expertise to bear on the project, particularly in the area of financial analysis, prior to the award of the contract.

In reality, the Turnpike's own finance staff was out of the loop for months before the agency's governing board voted unanimously to award the contract to MFS in March 1997. Despite this lack of involvement, the Turnpike's Chief Financial Officer was pressured at the eleventh hour to certify the purported accuracy of cost and revenue projections. Furthermore, other Turnpike staffers – including senior officials who had been assigned direct roles in the procurement – told the Commission that, as the project proceeded toward implementation and beyond, they, too, were relegated to the sidelines under questionable circumstances.

The individual in charge of day-to-day operations at the Turnpike during this period was Edward Gross, the Authority's Acting Executive Director from 1994 until January 1997, when "Acting" was dropped from the title.⁴⁷ According to sworn testimony from multiple witnesses and a thorough review of the record, Gross's tenure during the E-ZPass procurement was marked by turmoil virtually from the start. In some instances, the turmoil was the result of events and circumstances beyond his control. It

⁴⁷ Gross's tenure as Executive Director ended in January 2002 when he was discharged from the post by Governor James E. McGreevey.

was not Gross's decision, for example, to staff the procurement with individuals who, though Turnpike Authority employees, reported outside the agency to senior officials at NJDOT. Further, Gross was confronted internally with a series of difficult personnel issues. Witnesses told the Commission that key Turnpike employees simply did not get along, and simmering interpersonal disputes and rivalries periodically erupted into full-blown formal complaints.⁴⁸ In one such instance, an employee of the Authority's Budget and Finance Department, Francis K. O'Connor, accused the department head, Catherine A. Coryat, of pressuring him during the vendor evaluation process in a procurement unrelated to E-ZPass. An internal investigation produced no finding of wrongdoing. O'Connor, who meanwhile had been transferred to the Turnpike's central maintenance facility in Hightstown, filed a civil complaint alleging harassment. In late 1995, in an action coincident with settlement of that complaint, he was promoted, given the title of Special Project Control Administrator and assigned to the E-ZPass project as deputy to Paul A. Carris where his duties included controlling the flow of internal documents related to the procurement.

Individuals who worked at the Turnpike during this period testified that amid such personnel tangles, Gross made matters worse. They described him as an overbearing manager who tolerated little dissent and showed no patience with anyone or anything he perceived as an obstacle to rapid completion of E-ZPass. Gross himself testified that the

⁴⁸ Gross himself was named as a plaintiff in three separate civil actions filed by senior employees of the Turnpike, including Chief Financial Officer Catherine A. Coryat (nee Schladebeck), who filed a complaint in October 1997 alleging she had been subjected to a hostile work environment. Coryat's complaint included a recitation of incidents related to the E-ZPass procurement.

peculiar resolution of the O'Connor matter ultimately was his doing, despite the longstanding record of friction between O'Connor and the Finance Department's Coryat.

Further, while Gross told the Commission he had no substantive involvement in the project prior to mid-November 1996, documentary evidence and the testimony of others show that he was aware of, if not directly party to, various significant milestones in the procurement process until that point. Gross also testified that he knew of the Finance Department's complaints of being left out of the process, but despite this, sought to have the department's director certify E-ZPass cost and revenue figures she claimed were unverified. The record also shows that after mid-November 1996, Gross assumed direct control over the negotiation process leading to the Consortium's final contract with MFS.

• • •

During the early stages of the procurement, beginning in late 1995, the Turnpike's finance staff appeared, at least on paper, to be positioned for a central role. In a memorandum dated December 27, 1995, to Margro, Coryat sought to formalize staffing arrangements for the project: "As has been discussed on numerous occasions, implementation of Electronic Toll Collection will have a significant impact on the Finance & Budgets Department's operations," Coryat wrote. "I have assigned Pamela Varga and Donna Manuelli to represent this department. I would appreciate it if they were kept apprised of the process. They are also available for any input required for this process."⁴⁹

⁴⁹ See Appendix at p. A-42.

All three of these finance personnel, however, testified that their involvement was never more than sporadic through the spring and summer of 1996, and was virtually curtailed that fall and in the months immediately preceding the award of the contract by the Turnpike's governing board in March 1997. Addressing a key ramification of this disconnect, Coryat testified:

Q. Do you know if anyone did an independent assessment of the underlying assumptions for the revenue projections?

A. No, I don't know.

Q. Would your department be capable of doing that kind of analysis . . . ?

A. Yes.

Q. Were you ever asked?

A. No, not until after.

* * *

Q. . . [Y]ou were only asked to do any kind of analysis after the contract was already awarded to MFS?

A. Yes.

Manuelli testified that a pattern of selective exclusion was established throughout 1996 leading to the contract-award recommendation that autumn by the MET team:

Q. What was the level of cooperation you or the Finance Department were receiving from the ETC staff?

A. We weren't receiving any cooperation. We were, you know, frequently not invited to meetings, invited at the last minute. We didn't get the information. . . . We never got the information we needed. So it was not a very healthy, cooperative working relationship.

* * *

Q. Did you ever complain to anyone about this?

A. Well, sure. I complained to my boss, Cathy Coryat.

Q. Do you know if she took any steps to rectify the situation?

- A. *Yes. I believe she contacted – you know, initially she contacted Tom Margro, she contacted Ed Gross, she discussed it with Paul Carris. I know she did verbally and I believe she may have also done it in writing.*

According to documents obtained from the Turnpike Authority, Coryat alerted senior Turnpike officials, including Gross, about her department's frustration at least as early as August 1996 after Margro had announced his intention to resign as the Authority's Chief Engineer. In a memorandum to Gross dated August 23, 1996, Coryat stated, in part:⁵⁰

I believe Finance & Budgets has a very important role to play in the ETC procurement and have assigned two extremely competent professionals to this task. While the Authority has an ETC staff, I have been told that their purpose is to represent the Consortium as a whole, not the Authority. Since this is the case, I believe it to be critical that financial matters receive the attention they deserve. The best interest of the Consortium and the best interest of the Authority needs unbiased representation. We believe the ETC process to be important however, (sic) this is only one of many responsibilities of the Finance & Budgets representatives.

Overall, there have been activities where Finance & Budgets participation would have been very beneficial to the process. I realize that the ETC project has been an intense effort however (sic) you should know that this department is often left out of the loop. The lack of notice makes it extremely difficult to plan anything and reduces the opportunity to give things their proper attention. This department is repeatedly not informed of meetings or is asked to review things at the last minute. In fact, we were just invited today, Friday, to attend presentations on Monday. Most of the time we need to rely on information from our colleagues from other agencies since they usually receive information and prior notices.

I just want you to be aware of the extent of our efforts as well as our frustration.

⁵⁰ See Appendix at p. A-43.

One week later, in a follow-up memorandum dated August 30, 1996, Coryat complained to Carris that her staff's problems of access to meetings and information persisted. Referencing a Consortium presentation that had been held, Coryat stated, in part:⁵¹

As you know, I have spoken to Tom Margro and Ed Gross several times, and Pam Varga has spoken to you, regarding not being properly notified about ETC meetings. Ed assured me on August 29, 1996 . . . that he had discussed this matter with you and there would no long (sic) be a problem. . . .

At the presentation, members of other Authority's information (sic) Donna that they were expected to be at the negotiation meetings and that they received a schedule for the next three weeks. We have not received any notification of the negotiations meetings or schedule. I would appreciate this matter being addressed once and for all.

Gross testified that he was aware of these concerns at the time, that he discussed them with Carris and O'Connor, and that both individuals denied cutting Coryat and her staff out of the procurement. Gross acknowledged, however, he did not investigate further:

. . . I recall more than once that Cathy Coryat advised me that they were not getting cooperation from Paul Carris and Fran O'Connor and were not able to do the work that was required of them. And I spoke to both Carris and O'Connor who claimed otherwise, saying that the[y] were always – they always were cooperative, the finance department was always invited to meetings, and there was a number of meetings where they didn't attend. And, you know, I said – my response to it is that I wasn't able to judge who was accurate and who was not accurate. I said, Just cooperate. Get this stuff done. You know, it's important for the finance department to look at the numbers.

In their appearances before the Commission, Carris and O'Connor denied deliberately or knowingly frustrating efforts by the Finance Department staff to participate in the

⁵¹ See Appendix at p. A-44.

procurement. As to Gross' claim that he spoke to them about Coryat's complaints, however, both testified that they could not recall any such discussions.

Contrary to Gross' purported admonition that it was "important for the finance department to look at the numbers," Coryat and her staff testified that they had difficulty throughout the fall and winter of 1996-97 gaining access to key financial data related to the vendor proposals and were not active participants in the negotiations leading to submission of final offers. Further, they testified that they played no role in evaluating the accuracy of cost and revenue projections as submitted to the Consortium by the vendors, nor were they asked to review the New Jersey Highway Authority's December 1996 memorandum raising questions about the long-term accuracy of the violation-revenue estimates. The finance personnel also testified that they did not participate in presentations summarizing the vendor offers for review by the governing boards of the various Consortium entities, including the Board of Turnpike Commissioners, prior to the award of the contract.

Despite this lack of involvement, Coryat was asked by Gross to sign off on the accuracy and validity of revenue projections contained in the MFS proposal just days before the Turnpike Authority's governing board was to vote to award the firm the E-ZPass contract. The trigger for this incident was a proposed agenda that circulated at the Authority's headquarters the week before the board's March 25, 1997 meeting. MFS's contract offer was scheduled for a final vote, and the agenda item that embodied it bore a blank signature block above Coryat's name. Typically, the Authority's practice is to have the Chief Financial Officer sign or initial any item slated for a board action that may impinge upon the agency's operating or capital budgets. The object of this exercise is to

provide certification that adequate funds are available. Coryat testified that she was surprised to find that she would be required to sign the MFS item because the E-ZPass procurement, as structured, did not involve any immediate direct expenditure of Turnpike funds. More importantly, her department had not yet evaluated the firm's cost and revenue projections, particularly the bottom-line estimate of a \$159 million surplus.

Several days before the Turnpike Authority Commission's scheduled vote, Coryat was summoned to a meeting with Carris and Diane Scaccetti, then-Deputy Executive Director, at the behest of Gross, who was away from headquarters at the time. Also present was Manuelli. At this meeting, according to Coryat and Manuelli, Carris asked her to sign off on the MFS agenda item. Coryat described the session in sworn testimony as "very pressure-filled":

Q. Why do you think the signature, your signature on that agenda item was important to Mr. Gross?

A. Well, because it would show that the financial person at the Authority certified those numbers.

Q. Certified, in that you believe those items to be accurate?

A. Yes.

Q. Did you believe the numbers to be accurate?

A. No.

Q. Why do you believe the numbers were not accurate?

A. There were too many discrepancies between what the proposal said and what their [MFS's] presentation said. There were too many variables. Even I wasn't comfortable saying that we were going to make that kind of money. I just didn't think that was going to happen.

Q. Why didn't you think the proposal was . . . going to make that kind of money?

A. I thought there were pieces missing. Financing costs, fiber maintenance, change in – a change in anything, a change in our tolls, change in the collection of those violations could throw it off, you know, significantly.

At one point during the meeting, according to those present, Coryat asked whether the Authority's special services advisor, Phoenix, would be asked to sign the item. She testified that Carris scoffed at this suggestion, responding to the effect " 'they would never sign . . . those numbers.' And, I was like, but you expect me to?"

Carris testified that he had limited recollection of this encounter beyond the exchange concerning Phoenix:

She expected Phoenix to independently evaluate the cost proposals and to sort of bless them as valid, and I said that wasn't their role. She had always complained about her staff – well, she was complaining about the process because, again, the time frames, the meetings getting called on short notice. I believe she had issues with the documents [being] in a locked room. I'd say a good portion of it was just, you know, complaining about the process that had been imposed on everybody.

Q. *Did she ever voice to you during this meeting that she had a concern that she didn't think the numbers would work or the revenue stream would be foreseeable?*

A. *I believe so, yes.*

Coryat described the tone of the meeting as such that she feared consequences relating to her employment:

I was very nervous. I was afraid, I will say that. I was afraid of what Ed would do when he . . . realized I wouldn't sign it. And, yes, I was very afraid.

* * *

Q. *Do you think . . . you were given time to adequately review the agenda item prior to signing it?*

A. *No.*

Q. *What would have been a reasonable amount of time?*

A. *I don't know what a reasonable amount of time is. We should have been involved throughout the whole process. Had we been involved, there wouldn't have been an issue to having to do this item, you know, overnight. If we had been involved in the process, we wouldn't have had any questions. Hopefully, those all would have been resolved before we got here.*

Manuelli corroborated the essential facts as recounted by Coryat:

. . . Diane came with Paul Carris and . . . [they] wanted to sit there all day, if we had to, and get us comfortable so that Cathy could sign the agenda item.

Q. *Get comfortable with what?*

A. *With the agenda item that says that the deal was going to make \$159 million and pay for itself.*

Q. *So, is – Ms. Coryat's objection was to the wording or the fact that they wanted her to sign off and certify that number?*

A. *Both of it. She could not certify that number, she was not comfortable with saying that it would – with the way it was written, to say that the deal was going to make \$159 million and not cost anything. It failed to state that, under a number of different conditions, the deal could cost us money.*

. . .

Scaccetti testified that her role in the meeting was minimal:

. . . Notwithstanding the fact that Mr. Gross had previously, you know, presented a proposal that was supposed to result in revenue and no expenditure by the Turnpike, it was his desire to have that agenda item still signed off by the comptroller.

He happened to be out of the building; and he understood that Cathy Coryat did not want to sign the agenda item, and [he] asked me to go down and speak to her and to try to determine why that was and see if I couldn't resolve it. . . . I really didn't add much other than for me to be in the room while Paul explained to her what she said she had an understanding – understood through the entire process.

She felt she shouldn't sign it because there was no monies to be expended by the Turnpike Authority; and, therefore, she didn't believe

she had to sign it. Paul continued to try to persuade her; that, you know, it was not so much the monies but an endorsement of the financials and she wasn't prepared to do that.

On March 25, 1997, the Turnpike Authority's governing board met and voted unanimously to award the E-ZPass contract to MFS. Subsequent to the board meeting, Coryat testified that she was confronted by Gross and, in the presence of Scaccetti, was admonished by him. Coryat testified that, despite the paper trail of prior memoranda to the contrary, Gross implied that she had never complained before about her lack of familiarity with the financial aspects of the procurement:

After the Commission meeting, he called me up there, and he and Diane were there, and he told me that I was shirking my responsibilities, and I was out in left field. And I mean, it was a whole tirade he went through. And he told me that I never – I should have told him this before. And I tried to tell him, I told you numerous times before that I wasn't involved. And he just, you know, he went on yelling at me. There was no talking to him at this point, he was so angry, you know.

* * *

Q. *But you remember prior to being asked to sign this agenda item, you remember complaining to Mr. Gross that you are not being involved like you should be?*

A. *Yes, absolutely.*

* * *

Q. *How did the meeting conclude?*

A. *He told me I had to make those numbers, you know, get myself to where I felt reconciled with the numbers and come back to him . . .*

Q. *But the contract was already awarded at this point, correct?*

A. *Yes.*

Scaccetti testified that during this meeting Gross appeared “definitely disappointed” with Coryat’s refusal to sign the agenda, “and he communicated that [to] her.” But according to Scaccetti, Gross “didn’t show a lot of emotion one way or the other, so it was kind of always the same.”

In his testimony, Gross admitted instructing Carris and Scaccetti to meet with Coryat for the purpose obtaining her signature on the MFS agenda item. Gross characterized his action in this regard as “not the right thing to do,” stating:

. . . [W]hen I had asked Cathy to do that, it was not only premature, it was not proper for her to do that because it wasn’t out of the capital or operating budgets of the Turnpike.

Gross also acknowledged confronting Coryat after the board’s vote but testified that he could not recall details of the conversation with regard to her doubts about the accuracy of the revenue estimates:

What I – what I did do is I called her in and I said to her, If you weren’t prepared in going through the numbers, then you should have told me in advance. And I said to her, I need to know what you’re doing so that we work together and we don’t get surprised, and I had a conversation like that with her.

* * *

. . . I don’t recall precise dialogue with her where she didn’t agree with the numbers. I recall her saying that she had not had adequate time and adequate backup to be comfortable with the numbers, I remember that.

Nonetheless, Gross never informed the Turnpike Authority’s governing board of the signature incident, nor did he inform the board that the Authority’s own Chief Financial Officer had voiced concerns to senior staff about the accuracy of the MFS revenue

projections immediately prior to the board's vote to award the E-ZPass contract. Testifying on these points, Gross sought to minimize the actual contract-award decision, characterizing it as merely one step in a lengthy process:

Q. Did it bother you at the time you were immediately going to the board . . . to award the contract to MFS and your controller at that point [is] saying, I don't have enough information to sign the agenda item?

A. Well, she shouldn't have signed it – I shouldn't have asked her to sign it.

Q. That's not my question. Did it bother you at the time that your chief financial officer is basically telling you right before the board meeting where the board is going to award the contract to MFS [that] she's not going to sign the agenda item because she doesn't have enough information to do so?

A. No, because we still had a long period of negotiations with MFS. We weren't – we weren't doing anything but designating them as the winner of the procurement process, and then we had a major undertaking to go through in connection with the financing, in connection with the contract terms. No it didn't – it didn't trouble me.

Q. So your chief financial officer is saying she doesn't have enough information or data to sign the agenda item for this proposal and yet you have no problem with continuing to put the proposal before the board of Turnpike commissioners to award the contract to MFS?

A. Well, I mean, it's difficult for me to respond to that by saying yes or no. What I'm saying to you is that the award of that – the award of that contract was a green light to proceed to negotiate a contract and to negotiate financing. That wasn't the final dispositive point in time for the commissioners to act.

Q. It was dispositive of which vendor gets the contract, either Lockheed or MFS, right?

A. Well, I mean, that – that – yeah, it was – you're absolutely right.

Gross further testified that he could recall no prior occasion in which an agenda item either requiring, or presumed to require, the controller's signature went before the governing board without it:

Q. . . . *[A]s long as you were at the Turnpike, whether as acting executive director or executive director, all budget items – or all items which impacted [the] budget would be signed off on by the finance department or by the comptroller directly?*

A. *That – that is correct.*

* * *

Q. . . . *Was this the first time that you asked the comptroller to sign something that she wouldn't sign and then you presented it to the commissioners?*

A. *I think that's true.*

* * *

Q. . . . *[D]o we know . . . whether, when you presented this to the Turnpike commissioners, you said to them, "This has not been signed off on by the controller?"*

A. *I don't think I did say that.*

Key members of the Authority's governing board expressed surprise when informed of these events. Joseph P. Miele, at the time the board's representative on the Consortium's Executive Council, testified:

Q. . . . *Did anyone ever bring it to your attention that the comptroller refused to sign the agenda item certifying the accuracy or validity of the E-ZPass procurement [revenue estimates] prior to the commissioners' vote on March 25, '97?*

A. *No.*

* * *

Q. *Do you think you should have been [told]?*

A. *Yes.*

Frank X. McDermott, the then-Chairman of the Turnpike Board of Commissioners, expressed the same view:

- Q.** *Is that something that the board should have been informed of, that the comptroller refused to sign the agenda item for the E-ZPass procurement?*
- A.** *Well, I think the board should have been informed by the Executive Director because that certainly was an important consideration.*

• • •

Turnpike Authority finance personnel testified, and documents show, that only after the contract was awarded – when the momentum of the procurement shifted into negotiations to hammer out the final terms – were they directed to conduct a detailed analysis of the revenue and cost projections. Indeed, it is noteworthy that subsequent to the contract-award vote, there is no record of additional complaints from the Authority’s financial personnel about being excluded from the process. However, a host of thorny questions lingered for months regarding the accuracy and underlying validity of the data contained in the MFS proposal, and the process of sorting it out continued virtually until the contract was executed on March 10, 1998. It was during this process that the projected surplus associated with MFS’s proposal – initially pegged at \$159 million – diminished to less than \$35 million.⁵² Coryat testified:

- Q.** *. . . [B]asically, Donna [Manuelli] took the 159 million [surplus projection] and started working backwards?*
- A.** *Yes.*

* * *

- Q.** *Have you ever been involved in any contract where a contract was awarded with all these open financial questions?*
- A.** *No.*

* * *

⁵² See footnote at p. 90.

I can't imagine ever going forward with the contract with so many questions unanswered.

Manuelli, who was assigned to participate on behalf of the Turnpike Authority during much of the post-award negotiation phase, testified:

Q. *Shouldn't have all this accounting been done prior to the award of the contract?*

A. *Yes.*

* * *

Q. *Did you or Ms. Coryat ever become comfortable with the numbers . . . ?*

A. *No, I don't think so. I don't think we ever – neither one of us ever – ever attested to the numbers, neither one of us ever said, "Yes, these are good, reasonable numbers." All we did was we found backup for most of the numbers. We found a sheet of paper that MFS submitted that at least told us where the numbers came from and put them together into a spreadsheet, but that was the extent of it. We never were asked to test them. . . .*

Coryat and Manuelli both took issue with statements made by Gross on this issue during the Assembly Transportation Committee's E-ZPass hearings. In unsworn testimony on May 2, 2002, Gross told the Committee that

. . . between March of 1997 and the contract signing on March 10, 1998 the finance department of the Turnpike had fully reviewed and critiqued and signed off on the projections. . . . The department signed off on it.

* * *

. . . [I]n addition, she (Coryat) indicated that she had not fully reviewed, signed off on the revenue projections and her staff was still working on it, and they were having some difficulty getting some of the underlying worksheets, which ultimately was straightened out. . . .

[A]s I said, over a period of time the Turnpike's finance department did all of their due diligence and signed off on it.

Coryat, however, swore that neither she nor her department, ever fully reviewed, critiqued and signed off on the projections.

Q. . . . *[D]id you give anybody approval in your department to sign off on the revenue projections?*

A. *No.*

Q. *And you, yourself, didn't?*

A. *No.*

Q. *So how do you view Mr. Gross' testimony before the Assembly Transportation Committee?*

A. *I don't think it's true.*

Manuelli testified:

Q. *Is that (Gross's Assembly testimony) an accurate statement?*

A. *No, that's not an accurate statement. We never signed off. No one ever asked us to sign off on the projections.*

• • •

Confronted on this matter by the Commission, Gross testified:

Q. *Would it be surprising to learn that Coryat provided sworn testimony to the Commission that she was never comfortable with the projections so she never signed off on the project?*

A. *I'd be very surprised with that – with that testimony, I really would. I mean, I don't know where – within that statement I don't know where her discomfort – alleged discomfort would be, but I would be surprised by that.*

Q. *Would it surprise you to learn that Donna Manuelli made the same statement to the Commission?*

A. *Absolutely.*

• • •

Although Gross in his sworn testimony sought to minimize any role he might have played in connection with blocking the full participation of the Turnpike staff in the procurement process, several Turnpike personnel testified that they were subjected to intimidating treatment when he perceived that they were impediments to rapid completion of the contracting process.

Manuelli testified that after one meeting during the negotiations to iron out the final contract terms in the fall of 1997, Gross went to her superior, Coryat, and complained about Manuelli for pressing the vendor's representatives with questions about the deal's financial components. Manuelli testified:

Q. What did [Coryat] tell you?

A. She told me that he was not happy with the way that I was asking questions, just what I said, that I was too aggressive, you know, he didn't like the tone of the way I was questioning them, and that I needed to back off and back down.

Q. Did you heed the advice –

A. Yes.

* * *

Q. You didn't ask those questions?

A. No.

Q. Who was asking those tough financial questions during the time period after you stopped asking them?

A. No one.

* * *

Q. . . . What [were] you thinking?

A. It's very intimidating . . . I just didn't ask some of things or push as I would have pushed.

Gross testified that he recalled “one event at an early stage of a meeting with a lot of people in it where I thought Donna’s comments were a little aggressive.” He recalled “casually mentioning” this to Coryat but denied making it “a major issue.” Asked whether he tried to intimidate Manuelli into avoiding tough questions, Gross replied, “Absolutely not” and expressed surprise when informed that she testified to having felt intimidated by his action.

• • •

Carris testified that at one point in the negotiations, Gross discouraged him from raising questions about whether MFS should offer the Consortium a discount in view of the potential profit the firm might earn from the leasing of fiber-optic cable. Carris stated that he pointed out during one negotiating session that by installing fiber along primary toll roads in New Jersey, MFS would complete a lucrative regional fiber-optic network stretching from Ohio through New York and down to the Atlantic coast. Carris memorialized his concerns in a memorandum to Gross dated May 13, 1997, on the subject of “Fiber Optic Negotiations Issues.” The memo stated, in part:

It appears as though the MFS fiber people continue to look at the fiber component as their domain, independent of the rest of the ETC contract and are negotiating as if it were only a fiber contract. My impression is that [MFS Senior Vice President William] Thompson put together our multi-faceted, integrated deal back in October and now their fiber people are trying to steer clear of those linkages.

Carris, in his testimony, amplified on his concerns and stated they were set aside by Gross:

We were trying to get into background on where their costs – where their revenues were going to be coming from or how they were going to develop based on the components of right-of-way that we offered. In educating myself on the process with the fiber and what was going on in the industry, New Jersey was a main destination point for trans-Atlantic cables to come in. MFS basically was basically going to give us a ring of fiber in the State of New Jersey, but it became obvious to us during questioning them more and more that that ring was part of a bigger ring going out into the Midwest and then coming back. . . . I started to realize that, whatever, they were giving us, just by getting our right-of-way it was adding value to all of their contracts everywhere else that they had to complete this ring. And I put that on the table in front of Thompson and said, Well, if you're getting more money from . . . everybody else, why aren't we getting a piece of that, because we're giving you a completion of that loop. Mr. Thompson took great offense at that and got upset and Ed Gross turned to me and said, "Paul, I think you've gone too far with this," or something to that effect, and I shut up.

Q. *But the bottom line, MFS never gave the price break to the Consortium that you –*

A. *No, there was never any follow-up to get any benefit of what I pointed out.*

Carris also testified that there came a time when Gross booted him from the negotiations on the grounds that they were not proceeding with sufficient speed. According to Carris, the incident occurred on or about the Memorial Day weekend in May 1997:

I had to jump between the engineering back to the financial group and we got to the Friday of Memorial Day and I had the agency staff walking out getting ready to go away on a long weekend. MFS and Chase, their attorneys were starting to step out because they had planes to catch. . . . So my conclusion by Friday afternoon was we're not wrapping this up. Let's just suspend it, and then we'll get back with specific committee groups the following week.

Once that was done and I remember – I just remember getting a call from Ed Gross saying, Get back to my office. And he took issue with my taking that upon myself to stop negotiations at that point.

Q. *What happened when you got back to the Turnpike?*

A. *Fran [O'Connor] and I met him in his office and he basically yelled at me. He said I had no right to do what I did. I should have had*

everybody working through the weekend to get it done. I tried to explain to him why I disagreed. I told him I thought the financial section of the contract was nowhere near where it had to be. . . .

Q. *What happened after that point going forward?*

A. *I was taken out of the loop and Ed took over the negotiations. . . . I stayed around to basically serve as institutional memory . . . and Ed took over the negotiations, which culminated almost a year later.*

In separate testimony, O'Connor corroborated Carris' articulation of the essential facts of this encounter.

Carris submitted a notice of resignation to the Turnpike Authority on March 12, 1998, two days after execution of the E-ZPass contract. He did not have another job lined up.

. . .

Donald E. Mauer, who joined the Turnpike Authority as Assistant Chief Engineer in July 1997, testified that he was shunted onto the project's sidelines by Gross after writing a series of memos pointing out that work on the project had fallen behind schedule:

Q. *What caused you to become cut out of the loop?*

A. *I wrote a memo that said the job was not going to finish on time and here are the reasons why based upon, you know, my professional experience. That's all. And it was not a memo that [Gross] wanted to see or receive. I was called to task on it and that was it. It was the beginning of the end. I was cut out more than I was included on the construction of the job.*

Q. *But wasn't that memo within your sole area of expertise and –*

A. *Yes.*

Q. *– job duties?*

A. *It was my sole responsibility. When I joined the Turnpike as the assistant chief engineer, my obligation was to be the chief engineer for the consortium to execute the construction of the job.*

Gross testified that Mauer “absolutely was not cut out. . . . I never gave instructions to reduce his workload or not – or do anything different in connection with Don Mauer.”

Vendor Warnings Minimized

Before and after the E-ZPass contract was awarded – but prior to its actual execution – officials in charge of the procurement received verbal and written notice from representatives of MFS and its financial advisor, Newcourt Capital, alluding to the genuine risk associated with the untested self-funding approach.⁵³ Collectively, these contacts should have served as an ever-widening signal that trouble lay ahead. In each instance, however, they were set aside, treated essentially as little more than a series of unwelcome and unwarranted impediments to speedy completion of the deal.

• • •

Daniel M. Morash, then-Senior Vice President of Newcourt Capital, told the Commission that his firm took the position “from day one” that the projected revenue streams associated with the Consortium’s self-funding approach were speculative and advised its client, MFS, of such beginning as early as the fall of 1996. As the

⁵³ In addition to its role as financial advisor to MFS, Newcourt Capital organized and arranged the private-sector syndicate of lenders that eventually provided start-up capital for the E-ZPass project via bonds issued by the New Jersey Economic Development Authority.

procurement progressed, questions raised by both Newcourt and MFS were placed directly before the Consortium.

In a letter faxed to ETC Program Manager Paul A. Carris, on October 2, 1996, responding to a Consortium request for best and final offers (BAFOs) from vendors, MFS stated flatly it did not regard as viable a strategy reliant on uncertain revenue from E-ZPass violators without some mechanism to protect the firm from potential losses. The letter, signed by William P. Thompson, the firm's President and Chief Operating Officer, stated, in part:

*Our financial concern with the terms requested by the Consortium is based on our view that the E-ZPass project including potential revenues . . . is not likely to be self-financing. Our estimates for revenue from a fiber optic telecommunications system help narrow the financial gap, but do not change our fundamental conclusion. . . . If the violations rate falls below the Consortium's estimates, the MFS team faces increasing levels of financial risk, and will be in a money-losing position if the violation rate falls significantly below the Consortium's forecasts. We are only able to present a financial package of the sort the Consortium has requested (\$0 down, \$0 payment) if it guarantees to insulate the MFS team from losses . . .*⁵⁴

As an alternative, MFS advanced a second approach in which the Consortium collectively would spend \$120 million on the project after the first two years of development. The firm characterized this modified pay-as-you-go alternative as one that would

. . . Provide a financial backstop on the risks we face from lower than estimated violations rates, and – very importantly – align the Consortium's interests and ours in a number of important financial and operational ways. . . . We believe this very strongly, and have structured it so that it will be more attractive financially to the Consortium than Approach 1. We are recommending it for your serious consideration even though it yields lower returns to us . . .

⁵⁴ See Appendix at p. A-45.

Thompson told the Commission that he believed MFS did a “pretty good job” presenting the Consortium alternative funding approaches. As was testified to by Carris and other members of the MET vendor evaluation team, however, no alternative to self-funding ever received serious consideration or became the object of any rigorous comparative analysis. Further, Gross testified that neither he nor the Executive Council were ever presented with this second approach.

• • •

Eight days later, on the morning of October 10, 1996, MFS sent Carris a revised final offer. The firm reiterated its position that a self-funded E-ZPass system would be viable only if the Consortium assumed full responsibility for associated risk. Otherwise, MFS warned, it would be difficult if not impossible to obtain up-front financing from lenders. “If revenues are insufficient to cover capital and operating costs,” the firm stated, “the Consortium will need to make payments at the conclusion of the project to make up for the shortfall.” Further, MFS told the Consortium that its “updated financial assumptions” projected a likely deficit of at least \$12 million for violation-revenue alone at the end of the contract’s proposed eight-year term. According to this MFS communiqué:

Due to the unique nature of the project (i.e. lack of precedence for violation revenue collection for a toll facility) coupled with the fact that this same violation revenue will be relied upon significantly to pay down the debt, MFS strongly believes financing for this project will be unattainable on a \$0 down, \$0 payment basis without the Consortium’s support in the manner outlined above.

MFS went on to point out that it had not yet fully analyzed possible outcomes associated with the alternative funding approach it had recommended approximately one week earlier. “Time limitations preclude us from presenting the same scenarios for Approach 2, although we clearly believe them worthy of consideration should the Consortium choose to continue discussions with the MFS team with regard to the particular approach.”

• • •

After the contract was awarded to MFS by the Turnpike Authority’s governing board on March 25, 1997, the firm entered into negotiations to hammer out final contractual terms. As part of that process, Newcourt Capital, as MFS’s financial adviser, began sounding out the financial markets for investor receptivity to the proposed self-funding strategy. According to Newcourt Capital’s Daniel M. Morash, the investor community was lukewarm to the Consortium’s approach and made that plain in various meetings. In a letter to Turnpike Executive Director Edward Gross dated June 13, 1997, Morash and another Newcourt executive, Johannes G.M. Derksen recounted the substance of discussions with the lending community at that juncture. Among other things, Morash and Derksen told Gross that there may be difficulty obtaining timely receipt of letters of commitment from various investors who had expressed tentative interest in underwriting the project. A key sticking point cited by the Newcourt executives in this letter were concerns surrounding the revenue projections, and they told Gross that a substantial “reserve” account would have to be established in order to complete the deal. They wrote on June 13, 1997, in part:

The uncertainty of actual levels of fiber optic and violations collection revenues necessitates that large reserves be built into the Transaction. Newcourt is evaluating how to achieve the necessary reserves at a minimum cost to MFS NT and the Consortium, and is prepared to consider all alternatives that reduce costs while meeting the objectives of the parties.

Morash told the Commission that the Consortium, through Gross, its chief representative, was not receptive to Newcourt Capital's concerns. Morash testified:

. . . [W]e were being put under a lot of pressure to provide firm financing commitments to a transaction that had not yet been properly and finally scoped out. So, you know, we were very concerned about . . . being pushed into something before we were ready to do so. You know, once we agreed to the transaction we were going to have to deliver other commitments and we had to make sure that other financial institutions were comfortable with the structure, and what this [letter] says is that these issues haven't been adequately vetted for purposes of financial institutions giving credit approval.

Q. *Do you remember any kind of discussion . . . in response to this letter?*

A. *Just, you know, more pressure to get a final resolution.*

. . .

Approximately six weeks later, in a letter dated July 24, 1997, Morash informed Gross that while the firm had begun to line up institutional investors to provide start-up capital, problematic issues remained with regard to risk and costs. Morash stated that three major banking institutions with a significant presence in New Jersey – PNC Bank, Chase Manhattan and First Union – had declined invitations to participate. According to Morash, the banking community still regarded the financial structure as uncertain, despite the fact that it was anchored by the so-called “True Up” agreement obligating the

Consortium to cover all costs, including money owed to lenders, in the event of a revenue shortfall. In this letter, Morash wrote, in part:

These banks are not only large New Jersey/New York stakeholders, they are also banks with whom Newcourt has close business relations. Each gave the [E-ZPass] financing full and careful consideration. Furthermore, we approached the project finance and public finance lenders at several additional commercial banks who have also declined to participate to date. The primary reason for the commercial banks' discomfort is the potential for non payment of interest without the ability to accelerate the True-up prior to maturity, and other terms of the Financing which are necessary in order to comply with the "nothing down, nothing for eight years" requirement of the MFS NT contract.

In this letter, Morash also alluded to concerns that Newcourt Capital had expressed about the mechanism chosen by the Consortium for raising the start-up capital: a taxable, private-sector placement of loans bearing a mix of fixed and floating interest rates. During the negotiations, Newcourt had recommended instead the issuance of some form of tax-exempt public debt that would carry lower interest rates and thus be less costly to the Consortium over the long run. The tax-exempt approach, however, was vetoed by the Consortium – unilaterally by Gross, according to Morash's sworn testimony – because it would have taken too much time and because it was fundamentally incompatible with the Consortium's goal of having E-ZPass project eventually pay for itself.⁵⁵ Morash told the Commission the tax-exempt approach

. . . was set aside by Ed Gross in no uncertain terms. He said, 'stop trying to save us money,' would be the more direct quote.

Q. *Ed Gross said stop trying –*

⁵⁵ Because the long-term goal of a self-funded E-ZPass system was reliant, in part, on projected revenues from the commercial leasing of fiber-optic cable to private-sector interests, the vehicle for raising start-up capital, by law, could not be tax-exempt.

A. *Stop trying to save us money.*

Q. *That's an unusual concept, isn't it?*

A. *I was a little shocked by it. This [July 24 letter] was a more diplomatic way of saying that we looked at this [tax exempt approach], you [the Consortium] decided not to do it. Ultimately, it was bona fide that the transaction was not pursued on a tax exempt basis, because there was no way to have private sector revenues coming in, you know, the fiber-optic revenues, and still have a structure that was legitimately tax exempt.*

Q. *Unless there was a way to separate both transactions?*

A. *Right, exactly.*

Q. *Anybody thought of that or was it considered?*

A. *We thought it was our job to raise that and to run it – what I would call, run it to ground. In other words, keep pursuing it until, you know, you get a stoplight that you can't find a way to structure around. Time was of the essence the way that these negotiations went and the way it was presented to us at that point in time. And the consortium ruled it out, Ed Gross ruled out the tax exempt alternative.*

Morash testified that that he interpreted Gross's remark – "Stop trying to save us money" – in the context that the Consortium "had concluded definitively that they could not arrange tax exempt financing, so he wanted to stop talking about it."

Frustration of Private-Sector Scrutiny

According to Morash and MFS's William P. Thompson, Gross during the summer and fall of 1997 personally dominated the contract negotiations on the Consortium's behalf and sought throughout the process to eliminate anything he regarded as an obstacle to rapid closure of the deal. Among the purported obstacles were mechanisms typically incorporated into contractual documents governing such projects to protect investors, ensure due diligence and provide adequate public disclosure.

When Newcourt Capital drafted a term sheet calling for standard lender controls, for example, Gross unilaterally vetoed it and drove the point home by tearing up the draft, threatening to nullify the contract-award and walking out of the negotiating session. Lender controls are designed to protect the interests of those who supply capital financing by providing checks and balances against things that might go wrong – and thus possibly delay loan repayment – during contract implementation. In this instance, the controls proposed by Newcourt would have established a timetable for municipal court disposition of administrative fees assessed against E-ZPass violators and would have blocked payment to the vendor for non-performance. The controls sought by Newcourt Capital also would have required extensive pre-operational testing to verify the E-ZPass system’s viability and functionality, particularly its ability to weed out so-called “false positives,” that is, to distinguish legitimate E-ZPass customers from actual violators. Questioned on this point, Morash testified:

Q. Wasn't that [false positives] one of the major problems in the implementation of this project?

A. In retrospect.

Q. Would this have short-circuited that problem, do you believe?

A. Based on my experience in other project financings, the [lender control] structure works to assure delivery of a system on time and on budget.

Ultimately, Newcourt and MFS acceded to Gross’s demand for removal of lender controls from the final financing term sheet. Their reasoning, according to Morash, was that the Consortium had already agreed to assume the bulk of the risk via the “True-Up” arrangement obligating the toll authorities to cover any deficit.

At another juncture in the negotiations, Gross resisted Newcourt's demand that Consortium produce signed letters of accounting from the member authorities delineating their obligations under the True Up agreement. The firm also insisted that an outside entity be retained by the Consortium to examine the performance of the E-ZPass revenue streams on an annual basis after implementation of the contract and to revise the projections as warranted based on changing circumstances. Morash testified:

Q. What was the significance of . . . the accounting letters?

A. That if the process started to get out of control, the annual review would surface, would shine light on the situation, so that we didn't get to the end of eight years and then discover there was a problem.

Q. Why would that be an important factor for you?

A. Because then to the extent there was a problem, it would come to light early. And an appropriate response and solution would be put in place before it was too late.

Q. What was Mr. Gross' response to this?

A. Well, . . . he objected strenuously to it and only agreed to it once we said it was a condition of closing.

Q. Is it true that such letters of accounting are typical or standard in such projects and are critical to ensuring public disclosure of the key terms?

A. Yes.

Gross also opposed Newcourt Capital's plan to hire an outside accounting firm, Coopers & Lybrand, to conduct a thorough assessment of the proposed E-ZPass self-funding structure, including the viability of fiber-optic and violation-fee revenue projections, on behalf of the syndicate of lenders that was being organized to provide start-up capital. Morash testified:

Q. [Would] you characterize [hiring Coopers & Lybrand] as an effort to effect . . . private sector due diligence on this particular project?

- A. Right. Because at the time the only information we had was the pro formas that MFS had prepared and, you know, it's a normal due diligence matter for private lenders to get their own independent consultant. So we insisted that Coopers review the structure. And, again, there was a lot of pushback from Ed Gross on that because he said, well, if you have our guarantee at the end of eight years, what do you need a report for. And we said: Well, you know, we need a report as normal matter of diligence, so therefore, the nature of the report was negotiated at length.*
- Q. Would you say that Mr. Gross opposition to this initially was adamant?*
- A. Yes. And we had to insist that we would not proceed with the transaction without this.*
- Q. So this would have been a deal breaker for you if you could not have done this?*
- A. Right. Because we knew that the other investors in the Consortium – in the syndicate that we put together would require this, that their credit departments would require this . . .*

When it became apparent that Newcourt Capital would go forward with Coopers & Lybrand despite Gross' objections, Morash testified, Gross insisted that the terms of the study be negotiated in advance. “. . . [H]e wanted to put limitations on the – what constituted an acceptable report . . .,” Morash stated. For example, at Gross' insistence, it was agreed that the scope of work by Coopers would be subject to unusually stringent budgetary and time constraints. Moreover, the MFS revenue projections were to be deemed viable even if the results of the Coopers evaluation concluded that those projections, in reality, could deviate by as much as 30 percent. Morash testified the 30 percent figure was a compromise and that Gross initially sought 50 percent.

- Q. What was the time limitation?*
- A. I think, you know, we had started them up and they had to produce a report within . . . I think it was a two-week or three-week period of time. It was shorter than the normal review period.*

Q. What would you have expected the time limit to have been?

A. Four to six weeks instead of two or three.

Q. At the least?

A. Yes.

Q. What about the restriction on cost?

A. Well, the restriction in the cost means that the consultant would limit the hours and, therefore, the depth of analysis. And ironically at the time the big difference that came out – the big dispute that came out of the Coopers report was a difference between their analysis of the fiber revenues, which came in at about 40 million dollars, versus MFS' estimate of fiber revenues, which came in at about 120 million dollars. Interestingly enough, the actual revenues were about 80 million dollars, halfway in between the two estimates. That also gives you a sense for what we were talking about when we said the revenue streams were speculative. You got one person saying 120 million, another saying 40 million, the actual is 80 million; that's a wide discrepancy in what was ultimately – what was both estimated up front and collected; which, you know, is why from the start we said that the [True Up] guarantee was needed.

* * *

Q. Based upon your experience, is this a normal business practice?

A. No.

In its review of this matter, the Commission obtained documentary evidence suggesting that, in addition to the negotiated constraints that were placed upon the Coopers due diligence study, efforts were undertaken to restrict the firm's access to key personnel. Coopers employees seeking data and information for the evaluation, for example, were instructed in writing to funnel all communications through the Turnpike Authority in the person of Francis K. O'Connor rather than contacting the appropriate Consortium officials directly.

Coopers delivered a 20-page "letter report" to Newcourt Capital on September 10, 1997. The results were mixed. With respect to the violation revenues, the firm stated, in

part, that “[w]hile the analysis of the projections made by the MFS team is generally favorable (in aggregate), the unprecedented size of the project magnifies even small changes in the assumption values.” Echoing the “magic cube” risk assessment made nearly a year earlier by Chase Manhattan Bank, the report concluded, “small deviations in assumptions, taken in aggregate, can have a significant impact. Therefore, even small changes in multiple key variables may cause Violations Revenue to decline significantly.” As to the MFS projections for the other major revenue source, the leasing of fiber-optic cable, Coopers suggested “a likely scenario” would be a yield “in the range of \$31 to \$52 million versus the \$118.7 million projected in the plan.” Although Coopers characterized its own calculations as conservative and did not rule out the possibility that the MFS projections could be achieved, it stated that MFS’ fiber outlook “cannot be proven adequately to be fully included in the outlook for purposes of due diligence.” The report’s bottom line: “Overall, a likely scenario is that projected Violations and Fiber Revenues will be within 20% of that projected by the MFS team.”

In his testimony before the Commission, Morash characterized the report, given the constraints under which Coopers had been instructed to operate, as minimally sufficient to satisfy the requirements of lender due diligence. He described the document as “weak, shallow and proscribed” and stated that it possessed “the form of an independent review but not the substance.” Nonetheless, once the Coopers report was completed, and purported to show that the violations projections fell within the 30 percent deviation rate set forth in the exercise’s negotiated guidelines, Gross asked for a copy because, according to Morash, the document appeared to “support his position.” Morash testified that Newcourt Capital resisted this request on the grounds that the

report, though commissioned at the Consortium's expense, constituted proprietary material prepared for Newcourt on behalf of prospective lenders. Gross testified he requested the report but swore he never saw it.

• • •

In December 1997, the Consortium retained the firm of Public Resources Advisory Group, Inc. (PRAG) to assist in the final E-ZPass contract negotiations. After the contract was executed on March 10, 1998, PRAG was given the added responsibility to conduct an annual review of the cost and revenue projections and to calculate how those projections would affect the Consortium's obligations under the True Up Agreement. These annual reviews showed from the start that the Consortium faced an ever-widening deficit. PRAG's initial report, dated November 30, 2000, projected a deficit of \$64.8 million at the end of the contract period in 2008 – a reversal of nearly \$100 million from the \$34.9 million surplus projected at contract execution. A year later, on November 30, 2001, PRAG projected a deficit of \$161.7 million. In February 2002, revised figures showed the deficit increasing to at least \$300 million. In April of that year, further adjustment to the PRAG data boosted the deficit projection to \$469 million.

Referrals and Recommendations

The Commission refers the full record of this investigation to the following agencies of government for whatever action they deem appropriate:

- The Governor, Legislature and Attorney General of New Jersey
- New Jersey Department of the Treasury, Division of Purchase and Property
- New Jersey Turnpike Authority, South Jersey Transportation Authority and Port Authority of New York and New Jersey
- State of Delaware, Department of Transportation

• • •

Based upon the investigative record, the Commission makes the following recommendations for statutory and regulatory reforms:

1. Safeguarding Procurement Integrity

The E-ZPass contract procurement was doomed to mismanagement and thrown open to manipulation from the start because it was founded upon a wholly inappropriate process, it was mismanaged and manipulated, and it was subjected to little in the way of due diligence or accountability. The facts established by this investigation provide a basis for significant reforms aimed at fundamental weaknesses that render the present state procurement system vulnerable to wholesale abuse, either by design or by default, and that undermine the state's ability to maintain proper and effective financial oversight.

The Commission is particularly concerned about the need to ensure that the procurement framework is used properly and appropriately and that the state is equipped with credible tools to evaluate, monitor and audit all key financial and programmatic

elements that are part of the public-project procurement process – from design assumptions through operational performance. Too much is at stake for New Jersey and its citizens ever again to be subjected to the cost, inconvenience and embarrassment of a public project undertaken, in effect, with blinders on. The Commission, therefore, recommends that the Legislature and Governor:

- **Tighten the Definition of “Professional Services”**

E-ZPass was designated from the outset an integrated professional-service procurement and, as such, was exempt from a host of statutory and regulatory rules that govern open, competitive public bidding. The issue is not that professional-service arrangements necessarily constitute bad public policy; rather, the issue is: what constitutes a professional service? The Legislature has never explicitly defined the term or considered the need for limiting its use. That a massive capital undertaking such as E-ZPass could be placed for procurement purposes in the same category as legal or engineering consulting with no enhanced controls or oversight to safeguard fairness and guarantee a level playing field for vendors raises serious questions that go to the heart of whether the public’s best interests are properly served by current law. Indeed, the professional-service procurement process was never designed or intended for use in such instances. Given that the Appellate Division of New Jersey Superior Court actually upheld the professional-service designation for E-ZPass based upon the law and the facts as presented to it, the Commission believes it is all the more vital that the Legislature and the Governor take action to tighten the definition of this term. By doing so, they will not only protect taxpayers and

consumers; but they will also provide proper and reasonable guidance to the courts.⁵⁶

- **Strengthen Accountability under the Public Contracts Law**

In January 1999, after the E-ZPass procurement was completed, legislation was signed overhauling the state and local government contract law (*N.J.S.A 52:34-12*). Though hailed at the time as a means to enhance procurement integrity and to balance administrative efficiency with public accountability, the revised statute contains a provision which, in light of what is now known about the E-ZPass procurement, could be self-defeating. Subsections (f) and (g), state⁵⁷:

(f) for any procurement, the State Treasurer or the [Division of Purchase and Property] director may negotiate with bidders, after bid opening, the final terms and conditions of any procurement, including price; such ability to so negotiate must be expressly set forth in the applicable invitation to bid;

(g) award shall be made with reasonable promptness, after negotiating with bidders where authorized, by written notice to that responsible bidder whose bid, conforming to the invitation for bids, will be most advantageous to the State, price and other factors considered.

This language was intended to promote flexibility in obtaining the best deal at the best price on behalf of the taxpayers, but the Commission is concerned that it is so broad as to constitute an invitation to abuse. In effect, it opens the way for every procurement to be treated such that the lowest responsible bid no

⁵⁶ It is the Commission's contention that if all of the facts uncovered by this investigation had been known to the Appellate Division prior to its rendering of the decision in *Nachtigall v. N.J. Turnpike Authority*, 302 *N.J. Super.* 123 (App.Div. 1997), the conclusions reached therein may have been markedly altered.

⁵⁷ Underlined material denotes language added to the statute as part of the changes enacted in 1999.

longer is necessarily paramount in any instance. Further, the statute as written authorizes private discussions, i.e. “negotiations”, with select vendors prior to the award of the contract without any explicit mechanism to ensure that such discussions are carried out in the public’s interest. Given the troubled history of both the enhanced emissions-inspection and E-ZPass procurements, the Commission recommends that the relevant sections of this statute be reviewed at the earliest possible date and amended to incorporate appropriate checks and balances without undermining or forestalling negotiated procurements deemed proper and legitimate.

- **Establish a New Process for Achieving Unique Procurements**

New Jersey’s contract procurement system as presently constituted provides an inadequate regulatory framework for the proper promulgation and administration of unique, technically difficult and financially complex procurements, such as E-ZPass, that may involve an elaborate mix of capital components and services. The state, therefore, needs to formulate a process to deal with those types of procurements requiring custom treatment and special oversight. A task force should be established immediately to develop such a process and to recommend to the Legislature and the Governor a practical methodology for implementing it. A key function of this task force would be to establish core criteria for determining whether a given procurement qualifies for this unique category either because its scope is beyond that of conventional competitive public bidding or does not fit the definition of a negotiated

professional-service procurement, or because it is a hybrid of the two, thus requiring its own process.

- **Reorganize Government Oversight or Create an Independent Comptroller’s Office for Procurement Auditing**

The documented failures of the E-ZPass and enhanced emissions-inspection procurements point to the critical need for a central state-level entity to ensure that the public-project contracting system throughout New Jersey is subject to proper and thorough financial and programmatic oversight. The Legislature and the Governor should take appropriate steps to review the current fragmented oversight structure and either reorganize it or create an independent auditor/comptroller with authority to consolidate and expand procurement oversight functions, and properly charged with auditing and reporting thereon. The goal in either case would be to establish and administer a practical system for auditing, monitoring and certifying all public-project procurements pursued by the state or by the various authorities to which the state is a party, with the following critical tasks in mind:

- Review the feasibility of large, unique and complex procurements
- Ensure that proper procurement procedures are followed
- Examine the financial and programmatic viability of proposed public-project contracts prior to contract execution
- Certify the accuracy and propriety of cost and revenue projections associated with public-project procurements
- Perform specialized public-project auditing functions

2. Conflicts of Interest

New Jersey's conflict-of-interest statute should be amended to require that state employees whose positions bring them into contact with private vendors relative to the state contract procurement process be barred from taking employment with such vendors, subsidiaries or otherwise related companies for at least two years following termination of state service.

At a minimum, legislation should be enacted that explicitly requires disclosure of a pre-existing or current professional or personal relationship between a state official and a vendor or consultant with involvement in a state procurement. Such disclosures should contain details sufficient to identify the exact vendor or consultant, regardless of any subsidiary relationship with a larger entity.

3. Due Diligence: New Jersey Economic Development Authority

Statutes governing the operations of the New Jersey Economic Development Authority (NJEDA) should be amended to require that the NJEDA conduct authoritative and independent financial due diligence evaluations on all financing arrangements in which it agrees to participate as a "conduit" for the sale of bonds or with which it otherwise is integrally involved.

4. Vendor Protests

During the E-ZPass procurement, the losing bidder, Lockheed Martin IMS, filed a formal protest claiming the contract was unfairly awarded. The protest was dismissed

following two separate hearings presided over by the top administrative officials of the New Jersey Turnpike Authority, which was the lead agency in the procurement. In one instance, the presiding officer – at the time the Turnpike Authority’s Chief of Staff – was a reluctant participant who testified to being ill-prepared and denied the assistance of outside counsel. Thus, the Commission is concerned not only about the appearance of a conflict of interest associated with a protest proceeding conducted by an agency directly involved in a procurement, but also about the experience and qualifications of personnel who preside over such proceedings.

To address these issues, legislation should be enacted specifying that such protest claims be filed with and heard by a qualified, experienced and independent arbitrator.

5. Vendor Evaluations

The State Division of Purchase and Property should adopt regulations explicitly requiring that all vendor evaluation committees established pursuant to the state contract procurement process, particularly as it relates to large capital projects, include at least two members proficient in matters related to public-project financing. This is essential in those procurements where substantial sums of money are involved or nontraditional financing approaches are contemplated. In instances where appropriate and necessary expertise is not available within the government, the responsible agency should seek to obtain objective resources through the private sector at reasonable expense.

Further, to safeguard the integrity of the evaluation process, a reliable mechanism should be established to evaluate the suitability of candidates for membership on evaluation committees. Individuals found to have a current or past relationship with a

prospective vendor, or with the principal of a prospective vendor, should not be considered for evaluation assignments to which such a vendor is a party.

6. Transparency

In the interests of public disclosure, legislation should be prepared and enacted requiring that once a matter has entered the procurement process, any contact related to the procurement between state employees and representatives of active or prospective state vendors be memorialized in writing so that a public record of all such contacts can be maintained.

7. Service of Process

Legislation should be enacted to require that all foreign and domestic entities doing business in New Jersey relative to any public project – including consultants, contractors and subcontractors – complete, maintain and keep current the New Jersey Division of Revenue’s *“Public Records Filing For New Business Entity”* form that includes the designation of a registered agent and regional office within this state for the service of process (subpoena) for any legal action or inquiry, civil, criminal or otherwise. Further, proof of such filings should be required by the public entity prior to the award of any public contract. The Commission is constrained to point out that it repeatedly has made this recommendation over the course of a number of its investigations in recent years, and it seems to have fallen on deaf ears.

The Commission also recommends that the “Uniform Act to Secure the Attendance of Witnesses From Without a State in Criminal Proceedings” (N.J.S. 2A:81-

18 *et. seq.*) be amended to allow for compulsory attendance by out-of-state witnesses in investigations conducted by the SCI.



APPENDIX



CHART



A-3



File: ETC Executive Council

*Agenda Item
Eng & Council*



CHRISTINE TODD WHITMAN
GOVERNOR

FRANK J. WILSON
COMMISSIONER

STATE OF NEW JERSEY
DEPARTMENT OF TRANSPORTATION

1038 PARKWAY AVENUE

CN 601

TRENTON, N.J. 08625-0601

609-530-3536

~~8-10-95~~

8100.16

September 22, 1995

NJ DOT NJC 000 15

RECEIVED

SEP 22 1995

EXECUTIVE DIRECTOR

The Honorable Frank X. McDermott
Chairman, New Jersey Turnpike Authority
P.O. Box 1121
New Brunswick, NJ 08903

Frank

Dear Chairman McDermott:

In order to carry out Governor Whitman's policy on timely and cost-effective implementation of electronic toll collection, we must work together to provide a unified system for New Jersey's toll roads.

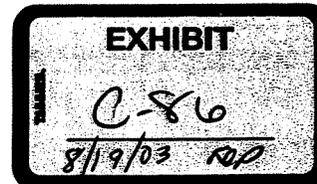
For that purpose, I offer the enclosed resolution which provides Board authorization for the Authority to participate in an Electronic Toll Collection Council that will coordinate the procurement of services and products across the agencies. The efforts of the Council will build on the work of the E-ZPass Interagency Group (IAG) to install a single electronic toll collection system throughout the region. Working together to provide a unified system will maximize customer service and convenience and will allow economies of scale and a rational implementation schedule.

I ask that this Resolution be presented to the Commissioners at the September Authority meeting.

Sincerely,

Frank J. Wilson

Frank J. Wilson
Commissioner



Enclosure

RESOLUTION NO. _____**RESOLUTION IN SUPPORT OF FORMING A
COUNCIL FOR THE IMPLEMENTATION OF
ELECTRONIC TOLL COLLECTION**

WHEREAS, an efficient program of highway Electronic Toll and Traffic Management (ETTM) is critical to the movement of people and goods in New Jersey and the region; and

WHEREAS, a critical element of ETTM is an electronic toll collection system which will eliminate the need for highway customers to stop and pay highway tolls with cash, tokens or tickets; and

WHEREAS, the highest level of customer service and convenience is achieved by providing a single electronic toll collection system across the State's toll facilities; and

WHEREAS, the New Jersey Turnpike Authority desires to implement regional electronic toll collection and has been involved with the *E-ZPass* Interagency Group in the cooperative evaluation of such equipment; and

WHEREAS, greater efficiencies can be achieved by cooperation and coordination among the involved agencies to ensure efficient and effective implementation and operation of electronic toll collection; and

WHEREAS, it is most beneficial to the State of New Jersey for all three toll roads to proceed simultaneously; and

WHEREAS, Governor Whitman has directed the Commissioner of Transportation to lead New Jersey's program and proceed in conjunction with outreach efforts to other northeastern states;

NOW, THEREFORE, BE IT RESOLVED, by the New Jersey Turnpike Authority and the members thereof that:

1. The New Jersey Turnpike Authority shall join with the New Jersey Highway Authority and the South Jersey Transportation Authority to form an Electronic Toll Collection Council for the purpose of implementing and operating a Statewide electronic toll collection system.
2. The Council shall be chaired by the Commissioner of Transportation. The Council shall include the Executive Directors of the New Jersey Turnpike Authority, the New Jersey Highway Authority, and the South Jersey Transportation Authority, and may be expanded to include other agencies.

3. The Turnpike Authority Chairman shall designate one Board Member, other than the Commissioner of Transportation who serves as Council Chairman, to serve on the Council in a policy oversight role.
4. The Council shall work cooperatively to expedite the implementation of an electronic toll collection system on the New Jersey Turnpike, the Garden State Parkway, and the Atlantic City Expressway. In addition, the Council shall also cooperate with other agencies operating toll facilities in New Jersey on subsequent expansion of the electronic toll system.
5. The Council shall develop procedures for soliciting proposals and awarding a contract for delivering and operating a Statewide system in the most expeditious and cost-effective manner available. These procedures will be submitted for approval by the Authorities. The Council shall also be responsible for overseeing the timely implementation of the project.
6. The New Jersey Turnpike Authority shall act as the lead administrative agency to effect the joint procurement, installation and operation of the common system. As lead administrative agency, the Turnpike Authority shall act on behalf of the Council to initiate all actions required to procure professional services or products necessary for the purpose of implementing and operating the Statewide system.
7. The Commissioner of Transportation is authorized to call upon any department, office, or division of this Authority to supply him with data, and any other information, personnel or resources he deems necessary to discharge his duties as Council Chairperson.



STATE OF NEW JERSEY
DEPARTMENT OF TRANSPORTATION

1035 PARKWAY AVENUE

CN 601

TRENTON, N.J. 08625-0601

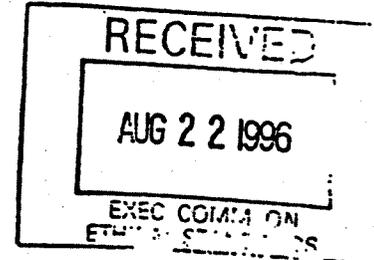
609-530-3536

August 20, 1996

CHRISTINE TODD WHITMAN
GOVERNOR

FRANK J. WILSON
COMMISSIONER

Honorable Christine Todd Whitman
Governor
State of New Jersey
CN-001 - State House
Trenton, New Jersey 08625



Dear Governor Whitman:

Please be advised, that effective immediately and until further notice I intend to avoid any business dealings including but not limited to actions, decisions, considerations, discussions, etc. with the following firms:

- ◆ AE Comm
- ◆ Booz Allen & Hamilton
- ◆ Dames & Moore

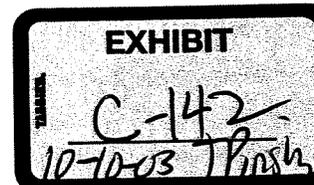
Deputy Transportation Commissioner, Sharon L. Landers should be contacted regarding any business dealings, transactions or decisions affecting the above referenced firms. She may be reached at (609) 530-2002.

Thank you for your cooperation in this matter.

Sincerely,

Frank J. Wilson

- c. Harriet Derman
- Michael Torpey
- Peter Verniero
- Sharon L. Landers
- ✓ Rita L. Strmensky





1256 No. Church Street, Unit 4
Moorestown, NJ 08057
PHONE: (609) 235-5252
FAX: (609) 235-7488

10/10/96

FAX Transmittal

DATE: 10/10/96

SENDER: Bill Rapp

Pages (incl. cover): 36

RECIPIENT: Paul Carris

FAX #: 609 530 5340

SUBJECT: BAFO

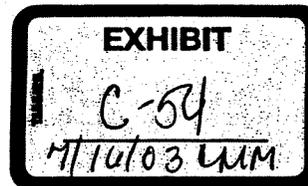
Remarks:

Hardcopy coming!

+ \$179.6 M NET

609-530-5340

ISSUES +
CONTACT,



IF YOU DO NOT RECEIVE ALL OF THE PAGES, PLEASE CALL AS SOON AS POSSIBLE

CONFIDENTIALITY NOTICE: Unless otherwise indicated or obvious from the nature of the transmittal, the information contained in this facsimile message is privileged and confidential information intended for the use of the individual or entity named above. If the reader of this message is not the intended recipient, or the employee or agent responsible to deliver it to the intended recipient, you are hereby notified that any dissemination, distribution or copying of this communication is strictly prohibited. If you have received this communication in error, please immediately notify the sender by telephone and return the original message to the above address via the U.S. Postal Service at our expense. Thank you.

HTA



MFS TransTech, Inc.
1256 North Church St., Suite D
Moorestown, New Jersey 08057-1129
TEL (609) 235-5252
FAX (609) 235-7488

October 10, 1996

Mr. Paul A. Carris
ETC Program Manager
New Jersey Turnpike Authority
Administration Building
P.O. Box 1121
New Brunswick, NJ 08903

Dear Paul:

Attached is our revised BAFO submission. Included are our overall financial projections, violations/collections/*E-ZPass* penetration sensitivity analysis, the responses to your questions, potential revenue opportunities and financial documentation are all included in this attachment. We have not been able to complete several of the analyses the Consortium requested, but are very interested in providing you with additional background information on these points should the opportunity present itself in the future. These incomplete analyses include:

- Sensitivity analysis based on Approach 2.
- An analysis of the impact of the inclusion or exclusion of Delaware from the financial analysis.

Our financials include fixed pricing for *E-ZPass* replenishment, elimination of capitalized maintenance, and an explicit treatment of financing charges for this project.

After reviewing *E-ZPass* with our project finance advisor, we believe that there are circumstances in which this project could generate sufficient revenues to pay for itself and generate net revenues for the Consortium. However, to finance this project, it will be necessary for the Consortium to provide assurance that it will underwrite its financial performance over the project life. If revenues are insufficient to cover capital and operating costs, the Consortium will need to make payments at the conclusion of the project to make up for the shortfall. Reflecting our updated financial assumptions and the changes you have requested, we anticipate that the Consortium would be required to make a \$12MM payment at the conclusion of the project assuming the Consortium's violations rates and a 50% collections rate on citations sent to violators. We

Wily rates change

anticipate that the project would be self-funding at a 1.0% violations rate and a 50% collections rate.

We have identified enhanced revenue opportunities beyond those we have discussed with you previously that collectively could generate in excess of \$250MM in revenues. The potential profits to the Consortium (after sharing with the MFS Team) that might exceed \$100MM. We itemize and discuss the basis for these estimates in the attachment.

Paul, I would like to reiterate our thanks for the professional and objective manner the procurement has been conducted. We remain very committed to the success of E-ZPass and look forward to working with the Consortium to set the standard for Electronic Toll Collection implementation in the U.S.

Best regards,



William P. Thompson
President & COO



New Jersey Turnpike Authority

ADMINISTRATION BUILDING P.O. BOX 1121 NEW BRUNSWICK, NEW JERSEY 08903
(908) 247-0900

COMMISSIONERS

FRANK X. McDERMOTT, *Chairman*
NANCY H. BECKER, *Vice Chair*
RAYMOND M. POCINO, *Treasurer*
JOSEPH (J.P.) MIELE
LAWRENCE F. KRAMER
FRANK J. WILSON

EDWARD GROSS
ACTING EXECUTIVE DIRECTOR

September 20, 1996

Mr. William Rapp
MFS Network Technologies, Inc.
1200 Landmark Center
Suite 1300
Omaha, Nebraska 68102

Dear Mr. Rapp:

Attached please find the guidelines MFS Network Technologies should use in the preparation of its BAFO to the Consortium.

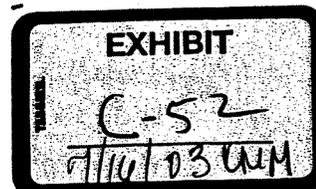
If you need any clarification, please call me at (908) 247-0900, extension 5280.

Very truly yours,

Paul A. Carris

Paul A. Carris
ETC Program Manager

PAC/jjs
Attachment



**CONSORTIUM REGIONAL ETC IMPLEMENTATION PROGRAM
GUIDELINES FOR BEST AND FINAL OFFER
MFS Network Technologies
September 20, 1996**

Member Agencies of the Consortium Regional Electronic Toll Collection (ETC) Program (the New Jersey Turnpike Authority, the New Jersey Highway Authority, the Port Authority of New York and New Jersey, the South Jersey Transportation Authority, and the Delaware Department of Transportation) are soliciting Best and Final Offers (BAFO) for deployment of an ETC system and operation of a regional ETC Customer Service Center. Twenty copies of your BAFO response shall be delivered no later than 1:00 p.m., Friday, September 27, 1996 to:

Mr. Paul A. Carris
ETC Program Manager
New Jersey Turnpike Administration Building
East Brunswick, New Jersey

Based upon discussions and interaction with the MFS/Chase Team over the last several weeks, it is the opinion of the Consortium that this program will be self-funding by the proposer. The Consortium believes that the systems and services it seeks to acquire will be provided at no cost to the Consortium and may, in fact, generate revenue in excess of costs based on the composition and structuring of your BAFO. In addition, it must be recognized that the Consortium agencies operate in an environment that requires "annual budgeting certainty." Therefore, a goal in the deployment of this ETC system and CSC operation is to receive a BAFO that is technically sound; puts forth a solid, well organized team; and provides, with certainty, the cost to the Consortium of the ETC system and CSC operation.

The Consortium is prepared to select the offer that represents the best value to the Consortium considering technical, cost, and other factors described in the original RFP and Addenda. To reduce the financial risk for proposers in structuring an offer that provides budgeting certainty, the Consortium is prepared to allow proposers to retain a portion of the revenues generated directly or indirectly over the contract term through the operation of the ETC system and/or the CSC operation. There will, however, be no sharing of any agency's toll revenue. The BAFO shall clearly specify the details of the offeror's price proposal to the Consortium, including any cost or revenue sharing arrangement, as applicable.

To assist the proposers in preparing their BAFO responses, it must be understood that the estimated market penetration rates cited in the RFP and the following estimated violation rates are provided as guideline estimates for the purposes of this procurement. Proposers are free to use these estimates or, independent of these and other assumptions, proposers may generate their own estimates in preparing a response that achieves the Consortium's goal of annual budgeting certainty. Furthermore, the Proposer's response must positively indicate the vendor's understanding that penetration and violation rate estimates do not represent a guarantee as to the level of activity.



MFS TransTech, Inc.
1256 North Church St., Suite D
Moorestown, New Jersey 08057-1129
TEL (609) 235-5252
FAX (609) 235-7486

September 27, 1996

Mr. Paul A. Carris
ETC Program Manager
New Jersey Turnpike Administration Building
P.O. Box 1121
East Brunswick, New Jersey 08903

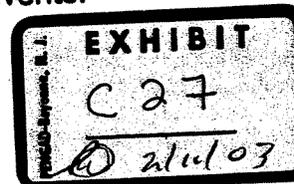
Dear Mr. Carris:

MFS Network Technologies Inc. (MFSNT) and our associated team members are pleased to present our Best and Final Offer (BAFO) to the member agencies of the New Jersey regional Consortium for the deployment of an advanced Electronic Toll Collection (ETC) system and operation of a regional ETC Customer Service Center (CSC). As the Prime Contractor, MFSNT will continue to be the single point of contact for program management and responsibility for this project throughout the life of the contract.

The MFS Team offers the Consortium a unique public-private partnership approach that will provide the system and level of service needed to successfully implement and operate the E-ZPass program at an acceptable level of risk to both parties. Our partnership approach recognizes the unique contributions that each party brings to a venture of this nature.

Our analysis of the business conditions as stated in the BAFO guidelines provides the basis for offering the Consortium several financing options. We are able to provide this offer based on certain assumptions that include revenues and business risks shared between our public/private partnership. The two basic approaches, detailed in the pages immediately following this letter, are:

1. \$0 Down, \$0 Payments – No initial payment and no recurring payments subject to a Consortium guarantee that the aggregate potential violation rate will not fall below 0.8% over the life of the eight-year contract. If the violation rate exceeds 0.8%, we will provide 15% of the profits, associated with this "surplus" to the Consortium, net of collection expenses – approximately \$9 million over the life of the contract (including Delaware). The 0.8% violation rate is relatively conservative compared with the Consortium's estimated violation rate of 0.93% over the eight-year contract life. We will work with the Consortium to fully define violation events, including the necessary "mix" of events.



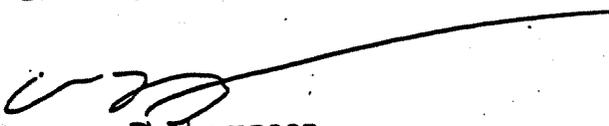
2. **\$0 Down, Budget Certainty** – No payments for the first two years, followed by fixed annual payments of \$60 million dollars in years 1999 and 2000. Within this framework, the Consortium and the MFS Team share in the actual profits associated with violations enforcement. Under this assumption, the Consortium can expect to receive approximately \$150 million over the life of the contract.

Our team prefers the second approach as it truly aligns our interests with those of the Consortium over the eight-year contract, creating congruence for our mutual goals and objectives. We must emphasize that, based on our assumptions and predicated on all parties achieving mutually agreeable documentation, we are confident that it is possible to secure financing for either of these approaches. We are prepared to work with the Consortium for these approaches or other negotiated alternatives and variations. Additionally there are certain revenue projections (e.g. Fiber Optic R.O.W. revenues) that we have of necessity stated conservatively.

Our BAFO includes by reference our cumulative responses to all requirements as stated in the Request for Proposal and subsequent Addenda and Clarifications.

The MFS Team remains committed to the New Jersey Regional ETC program. We offer our proposal to provide the Consortium with a technically sound, cost efficient, well-managed and financially attractive offer that presents the highest value and lowest possible risk solution. Bill Rapp, our Sales Manager, is available should there be any questions regarding our submittal.

Sincerely,



William P. Thompson
President and COO
MFS TransTech, Inc.

Clarifications to Approach 1

\$0 Down, \$0 Payments

- No initial payment and no recurring payments
- Payment schedule subject to a Consortium guarantee that the aggregate violation rate will not fall below 0.8% over the life of the eight-year contract
- If the violation rate exceeds 0.8%, we will provide 15% of the profits associated with this "surplus", net of collection expenses, to the Consortium. Using the Consortium's violation rates and including Delaware, this will generate an estimated \$9 million for the Consortium over the eight years of the contract
- Administration Fee sharing matrix for violation rates and collection rates other than those of this base case to be established during negotiations
- All tolls associated with citations collected will be forwarded to the appropriate Consortium member
- New citation issuance criteria (e.g., six-month guidelines for NJHA and SJTA) as presented in the BAFO details
- CSC costs, including banking charges associated with replenishment, are based on stated penetration levels. Deviations from the penetration assumptions will result in the appropriate pass-throughs to the Consortium
- Definition of a violation to be finalized during negotiations, but understood to include "non-payment", "partial payment", "missed basket", "unread tag" and "license plate not readable"
- Consortium members will provide operational support to MFSNT's VPC processes to maximize its effectiveness
- Offer assumes implementation of the MFSNT fiber optic network R-O-W option
- These projections include Delaware.

Clarifications to Approach 2

\$0 Down, Budget Certainty

- No payments in 1996, 1997 or 1998
- Annual payments of \$60 million in 1999 and 2000
- No payments in 2001 and beyond
- Sharing of violations revenues net of collection costs; using the Consortium's estimated violations rate and a collection rate of 50% on citations sent, the Consortium will receive violations sharing of an estimated \$150 million over the eight years (including Delaware)
- Administration Fee sharing matrix for violation rates and collection rates other than those of this base case to be established during negotiations
- All tolls associated with citations collected will be forwarded to the appropriate Consortium member.
- New citation issuance criteria (e.g., six-month guidelines for NJHA and SJTA) presented in the BAFO details
- CSC costs, including banking charges associated with replenishment, are based on stated penetration levels. Deviations from the penetration assumptions will result in the appropriate pass-throughs to the Consortium
- Definition of a violation to be finalized during negotiations, but understood to include "non-payment", "partial payment", "missed basket", "unread tag" and "license plate not readable"
- Consortium members will provide operational support to MFSNT's VPC processes to maximize its effectiveness
- Offer assumes implementation of the MFSNT fiber optic network R-O-W option
- These projections include Delaware.

NEW JERSEY DEPARTMENT OF TRANSPORTATION
MEMORANDUM

TO: Jack Naiman
Director, Division of Procurement

FROM: Chris Cox *Chris*

SUBJECT: Addendum for additional scope of work for Kingston Cole & Associates

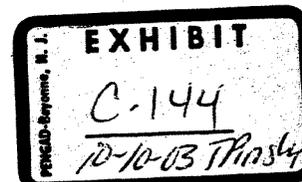
DATE: September 19, 1995

Action Requested:

The basic tasks required in contract # A70745 with Kingston Cole & Associates are nearing completion. One of the outcomes was the recommendation to Commissioner Wilson that two functional specifications and RFP's be issued as soon as possible, on a parallel track.

- The first RFP will package all the right of way in the various transportation agencies' domain, and offer it through a "bidding" process to qualified proposers to construct, operate, maintain and market a fiber optic backbone system. The successful proposer will share revenues and other perquisites, with NJDOT and the Authorities, derived from their commercial licensing or leasing of the fiber optic system. The RFP will be functional, and will allow the proposers to present the structure and relationship which offers them and the transportation authorities the optimal revenue stream.
- A second RFP is recommended to select a qualified proposer to construct, maintain, and operate an electronic toll collection system (referred to generically as ITS in the attached scope) on the Authorities' rights of way. This is also expected to generate revenue for the state. This system will use the fiber optic backbone as part of the necessary technology to operate the systems. This RFP will also be functional in nature, inviting creative proposals to develop the business relationship between public and private sectors.

A scope of work to define further the necessary tasks and associated costs was requested from Kingston Cole & Associates in August. (See attached memo.) This is a request for an addendum to the original contract, pursuant to the attached scope of work, to authorize Kingston Cole & Associates to assist in developing requirements, soliciting proposals, evaluating responses, and negotiating resultant agreements or licenses for two RFP processes.



Background:

The contract issued in February, 1995, to Kingston Cole & Associates, was to determine the market feasibility for and assess the value of the state's right of way to the telecommunications industry. Also explored was the feasibility of "partnering" with the private sector to build intelligent transportation applications on a revenue-producing fiber optic infrastructure in the right of way. Pursuing those tasks has resulted in the conclusion that there is significant private sector interest in the right of way of the transportation authorities (Turnpike, Garden State Parkway, and Atlantic City Expressway) as well as key state roads and interstates. There is also interest and revenue potential, from a different mix of companies, in installing and operating electronic toll collection on authorities' roads.

The timeliness of this second conclusion was brought to bear in the past week with the announcement by the Governor that she wants to move ahead with electronic toll collection implementation. Commissioner Wilson has announced that a consortium of the New Jersey transportation agencies will be moving full speed ahead to install electronic toll collection. Based on the feasibility research from the Kingston Cole & Associates contract, Commissioner Wilson has recommended that a public/private approach is the method to use, rather than just building everything entirely with state or federal funds.

Discussion:

Throughout his work with NJDOT, Kingston Cole has been supported by DAG Susan Roop for advice and guidance about the framework within which his recommendations can proceed. Mr. Cole and Commissioner Wilson have met with the Director of Law and DAG Roop to discuss the alternatives for proceeding, and that review is ongoing. The Commissioner has also kept the Treasurer informed of the public/private approach which is recommended for the fiber backbone and the electronic toll installation.

The attached scope of work from Kingston Cole & Associates is the necessary next step to continue the process which is underway. There is no change in the hourly rate for Mr. Cole from the original contract. The firm SRI International is being proposed by Mr. Cole as a subcontractor for this work. Mr. Cole interviewed a number of firms and chose SRI. Their qualifications are a part of the scope, and an explanation of that choice is included. The nature of this RFP and procurement is entirely new to New Jersey, and likely new within the country. It is not work which the Department or the State has the background, expertise, or time to undertake.

Recommendation:

Proceed with addendum to contract with Kingston Cole & Associates.

DOT00615

KINGSTON COLE & ASSOCIATES

September 12, 1995

Ms. Christine Cox
Department of Transportation
State of New Jersey
1035 Parkway Avenue, CN-600
Trenton, NJ 08625

Subject: Change Order and Related Scopes of Work for Fiber Optics and Intelligent Transportation Systems (ITS) Requests for Proposal (RFP's)

Ms. Cox:
Dear Chris,

Per our findings and conclusions, Kingston Cole & Associates is recommending issuance of two (2) Requests for Proposal (RFP's). The objectives for each RFP will be:

- **Fiber Optic RFP:** To select a qualified proposer who will construct, operate, maintain and market a fiber optic backbone system along various NJDOT and Authorities' rights of way (ROW). The proposer will also share revenues and other perquisites, to be determined in negotiations, with NJDOT, the Authorities and the State of New Jersey from the commercial licensing or leasing of the fiber optic system.
- **Intelligent Transportation Systems (ITS) RFP:** To select a qualified proposer who will construct, maintain and operate an ITS system along selected Authorities' rights of way. The approved system(s) will significantly alleviate traffic congestion problems, provide compatible and much-needed technological applications to the State's major toll roads and generate new sources of revenue for New Jersey's Highway Trust Fund, the General Fund and the Authorities.

Given the disparate objectives, potential proposers and needs of the two RFP's, separate Scopes of Work are submitted for this project. In terms of work effort, we assume that the two RFP's will be issued in the same approximate time frame (last quarter, 1995 and/or first quarter, 1996). The two projects will therefore closely parallel each other in terms of milestones and other significant events and dates.

Per your request to Kingston Cole & Associates, I am submitting to you a Change Order and related Scopes of Work to provide assistance to NJDOT in the development of RFP's for the above noted areas. The details and justifications for the Change Order are as follows:

DOT00616

1

CHANGE ORDER

Submitted by: Kingston Cole & Associates (Vendor No.: 347404720)
Requested for: Contract No. A70745

Per your memorandum to us of August 16, 1995, Kingston Cole & Associates now submits a Change Order and related Scopes of Work (Attachments 1 and 2) to the New Jersey Department of Transportation (NJDOT). Your memorandum succinctly states the rationale for the requested additional work, "... Assistance with a specific procurement process is too large an effort to handle that way (through small add ons to the existing contract). Therefore, I am asking for a scope of work, cost estimates and time lines which you propose for the completion of a full scale procurement. Include subconsultant information as well."

To this rationale we would add the following additional justifications:

- The proposed RFP's, one for development of a fiber optic backbone system and the other for ITS development of the Authorities' rights of way, are a logical extension of much of our work to date. Essentially, Kingston Cole & Associates has been conducting market research, i. e., to determine if the fiber optics, intelligent transportation systems (ITS), cellular and personal communications systems (PCS) industries are ready and willing to develop NJDOT's rights of way in public/private partnership arrangements. The answer has been a resounding "Yes".

Rather than just analyze and study the current situation, as most consultants do, Kingston Cole & Associates has actively solicited and encouraged the various telecommunications industries to develop proactive plans for deployment of the networks, applications and services along NJDOT and Authorities' rights of way.

The affected industries are therefore closely monitoring our progress and efforts. Indeed, major corporations now expect release of requests for proposals (RFP's) on or before the first quarter of 1995. Delay caused by a protracted consultant selection process could significantly alter industry expectations and jeopardize revenue producing possibilities for the State and NJDOT. We cannot emphasize enough the need for rapid, albeit prudent, development and issuance of RFP's that will capture the current "Window of Opportunity."

- Our estimates of annual revenues from the various projects, depending on the degree of privatization offered by potential proposers are: 1.) \$8 to \$10 million for the fiber optics RFP; and, 2.) \$7 to \$30 million for the ITS RFP, contingent upon the degree of privatization offered by the winning proposer. These are new revenues not anticipated or projected in NJDOT's current or future budgets. Our understanding is that looming transportation problems, e. g., future toll road increases, could be obviated by the revenues estimated for our telecommunications projects.

- The personal relationships that we have developed with key leaders in the telecommunications/ITS industries, as well as the liaisons that we have created with NJDOT and other State personnel (e. g., Department of the Treasury, Department of the Attorney General, etc.) must be maintained and nurtured through the RFP processes. These intangibles might be wasted, should another consultant, or consultant group, now replace Kingston Cole & Associates.

This Change Order is thus a logical extension of those earlier efforts that now requires extensive new skills, expertise and funding to meet the comprehensive challenges of designing, issuing, managing and negotiating two RFP's that will set new standards for state governments throughout the country.

With this Change Order, Kingston Cole & Associates is also submitting the credentials of a new subcontractor to assist us throughout the various steps of the competitive bidding process. That subcontractor is SRI International. We have already provided you with information concerning the credentials and experience of SRI and related personnel who will work on the proposed projects.

The justification for the inclusion of SRI International (SRI) is simple and compelling: The RFP's that we will develop for NJDOT will be the most complex and innovative ever issued in the United States for either a public/private partnership agreement or revenue sharing potential. Per our reports to NJDOT, we believe these projects, and the proposals that will be received, will exceed any similar efforts to date by orders of magnitude.

In order to match these efforts, a commensurate increase in technical expertise and background will be required. Kingston Cole & Associates's previously subcontracted technical expertise is simply not sufficient for the proposed Scope of Work. We think that NJDOT and the Department of the Treasury will agree that the exceptional credentials of the SRI International team are more consistent with the comprehensive work effort now proposed.

Finally, SRI was not selected by us without extensive inquiry and investigation. More than seven firms, large and small, with expertise in engineering and telecommunications related fields, were interviewed. NJDOT personnel were queried as to their relationships and perceptions of firms currently approved for contract work with the Department. A major emphasis was placed on employment of a qualified firm with substantial connections and contacts in the State of New Jersey. SRI was the outstanding firm on all counts; including a major New Jersey presence in the form of the David Sarnoff Research Laboratory facility on Route 1 that is wholly owned and operated by SRI.

To facilitate the review and approval process, we are providing you with two Change Orders, each with its respective Scope of Work that includes estimated hours for completion of the RFP projects and a total dollar amount not to exceed three hundred and ninety six thousand dollars and no cents (\$396,000.00). Should you have any questions or concerns, please do not hesitate to contact me. Thank you for your time and effort in consideration of this matter.

Submitted by:



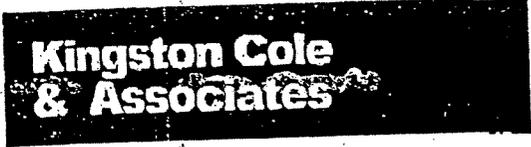
Kingston Cole, Principal

Kingston Cole & Associates

Attachments

DOT00619

1537 Fourth St., Ste: 169 San Rafael, CA 94901
Tel: 415-455-0800 Fax: 415-456-0558



Fax

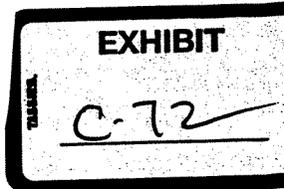
To: Paul Carries From: Kingston Cole
 Fax: 908-247-3811 Pages: 8
 Phone: 908-247-0900 x5280 Date: 9/3/96
 Re: Fiber Optic System CC:

Urgent For Review Please Comment Please Reply Please Recycle

• Comments:

The following is a memorandum for file I am showing of you on an informal basis only. Any distribution is not advised.

KJC



NJTASCI 913202

MEMORANDUM FOR FILE

BY: Kingston Cole
RE: Initial Negotiating Positions for Fiber Optic Network/ETC
DATE: September 3, 1996

I. Introduction/Overview

MFS has clearly presented the better proposal in this area. They have "been there, done that" with resource sharing arrangements negotiated at BART and the New York Throughway. BART's deal remains preeminent with a 91% (for BART) share of the revenues and a \$40 million integrated SONET and trunked radio system, and 48 strands of fiber, being paid for with BART's share of the revenues. The New York Throughway deal has been the subject of much criticism, with the agency receiving only 25% of the revenues, as well as some fiber and service. Rumor has it that Throughway management is very upset and trying to re-negotiate the deal.

Nevertheless, MFS has at least offered something for each of the Authorities, as well as the future potential to grow the fiber optic system along NJDOT's public access roads in the near term future. Two small sections of NJDOT's public roads are specifically requested in MFS' proposal, to provide system redundancy.

Lockheed's offer is for one Authority only, the NJ Turnpike. Clearly, this has irked all the Authorities, in one form or another. NJ Turnpike personnel told me they believed theirs was the only right of way (ROW) with value (based on both proposals), and they should therefore receive a larger piece of any revenue "pie." NJHA personnel informed me:

- 1.) They find Lockheed's proposal absolutely unacceptable and insulting on its face (\$150,000 for a one year option solely to look at their ROW);
- 2.) They have devoted the best and most knowledgeable personnel to this project (Thus working harder than other Consortium members?); and,
- 3.) They know they have value because of previous fiber optic deals, existing empty conduit, etc.

NJHA therefore believes it should have a bigger slice also. SJTA is not even mentioned. As usual, they undoubtedly will accept this slight with quiet resentment.

II. MFSNT

MFS has put a bona fide, comprehensive offer on the table--in sharp contrast to Lockheed and their inexperienced developer, Symphony Management. My initial recommended negotiating posture is: KC&A and the Consortium negotiating team use this segment of the negotiations to

determine how tough, flexible, etc. the Chase Manhattan/MFSNT team will be. We "take the point" for the entire negotiations. The rationale for this approach is:

MFS' offer in this area is similar to the one made to BART. We have much to negotiate, but, as described in detail below, the relative negotiating positions, personalities involved, etc. are known quantities, i. e., we all have a rough idea of the price tag on this segment of the RFP. There are a lot fewer unknown factors here than in the larger ETC negotiations.

I believe MFS thinks the fiber optic offer will clearly differentiate their overall offer from Lockheed's. Although this is just an option, per the terms of the RFP, MFS clearly believes the proposed revenue streams, new SONET equipment and generally sophisticated approach and presentation will put them over the top--all other factors being equal.

Despite MFS' brave talk about their options and alternative routes to build an East Coast (Boston to Miami) fiber optic system, we can minimize, if not remove many of these options from the table. We are poised to impose much higher fees, penalties, etc. for access onto NJDOT public roads. No longer will so-called "public utilities" be able to drill, trench and bore with impunity. Furthermore, I will recommend a moratorium to Commissioner Wilson on any fiber optic construction for a period of 6 to 9 months. The rationale for the moratorium is one I have used in California several times with other clients: Too many companies want access; they are causing safety problems and eroding the useful life of the public access roadways. A moratorium for a reasonable time is therefore warranted while we study the situation.

MFS' other option to get from New York to Florida is AMTRAK. I question whether MFS is willing to imperil its relationship with Chase Manhattan--and the overall ETC proposal--to build a fiber optic conduit system for 6 carriers along AMTRAK's alternative route. I think the overall project, with all its implications, potential revenues and ETC market dominating potential is more important than just another fiber route. Furthermore, AMTRAK's new ROW director, Joe Baybado from BART, just arrived. He's not going to be able to cut a deal of this magnitude for at least 6 months.

I therefore recommend that we take the "point position" in testing the mettle of the other side's negotiating team. If there are other areas where the Consortium knows with reasonable certainty what it wants, we can move in parallel; preferably exchanging perspectives on how the other side is reacting to our respective positions.

The following are some early thoughts regarding specific negotiating positions vis a vis MFS:

1. Revenue Stream

MFS calculations in this area are extremely conservative. The company calculates revenues at \$175 per duct per mile per month, which translated to \$2100 per year, or \$.40 per foot per year. In contrast, BART is receiving rates of \$5 to \$8 per foot per year for the Transbay Tube, \$3.75 for routes through San Francisco and Oakland to the Tube and \$1.85 (more than 4 times their projections for New Jersey) in the less desirable outlying parts of the Bay Area. NJHA is now doing better than \$2 per foot in certain sections of its ROW.

The company's dark fiber estimates represent a similar low evaluation. I believe we can safely estimate at least double MFS' proposed revenue stream from this project. They are estimating \$6.8 million per year when filled; I believe \$15 million is a more realistic projected revenue stream. Only the market will determine the actual price level--but a reasonable starting perspective helps us with other areas of the negotiations. MFS is playing mind games--minimizing the revenue estimate (in the guise of conservative financial estimates) to give themselves an edge in other area, e. g., financing the system.

2. Financing the System and Related Terms

MFS calculates the cost of the system at approximately \$50 million in the interview on Friday, August 30. According to their written proposal, if the Consortium borrows the money (presumably from MFS' partner, Chase Manhattan) to build the system over a 7-year period, the debt is amortized with 84 monthly payments of \$2,179,028 each for a total payment of \$183,038,352. Something is off here that must be checked.

In any case, MFS indicated that a 30 year term (probably the present value calculation for the \$50 million over 30 years) is more acceptable to industry standards. I agree on the term, albeit we should put escalators (COLA's) in at 20 years for the remaining term.

More importantly, MFS is pushing for the Consortium to put the full faith and credit of the Authorities behind the debt that would be incurred. The debt would be paid with proceeds from fiber and conduit rentals. Should those not prove sufficient, the Authorities would be required to subordinate other debt to payment of any shortfall. Implicit to this is that if the Authorities want any other type of deal, they will have to radically alter the revenue split; probably closer to the NY Throughway deal of 25%.

I am negotiating non recourse financing in another deal now. There, the equipment is the lender's only real recourse. No tax exempt bond indebtedness can be incurred because the government agency refused to accede. On the other hand, the lending institution (JP Morgan) not only is reputable; but believes it will do quite well with a private placement financing at market (not tax exempt) rates. I do not see why this approach, keep the 85%, use market rate financing and keep the Authority's credit ratings and obligations out of the deal, cannot be our

initial negotiating position. We can back down gradually on the percentage, if necessary. As I understand it, the Authorities cannot subordinate their debt in any case.

3. License Fee

MFS has put no money on the table for this venture. This negotiating posture is consistent with the remainder of the ETC proposal with their partner. Nevertheless, it is inconsistent with what they offered BART, i. e., \$3.5 million, essentially as a license fee, to construct, maintain and market the system. MFS makes money several ways once it signs a deal, including: 1.) Profit margins on construction (which we will have to control); 2.) a possible fee for placing the loan; 3.) fees for pulling the fiber of the various carriers occupying the system; 4.) fees for maintenance and repair of the system; and, 5.) their 15% percent of the gross receipts.

I believe our initial posture should be to ask for \$8 to \$10 million (I am not sure at this point how much) as a license fee for participating in this deal. They will go ballistic--but as noted above, I believe they really want this deal.

4. Term and Payments by the Industry

As indicated above, 30 years should be acceptable to both sides. We should demand COLA's at 5 year intervals, after the first 20 years. I prefer annual payments. As MFS indicated in the interview, some companies will want to pay the net present value of a 30 year lease with a lump sum payment now. This may be an attractive option to the Authorities. The market will tell us which option is better. MFS, in sharp contrast to Lockheed, will give the consortium right of approval on all leases/licenses to carriers in the system--a necessary control issue to prevent conflict of interest situations.

5. Fiber and Duct Space for the Consortium

MFS says 8 fibers throughout the system will be dedicated to the Consortium. They believe these will be more than enough to meet the Authorities' needs. While this may be true, I believe the real reason for this meager offer is that MFS wants the Consortium to be "fiber poor" so that potential competition (with MFS telecom services) for the rest of New Jersey's telecommunications business will not arise from the Consortium. The \$50 million in annual telecommunications revenues that now goes to Bell Atlantic and AT&T could go to MFS and others--or it could be handled, at least to a limited degree, by the SONET system we are negotiating here.

I believe our initial negotiating position should resemble the BART deal: 1 innerduct and 48 strands throughout the system for the Consortium. If MFS does not want any competition, let them offer something else in return for a non compete clause.

6. Technical Aspects

MFS is offering OC-1 speed on this system. I believe we should go up to OC-3 capability. This higher speed network is closer to the industry standard. SONET is correct for the applications platform, so I have no problems there. The ADM/Drop Multiplexed configuration, SNMP software, etc., need to be reviewed in greater detail by one of my people (and Consortium personnel) during negotiations. It is not critical now.

7. Miscellany

a. Expediting the Deal

While there are a great many details and issues to be negotiated, MFS knows that if we can reach agreement in principal on major terms and conditions regarding the fiber optic system, the rest of negotiations will move very quickly. That is because of my past experience in negotiations with them--we do not have to start from scratch. The thought of a signed contract, which is what they need to begin marketing (and really pre-funding) the fiber optic system is a powerful incentive to both sides.

b. Exclusivity

As opposed to Lockheed's offer, MFS should go along with a BART-type of approach that specifies a non-exclusive license arrangement with several conditions that take care of MFS' concerns. No one wants to run afoul of the new Telecommunications Act, particularly the various attorneys representing Consortium members. We can give them first rights to negotiate for a reasonable time after a conduit is filled. We can also offer non-compete assurances, if we deem it appropriate, for use of the Consortium's own fiber. All these moves amount to sufficient "exclusivity", without actually stating it, to satisfy both sides.

c. Joint Governing Board

MFS alludes to the formation of a joint governing board in its proposal. I have used this device before and think the Consortium could employ some type of Joint Powers Board that could resolve payment and other disputes. Given my discussions with representatives from the Authorities, I will recommend that more thought be given to this option. Whether it fits for the entire ETC project is problematic.

d. Extra Conduit Space

Both NJHA and NJDOT have existing, empty fiber optic conduit space. This space could be utilized to reduce the overall costs of construction considerably. I have an inventory of NJDOT empty conduit; Dave Ryan of NJHA will work with us on this. There is an outside possibility we can use this RFP process to parlay a larger network through key NJDOT access roads with empty duct space. I recommend holding this issue back in negotiations until an appropriate moment, i. e., we have something to offer--but I want to know what MFS will trade for it.

III. Lockheed/Symphony Management/Bell Atlantic

I cannot determine from their offer whether these players are serious or simply believe a minimum, almost laughable offer is all that is needed to get them through negotiations. Bell Atlantic used this type of ponderous, imperious approach last year in its negotiations with NJHA. Symphony Management (SM), the ostensible developer for the fiber optic system, is a bunch of minor cable TV and other minimal technologies company that has submitted one bid (to the Penn. Turnpike) and has not track record whatsoever in these types of fiber optic/revenue sharing deals.

The Lockheed offer on the table is clearly unacceptable. In both sets of interviews, their personnel were told informally that the offer was not enough, i. e., just putting fiber on the Turnpike and ignoring the needs and revenue potential of the other Authorities is unacceptable. Claims by Symphony Management that they do not know the potential market value of the NJHA are disingenuous; Bell Atlantic has all sorts of information, based on more than two years of negotiations for the same ROW. They could not share?

Recommended Strategy: See if Lockheed/Symphony Management has gotten the message to seriously amend their proposal. If not, we should consistently tell them that winning the ETC portion of the RFP does not include any type of fiber optic system. The Consortium, or its various members, reserve the right to seek an alternative approach to building a State-wide system exclusive of the ETC project.

I find an objections and "deal breakers" to almost every position in the Lockheed proposal. Some of the problem areas include:

1. Exclusivity

SM seems to believe the entire NJT will be locked up for 40 years with an exclusive arrangement for them. Somehow, the Consortium will have no right to review licensing agreements and will have to take SM's word that they are valid, industry-priced awards. Future growth of the system will be strictly determined by SM. None of this makes any sense, either from a business or legal sense. All SM is doing is tying up the Turnpike for a minimal annual fee of \$450,000. Given my estimation of the system's worth, as well as even MFS' first minimal estimate, \$450,000 is a fabulous deal for Lockheed, SM and most obvious of all--Bell Atlantic. I believe the rest of the telecommunications industry, now trying to access New Jersey in major ways, would seriously consider litigation (under the new federal Telecommunications Act) to try and stop this type of arrangement.

2. 16 Strands of Fiber

In addition to the annual fee, SM is offering 16 strands of fiber along the entire length of the Turnpike. SM values this at \$1.8 million per year, or \$40 million over the 40 year term of the proposed agreement. The assumptions supporting this "value" are not offered. Nor are their any

indications of whether any type of service will be offered, and at what rates, to make this fiber operational (lighted fiber). In response to a question, SM personnel indicated that these 16 strands would be in their own, NJT-owned, innerduct. A standard innerduct can hold up to 216 strands of fiber. Not only is the SM offer a waste of space, I was dumbfounded that they would concede the extra innerduct space during the interview--before negotiations have even begun. I had assumed (as would anyone familiar with the technology) that NJT's 16 strands would fit nicely in the same conduit with the 96 strands SM proposed to offer to the market--all very comfortably with room to spare! Symphony Management has little experience in these matter--a point conceded during the interviews by one of their bidding partners, Bell Atlantic.

3. Revenue Estimates

Symphony Management's offer, 25% of all revenues with a cap at \$25 million (NJT can only make a maximum of \$6.25 million annually) is also very perplexing. Why the cap? What are the assumptions? Rather than speculate, I will discuss this more with Paul Carris, Tom Margro, et. al. as we get closer to actual negotiations. Like the entire proposal, it makes no sense other than just as a holding pattern while the other parts of the ETC proposal from Lockheed are discussed.

KC



Garden State Parkway

Memorandum

CONFIDENTIAL

DATE: January 8, 1997

TO: Dave Mortimer, Chief of Staff NJDOT
Edward Gross, Acting Executive Director NJTA

FROM: Lewis B. Thurston III, Executive Director *LBT*

SUBJECT: Electronic Toll Collection

Throughout the procurement process our representatives have been concerned and have expressed these concerns about public acceptance of the massive enforcement effort necessary to attempt to deal with all violators and the reliability of revenue to be derived from the administrative fee associated with the violations. We continue to have these concerns.

Because of the tightness and intensity of the procurement schedule, it was not possible to do as much analysis of the revenue potential to verify the vendors assumptions as we might have liked. Because of the recent delays in the process, our staff has had an opportunity to do some further evaluation relative to this concern.

Enclosed is a copy of an evaluation report which our three principal project representatives have submitted to me which includes some analytical data and a recommendation to have an independent firm do further analysis. Chairman Buckelew and I have reviewed this and feel we should share this information with you at this time so that you, as the lead persons and agencies in the consortium, may have the benefit of it. We believe it would be beneficial to have further analysis done and I will be glad to discuss with you the appropriate manner in which that should be done both for the consortium and for the Highway Authority.

I look forward to discussing this matter with you after you have had an opportunity to review the enclosed information.

LBT:pm

enc.

cc: Chairman J. Buckelew
Frank Scangarella

Violator Stats/Assumptions

Current violation rate approximates 2%

Of 1.4 million transactions per day, this is 28,000 per day

Average transactions per day per patron is 3

Violations, as a percentage of revenue, peak in the winter months and are at their lowest levels in July and August.

No specific statistics are available regarding the number of individual violators on our road.

Some % are frequent repeat violators - daily, weekly

Some % are infrequent repeat violators - monthly, 3 in 6 months

Some % will be non enforced violators - less than three in 6 months

Most repeat violators violate at least once each way (two per day)

Some repeat violators violate less than twice per day (1 per day, 1 per week)

To be conservative, assume repeat violators will accumulate a weeks' worth of violations before receiving the first notice. This equals \$325.00 in admin fees.

Infrequent repeat violators - to be conservative, use \$325.



Garden State Parkway



Memorandum

CONFIDENTIAL

DATE: 12/27/96

TO: Lewis B. Thurston III, Executive Director

FROM: NJHA MET Members

SUBJECT: ETC Evaluation

Since receipt of the best and final offers, the project team has reviewed the proposals for electronic tolls from various viewpoints in an effort to verify the projected revenues from the violation enforcement.

Although the percentages represent our collective best estimate, another approach is to estimate the number of actual violators and the fees required from each.

The following facts represent the NJHA violation history:

1. Violations as a percentage of income peak in the winter months and are at their lowest levels in July and August. This suggests that most violators are regular commuters, not seasonal or recreational travelers. (Analysis attached.)
2. Our annual violation rate for 1994 and 1995 has been 1.89 and 1.9, respectively. This year appears to be coming in about 2.10.
3. Given our daily transactions of 1.4 million, we average about 28,000 violations per day.
4. The average patron accounts for three transactions per day.

Based upon the above, it would be reasonable to conclude that most violators are repeat violators. No specific statistics are available which would define the exact number of individual violators. However, reasonable assumptions suggest that the core violators approximate 15,000 to 18,000.

The vendor's projections of NJHA related violation administrative fee income over the eight years is \$244,225,000. The vendor indicates that this income stream is achievable based on the RFP data and on the vendor's past experience. The vendor's projected collection rate is approximately 50% of violations mailed.

We recently contacted the New York State Thruway. Their collection experience approximates a 36% collection rate.

Their

Do

12/27/96

TO: Lewis B. Thurston III

SUBJECT: ETC Evaluation

Page 2

Various assumptions can be made. By the time a repeat violator receives his first notice, he would probably have at least a week's worth "in the mail." This would result in 10 to 15 violations. Assuming the maximum of 15, this represents \$325.00 in administrative fees.

Using the high end of 18,000 core violators and allowing for 10% additional violator turnover per year over the eight year life of the contract, there would be a total of 30,600 violators. Projecting this times \$325 results in only \$11,475,000 in administrative fees. At a 50% collection rate, this is \$5,737,500.

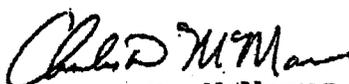
Furthermore, even allowing for 100% error on both factors of the projection (doubling both the 30,600 and \$325), the administrative fees generated at a 50% collection rate would be \$19,890,000 (61,200 x \$650/2).

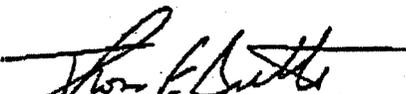
Looking at the figures from another perspective, the vendor expects to collect \$172,303,250 from NJHA violation administrative fees during the first three years of operation. This results from the mailing of 13,518,750 collection notices (\$25.00 each) per the BAFO. These are the years with the highest projected violation rates.

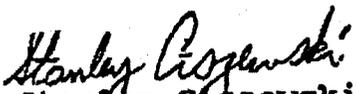
Using the above repeat violator assumptions and the average fee of \$325, this would translate to the equivalent of over 1,060,000 violators in a three year period. Or, using our maximum projected figure of 43,200 for three years, this represents fees of \$7,977 per person.

CONCLUSION: Based upon the above scenarios, the cost sharing formula, particularly Tier 2, becomes critical for the Authority, as it appears that the violation income projections will not be realized. The agency that benefits the most from ETC implementation must bear the major share of the costs.

It seems that, at this point, it would benefit the Authority to have an independent firm, such as Deloitte & Touche, review the figures and projections for any impact on the Authority's financial statements and budget. In addition, the firm would provide a valuable resource to the Authority in guiding us through the negotiations of terms and conditions. Certainly, after a contract is signed, they would find it necessary to review its impact, so it may be in our best interests to have them review the figures beforehand, if any non-disclosure and conflict of interest issues can be resolved.


Charles D. McManus


Thomas F. Butler


Stanley Ciszewski

TFB:acs

cc: J. F. Flynn

NEW JERSEY TURNPIKE AUTHORITY

From the Desk of
PAUL A. CARRIS



3 45 PM

TO: Ed Gross DATE 1/17/97

- My comments are written on Phoenix's memo commenting on the NJTA memo re: projected admin fee.
- At Dave Mortimer's direction a clean copy of the Phoenix memo has been faxed to Jim Crawford and Lew Thurston.

Paul

EXHIBIT
C-66
7/31/03 CM

MEMO

 phoenix
planning & evaluation ltd

3204 Tower Oaks Boulevard
Rockville, MD 20852
(301)984-4210

Date: January 17, 1997
To: Paul Carris
Fran O'Connor
NJTA
From: Margaret Melhem
Subject: NJHA Revised Violation Revenue Projections

As the NJHA MET Team members indicated in their 12/27/96 memo to Louis Thurston, violation rates post ETC implementation are difficult to predict. As a point of reference, the rates provided by the Authorities to vendors during the BAFO process were:

	<u>NJHA</u>	<u>NJTA</u>	<u>PANYNJ</u>	<u>SJTA</u>	<u>DeIDOT</u>	
6/97-12/97	0.0%	0.0%	1.0%	2.5%	0.0%	} Given as Consortia estimate Vendors to use the own best estimate which resulted
1/98-12/98	2.5	0.5	1.0	2.5	0.0	
1/99-12/99	2.0	1.5	0.5	2.0	0.5	
1/00-12/00	1.0	2.0	0.5	1.0	1.0	
1/01-12/01	0.5	1.0	0.5	0.5	0.5	
1/02 & Beyond	0.5	0.5	0.5	0.5	0.5	

As shown below, the average rates used by the Vendor to predict violation revenues indicated a more rapid decline in violation rates than those projected by the Authorities.

	Average Rate
1997 (6 mos)	1.52%
1998	1.85
1999	1.67
2000	0.60
2001 & Beyond	0.50

The revised projected NJHA violation rates presented in the NJHA Met Team 12/27/96 memo are dramatically lower than previous Authority projections. They are based on the following assumptions:

There is a core set of violators, estimated at 18,000, made up of regular commuters who are responsible for most violations. While we are not clear on the basis for their estimate, it appears to contradict information provided by

NJHA during proposal negotiations when it was indicated that only about 35% of violations come from repeat violators. It also seems to contradict information provided by vendors —that in their experience most violations result from individuals who do not have ETC accounts (i.e. non-commuters).

The NJHA analysis seems to suggest that transient drivers are not responsible for any violations. As shown in Attachment 1, if transient or non-repeat violators account for 65% (100% minus 35% repeat violators) of violations, as previously estimated by NJHA, then expected NJHA violation revenues at a collection rate of 25% of all violations would be about \$332 million over the eight year life of the contract from non-repeat violators. Should non-repeat violators account for only 45% of violations, then NJHA violation revenues would be \$230 million over the eight year life. At 20% of violations, revenues from non-repeat violators would be \$102 million. As NJHA indicates, the percentage of transient violations is a key indicator of violation revenues. These calculations do not include revenue from repeat violators and are based on current violation rates.

A second key NJHA assumption is that violations will decrease dramatically, once ETC is implemented. According to the NJHA analysis, within a week or so the repeat (commuter) violator will accumulate 15 citations. After receiving these citations they will cease to violate. NJHA estimates the annual turnover rate in these core violators at 10%. At the low end, NJHA analysis results in a prediction of 30,600 violators or 459,000 violations over the eight year life of the contract resulting in violation revenues of \$5.7 million. At the high end, NJHA analysis results in 61,200 violators or 1.6 million violations over the contract for \$19.9 million in violation revenues.

As Attachment 2 indicates, violation revenues falling to these levels, within a week or so of ETC start up, equates to NJHA violations decreasing from the current average of 28,000 violations per day to an average of just 74 violations per day at the low end estimate or 256 violations per day at the high end estimate. On a positive note, however, if these rates could be achieved, NJHA would benefit from a \$33 million reduction in lost toll revenue over the eight year contract period.

Vendor projections of violation revenue were very close: \$399 million by MFS/Chase and \$384 million by Lockheed. In any case, there would be no benefit for MFS/Chase to dramatically over estimate violation revenues, as the NJHA analysis suggests, since they are financing the project

Paul Carris
January 17, 1997
Page 3

and under any circumstances will receive no payments from the Consortium for eight years. Indeed their very premise in offering the Consortium a zero cost, zero payment deal is the belief that revenue from violations and related operations will more than pay for the system.

Again, we agree with NJHA that violation rates are difficult to predict and believe it would be worth while to survey existing ETC operations to obtain information on the violation rates being experienced in these operations.

- NJHA gives "violations as a percentage of income", which is a measure never used in our analysis or the vendors' analysis.
- I cannot determine whether the violation rate given by NJHA is even an "apples to apples" comparison, since the vendors ~~and~~ defined violations as a % of non-ETC account holders.

Attachment 1
 NJHA: Revenues From Non-Repeat Violators

Current Annual NJHA Violations	Percent of Non-Repeat Violations	Total Non-Repeat Violations Per Year	Collection Rate (1)	Total Annual Number of Collections	Total Annual Violation Revenues	Total Violation Revenues Over 8 Years
10,220,000	65.0%	6,643,000	25.0%	1,660,750	\$41,518,750	\$332,150,000
10,220,000	50.0%	5,110,000	25.0%	1,277,500	\$31,937,500	\$255,500,000
10,220,000	45.0%	4,599,000	25.0%	1,149,750	\$28,743,750	\$229,950,000
10,220,000	35.0%	3,577,000	25.0%	894,250	\$22,356,250	\$178,850,000
10,220,000	20.0%	2,044,000	25.0%	511,000	\$12,775,000	\$102,200,000

(1) The projected collection rate is 50% of citations sent or about 25% of violations overall.

Attachment 2
 New Jersey Highway Authority
 Projected Violation NJHA Rates Per 12/27/96 Memo to L. Thurston

	Avg. No. of Violations Post ETC Implementation			
	Low End Projection		High End Projection	
	Daily	Annual	Daily	Annual
Year 1	740	270,000	2,564	936,000
Year 2	74	27,000	256	93,600
Year 3	74	27,000	256	93,600
Year 4	74	27,000	256	93,600
Year 5	74	27,000	256	93,600
Year 6	74	27,000	256	93,600
Year 7	74	27,000	256	93,600
Year 8	74	27,000	256	93,600
Total Over 8 Years	1,258	459,000	4,356	1,591,200
Violation Revenue @ 50% Collection Rate	\$15,725	\$5,737,500	\$54,450	\$19,890,000

- 74 daily violations represents 0.00528 percent violation rate (measured against all transactions). This is what the NJHA 12/27/96 memo indicates violations will drop to after 1 week. The NYS Thruway after several years of operation show a weekday violation rate of 0.44 percent of total transactions which is almost 100 times greater than NJHA's newest assumption. The MTA shows a 1.42 percent violation rate or 270 times greater.
- The 12/27/96 NJHA memo leads one to conclude that video enforcement will reduce ^{the} current 28,000 daily violators to 74. This should please everyone.



New Jersey Turnpike Authority

MEMORANDUM

December 27, 1995

MEMORANDUM TO: Thomas E. Margro
Director of Maintenance and Engineering Services/
Chief Engineer

SUBJECT: Electronic Toll Collection

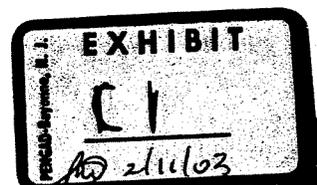
As has been discussed on numerous occasions, implementation of Electronic Toll Collection will have a significant impact on the Finance & Budgets Department's operations.

I have assigned Pamela Varga and Donna Manuelli to represent this department. I would appreciate it if they were kept apprised of the process. They are also available for any input required for this process.

Catherine A. Schladebeck
Comptroller

/bdg

cc: P. Varga
D. Manuelli





New Jersey Turnpike Authority

MEMORANDUM August 23, 1996

MEMORANDUM TO: Edward Gross
Acting Executive Director

SUBJECT: ETC

RECEIVED

AUG 26 1996

EXECUTIVE DIRECTOR

I have discussed my concerns regarding the coordination of ETC efforts with Tom Margro on many occasions. These concerns have also been revisited at staff meetings.

Tom has made many attempts to correct the problems we have experienced. However, I continue to have concerns which are highlighted by Tom's resignation from the Authority.

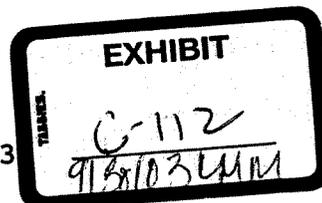
I believe Finance & Budgets has a very important role to play in ETC procurement and have assigned two extremely competent professionals to this task. While the Authority has an ETC staff, I have been told that their purpose is to represent the Consortium as a whole, not the Authority. Since this is the case, I believe it to be critical that financial matters receive the attention they deserve. The best interest of the Consortium and the best interest of the Authority will not always be the same and the Authority needs unbiased representation. We believe the ETC process to be important however, this is only one of many important responsibilities of the Finance & Budgets representatives.

Overall, there have been activities where Finance & Budgets participation would have been very beneficial to the process. I realize that the ETC project has been an intense effort however you should know that this department is often left out of the loop. The lack of notice makes it is extremely difficult to plan anything and reduces the opportunity to give things their proper attention. This department is repeatedly not informed of meetings or is asked to review things at the last minute. In fact, we were just invited today, Friday, to attend presentations on Monday. Most of the time we need to rely on information from our colleagues from other agencies since they usually receive information and prior notices.

I just want you to be aware of the extent of our efforts as well as our frustration.

Catherine A. Schladebeck
Comptroller

/bdg



A-43

NJTASCI 059417



New Jersey Turnpike Authority

MEMORANDUM

August 30, 1996

MEMORANDUM TO: Paul Carris
ETC Project Manager

SUBJECT: Notification of Meetings

As you know, I have spoken to Tom Margro and Ed Gross several times, and Pam Varga has spoken to you, regarding not being properly notified about ETC meetings. Ed assured me on August 29, 1996 that he had discussed this matter with you and there would no long be a problem

On August 28, 1996, Donna Manuelli attended a meeting where additional oral presentation were discussed. At the time she left the meeting, the location and date had not been confirmed.

Since we had not received notification of the meeting, we called both your office and Tom Margro's Office to determine if our attendance at the meeting was appropriate. We were told that we would receive a call from Francis O'Connor to advise us if we should attend.

At 5:00pm, Pam called Mr. O'Connor's office to attempt to determine if our department was expected to attend. She left a message and waited, with Donna, until 5:30 pm. No call was received.

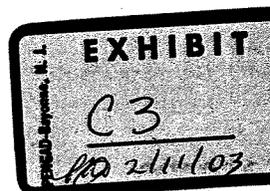
On August 30, 1996, at 8:50am, Alex Richardson came to our department with a message that Donna was welcome to attend the presentations and if she wasn't available, Pam was welcome. He stated that the meeting started at 9:00 am at the Highway Authority's Executive Offices.

Several other Turnpike employees attended the meeting. All of them were notified in advance. Once Again, Finance & Budgets did not receive the appropriate notice of a meeting we should be involved in. However, even with the extremely late notification, Donna Manuelli did make arrangements to attend the meeting although she unfortunately had to miss a part of the first presentation.

At the presentation, members of the other Authority's information Donna that they were expected to be at the negotiation meetings and that they received a schedule for the next three weeks. We have not received any notification of the negotiations meetings or schedule. I would appreciate this matter being addressed once and for all.

Catherine A. Schladebeck
Director of Finance & Budgets/
Comptroller

/sv
cc: E. Gross



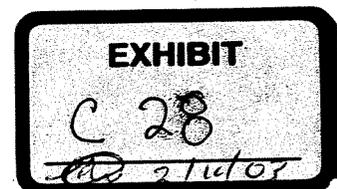
MFSNT BAFO Clarification Questions October 1, 1996

1. Although a violation rate of 0.8% seems reasonable, for either Approach (i.e. 1. \$0 Down, \$0 Payments, 2. \$0 down, Budget Certainty), please clarify the Consortium obligations should the violation rate fall below 0.8% at any time during the contract. (We note that your BAFO Parameters show the rate falling to 0.5%). Your offer, at least Approach 1, indicates that it is based on the premise that the "aggregate violation rate will not fall below 0.8%". Does "aggregate" mean "average" rate? Is Approach 2 also predicated on the expectation of a 0.8% violation rate?

- * How will the violation rates be monitored? do these figures include DelDot?

We have calculated the average violation rate (weighted by transactions for the different Consortium roadways) over the 8 year project life to be 0.93% using the Consortium's estimates. In some years, the Consortium's estimated overall violation rate is higher than this level on a weighted average basis, and in later years, its estimate (0.5% for all roads) is lower. The 0.8% violations rate introduced in our BAFO response is a number that is similar in nature to the 0.93% rate -- an average over the eight year period of time. The framework we are proposing places no financial obligations on the Consortium if the overall violation rate drops below 0.8% for a year or a specific period of time in the eight year period, but does place a financial obligation on the Consortium if the violations rate falls below 0.8% over the eight year life of the project.

Our financial concern with the terms requested by the Consortium is based on our view that the E-ZPass project including potential revenues (from statement inserts, float from E-ZPass account balances, the potential sale of customer lists and other incidental revenue sources) is not likely to be self-financing. Our estimates for revenues from a fiber optic telecommunications system help narrow the financial gap, but do not change our fundamental conclusion. As a result, we have developed the two financing approaches outlined in our BAFO response. If the violation rate is as high as the Consortium has estimated and the MFS team receives the resulting administrative fees as outlined in our BAFO response, we will be able to provide E-ZPass equipment and services at no cost to the Consortium, and forward \$8.5MM of administrative fees to the Consortium, as outlined in Approach 1. We believe that our rate of collections will be high enough to allow us to make this offer. If the violations rate falls below the Consortium's estimates, the MFS team faces increasing levels of financial risk, and will be in a money-losing position if the violation rate falls significantly below the Consortium's forecasts. We are only able to present a financial package of the sort the Consortium has requested (\$0 down, \$0 payments) if it guarantees to insulate the MFS team from losses resulting from violation rates significantly below its estimates over the eight year period of the project.



Approach 2 addresses the financial risks of the MFS team in a different manner. The two payments of \$60MM (one in 1999, one in 2000) provide a financial backstop on the risks we face from lower than estimated violations rates, and – very importantly – align the Consortium's interests and ours in a number of important financial and operational ways. As a result, we believe this approach is a sounder framework for our relationship with the Consortium. We believe this very strongly, and have structured it so that it will be more attractive financially to the Consortium than Approach 1. We are recommending it for your serious consideration even though it yields lower returns to us than Approach 2. In a complex and dynamic service business such as E-ZPass, we believe that alignment of interests between the Consortium and its service providers is critical to a successful working relationship over a long contract period. We are asking no violations rate guarantees from the Consortium under Approach 2, and it is not predicated on the expectation of a 0.8% violations rate.

DeIDOT is not included in our proposal, but the percentages we propose are valid if DeIDOT is included.

We suggested that we should develop a mutually agreeable set of definitions and monitoring protocols if Approach 1 is the option most preferred by the Consortium. We suggest an annual monitoring (and, if necessary, reimbursement) process, developed with the expectation that the violation rate will be higher in early years than in later years. We are proposing an average violations rate over an eight year period with the understanding that this approach will require a financial settlement at the end of the project in addition to the annual monitoring and reimbursement process.

In addition to a process for monitoring results and triggering reimbursements, Approach 1 also requires the MFS team and the Consortium to arrive at a common definition of a violation, the policy for handling customers who drop to zero balance, partial coin violators and so on. We have made allotments for the magnitude the potential violations that will not generate citations because of the Consortium's policies. An unfortunate feature of Approach 1 is the fact that the MFS team has a strong financial interest in limiting this loss of fee income, and needs financial protection from expansion of leniency programs, special consideration for customers who generate violations, etc., beyond the allotment we have assumed. All in all, Approach 1 will require a great many operational definitions and careful delineation of the financial obligations of the two parties, with the recognition that the parties' interests might conflict numerous times as new conditions arise.

2. Please clarify the 7th bullet in the page that details Approach 1. This bullet states that "Deviations from the penetration assumptions will result in the appropriate pass throughs to the Consortium." What are the nature and extent of the pass throughs?

N.J.S.A. 52:9M-12.2 provides that:

[w]henver a proposed State Commission of Investigation report is critical of a person's conduct, a copy of the relevant portions of the proposed report . . . shall be sent to that person prior to the release of the report. Upon receipt, the person criticized shall have 15 days to submit a written response of a reasonable length which the commission shall include in the report together with any relevant evidence submitted by that person.

The following materials are responses submitted pursuant to that statutory requirement. The reader should note that they are not under oath and, in some instances, are the responses of representative counsel on behalf of their clients.



Kingston Cole & Associates
Tele: (415) 455-0800

kca@kingstoncole.com
FAX: (415) 456-0558

May 24, 2004

Mr. Brian G. Flanagan, Counsel
Commission of Investigation
State of New Jersey
P. O. Box 045
Trenton, New Jersey 08625-0045

RECEIVED
2004 MAY 28 AM 10:27
COMMISSION OF INVESTIGATION

RE: Response to Allegations in Proposed Report No. 04-05-002

Mr. Flanagan:

I received your certified letter offering me the statutory right to respond to the criticisms proffered by your office in the EZ Pass procurement investigation on May 12, 2004. The sections provided to me are so heavily redacted that I am unable to determine context or application of certain comments to and about me with any degree of accuracy. Since you only provide selective quotes, I believe you have not honored either the wording or intent of N.J.S.A 59:9M-12.2. I protest this treatment by you and your office.

Given these handicaps, I will now attempt to offer factual and relevant rebuttal as best I can to the inferences you appear to be attempting to create in your proposed report. The clearest statement of your intent and direction that I am able to discern appears on page 15 of 15 in the paragraph which reads:

“The Commission is constrained to question the legitimacy of the overall process utilizing in the Lockheed protest because neither the hearing officers nor the court were aware at the time of their deliberations of the unusual circumstances under which the vendor proposals were evaluated and scored by the MET team; the full extent of the relationship between (sic) Frank J. Wilson, Kingston Cole, and MFS; [TEXT OMITTED] and the existence of Cole’s memorandum in which he posited a strategy to mislead Lockheed at a critical juncture.”

There are two major accusations here. The first is that there is allegedly some “relationship” among (not between) the three parties. I unequivocally deny any relationship of any type with MFS. As I stated in my testimony, and you could determine with some reasonable due diligence, the only relationship I have ever had with MFS is professional, ethical and, more often than not, very adversarial. The facts are:

I. The Relationship(s) Allegations

A. My Alleged Relationship with MFS:

I was BART's consultant in a competitive bid process that selected MFS to construct a commercial fiber optic system along that transit agency's rights-of-way (ROW). I was BART's consultant throughout the competitive bid process, which lasted into early 1995. I was not BART's consultant during the implementation process, i.e., when MFSN was installing the fiber optic conduit, soliciting occupants, etc.

I became a BART consultant again in 1997, after winning a competitive bid process. In 1999, I advised my client that MFS (later known as Adesta) was not performing under its contract with BART and in danger of bankruptcy. Following my advice, and after a two-year process, Adesta's contract was terminated at BART. I will be glad to provide you with a name of a person at BART that can verify these statements.

It should also be noted that Mr. Wilson left BART in the spring of 1994 to become Commissioner at NJDOT, before MFS was even selected for exclusive negotiations (There were four bids in response to the BART RFP.). It was another six or seven months until final award was made to MFS. Yes, he approved the initial consulting contracts for my work at BART. No, he did not take any part, much less an active one, during any phase of the procurement process.

I was instrumental as a consultant in recommending to the following Kingston Cole & Associates (KC&A) clients that MFS bids be rejected;

- Los Angeles Metropolitan Transit Authority
- Peninsula Joint Powers Board (Ca. transit agency that runs the CalTrain between San Jose and San Francisco)

My advice was accepted in both cases. MFS's bids were dismissed.

I also advised SEPTA (transit agency for Philadelphia) that MFS was bargaining in bad faith on an existing contract between those two parties. The agency accepted my advice; I later assisted them in writing an RFP for personnel to manage a fiber optic (and wireless) development program that put SEPTA back on track.

I further spoke with, and actively lobbied the New York State Thruway Authority for several years to dismiss MFS for unethical (conflict of interest) handling of NYSTA's commercial fiber optic/right-of-way management program. I wanted them to hire me to work on terminating the MFS/NYSTA contract. NYSTA eventually dismissed the person the contact person with whom I was dealing—and sued MFS.

As with the BART situation, I will be more than happy to assist you in verifying these statements. I certainly described these situations, and my actions, in my testimony last November. I would characterize my relationship with MFS as properly adversarial from

1992 (Their initial overtures to BART) to sometime in 1994 when I became convinced they were not acting in the best interests of my client, BART. After that, I would characterize our relationship more as sworn enemies, particularly as I was able to advise my clients to be exceedingly careful (EZ Pass project) or not to deal with them at all (LAMTA, Caltrain, SEPTA, etc.). Your attempt to create an inference otherwise is completely repudiated by these facts.

B. My Relationship with Frank Wilson:

As I stated in my testimony, we are acquaintances, and really only business acquaintances. I have never been invited to his home. I have never met either his wife or his children. We have never played golf or other recreational activities together. What we have done together is develop some excellent programs that have benefited my clients when he has been their chief operating officer. Specifically:

1. BART: The commercial fiber optic program I developed for BART now generates more than \$3 million in annual revenues. The concept was his, the implementation and most of the negotiating of the first deals with MFS (and later the carriers) was my work, in conjunction with other BART personnel. Another revenue process, the wireless site leasing program (based on the NJDOT model) generates another \$750,000 annually for BART. They have been a long-time, very pleased client.

2. NJDOT: The commercial wireless program I helped to create netted the State over \$1 million after it was implemented. Governor Whitman later turned the program over to Treasury, where it floundered. I also was a key negotiator in the protracted discussions between NJDOT and the Throughway (on one side) and Bell Atlantic to force the telephone company to return \$10 million to the State that had been awarded under a contract issued by the Throughway just before the Whitman administration assumed office.

I also served as the marketing consultant to NJDOT, encouraging major corporations, including Lockheed, MFS, Rockwell, EDS, etc., to give the State serious consideration for privatization efforts of the State's various ROW (See Attachment for the one-page marketing descriptor.). That marketing effort led to a second contract (Again obtained through competitive bid.) to draft an RFP this was provided to you. Mr. Tom Calu and possibly Ms. Chris Cox, both of whom I believe you called to testify, can substantiate the substance of these statements and my work product (You were given a copy of all my related reports and the RFP by me, on a voluntary basis, last year.).

These efforts were accomplished because of Mr. Wilson's vision and belief that the State could follow the BART model and create "high speed lanes along the Information Highway" (Attachment language) as well as develop a substantial revenue stream at the same time. During those seminal years, 1992 through 1997, there was not even a handful of consultants that had the experience and perspicacity to advise a client in these areas. If I was one of them; Edwards & Kelcy (They had done a similar project in Maryland in 1994.) was another. I cannot think of any others.

Those are the reasons why, a successful track record and an understanding of a sophisticated marketplace, Mr. Wilson hired me. What I had done at BART was sufficiently unique that it was the subject of scholarly papers and analysis at all levels of the telecommunications, transportation and transit industries. My credentials succeeded in two competitive bids for consulting services in New Jersey—and countless other venues (Please note my Web site for more details: www.kingstoncole.com.) To allege as you appear to do, that we had some sort of non-professional relationship is belied by the facts. I might also note, as I did in my testimony, that Mr. Wilson and I have tried to do business several times since his departure from NJDOT. With the exception of a one-day consulting assignment (I earned, I think \$2,000), nothing has ever succeeded. Again, that's acceptable because ours is a professional, ethical business relationship.

C. Mr. Wilson Alleged Relationship with MFS:

I have never had an inkling of any type of inappropriate relationship between these two. I know MFS had sent Mr. Wilson an unsolicited proposal to develop some section of NJDOT highways before I became a consultant to the State. I met briefly with them regarding that proposal just after I became an NJDOT consultant. I'm not sure whether Mr. Wilson met with them. In any case, unsolicited proposals are standard business practices that are treated with no undue consideration. Meeting with MFS personnel was certainly a standard business practice as well. Ascribing any untoward motives to these actions is patently absurd and unreasonable.

As mentioned previously, Mr. Wilson was long gone from BART to New Jersey before any final award was made to MFS. The final award to MFS was made by the BART Board of Directors, as assisted by then-General Manager Richard White (now the GM at Washington, D.C., Metropolitan Transit Authority [WMATA]). Again, I would be glad to provide you with Mr. White's contact information so that you can corroborate this fact.

Ascribing some phantom, unethical relationship to Mr. Wilson and MFS as you appear to be doing simply has no basis in fact. He provided the concept of seeking commercial development of BART ROW in 1992—and nothing more.

II. The Allegation in the September 3, 1996 Memorandum that I posited a strategy to mislead Lockheed at a critical juncture.

The only possible, relevant language in the memorandum you could be citing (And which you showed me a *New Jersey Star Ledger* article of May 18, 1997 article as somehow constituting proof.) is as follows:

“Recommended Strategy: See if Lockheed/Symphony Management has gotten the message to seriously amend their proposal. If not, we should consistently tell them that winning of the ETC portion of the RFP does not include any type of fiber optic system. The Consortium, or its various members, reserve the right to seek an alternative approach to building a State-wide system exclusive of the ETC project.”

A. My role in the Negotiating Process:

First and foremost, the entire memorandum is just non-binding advice from a consultant. I was not in secret (or any other type of) communication with Frank Wilson because he had recused himself and made that fact abundantly clear to me and everyone else involved in the ETC project.

Second, I was not a voting member of the MET team. I had neither a vote, nor any undue influence on their decision making process. As a consultant, it is/was my responsibility to provide advice to clients. They are under no obligation, much less pressure, to take it.

Third, I wrote the memorandum for my file to ensure that I had a clear understanding of the two proposals from the very narrow perspective of the commercial fiber optic system terms and conditions offered by each. I had no involvement in the drafting of any language in the ETC RFP that would have triggered the proposals. I had nothing to do with establishing the value (points or otherwise) of a commercial fiber optic offer from any proposer.

Fourth, I was, very simply, invited in as a specialist, during the negotiations. The memorandum dealt with the factual areas of the two parties' offers (fiber optic systems only) at the end of the first phase of those negotiations. I was thinking prospectively—seeking the best way to push Lockheed to make a more lucrative offer to the State. Had they done so, there was another round of best and final offers (BAFO) to push Lockheed and MFS to improve their offers.

Fifth, I cannot remember precisely why I gave the memorandum to Mr. Carris. I imagine it was because I told him that I had created it, and he subsequently requested a copy to help him clarify his thinking, i.e., it was a professional courtesy. I suppose he could have requested it be developed in the first place. But then I would not have indicated that it was a “Memorandum for File.” Looked at from a reasonable, chronological perspective, I am unable to remember a simple act almost eight years after the fact. Why Mr. Carris

either gave it to the *New Jersey Star Ledger* reporter—or gave it to someone else who did—I have no idea.

Sixth, as to what I was trying to say in the memorandum intended only for my files is quite simply this: If Lockheed did not want to improve their offer in this one area, that was their business. As the rest of the memorandum describes in detail, I did not think this would have been a wise decision. I had spent considerable time visiting with Lockheed personnel (accompanied by either Ms. Cox or Mr. Calu) during the marketing period described in the Attachment. If they “Didn’t get it” that was their problem.

B. The Other RFP, or the “Better Strategy”:

The last sentence from my memorandum that is cited in the *Star Ledger* article is key for two reasons: 1. I truly believed I had a “better strategy” for the State if the entire bid process (not just Lockheed’s proposal) failed; and, 2.) You consistently refused to bring up this strategy during my testimony. In retrospect, I now believe your tactic of avoidance was deliberate and certainly will result in a flawed report to the Legislature, if not corrected.

The “better strategy” was the RFP for fiber optic development of the State of New Jersey that I spent several months developing for NJDOT in the early and middle part of 1996. I provided you with a copy of that RFP as a courtesy last year. You also were undoubtedly told about it by Mr. Calu, and possibly Ms. Cox, in their testimony.

Quite simply, the drafting of this comprehensive document occupied my entire time during the first half of 1996. That also means that, as stated several times during my testimony, I had almost nothing to do with the drafting of the competitive bid document for the ETC project. Your citation of 6.5 hours may be correct, but it was a pittance. It was also ceased when Mr. Calu and I determined that a conflict of interest might exist.

I also had nothing whatsoever to do with the selection of the MET team, any other consultants (including Phoenix) or any other details on that project.

At one point late in the day of my testimony, you showed me an exhibit (amongst a blizzard) that showed several entries with the statement “Work on RFP.” I remember not being able (either because of jet lag, or not remembering a date seven years in the past, or simply your own calculation) to do anything except deny that I had worked on the ETC RFP.

I am now replacing that mental blank with the clear and unequivocal statement, which you can easily validate, that the “Work on RFP” exhibit you showed me (as well as several other similar invoices I submitted) refers only to my work on the “other RFP.” That is, the separate attempt to ensure fiber optic network development of the State that was written independently by me and other consultants—and would, I believe, been issued—if the ETC project had foundered.

The statement, “ The Consortium, or its various members, reserve the right to seek an alternative approach to building a State-wide system exclusive of the ETC project.” therefore alludes to the right of any government agency to reject any and all offers in a competitive bid process. That is standard boilerplate language.

Even in the midst of the ETC negotiations (all 40+ hours of my total involvement), I believed that the Consortium had an excellent backup plan; an “alternative approach,” the RFP I had developed several months before. In other words, New Jersey didn’t need either MFS or Lockheed’s proposals to develop its rights-of-way. Given this state of mind, I was even more confident in advising my client to bargain harder with the two parties to obtain the best possible deal for the State—not the sole benefit of MFS.

III. A Final Issue

Another issue that needs clarification: How I came to be hired by the ETC Consortium. You have made it seem to be a sort of lurid mystery. That is, I believe, not the case. Yes, I had represented the State in marketing efforts to promote fiber optic systems in the State during the previous year. As such, I made many presentations and met many people. Telling them about the opportunity was my job. As mentioned previously, I was one of at most two or three consultants in the United States that could speak knowledgeably about these types of privatization efforts (See again the Attachment.).

Therefore, receiving a call at the end of the ETC competitive bid process makes eminent sense. I knew, or had at least met, many of the parties on both sides of the table. I had the credentials to advise the MET Team in only one, narrowly defined area. And that's what I did—and no more.

As to who actually called me, I do not have a specific recollection or any record (I've looked.). In all probability, the person was either Mr. Carris or Mr. Fran O'Connor. I say this because they were the two individuals with whom I had the most interplay during the brief periods that I was back in New Jersey assisting the MET Team.

IV. Final Conclusions

I am frankly astounded that you have chosen to draw so many ill-founded inferences. You have reams of paper, including analytical reports, memoranda, etc., that were provided voluntarily by me and others that establish my position as a consultant with excellent credentials—and a reputation for integrity that I want to protect.

And yet you have focused almost exclusively on one memorandum, and only limited language in that document. I wrote more than one memorandum during the ETC negotiations, and the same message is clear and unambiguous throughout: bargain tough and do not be intimidated by either proposer.

The "fix" was not in. Mr. Wilson and I were not colluding to "fix" the bid for MFS or disadvantage Lockheed. The appropriate conclusion is that Lockheed consistently acted like a bunch of blockheads. And I was simply advising my client on how best to push them harder.

It should also be noted (but apparently not remembered too well by your Commission) that we have all been through an exhaustive, formal protest on this very same subject. I actually testified as Lockheed's (hostile) witness. This was followed by formal litigation, as well as a subsequent appeal of the adverse (to them) verdict by Lockheed. The relationships of the parties and the memorandum in question have been reviewed and mulled over *ad nauseum*.

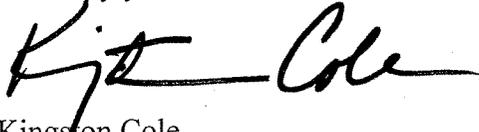
Kingston Cole & Associates
Tele: (415) 455-0800

kca@kingstoncole.com
FAX: (415) 456-0558

Parenthetically, how a newspaper reporter characterizes it—without knowing about the other RFP (He had no business knowing about it, either.) is of no import whatsoever to the question of whether the bid process was fair or otherwise to Lockheed (or MFS, for that matter).

I will forego, in the interests of brevity only, the remainder of my objections to the conclusionary language of your proposed report. I am completely mystified as to why this inquiry merits the time, effort and expense that your Commission appears to be investing. And, given the extensive past history of administrative and judicial review, I simply cannot find any good reason for the tortured inferences you seem to have drawn from events that are almost a decade gone by.

Sincerely yours,

A handwritten signature in black ink, appearing to read "Kj Cole". The signature is fluid and cursive, with a long horizontal stroke extending from the middle of the name.

Kingston Cole
Attachment

Sent by US mail and e-mail today

NJDOT'S PRIVATIZATION EFFORTS FOR ITS RIGHTS-OFWAY
AN OVERVIEW

The State of New Jersey Department of Transportation (NJDOT) is opening its highways, toll roads and other public rights of way (ROWs) to competitive bidding for development by the telecommunications industry. These ROWs are critical high speed "lanes" along the busiest "information highway" in the U.S.; the Boston/New York/Washington D.C. Corridor. NJDOT is also seeking intelligent transportation systems (ITS) proposals and solution for these same roadways.

In line with Governor Whitman's privatization policies, NJDOT Commissioner Frank Wilson has directed his staff to develop and implement flexible negotiating processes that will facilitate and expedite private industry proposals for development of these ROWs. NJDOT plans to solicit proposals, evaluate them, negotiate terms and conditions and execute final public/private agreements within the next year to eighteen months. NJDOT has engaged the services of a consulting firm, Kingston Cole & Associates, to assist in this process.

The ROWs available are in five categories: (1) NJDOT's "public roads", comprising all of New Jersey non toll public roads; (2) The New Jersey Turnpike Authority; (3) The New Jersey Highway Authority (Garden State Parkway); (4) The South Jersey Transportation Authority; and, (5) New Jersey Transit (bus and train routes, etc.) properties.

Opportunities for participation fall into the following industry categories:

1. Fiber Optic Carriers: NJDOT will consider proposals from system integrators and potential non-exclusive licensees for access on State ROWs.
2. ITS Providers: NJDOT will consider privatization proposals from systems integrators, vendors and providers of applications.
3. Cellular and Wireless (PCS) Operators: NJDOT contemplates; granting master lease agreements to enable comprehensive deployment of network systems for these service providers.
4. Cable TV Operators: NJDOT will consider proposals from companies seeking new ways to reach their existing and prospective customers.
5. Consortium Arrangements: NJDOT is seeking optimum arrangements with private industry members. Consortium arrangement, comprising members from two or more of the above categories, may best achieve these goals.

If your firm is interested, please contact Kingston Cole & Associates at (415) 455-0800 for more information. You may also contact the firm principal, Kingston Cole, through NJDOT at: (609) 530-5637. Your firm is invited to participate in this ground breaking project at whatever level is appropriate, including provision of "Beta Tests" for selected equipment and technologies with applications to NJDOT operations and activities.

Brian Flanagan, Counsel
State of New Jersey
Commission of Investigation
PO Box 045
Trenton, New Jersey 08625-0045

RECEIVED

2004 MAY 27 AM 11:01

COMMISSION OF
INVESTIGATION

May 25, 2004

Re: Notice of Proposed Report

Dissemination No. 04-05-015

Dear Mr. Flanagan:

The following is provided pursuant to N.J.S.A. 52:9M-12.2 and your letter of May 10, 2004 (received in Financial Management & Budget, Delaware Department of Transportation on May 17, 2004).

Flawed RFP/Flawed Methodology

The excerpt provided in the attachment to your letter does not provide adequate context to understand what the statement "shifting of the risk" refers to or means. However, the Commission's finding of a "Flawed RFP/Flawed Methodology" would seem to be at odds with the favorable rulings of the New Jersey courts, which exonerated the Consortium from all allegations of procedural and other irregularities in this RFP process. I believe the opinions from these legal proceedings are relevant evidence that should be a part of the Commission's report.

Vendor Performance Problems: Known but Minimized

Delaware was not a participant in the Consortium when its RFP was prepared. However, we were aware that potential bidders had been the subjects of a qualification review and determination process. We further confirmed, through outside experts that we engaged, that the bidders who had been qualified in the Consortium's process (Lockheed and MFS) were qualified to perform the work and services specified in the RFP.

Inquiries were made to current and prior clients of both bidders, as part of the Consortium's due diligence process. We also had direct knowledge of MFS's work from the SJTA. Both bidders' performance for other toll clients included positive and negative findings, but the conclusion from all inquiries indicated that both bidders were qualified.

A pre-proposal test-lane requirement was not included in the Consortium's RFP, but it did require pilot or test-lane demonstrations in the scope of work to be provided.

A Questionable Evaluation

Although David M. Mortimer was very focused, results oriented, and challenged the team to accomplish its task of reaching a vendor recommendation, he in no way influenced my decisions, pressured me into making a decision, or prevented me from obtaining information I felt I needed to reach a decision.

While I would not characterize it as pressure, I certainly represented the high priority and sense of urgency to implement electronic tolling in Delaware expressed by the Governor and the Secretary of Transportation of Delaware on behalf of our toll customers.

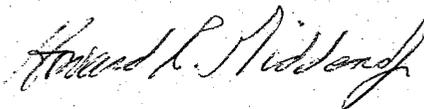
The MET members represented the differing interests of their respective agencies, and it was difficult at times to reach collaborative solutions. The use of a non-voting facilitator or leader, initially Thomas Margro and later David Mortimer, aided the team during this process. In particular, it helped prevent dominance by any single agency, which could have jeopardized the team approach that was required by the agencies' joint project. I worked to be cooperative and respectful toward team members and Mortimer, but not "compliant", during this process.

I did report to Secretary Canby on at least two occasions that I recall, including a discussion about the evening that the MET scored the proposals, that Mortimer was confrontational and challenged the group to act. But, I also stated that I did not believe that I or the other team members were impeded in assessing the proposals and reaching a decision, so that it was not an issue that I felt she needed to address.

The statement "they were instructed by Mortimer to score the vendors' final proposals within hours of the receipt of those documents by the group" is technically correct, but incomplete in context. The vendors' proposals were presented, reviewed and re-submitted several times, in response to issues and requests for clarification raised by the MET. The vendors' "final proposals" included limited and identified modifications to their earlier submissions. While the "final proposals" were reviewed in total, that review could be focused on the specific modifications and their relations to other parts of the proposal that remained unchanged from earlier submissions. Thus, the totality of the review and consideration of the vendors' proposals prior to scoring the proposals was not confined to a time period "within hours of receipt of those documents."

Finally, as I testified, I do not remember why my second scoring of the final proposals changed. As the Commission's report states, the scoring of the proposals was "laborious" and involved "thick packets of detailed scoring sheets". My first and second scoring involved diligent consideration of each item to be scored. Therefore, after nearly eight years, I do not, nor would it be reasonable to expect I would recall, my specific decision on each scored item on my initial or second scoring.

Very truly yours,



Howard R. Giddens, Jr.

Cc: Frederick H. Schranck, Deputy Attorney General
Delaware Department of Transportation

**EDWARD GROSS, Esq.
ATTORNEY AT LAW**

June 1, 2004

BY FACAMILE & FIRST CLASS MAIL

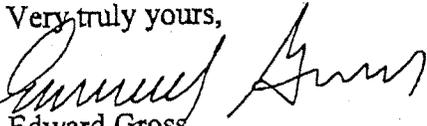
Brian Flanagan, Esq., Counsel
State Commission of Investigation
P.O. Box 045
Trenton, New Jersey 08625-0045

Re: Notice of Proposed Report
Dissemination No. 04-05-004
Written Response of Edward Gross

Dear Mr. Flanagan:

In accordance with your letter, dated May 10, 2004 and received on May 14, 2004, I am furnishing herein my response, duly signed, for inclusion in the Commission Report.

Very truly yours,


Edward Gross

Enclosure – Response of Edward Gross

17 CENTERBOARD DRIVE • BAYVILLE, NJ • 08721
PHONE: 732-606-9377 • FAX: 732-606-9379
E-MAIL: GROSSEDWARD@COMCAST.NET

EZ-PASS
RESPONSE TO THE PROPOSED REPORT
OF THE
STATE COMMISSION OF INVESTIGATION

Edward Gross
June 1, 2004

TABLE OF CONTENTS

INTRODUCTION

The SCI's Conclusion that the Procurement Process was in the Hands of a Few with Little Accountability is Fundamentally Flawed.....Page 1

THE PROCUREMENT PROCESS

The SCI's Conclusion that Prior to the First Lockheed Protest I may have Participated in the Procurement Process on the Merits is Wrong.....Page 3

THE LOCKHEED PROTESTS

The SCI Conclusion that the Lockheed Protest Hearings may have been Improper is Unfounded.....Page 5

EZ-PASS – NEW REVENUE SOURCES – FINANCIAL DUE DILIGENCE

The SCI Conclusion that there was an Absence of Financial Due Diligence to Test the New Revenue Streams is Inaccurate.....Page 7

EXCLUSION – MANIPULATION AND INTIMIDATION OF TURNPIKE PERSONNEL

The SCI Finding that I Manipulated and Intimidated Turnpike Personnel Is False.....Page 11

VENDOR WARNINGS MINIMIZED

The SCI Conclusion that Vendor Warnings were Minimized is a Mis-Characterization of the Dialogue with the Vendors.....Page 14

CONCLUSION.....Page 15

EXHIBIT A

EZ-PASS
RESPONSE TO THE PROPOSED REPORT OF THE
STATE COMMISSION OF INVESTIGATION ("SCI")

INTRODUCTION

THE SCI'S CONCLUSION THAT THE PROCUREMENT PROCESS WAS IN THE HANDS OF A FEW, WITH LITTLE ACCOUNTABILITY, IS FUNDAMENTALLY FLAWED

The EZ-Pass consortium was formed in the latter part of 1995 at the direction of Governor Whitman. It initially consisted of the New Jersey Turnpike Authority ("NJTA"), the New Jersey Highway Authority ("NJHA"), and the South Jersey Transportation Authority ("SJTA"). Shortly after its formation, the Port Authority of New York and New Jersey ("PA"), and the State of Delaware joined the consortium.

The consortium formed an Executive Council under the leadership of the New Jersey Department of Transportation ("NJDOT") to establish policy for the consortium. Each consortium agency and the State of Delaware was a member of the Executive Council. The New Jersey Commissioner of Transportation was Chairman of the Council. The agencies designated Commissioners and/or Executive Directors or similar ranking persons as their representatives on the council. The NJTA designated Commissioner Joseph P. Miele and me to represent it on the Executive Council.

The purpose of the consortium was to provide New Jersey with a cost effective, efficient, and relatively prompt process for bringing electronic toll collection to the State of New Jersey, after delays by the State, put it behind the progress made by the toll facilities of New York State.

The consortium designated the NJTA the lead agency for the procurement, installation and operation of toll collection system. However, the NJTA had absolutely no decision making power over any of the agencies or the State of Delaware. The procurement was the result of the collective decision making of all the agencies and the State of Delaware.

Each agency through their representatives and staff, independently reviewed, contributed and approved the (1) Request for Qualifications/Information, (2) Request for Proposals, (3) Reviewed and scored the Proposals, (4) Selected MFS Technology ("MFS") as the contractor through separate Board of Commissioner action or in the case of The State of Delaware by their Commissioner of Transportation and (5) Participated in the negotiations and approved the contract and financing for the project.

The procurement, contract and financing negotiations occurred during the period, April 1996 to March 1998. Representatives and staff from each agency participated in hundreds of committee and sub-committee meetings and each agency contributed to the process and independently approved every component of this complex and challenging project.

During the period of November 1996 to March 1998, on behalf of the NJTA as lead agency, I chaired meetings with other agency heads but I was not empowered, at any time, to substitute myself or the NJTA for the independent decision making authority of any other agency.

In fact, in 1997, while the contract and financing negotiations were ongoing, NJDOT Commissioner John Haley suspended negotiations with MFS and appointed a Task Force consisting of representatives from the PA, State of Delaware and New Jersey Department of the Treasury, to assess the contract terms and the financing. After the Task Force issued a generally favorable report, Commissioner Haley hired the law firm of Wolff &

Sampson, Esq. to lead the contract and financing negotiations. Commissioner Haley also designated a senior NJDOT official to attend and participate in the negotiations. Thus, neither the NJTA nor I led the negotiations that ultimately resulted in the executed contract and financing with MFS and Newcourt Capital.

The State Commission of Investigation's finding that the procurement process was in the hands of a few, with little accountability, is fundamentally flawed.

THE PROCUREMENT PROCESS

THE SCI CONCLUSION THAT PRIOR TO THE FIRST LOCKHEED PROTEST I MAY HAVE PARTICIPATED IN THE PROCUREMENT PROCESS, ON THE MERITS, IS WRONG.

The NJTA, as lead agency, designated its then Chief Engineer, Tom Margro, as the person to coordinate the development of the procurement process.

The first step in the procurement process was the issuance of a Request for Qualifications/Information that resulted in selecting companies eligible to receive the proposal. In April of 1996 the qualified companies received the Request for Proposal.

In July 1996, the Executive Council approved the procedures for the evaluation of the proposals, which procedures included the formation of a proposal review team. The review team, known as the Multi-Disciplined Evaluation Team ("MET Team"), consisted of the Chief Engineer or a similar ranking person, from each agency. Tom Margro was the Chairman of the MET Team.

I did not participate in the evaluation process and I made no decisions affecting the evaluation process up to the filing of a protest by Lockheed Martin ("Lockheed"), one of the proposers. In fact, until a briefing on October 11, 1996, by the electronic toll Program Manager, Paul Carris, I was not aware of the MET Team final recommendation to be made to the Executive Council.

Tom Margro and Paul Carris briefed me, from time to time, as the Acting Executive Director of the NJTA, on the MET Team progress. I did not participate in the drafting of the RFQ/RFI, the RFP, the addenda to the RFP or the Best and Final Offer Guidelines ("BAFO"). I did not attend meetings of the "MET Team" or score the proposals. From late July 1996 until October 21, 1996, my only contact with the procurement process was procedural.

On October 21, 1996, Lockheed, one of the proposers, filed a protest with the NJTA, as lead agency. Lockheed contended that the proceedings of the MET Team were unfairly bias against them and requested that the procurement process be set aside. Under the NJTA Regulations, as Acting Executive Director, I was the designated Hearing Officer, for the Lockheed Protest. The NJTA procedure for handling protests is similar to the procedure of other State agencies and departments.

On October 28, 1996, in advance of the protest hearing, I prepared a detailed statement of my involvement in the procurement process. I concluded that I had no substantive participation in the procurement process and could be impartial. Exhibit A is a copy of my October 28, 1996 statement that was previously provided to the SCI and not referenced in their proposed report.

The SCI conclusion that I may have participated in the procurement process on the merits prior to the first Lockheed Protest is wrong.

THE LOCKHEED PROTESTS

THE SCI CONCLUSION THAT THE LOCKHEED PROTEST HEARINGS MAY HAVE BEEN IMPROPER IS UNFOUNDED

Lockheed filed two Protests with the NJTA. I was the Hearing Officer in the first Protest that was held in early November 1996.

Upon the filing of the first protest on October 21, 1996, I stayed the procurement process pending the completion of the Protest. In order not to unnecessarily delay the procurement process of a significant multi-State undertaking, I exercised my discretion, as provided in the New Jersey Administrative Practice Act (NJAPA"), to fix a prompt hearing date and not permit formal discovery. However, I directed the consortium to cooperate with Lockheed in producing witnesses without the need for subpoena. Furthermore, since I considered the Protest of significant importance, I exercised the discretionary power under the NJAPA to hold an evidentiary hearing where both sides could offer live testimony, cross exam witnesses and present documentary evidence.

As Hearing Officer, it was not my role to designate the witnesses that each side would produce or to determine the documentary evidence that would be placed in the record before me.

The SCI's criticism of the protest proceeding conducted by me is unfounded. If evidence existed that was not introduced, which if offered, may have produced a different result, then fault lies with those that prepared the case on Lockheed's behalf.

At the conclusion of the first Protest, I rendered a 45-page decision that examined virtually all the facts placed in the record and denied Lockheed's Protest. Lockheed's appeal to the New Jersey Superior Court, Appellate Division, was dismissed as premature, since, as of the first Protest, the consortium had not selected a contractor.

In April 1997, after MFS was selected as the contractor, Lockheed filed its second Protest with the NJTA. I recused myself as hearing officer, since at the request of the Executive Council, following the completion of the first Protest, I became actively involved in the procurement process and no longer believed I could be impartial. The Hearing Officer was NJTA Chief of Staff, Diane Scaccetti.

To assist Diane Scaccetti in the protest, I assigned Andrea Ward, Esq. as her counsel. Ms. Ward was one of the most senior and qualified attorneys in the NJTA's legal department. I could not provide Mrs. Scaccetti with substantive advice or guidance, but on an administrative basis, I fully supported her work. Mrs. Scaccetti denied Lockheed's second Protest.

The first and second Protests were the subject of appeal to the New Jersey Superior Court, Appellate Division. In a lengthy written decision, the Court, on the merits, affirmed the decision of the NJTA.

It is remarkable that the SCI finds it appropriate to criticize the protest proceedings, while the second highest Court in New Jersey found otherwise.

EZ-PASS – NEW REVENUE SOURCES – FINANCIAL DUE DILIGENCE

THE SCI CONCLUSION THAT THERE WAS AN ABSENCE OF FINANCIAL DUE DILIGENCE TO TEST THE NEW REVENUE STREAMS IS INACCURATE

Electronic toll collection provided an opportunity, not available previously under a manual toll collection system, to identify toll cheats, and assess an administrative fee against them for the violation, in addition to collecting the unpaid toll. To identify a violator, cameras are positioned at the toll lane that will take a picture of the motor vehicle license plate of a potential violator and electronically transfer the image to a Violation Processing Center ("VPC"). If the license plate were readable, the license plate number would be sent electronically to a motor vehicle agency for identification of the motor vehicle owner.

Historically, toll roads throughout the world have lost significant revenue caused by toll cheats. By illustration, prior to the installation of electronic tolls, the NJHA averaged about 28,000 thousand violations per day and identified a very small fraction of the violators.

Each agency, using its historical toll data, estimated the percentage of toll violations occurring after the installation of electronic tolls. Although the percentage was a very small percent of total volume, and was projected to decline as motorists became aware of the identification process, it nonetheless represented a large number of potential violators. By example, in 1995, the collective annual volume of traffic for all agencies exceeded 1

Billion transactions annually. On average, the consortium estimated that slightly less than 1% of motor vehicles would be toll violators. Under Video Enforcement Law adopted by the State of New Jersey in 1997, the consortium was permitted to assess a \$25.00 administrative fee for each toll violation.

The consortium, along with the contractor, MFS, projected that 50% of violations could not be identified based upon camera malfunctions, lack of owner identification and owners traveling either without their transponders or not properly mounted. The consortium and MFS projected that one-half of the identified violators would pay the administrative fee of \$25.00. Over an 8-year operating period this revenue source was projected to raise about \$400 Million.

The second new revenue source was leasing excess capacity from the fiber optic system installed to operate electronic tolls. Over the 8-year operating period, fiber leases were projected to generate more than \$100 Million.

The consortium decided to dedicate these two new revenue sources to pay for the cost to install and operate the electronic toll system over the first eight years. If the projections were fully realized than the cost to install and operate the system for the first 8-years would be paid without using the traditional and conventional means for payment – toll revenue. To the extent that the new revenue sources fell short, each agency would be required to pay the shortfall from its toll revenue. The agencies set up a procedure to

¹ When the Violation Center began its new operation in 1999, it had a number of deficiencies, not uncommon a new business. The contractor sent violations to motor vehicle owners who had EZ-Pass since it unable to satisfactorily identify violators from non-violators; its camera equipment was not operating at an acceptable level and its collection process was compromised since a collection agency was not engaged in a timely manner. The contractor was assessed nearly \$20 Million in liquidated damages for contract failures. Furthermore, the contractor did not complete the software integration with the municipal court system on time, thus preventing adequate enforcement. In 2002, the new State Administration changed the entire program. We will truly never know how successful this revenue source could have been.

establish annual reserves from their toll revenue to pay the shortfall at the end of the 8-year period. The use of the new revenue sources to pay the cost of installation and operation thus reduced the burden on toll revenue but never eliminated the agencies underlying legal obligation to pay for the system from toll revenue to the extent the new sources were inadequate.

The SCI's conclusion that I personally described EZ-Pass as a no cost project is inaccurate. I consistently stated to the media and the general public that the cost of the EZ-Pass project would first be paid from the two new revenue sources, whose initial projections were adequate to pay for the installation and operation. However, I regularly noted that if there were a shortfall, the agencies would pay the shortfall from their toll revenue.²

The SCI's conclusion that the financial process lacked independent financial due diligence misses the core point. Toll collection revenue, without the new revenue sources, would have initially been the exclusive source to pay for the electronic toll system. Thus the amount of revenue generated from the new revenue sources was less important than the effort by the consortium to create new revenue sources and reduce the burden on toll revenue. The SCI's criticism that there lacked financial due diligence could arguably only be correct, if in the absence of projected new revenue sources to pay for the installation and operation of the system, the States of New Jersey, New York and Delaware would have abandoned the installation of electronic toll collection – an impossible scenario.

² The initial cost to operate the system was significantly understated due to the unforeseen popularity of the system. As a greater percent of motorists convert to EZ-Pass from manual payment, transaction costs increase. Greater use of EZ-Pass by the motoring public materially improves congestion at toll plazas. In addition, the NJTA realized considerable labor savings since EZ-Pass reduced the number of toll collectors. The NJTA estimated its savings at \$10 Million annually.

The Commission points to the testimony of James Crawford, Executive Director of SJTA and Lewis Thurston, Executive Director of the NJHA as examples of agencies that raised doubt on the projected revenue from toll violations. It is true that during meetings of the finance departments of each agency and at meetings of the agency heads, questions were raised on the amount of the projected toll violation revenue. Since collecting administrative fees from toll violators was a relatively new endeavor, it is understandable that legitimate expressions of uncertainty would be expressed from time to time. The SCI, however, fails to acknowledge that each agency, including the NJHA and the SJTA, independently approved the projected new revenue from toll violators.

Furthermore, the SCI's criticism that financial due diligence was lacking is also inaccurate. The finance departments of each agency were staffed with experienced and knowledgeable individuals on toll road financial matters. In fact, many of these individuals would be considered by others, experts in toll road financial planning. The finance departments of all the agencies reviewed and adjusted the assumptions used to project toll violation revenue and frequently discussed this subject at joint meetings of the departments.

In addition, the contractor, MFS and the losing proposer, Lockheed, both projected approximately the same toll violation revenue. Finally, the lending syndicate, headed by Newcourt Capital, engaged Coopers & Lybrand to review the two new revenue sources and their report found the projected new revenues satisfactory. In fact, there was an abundance of financial due diligence.

EXCLUSION, MANIPULATION AND INTIMIDATION OF TURNPIKE PERSONNEL

THE SCI CONCLUSION THAT I MANIPULATED AND INTIMIDATED TURNPIKE PERSONNEL IS FALSE

As Executive Director of the NJTA, I was responsible for the day to day operation of one of the most important highways in the United States. The NJTA's labor force exceeded 1500 full time and 600 part-time employees. The NJTA had an operating budget of approximately \$170 Million and a capital program that in 2000 exceeded \$1 Billion.

The issues of the day at the NJTA ranged from traffic congestion and labor disputes to road construction and fatalities. While I was Executive Director, the NJTA successfully completed a \$2 Billion bond issue and materially improved its financial condition. As a result, in 2000, the bond rating authorities increased the ratings on NJTA bonds.

As in all large organizations, the NJTA, from time to time, faced personnel issues, such as, job performance, absenteeism, and personality clashes. I always sought to resolve these issues in a reasonable and fair manner. However, it is understandable that some employees disagreed with my decisions.

It is true that I demanded of my employees that they produce to the best of their abilities in order to maintain the Turnpike as one of the best and safest highways in the United States. It is unjustified to describe my performance as "manipulating" or "intimidating".

In the 1996 time period, Cathy Coryat, Finance Director, advised me that the electronic toll staff was not adequately providing financial information to her department as well as not providing her department with timely notice of meetings.

I met with the electronic tolls Program Director, Paul Carris and his Deputy, Fran O'Connor who denied that the Finance Department was not given access to data or timely notice of meetings.

I asked both the finance department personnel and the electronic toll staff to improve their communications with each other and to make sure the flow of financial data to the finance department was not impeded. I did not receive a subsequent complaint from the finance department. From time to time, I would ask each department if there were any problems between them and was always told there were none.

As Director of Finance, Cathy Coryat, signed off on all matters presented to the Board of Commissioners that impacted on the current annual operating budget or the current capital budget. The said sign off indicated that there was adequate funds in either budget to pay for the service or purchase proposed. I mistakenly asked Cathy Coryat in March 1997 to sign off on the proposed selection of MFS as the electronic toll contractor. Since this item would not affect the current operating or capital budget there was no reason for her sign off. There was no need to report this incident to the Board of Commissioners since, but for my error, the issue of sign off would not have arose.

I regularly informed the Commissioners of the NJTA on every important aspect of the EZ-Pass project. From the Lockheed Protest in November 1996 through the Board approval of the MFS contract and financing in March 1998 and thereafter during the installation and operational period, I briefed the Commissioners on this project at each

monthly commission meeting. The executive session minutes, although not verbatim, will reflect my monthly briefings of the Commissioners.

Donna Manuelli, Assistant Director of Finance, from March 1997 to March 1998, actively led the finance department of the other agencies in the review and approval of the projected revenue and expense for this project. In fact, the revenue and expenses were contained in a spreadsheet called the "Base Case Model" that was a signed exhibit to the MFS contract. Unless all the agencies, including the NJTA approved the "Base Case Model", there would not have been a closing of the financing nor would a contract with MFS been executed. The "Base Case Model" was also presented to the NJTA Commissioners on March 10, 1998, when the Board approved the contract and financing.

The personnel of the finance department, ETC staff, the engineering department and the toll and technology departments of NJTA were challenged with the task of converting from manual to electronic toll collection and to integrate their work with the other consortium agencies. It was a major undertaking. For the most part, the personnel performed very well. A few may have some misgivings, but in a major endeavor of this kind, those few disappointed employees do not justify the SCI's finding that I manipulated and intimidated NJTA personnel.

VENDOR WARNINGS MINIMIZED**THE SCI CONCLUSION THAT VENDOR WARNINGS WERE MINIMIZED IS A MIS-CHARACTERIZATION OF THE DIALOGUE WITH THE VENDORS**

Newcourt Capital ("Newcourt") was engaged by MFS, in 1997, to arrange the financing for the project in accordance with its best and final offer to the consortium. The financing required that the agencies advance no funds and only make voluntary principal payments during the first 8 years of operation.

Newcourt led the lending syndicate and negotiated the terms of the financing on behalf of the syndicate. It was their responsibility to secure the most favorable terms for the syndicate, while it was the consortium's responsibility to secure the most favorable terms for the agencies. The communications between Newcourt and me were within this setting.

It was pure negotiations for Newcourt to indicate that the New Jersey Banks declined to be part of the lending syndicate. In fact, commercial banks generally make short term commercial loans. This financing was long term and made them an unlikely candidate under any circumstance to be part of the lending syndicate.

The most revealing fact in connection with the financing is that Newcourt produced the syndicate that lent the consortium \$300 Million under terms consistent with MFS's commitment. Most of the lending syndicate members were insurance companies as opposed to banks. Insurance companies traditionally make long term commercial loans.

I advised Newcourt that a discussion of tax-exempt financing would be difficult to achieve and therefore would be evaluated after the financing was in place... A portion of the financing was legally ineligible since private sector firms were leasing a portion of the fiber optic system. In addition, under the contract MFS was to share in any surplus after all project expenses were paid. This arrangement raised further question on the use of tax-exempt financing. The terms of the financing permitted conversion to tax-exempt financing if it was determined at a future date that the project was eligible.

Newcourt advised me at a late date in the negotiations that the lending syndicate wanted to hire an independent consultant to review the projected new revenue sources; that is, toll violation revenue and fiber leasing. I was not opposed to the engagement of an independent consultant but concerned with the time line. I did absolutely nothing to impede the work of Coopers & Lybrand.

The vendor dialogue was part of the negotiation process. The SCI conclusion that vendor warnings were minimized is inaccurate.

CONCLUSION

The procurement and financing for this complex project covered a two-year period, from April 1996 to March 1998. It involved five major toll facilities and hundreds of their representatives meeting on a frequent basis while still performing their other job responsibilities.

As the Executive Director of the NJTA and the lead agency for the consortium, I gave it my best. Although some mistakes were no doubt made, I believe my overall performance

was very good. I performed in good faith with no other objective than improving the service to the motoring public.

The SCI did not provide me with their full report, however, the sections made available to me, suggest that the SCI failed to interview key personnel that would have corroborated much of my testimony.

Jim Poole, Public Finance Director of the New Jersey Treasury Department. He was intimately familiar with the financing terms. The SCI makes no reference to him.

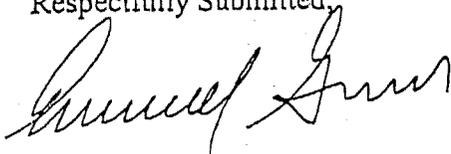
Darryl Bookbinder, Assistant Counsel for the P/ANYNJ. He attended most of the negotiation sessions on the contract and financing terms. The SCI makes no reference to him.

Howard Giddens, Finance Coordinator for the State of Delaware. He attended most of the negotiation sessions on the contract and financing terms. The SCI makes no reference to him.

Wolff & Sampson, Esq., lead negotiator, in 1998, for the MFS contract and the financing. The SCI makes no reference to the firm.

Bill Wolf, Esq., Counsel to the NJTA for this project. Mr. Wolf was an active participant in all aspects of this project. The SCI makes no reference to him. It would be unfortunate if the NJTA raised attorney-client privilege since he has so much factual information to offer the SCI.

Respectfully Submitted,



Edward Gross

June 1, 2004

*EXHIBIT A*STATEMENT OF EDWARD GROSS
REGARDING REGIONAL ELECTRONIC TOLL COLLECTION PROCUREMENT

In the latter part of 1995, the New Jersey Turnpike Authority (hereinafter referred to as "NJTA") joined with the New Jersey Highway Authority (hereinafter referred to as the "NJHA") and the South Jersey Transportation Authority (hereinafter referred to as the "SJTA") to form a consortium for the purpose of procuring a Regional Electronic Toll Collection System. Thereafter, the Port Authority of New York and New Jersey (hereinafter referred to as "PANYNJ") and the State of Delaware Department of Transportation (hereinafter referred as the "Delaware DOT") joined the consortium. The Chairman of the consortium is the New Jersey Commissioner of Transportation, Frank Wilson.

The consortium designated the NJTA as the lead agency for the purpose of procurement, installation and operation of the Regional Electronic Toll Collection system. The NJTA designated its then Chief Engineer, Thomas Margro, as the person to coordinate the development of staff and the procurement.

The consortium created an organizational structure with the staff led by Thomas Margro reporting to an Executive Council consisting of representatives of each of the consortium members. The NJTA designated Commissioner Joseph P. Miele and its Acting Executive Director Edward Gross to represent it on the Executive

-2-

Council. The Chairman of the Executive Council is Commissioner Frank Wilson.

The Executive Council has met on three occasions. Amongst other things, the Council approved the procedures for evaluation of the proposals at its meeting in July 1996. The evaluation procedures included the formation of a proposal review team consisting of the Chief Engineer, or a similarly ranking person, from each of the member organizations.

In accordance with the procedure approved by the Executive Council, I did not participate in the evaluation process and I made no decisions affecting the evaluation process while it was in progress. In fact, until a briefing by Program Manager Paul Carris on October 11, 1996, I was not aware of the final recommendation to be made by the review team to the Executive Council.

At the Executive Council meeting of October 17, 1996, the Executive Council members received a briefing on the proposals of Lockheed and MFS and the recommendation of the review team.

As Acting Executive Director, I was briefed from time to time by Thomas Margro and Paul Carris on the progress of the review committee efforts. I did not participate in the drafting of the RFQ/RFI, the RFP, the addenda to the RFP and the BAFO guidelines. I did discuss each of the documents in general terms with either Thomas Margro or Paul Carris and made some recommendations from time to time in connection with these

-3-

documents but gave no direction that they be changed.

I have reviewed the protest letter of Lockheed dated October 21, 1996 and each element of protest contained therein. I have had no personal involvement in the allegations set forth in the protest letter that give rise to the complaint of Lockheed.

As a member of the consortium Executive Council, I have participated in the development of a Memorandum of Understanding between the consortium members to establish cost sharing, revenue sharing and general terms and conditions for consortium action. I have also participated in the structural issues related to the consortium. These activities relate to the organization and operation of the consortium irrespective of which vendor is selected under the procurement process.

DATED: October 28, 1996

May 25, 2004
RECEIVED
2004 MAY 25 AM 11:46

Mr. Brian Flanagan
State of New Jersey
Commission of Investigation
P.O. Box 045
Trenton, New Jersey
08645-0045

DEPARTMENT OF
INVESTIGATION

Dear Mr. Flanagan:

Thank you for providing portions of the report relative to your investigation into the New Jersey E-Flow Procurement. There are a few points that need to be made to help clarify some of the elements of the report:

Page 3 of 5 ... top paragraph ...
The MET members in fact had access to any resources they believed they needed and could include those people as part of the MET team representing this agency. Several members brought their CFO's or delegates to examine the BAFD. Unless those ~~resources~~

resources were present the night of the final scoring, the MET representatives could not then contact such resources. My entire team was present the night of the final scoring and included a public sector finance expert, an operations person, a technical person as well as myself.

Page 4 of 5 - top of page ...

The record should clearly reflect that I voted against MFS in both rounds of scoring. In defense of the MET members who voted for MFS, I should point out that we were forbidden from having any contact with our superiors during the scoring process. Since a New Jersey "procurement" attorney had been provided to oversee and guide the procurement process, it is my

opinion that the other MET members relied upon this expertise. David Mortimer must certainly exerted control and authority over the MET team in his role as chief of staff to the NJ DOT Commissioner, and it would be foolish to believe otherwise. The combination of procurement oversight by a new young attorney coupled with the presence of David Mortimer, who represented higher authority, may very well have quelled any doubts the other MET members may have had in their scoring decisions. My own scoring reflected my ~~own~~ opinion and that of my resources that MFS technically could not perform all that their financial projections had little basis to rely on.

Signed before me on
June 7, 2004

Janet M. Turcotte

JANET M. TURCOTTE
NOTARY PUBLIC OF NEW JERSEY
MY COMMISSION EXPIRES MAY 23, 2009

Walter Fastabos



SAN FRANCISCO BAY AREA RAPID TRANSIT DISTRICT

300 Lakeside Drive, P.O. Box 12688
Oakland, CA 94604-2688
(510) 464-6000

RECEIVED

2004 JUN -2 AM 10: 24

STATE COMMISSION OF
INVESTIGATION

May 25, 2004

James Fang
PRESIDENT

Dan Richard
VICE-PRESIDENT

Thomas E. Margro
GENERAL MANAGER

DIRECTORS

Dan Richard
1ST DISTRICT

Joel Keller
2ND DISTRICT

Roy Nakadegawa
3RD DISTRICT

Carole Ward Allen
4TH DISTRICT

Peter W. Snyder
5TH DISTRICT

Thomas M. Blalock
6TH DISTRICT

Lynette Sweet
7TH DISTRICT

James Fang
8TH DISTRICT

Tom Radulovich
9TH DISTRICT

Mr. Brian Flanagan
Counsel
State of New Jersey
Commission of Investigation
P.O. Box 045
Trenton, NJ 08625-0045

Dear Mr. Flanagan:

I am writing to you to respond to the portions of the proposed report on New Jersey's EZ-Pass Procurement that I received via mail on May 18, 2004.

First, let me say that it is extremely difficult to respond to portions of a report where text has been omitted, as it is difficult to have any sense of context as to meaning or intent nor any sense of time or sequence of events. However, based on the "portions" provided to me, I offer the following comments.

Wilson's Recusal

I have no recollection of the September 20, 1996 BAFO language referred to in the report. I had resigned from the Turnpike Authority in August and left the Authority in mid-September. In any event, as I had previously testified to the Commission investigators, I did not believe that the proposal had to be self-funded. Self-funding was a goal that we were hoping would be realized, however that could only be determined during negotiation with the proposers. I had left the Turnpike Authority (and the State of New Jersey) prior to final negotiations with the proposers.

Flawed RFP/Flawed Methodology

First, it is impossible to understand the reasoning behind the above title description without being able to see the "omitted" text. However, to the best of my recollection we wanted to make sure that the proposers and the evaluation team would have a common understanding of the evaluation criteria and their order of importance. As noted in the report, this change was made three weeks before proposals were due which was considered more than enough time for the proposers. We were dealing with proven technology that was being used in an operating environment (NY State Thruway) and the thought was that the emphasis on the technical solution should not be greater than that of the cost. In retrospect, considering the successful operation of EZ-Pass in New Jersey, it would appear that the technology was not an issue.

Mr. Brian Flanagan
Counsel
State of New Jersey
May 25, 2004

Page Two

Exclusion, Manipulation & Intimidation of Turnpike Personnel

Nothing that I have been provided with from the report describes specifically any negative impact on the Finance & Budget Department's operations. The only thing I can deduce from the portion of the report provided me is that there was frustration on the part of Finance & Budget Department staff regarding participation in meetings.

The day-to-day management of the EZ-Pass procurement was handled by the ETC project staff who were located at Turnpike headquarters. If the Finance & Budget Department had issues, they could easily access the Project Manager – Paul Carris, or myself.

Both Cathy Coryat and I reported directly to the Turnpike Executive Director – Ed Gross. We both attended Mr. Gross' weekly staff meetings. Ms. Coryat and I had discussed the Finance & Budget Department's participation in the procurement process and the relationship of the ETC Project staff to the Authority and to the Consortium. I was not aware of any significant problems, as there was ample opportunity for these to be aired with me directly or with Mr. Gross.

In closing, I would like to thank you for the opportunity to reply to the report, although it is extremely difficult to do so for the reasons I stated earlier. I hope my response will be of assistance.

Yours truly,


Thomas E. Margro
General Manager

RECEIVED

2004 JUN -1 AM 10:19

STATE DEPARTMENT OF
INVESTIGATION

May 27, 2004

Mr. Brian Flanagan, Counsel
State of New Jersey
Commission of Investigation
PO Box 045
Trenton, NJ 08625-0045

Re: Notice of Proposed Report
Dissemination No. 04-05-012

HAND DELIVERED

Dear Mr. Flanagan:

I am in receipt of the referenced document as transmitted by you on May 10, 2004 and received on May 14, 2004 via Certified Mail. I have had the opportunity to review the 6 pages of text that you have related to my testimony in this investigation. It is my request that the following response be considered for inclusion in the final report.

Page 1, Paragraph 1 The report refers to the actions of the MET Team concerning the revenue proposed from the Smart Card option. I do not recall offering any testimony on this specific matter, nor do I currently have any specific recollection now of this matter.

Page 1, Paragraph 2 The report states" when the MET Team accepted MFS's revised final offer, and thus gave an official imprimatur to the shifting of the risk entirely to the Consortium, it was done in an ad hoc manner and not pursuant to any specifications, process or technical language drawn from the RFP or any other procurement documents"

The MET Team did not have the responsibility to accept the offer; it did have the responsibility to evaluate the response to the RFP. Any acceptance of any offer was reserved for the Executive Committee of the Consortium. The procurement process was founded with the RFP request and subsequent written request for additional information or clarification from each proposer. Furthermore, at the time of the evaluation, SJTA did not consider the MFS proposal as a shift in the risk. It considered the proposal as a deferred payment obligation that would (may) be due at the end of the term. Subsequent annual budgets for SJTA did include funds in anticipation of that potential outcome.

Page 3, Paragraph 1 The report states that "none of the MET members was experienced in public- or private -sector finance..... I submit that this state is not accurate. As Chief

Engineer of the SJTA I had several years in Conventional Public Sector finance of capital programs. In addition to this personal experience, the MET Team was provided guidance in this area by the Phoenix Group, a consultant retained by the NJ Turnpike to assist the MET Team.

Thank you for the opportunity to offer these statements for the record.

Sincerely,



Donald J. Mauer, Jr

RECEIVED
2004 MAY 27 AM 11:02
COMMISSION OF INVESTIGATION

May 24, 2004

Brian Flanagan, Counsel
State of New Jersey
Commission of Investigation
P.O. Box 045
Trenton, NJ 08625-0045

Re: Francis K. O'Connor
Notice of Proposed Report
Dissemination No. 04-05-006

Dear Mr. Flanagan:

I am in receipt of your personal and confidential correspondence dated May 10, 2004, mailed on May 12, 2004, which included a criticism of my actions with regard to your investigation concerning New Jersey's EZ-Pass Procurement. I received this correspondence on May 13, 2004.

With regard to the statements in the proposed draft, I would like to address two statements. The first is on Page 3 of 5 wherein it states:

"O'Connor, who meanwhile had been transferred to the Turnpike's central maintenance facility in Hightstown, filed a civil complaint alleging harassment. In late 1995, in an action coincidental with settlement of that complaint, he was promoted, given the title of Special Project Control Administrator and assigned to the E-ZPass project as deputy to Paul A. Carris where his duties included controlling the flow of internal documents related to the procurement."

This statement makes it appear as if I had discretion concerning the flow of documents. I never withheld any documents from any individual.

Brian Flanagan, Counsel
May 25, 2004
Page 2

The next statement I would like to address is on Page 5 of 5 wherein it states:

“In its review of this matter, the Commission obtained documentary evidence suggesting that, in addition to the negotiated constraints that were placed upon the Coopers due diligence study, efforts were undertaken to restrict the firm’s access to key personnel. Coopers employees seeking data and information for the evaluation, for example, were instructed in writing to funnel all communications through the Turnpike Authority in the person of Francis K. O’Connor rather than contacting the appropriate Consortium officials directly.”

I disagree with the implications in the conclusion of the proposed draft. As I testified during the hearing, information and communications were sent to me to ensure the fact that all correspondence and other information were appropriately responded to. In fact, the first time I learned that information had to go through me was when the document was handed to me during my testimony. Apparently, Mr. Gross had decided that all information was to be “funneled” through me. I do not recall ever seeing any written instructions regarding the “funneling” of communications.

I want to further clarify that in no way did I ever intentionally or otherwise restrict access to anyone during this period. My responsibility was to get the information requested for the person requesting it.

Thank you for this opportunity to respond to your draft.

Very truly yours,

Francis K. O'Connor

Francis K. O'Connor

David Mortimer
17 Cambridge Road
Lafayette, New Jersey 07848

RECEIVED

2004 JUN -1 PM 4:28

STATE COMMISSION OF
INVESTIGATION

June 1, 2004

Brian Flanagan, Esquire
General Counsel
State of New Jersey
Commission of Investigation
PO Box 045
Trenton, NJ 08625-0045

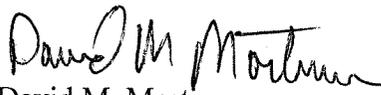
Re: Notice of Proposed Report
Dissemination No. 04-05-005

Dear Mr. Flanagan,

The attached is a response to the Commission's letter regarding its Proposed Report on the New Jersey EZ Pass Procurement.

Kindly mark the extra copy "received" and return it to me.

Very truly yours,


David M. Mortimer

PES

**David Mortimer's Response to Notice of Proposed Report
of the State Commission of Investigation
May 24, 2004**

RECEIVED

2004 JUN -1 PM 4:28

STATE COMMISSION OF
INVESTIGATION

General Comments:

Having been given only limited excerpts of the proposed report, it is difficult to adequately respond without fully understanding the context in which the excerpts were made. Unlike the State Commission of Investigation (SCI) practices, Mr. Mortimer believes his comments should be incorporated into the SCI report in full¹.

Comment I

Since so much time has elapsed between the time of the investigation and the time of the procurement of EZ Pass (approximately seven years), the quality and accuracy of the report is tainted. The process by which an individual must recount actions and conversations seven years after they occurred is fundamentally flawed. In many instances, statutes of limitation prevent actions like this. Further, while the SCI has unlimited taxpayer funded financial and professional resources, the subjects of the investigation are not afforded minimal due process guarantees, such as the right to cross examination, the right to present exculpatory testimony or to confront ones accusers. As a result, the process is biased. For the SCI to prepare an accurate reconstruction of conversations, events and documents outside the traditional and generally accepted rules for evidentiary practices can only produce a document of dubious value and credibility. Obviously, the SCI wished to reach a pre-ordained result.

Comment II

SCI report appears to separate and single out the New Jersey procurement from the multi-state procurement process which occurred. This approach is incorrect. EZ Pass was procured by three states and through a consortium of five agencies. These five agencies had extensive staff involvement, and they were supplement by professional support in the financial, legal, toll operations and engineering aspects of the procurement. There were as many as thirty-five individuals from the agencies and consultants who were involved on an everyday basis. Furthermore to ensure the integrity, these

¹ I have written my response in the third person because it is less confusing, and easier for readers to review and understand.

independent agencies throughout the entire process retained their right to opt out of any actions of the Consortium at any time. The fact that the current administration continues after seven years to promote EZ Pass, is a testament to the integrity of the procurement. For the SCI to revisit this consortium decision, is little more than "Monday morning quarterbacking."

In addition, it is beyond comprehension to even suggest that any one individual could unilaterally abrogate the extensive and deliberate multi-step approval methodologies of the consortium's MET team and Executive Council. The Consortium received input from staff, consultants, executive management and Boards for five independent agencies in the states of New Jersey, New York and Delaware. At no point did any one person or agency control the process.

Mr. Mortimer had a limited role within the process. Mr. Mortimer's role was strictly that of a non-evaluating process and schedule moderator with no supervisory management of the individual MET team members or agencies. As it was, Mr. Mortimer served at the pleasure of the Consortium's Executive Council. At no time did Mr. Mortimer ever perform in any manner that was improper or injurious to the procurement processes. Nor did Mr. Mortimer directly or indirectly manipulate the processes, individuals or outcomes of this procurement.

Comment III

SCI report questions whether Mr. Mortimer had the appropriate background to act as chair of the MET team. While it is unclear how the SCI is qualified to determine appropriate business experience, what is clear is that the report fails to consider Mr. Mortimer's substantial business experience in reaching its conclusions. Mr. Mortimer has thirty years of sound business experience. He had managed significant organizations within two large international corporations (H&R Block, Inc. and Beneficial Management Corporation, Inc.) as well as his own business. Further to refrain from considering a long record of exceptional performance within state government is an inexcusable oversight. Mr. Mortimer served as Chief of Staff of the Department of Transportation from July 1994 to July 1997. He then served as Assistant State Treasurer and later Associate Deputy State Treasurer from July 1997 until May 2000. Finally Mr. Mortimer was chosen to oversee the Department of Education's Division of School Facilities, which implemented an \$8.6 Billion school construction program. The failure to set forth Mr. Mortimer's qualifications is simply an unjustified baseless attack on his business and professional career.

Comment IV

The SCI report oversimplifies and downplays the uniqueness of this procurement. There had never been an inter/intra state procurement by many agencies for a new technology application. The SCI considers this procurement on the same footing as acquiring everyday goods and services. This is an error. The procurement was unique and very intricate due to the number of parties and complexity of technology issues. As a result, the consensus-making and decision-making were also unique. This required that novel solutions be made by management. To overlook this fact is a disservice to the reviewers of the report, and undermines the credibility of the SCI report.

Comment V

SCI infers that Mr. Mortimer was intimately involved in the procurement for a long period of time. This is incorrect. The procurement took nearly two years, from early 1996 until early 1998. For the first eight months of 1996, the chair of the MET team was Thomas Margro, Chief Engineer for the New Jersey Turnpike. In September, 1996, there was a transition period where Mr. Mortimer worked with Mr. Margro. Mr. Mortimer served as chair from October through the end of November 1996 when the evaluation period was completed. Upon completion of the evaluations, New Jersey Turnpike Executive Director Ed Gross was the principal responsible for negotiation of the contract terms. Presented below is a more extensive timeline of events which clearly illustrates the limited involvement of Mr. Mortimer.

RFP Timeline: Margro as Chair (Winter 1996-August 1996)

Early 1996 the New Jersey Turnpike Authority (NJTA), New Jersey Highway Authority (NJHA), South Jersey Transportation Authority (SJTA) and the Port Authority of New York & New Jersey (PORT) formed a Consortium to procure electronic toll collection capacity along their respective bridges and roadways. A structure was established by which each agency designated a member to the Consortium's Executive Council, generally Commissioners and agency Executive Directors or other senior management personnel, which would provide senior level oversight to the procurement team. The procurement team or MET team, as it was known, was staffed by various technical personnel from each agency, supported by the resources of their agency as called upon by the MET team member. For example a team of engineering professionals from each agency developed and evaluated the technical specification of the RFP for the electronic toll collection systems.

Similarly, the financial staffers did the same for the relevant financial documentation. NJT Chief Engineer Thomas Margro served as the MET team Chairman.

Spring into early fall of 1996 an RFP was prepared and issued. Also, at the time, responses were received and the evaluation of same had begun by the MET team. Throughout July, August and early September extensive technical, engineering and operational reviews were conducted to determine if the bids were responsive and responsible. Chairman Margro informed the Executive Council that both respondents' proposals were deemed responsive and responsible. Based upon these exhaustive reviews the two respondents were advised that there would be a series of oral presentations. In September Chairman Margro announced his forth coming resignation to accept a new position at BART in San Francisco. Mr Mortimer was advised by NJDOT Commissioner Frank Wilson and NJT Executive Director Edward Gross that he was to assume Mr. Margo's responsibilities as chairman for the MET team activities in addition to his NJDOT duties. During this time frame the Department of Transportation for Delaware (Del DOT) joined the Consortium.

Transition: Margro to Mortimer (September 1996)

Throughout the rest of September Mr. Margro and Mr. Mortimer served together as Mr. Margro transitioned out of the role. Oral presentations were conducted and additional information was provided by the respondents to clarify certain matters resulting from the staff's technical, engineering, operational, financial and legal reviews of the documents and oral presentations. Up to this point, the working groups proceeded on two paths simultaneously. The entire MET team would meet to review the proposals, and subject area subcommittees would continuously review, evaluate and comment upon a multitude of complex technical, financial, operational, and legal issues of each respondents' proposal. Also, members of the Executive Council and agencies senior staff were provided with oral progress reports by Mr. Margro and Mr. Mortimer, as well as, from their respective MET team members.

Mortimer as Chair (October 1996 & November 1996)

During this time, the respondents submitted their Best and Final Offers which when reviewed resulted in further requests for clarifications. This resulted in the submission of Best and Really Final Offers. These were scored. Upon completion of the scoring by the MET team, the entire MET team with Mr. Mortimer presented the scoring results and recommendations

for award to the Consortium's Executive Council. The Executive Council asked many questions that were responded to by the MET team. The Consortium's Executive Council voted to accept the recommendation and have the recommendation for award presented by Del DOT Commissioner Ann Canby, for the Delaware approvals, by Ms. Karen Anton, the Port Authority's Chief Technology Officer, to the Port Authority's Commissioners, and by Mr. Mortimer to each of the three New Jersey toll authorities.

Gross assumes leadership role (December 1996-Complete Implementation)

At this time the New Jersey Turnpike became the central agency in the procurement. Mr Mortimer's role was phased out to that of presenting the approved materials to the three New Jersey authorities. Since the Turnpike was to sign a master agreement on behalf of the five agencies, the Turnpike was selected to be the chief negotiator. New Jersey Turnpike Authority Executive Director Edward Gross finalized the contract with the concurrence of all five consortium members.

To the extent, Mr. Mortimer is discussed within the report; it should clearly indicate his relatively brief involvement in the procurement. Further any of the deadlines imposed were agreed upon by the parties during the Margro phase of the procurement, it was Mr. Mortimer's duty to make certain the process move forward on a timely basis.

Comment VI

There are comments in the report that infer Mr. Mortimer intimidated the evaluators into a hasty completion of the evaluations. This is untrue, the evaluators had been meeting for months during which extensive reviews and comments were completed for each of the several categories that were to be scored. On the evening of the final vote, the issue came up as to whether the MET team should break for the evening or reconvene early the next morning prior to a scheduled Executive Committee meeting. Seeing no consensus among the evaluators as to their preference, Mr. Mortimer urged them to stay on schedule and complete their assignment that evening. To the best of Mr. Mortimer's recollection, only one evaluator, Mr. Carris, objected. These facts do not constitute "intimidation".

Comment VII

There is a statement in the report that Mr. Mortimer removed certain scoring sheets from the room in which the evaluators were deliberating. This is untrue as written and must be placed in context. By rules adopted by the consortium, the evaluators' deliberations and evaluations were declared confidential. Since the scoring sheets were very elaborate (multi-page documents), there was a requirement to tabulate the scores of the evaluators, to ascertain who the successful bidder was. Scoring sheets were taken from the room for the limited purpose of totaling the scores. No wrongdoing can be inferred from this action. It was simply an administrative action. Each evaluator signed their respective scoring sheets at the conclusion of the evaluation. At no time did any evaluator question the authenticity of their own documents or the evaluation process. And, at the meeting of the Executive Council the next morning, the evaluators participated in the presentation of the evaluation to the Executive Council members. There were numerous questions asked by the Executive Council members. The evaluators answered each question openly, freely and comprehensively. No one requested additional time to evaluate any aspect of the evaluations.

Final Comment

In the view of many, EZ Pass has significantly improved the quality of life for many New Jersey motorists, daily commuters, truckers and those vacationing at the shore. The reductions in toll barrier congestion not only saves time and money, but also reduces pollution thereby, improving the quality of the air we breathe, as well as, providing the public with a seamless electronic toll collection system from Massachusetts to Virginia. The implementation of EZ Pass has been lauded for its vision. While there are issues that arise from all complex endeavors this report and its criticism are nothing more than Monday morning quarterbacking of a winning game.

9737444928

06/04 '04 08:58 NO.383 02/03

GIBBONS, DEL DEO, DOLAN, GRIFFINGER & VECCHIONE

A PROFESSIONAL CORPORATION

ATTORNEYS AT LAW

ONE RIVERFRONT PLAZA
NEWARK, N.J. 07102-5496
973-596-4500LAWRENCE S. LUSTBERG
Director
(973) 688-4751DIRECT FACSIMILE
(973) 838-4285
llustberg@gibbonslaw.comWEB SITE
<http://www.gibbonslaw.com>

June 3, 2004

VIA FACSIMILE AND REGULAR MAILBrian Flanagan, Counsel
State of New Jersey
Commission of Investigation
P.O. Box 045
Trenton, New Jersey 08625-0045**Re: Proposed Report No. 04-05-007/Amy Rosen**

Dear Mr. Flanagan:

As we discussed last week, my client, Amy Rosen, has appropriately forwarded me your letter dated May 10, 2004, and the brief portion of the above-referenced Proposed Report which mentions an alleged conversation between Ms. Rosen and Frank Wilson. As Ms. Rosen stated, under oath, when you spoke to her telephonically, she has no recollection of the alleged conversation about which Mr. Wilson apparently testified, although she spoke to Mr. Wilson frequently during this period. However, for a number of reasons, she finds Mr. Wilson's account of that conversation suspect, if not incredible. This is so for several reasons.

First, according to the Proposed Report, Mr. Wilson relates that "She [apparently Ms. Rosen] simply said we are meeting today and is the schedule -- some material change in the schedule, is my recollection." However, the truth is that on October 8, 1996 -- and, indeed, from October 6 through October 10, 1996 -- both Ms. Rosen and Mr. Wilson were attending the national meeting of the American Public Transit Association ("APTA") in California. Under those circumstances, it seems highly unlikely, if not inconceivable, that Mr. Wilson inquired as to whether there would be New Jersey Transit Board meeting that day or the next, since several (probably a majority) of the Board members were in California for the meeting.

Second, in response to the question "And you already said that she had a copy of this August 20 [recusal] letter?", the Proposed Report states that Mr. Wilson stated, "I think so." In fact, however, as Mr. Wilson well knows, Ms. Rosen was absolutely aware that he had recused himself from all matters relating to the EZ Pass Procurement; it is for that reason that she is so certain that she never entered into any discussion with Mr. Wilson in order to influence this procurement. Mr. Wilson's answer ("I think so."), while seemingly insignificant, demonstrates

9737444928

06/04 '04 08:59 NO.383 03/03

GIBBONS, DEL DEO, DOLAN, GRIFFINGER & VECCHIONE

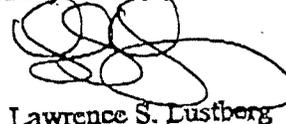
Brian Flanagan, Counsel
June 3, 2004
Page 2

that he was either confused, or not being forthright, in his testimony. Under those circumstances, it is inappropriate to include such testimony in a Report, particularly where the effect of it could well be to cast aspersions on as accomplished, dedicated and ethical a public servant as Ms. Rosen has proven herself to be over her many years of service as, for example, a member of the Board of New Jersey Transit (of which she was Vice Chair for 5 years), as a member of the Board of Amtrak; and as Deputy Commissioner of New Jersey Department of Transportation.

Third, and most significantly, the entire import of the excerpt which you provided lies in the implication that Ms. Rosen herself was somehow in a conflict situation. That, for example, is the unfair and unwarranted inference that arises from the exchange beginning "Q. Amy Rosen is the vice-chairman, New Jersey Transit board of directors? A. That's correct. Q. She's also an executive from Lockheed? A. Correct. I thought it was strange." In fact, however, as the Commission is, I am sure, aware, New Jersey Transit, of which Ms. Rosen was Vice Chair of the Board (and Mr. Wilson was Chair) had no responsibility for the EZ Pass procurement; instead, the New Jersey Department of Transportation -- of which Mr. Wilson was Commissioner and in which Ms. Rosen held no position -- handled that procurement. Nonetheless, Ms. Rosen at no time represented Lockheed Martin at any meeting with the New Jersey Department of Transportation or any of its officials with respect to the EZ Pass procurement. Thus, the implication that she engaged in any conduct whatsoever that in even the remotest way bordered on a conflict of interest is completely unfounded and utterly unfair. Because that is the implication that, unfortunately, arises from the excerpt provided, Ms. Rosen, who by her signature below provides this response in her name, respectfully objects to it and asks that it be excluded from the Report, in order both that the Report be accurate and so that it treats her fairly, and does not defame her.

Thank you for your kind consideration of this letter.

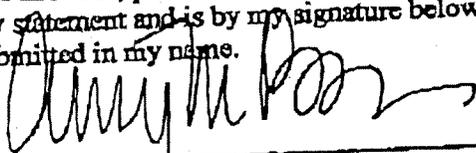
Respectfully yours,



Lawrence S. Lustberg

LSL/leo

The above is, pursuant to N.J.S.A. 52:9M-12.2, my statement and is by my signature below, here submitted in my name.



Amy Rosen



New Jersey Turnpike Authority

ADMINISTRATION BUILDING P.O. BOX 1121 NEW BRUNSWICK, NEW JERSEY 08903

2004 JUN -4 AM 9:37 TELEPHONE (732) 247-0900

JAMES E. MCGREEVEY
GOVERNOR

STATE COMMISSION OF
INVESTIGATION

JOSEPH SIMUNOVICH, *Chairman*
JOSEPH (J.P.) MIELE, *Vice Chairman*
JOHN HIBBS, *Treasurer*
LUIS FERNANDEZ, *Commissioner*
HAROLD L. HODES, *Commissioner*
DAVID G. EVANS, *Commissioner*
HARRY LARRISON Jr., *Commissioner*
JOHN LETTIERE, *Commissioner*
MICHAEL LAPOLLA, *Executive Director*

RECEIVED

2004 JUN -4 AM 9:37

STATE COMMISSION OF
INVESTIGATION

May 27, 2004

Brian G. Flanagan, Counsel
State Commission of Investigation
28 West State Street
P.O. Box 045
Trenton, New Jersey 08625-0045

RE: Supplementary Statement Pursuant to N.J.S.A. 52:9M-12.2

Dear Mr. Flanagan:

Thank you for forwarding the materials regarding your Notice of Proposed Report of the SCI Inquiry into the New Jersey E-ZPass Procurement. Please accept this letter as response to your invitation to provide a statement pursuant to the above statute.

As you are aware from my testimony, and I am sure from your investigation as a whole, my role in the procurement of the E-ZPass system was very minimal and, in fact, I was affirmatively excluded from the process at practically every significant stage. At all stages of your inquiry, I further volunteered to cooperate with the SCI and provided voluntary statements when asked, including providing sworn testimony even without subpoena.

I have reviewed the three (3) pages of the draft SCI report where certain events in which I participated are mentioned. They are included under the title of "Exclusion, Manipulation and Intimidation of Turnpike Personnel". Before getting to my substantive comments, I wish to state that **at no time whatsoever did I ever directly or indirectly manipulate, intimidate or even attempt such conduct regarding Kathy Coryat or any other member of the Turnpike staff.**

In specific regard to the pages provided by the SCI and where I am mentioned, I wish to make the following clarifications and contextual comments in order that my conduct is properly characterized and reported.

NEW JERSEY TURNPIKE AUTHORITY

1. Ms. Coryat was not summoned to a meeting with Mr. Carris and me. Solely upon Mr. Gross' instruction, I called Ms. Coryat, and she told me over the telephone that she did not think that she had to sign the document recommending the award of the E-ZPass contract to MFS because no funds were being expended. When I reported her position to Ed Gross, he told me to nonetheless accompany Mr. Carris to Ms. Coryat's office because he still wanted her signature on the document. It was not presented to me as an option or choice, I was told to go and I went. There was absolutely no coercion or intimidation used by Mr. Carris or me during the discussion. The description of "very pressure-filled" is somewhat dramatic. Mr. Carris showed Ms. Coryat and Ms. Manuelli some documents regarding the financing for the project. Ms. Coryat and Ms. Manuelli discussed them with Mr. Carris and the discussion ended. I had no knowledge of the content of the documents. I did not participate in the substance of the discussion, nor did I participate in the review of the proposals, either technical or financial. Significantly, neither Mr. Carris nor I asked her to sign anything.

2. Ms. Manuelli testified that I came with Paul Carris, which is correct. She further states, however, that Mr. Carris and I "... wanted to sit there all day if we had to, and get us comfortable so that Cathy would sign the agenda item." That is an exaggeration of the events. Firstly, this statement is simply wrong as I had an agenda book to put out for the pending Board meeting and I didn't have time to sit with them all day. To the best of my recollection, Mr. Carris and I made a visit to Ms. Coryat's conference room, and when Ms. Coryat, Ms. Manuelli and Mr. Carris finished discussing the documents he brought with him, we left. At Mr. Gross' request, I later reported my observations of this meeting and specifically advised that Ms. Coryat was not inclined to sign any document for Mr. Gross. That was the sum and substance and indeed the end of my discussions regarding the signing of the document.

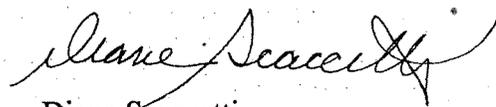
3. On the top of page 3, a meeting between Cathy Coryat, Mr. Gross and me is mentioned. The transition from the previous page does not clearly reflect that this meeting is subsequent to the meeting discussed in Nos. 1 and 2 above. In fact, this meeting (which I mentioned above) was simply called by Mr. Gross upon his return to the Authority Administration Building whereupon he requested to be briefed on what had occurred and to discuss with Ms. Coryat her decision not to sign the document. At no time whatsoever did anyone, including Mr. Gross, mention retaliation or other efforts to coerce Ms. Coryat into approving the MFS Agenda Item.

In sum and substance, I must reiterate that I was not involved in the E-ZPass procurement process. While my position did mandate, on a few rare occasions, that I attend a few meetings, or that I prepare agendas for Authority consideration (and from which I learned some information), I simply had no substantive role in E-ZPass whatsoever. While the record must establish that Mr. Gross headed and propelled the E-ZPass program through the administration system, I did not witness at any time his alleged coercion or intimidation of Ms. Coryat or any other Turnpike employee.

NEW JERSEY TURNPIKE AUTHORITY

Thank you for this opportunity to provide this statement and I remain willing to cooperate with the SCI in any manner you deem appropriate.

Very truly yours,

A handwritten signature in cursive script, appearing to read "Diane Scaccetti".

Diane Scaccetti
Deputy Executive Director
Administration

c: Robert J. Carroll, Esquire

**HOAGLAND, LONGO, MORAN,
DUNST & DOUKAS, LLP**
ATTORNEYS AT LAW

40 Paterson Street
P.O. Box 480

New Brunswick, NJ 08903
(732) 545-4717

(732) 545-4579 (Fax)

<http://www.hoaglandlongo.com>

Westfield Office: (908) 232-9944
(732) 545-4579 (Fax)

Clinton Office: (908) 713-9600
(732) 545-4579 (Fax)

Eatontown Office: (732) 542-7474
(732) 545-4579 (Fax)

New York City Office: (212) 267-4876
(732) 545-4579 (Fax)

Buffalo, NY Office: (716) 853-3801
(716) 853-0265 (Fax)

BARTHOLOMEW A. LONGO
JAMES B. MORAN †
ALAN I. DUNST †
KENNETH J. DOUKAS, JR.
DONALD D. DAVIDSON †
THADDEUS J. HUBERT III † *
JOAN ALSTER WEISBLATT *
KAREN M. BUERLE
ROBERT G. KENNY
MICHAEL J. BAKER
ANDREW J. CARLOWICZ, JR.
GARY J. HOAGLAND
JEFFREY S. INTRAVATOLA **
LAWRENCE P. POWERS
THOMAS J. WALSH, JR. ○○
ROBERT S. HELWIG
MICHAEL F. DOLAN
DOUGLAS M. FASCIALE †
MARC S. GAFFREY
JOHN C. SIMONS †
SUSAN K. O'CONNOR
PATRICK J. McDONALD *
ANDREW N. KESSLER ○
DANIEL J. COGAN
EDWARD J. REBENACK ○○
MICHAEL T. KEARNS ○○

DIANE HOAGLAND
NORA J. GRIMBERGEN ○
MARK S. GARBER
DAWN P. MARINO **
CRAIG M. ARONOW ○○
SUSAN A. CARDONE ○○
BRAD F. RANDELL
JEFFREY J. CZUBA
MARIANNE BRADSHAW **
J. SILVIO MASCOLO
ANTHONY C. IACocca ○○
CHAD M. MOORE
BRIAN J. CHABAREK ○○
JENNIFER SANTANGELO **
SEAN P. MULLIGAN
JOAN H. OSBORNE ○○○
SHERYL A. FAY
RYAN K. BROWN **
CRAIG L. CORSON
JEFFREY C. MAZIARZ **
FRED PUGLIESE ○○
KEITH B. BANNACH ***
GEORGE W. PRESSLER, JR.
NICOLE M. DOWNS
JOSEPH C. LIGUORI
RYAN E. GILBERT ○○
SHAZIA CHAUDHRI deWITT ○○
BRUCE W. MC COY, JR. ○○

JENNIFER L. TIERNEY
RICHARD W. GAECKLE ○○
KRISTY KULINA ○○
JOSEPH V. LEONE
CHRISTOPHER J. GONNELLA ○○
LEORA B. FREIRE ○○
JASON R. GOSNELL ○○

COUNSEL
JOHN J. HOAGLAND
HERMAN L. BREITKOPF
RICHARD S. COHEN
JACQUELYN L. POLAND
THOMAS B. LEYHANE
MARC D. GOLDSTONE **
JAMES S. NOWAK *
ERIC C. GENAU *

*MEMBER NY, NJ & ILL BARS
**MEMBER NJ & PA BARS
○MEMBER NJ & FL BARS
○○MEMBER NJ & NY BARS
■MEMBER NJ, DC & NY BARS
■MEMBER NJ & DC BARS
●MEMBER OF NY BAR
□MEMBER OF NJ & VA BARS
□□MEMBER OF NJ & AZ BARS
***MEMBER OF NJ, NY & WI BARS

† CERTIFIED BY THE NEW
JERSEY SUPREME COURT AS
A CIVIL TRIAL ATTORNEY

June 8, 2004

Brian Flanagan, Counsel
State of New Jersey
Commission of Investigation
28 West State Street - 10th Floor
P. O. Box 045
Trenton, NJ 08625-0045

Via Fax to (609) 633-7366
& Federal Express Delivery

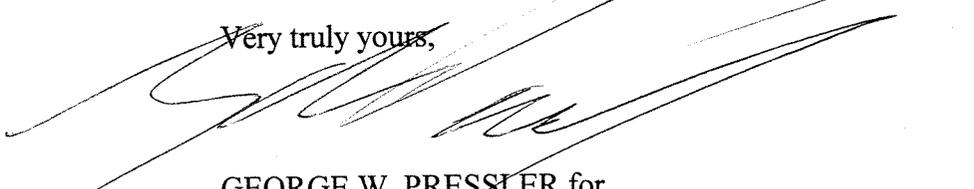
Re: Notice of Proposed Report
Dissemination No. 04-05-022

Dear Mr. Flanagan:

Enclosed please find the response of Frank Wilson pursuant to N.J.S.A. 52:9M-12.2.

If you have any questions regarding same, please do not hesitate to contact me.

Very truly yours,


GEORGE W. PRESSLER for
Michael J. Baker

MJB/gke

Copies to: Frank Wilson
Robert G. Kenny, Esq.

RECEIVED
2004 JUN 10 AM 10:17
COMMUNICATIONS

June 8, 2004

Mr. Brian Flanagan, Counsel
State of New Jersey
Commission of Investigation
P.O. Box 045
Trenton, NJ 08625-0045

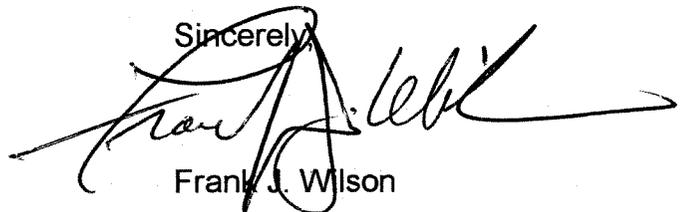
Dear Mr. Flanagan,

Thank you for the opportunity to review the Commission's draft report regarding the EZPass project. I appreciated the extension of time to review and comment on its contents. Your original mailing was delivered to an incorrect address.

Despite the long passage of time (almost eight (8) years) since the events addressed in your report took place, I've tried my best to provide accurate and factual input so that you may have a better understanding of all the matters you examined.

If I can be of any further assistance I would be happy to do so.

Sincerely,



Frank J. Wilson



C-WONDER-1

printed 6/9/04

JUN - 9 2004

Frank J. Wilson's Response to the Commission's EZPass Report

1. The Commission's report attempts to create the impression that there was an effort to set artificial deadlines and rush the evaluation process.

I never established a scheduled deadline to complete the EZPass procurement. I simply monitored the progress of the procurement because that schedule set the pace for other actions that I was responsible for such as funding reallocation and legislative approval for photographing license plates.

The overall procurement process lasted approximately 7 months. Evaluation of the specific proposals lasted almost 4 months. This is very typical for a complex process.

No one ever asked me to extend the schedule and therefore I did not understand it to be a problem.

2. In many places in the Commission's report there is an attempt to establish that I and/or other public officials made a no cost bid a mandatory requirement of the project.

I never demanded or required the project to be implemented at no cost. The procurement was structured to allow each bidder the freedom to assign its own cost and income forecast.

All the procurement documents, and request for proposals embody the required terms and conditions. No requirement was specified for a zero cost bid.

Had we required the bids to be at zero cost we would never have considered Lockheed's bid. Since they presented a net cost of approximately \$20 Million this bid would have been rejected at the outset as being non-responsive if we indeed required a no-cost bid from the vendors. Lockheed's bid was considered responsive and valid even at the \$20 Million cost level which clearly indicated that a zero-cost bid was not expected or required.

3. Under the Consortium's negotiated procurement process all records, evaluations, scoring, discussion notes, and meeting minutes were to be kept confidential during the negotiating period to protect the intellectual property and competitive advantage of the bidders. At the conclusion of the process all of these records were to become available with full public disclosure for examination or audit by any interested party. This provision is a key component of all negotiated procurements used by public agencies across the country and is consistent with the procurement regulations of the NJ Turnpike Authority.

4. The Commission's report concludes that the EZPass procurement process offered no oversight or transparency. This conclusion is simply not supported by the facts.

The EZPass procurement had more oversight, checks and balances and transparency than any other contract ever awarded in the state and more than any I had seen in over twenty-five years of experience with public agency procurement.

These are the facts:

- Technical review and evaluation was done by approximately 30 different and independent members of the Multi-Agency Evaluation Team (MET) from five separate agencies including legal, financial and operations consultants. One of these consultants was HNTB, the Turnpike's Engineer of Record. Additionally, five more members provided the actual scoring that led to the selection of MFS.
- An Executive Council consisting of the Executive Directors and Chairman of the Board or other Board Members from each of the five participating agencies exercised oversight and policy direction of every significant step of the program including, technical requirements, funding methods, schedule, basis of award and policy issues.
- NJDOT provided administrative support and coordination and facilitated the work of the MET and Executive Council and acted as agent for the Consortium to assist it to arrive at a consensus selection.
- Additionally Rick Mroz led the Governor's Authorities Unit reporting directly into the Governor's office and was available to provide relief or adjudicate any complaints, disputes or disagreements that may exist between or among the toll road authorities and any State department including NJDOT. To my knowledge no one ever registered any complaints or concerns regarding any aspect of the procurement process with the Governor's Authority Unit.
- While I had left NJDOT in December 1996, my successor Commissioner John Haley had assumed his position prior to the finalization of the selection of MFS. He had an opportunity to modify or stop the process if any member of the Consortium so desired.
- After a selection recommendation was made, five Executive Directors had to present their recommendation to five separate Chairmen and five separate Boards each of which having to exercise their independent authority to accept or reject the recommendation from the MET.

No individual or group of individuals could possibly manipulate a procurement outcome with so many independent officials and agencies involved at every level of review. No NJDOT officials including Frank Wilson, Sharon Landers, Tom Margro or David Mortimer ever reviewed the EZPass proposals, never scored the proposals, never made a recommendation regarding award and never cast a vote at any of the Board meetings which were required to convert the recommendation into an official contract.

In fact the award of a contract to MFS was not completed until March of 1998 which was 15 months after I left state government. This permitted anyone who had any difficulty with the recommendations to seek changes up to and including a complete re-bid without having to be concerned with my position or reaction. No such change in recommendation or request for re-bid was ever made.

5. The Commission's report appears to imply that I planned to award an EZPass contract only if one or more bidders would cover all the costs. This implication is not accurate and ignores my ability to provide financial relief for the New Jersey Toll Roads using public funding under my control.

My remarks in this report indicate I expected that the project would cost some finite amount and had not expected to receive a zero cost option.

Regarding the Authorities incurring a cost for the EZPass project, each Executive Director indicated that they had a shortage of capital funds to pay for their share of the project without toll increases.

I made a commitment to find other sources of capital to advance the required funding from the hundreds of millions of dollars from the Transportation Trust Fund and/or the Federal Highway Agency. I intended to reprogram and reallocate the required capital in a timeframe that would permit the EZPass project to proceed on its own schedule without having to wait for the toll road authorities to pass resolutions to raise their tolls. In effect NJDOT would act as a funding agent (similar to a bank) and be reimbursed sometime in the future when the Authorities were in a better financial position. Again, I stress the need to focus on schedule issues so that I could ensure that the necessary funds were available when needed. Also, again this testimony from Thurston and Crawford further support the notion that I expected the project to have a finite cost – no zero cost option was expected.

6. The Commission's report creates the impression that I forced the Turnpike to hire Mr. Margro. The fact is I urged no one to hire Mr. Margro. I was advised by Mr. McDermott, Chairman of the NJ Turnpike and Mr. Miele (a Turnpike Board

Member) that the Turnpike was searching for a Chief Engineer. They had considered many candidates and were not satisfied that they had found a suitable choice. I simply offered to give them the name of someone who I thought could help them. I did so. I never attended an interview. I didn't have a vote on the matter. I was subsequently told that Mr. Margro was a wonderful find and that the staff and the Board appreciated me providing the introduction since Mr. Margro had exceeded their expectations of performance as their Chief Engineer.

7. The commission report attempts to establish that a relationship existed between MFS, Mr. Cole and myself at BART and that this relationship was intentionally repeated in New Jersey. No such relationship existed at BART.

Mr. Cole was brought to BART at the request of two members of the BART Board. He advised BART on how to complete a successful project which used BART's right-of-way to enhance its communications capability and earn an income of approximately \$3 Million annually. While I was the General Manager of BART, I was not involved in the procurement that ended in an award to MFS Network Technologies. In fact, I never presented a recommendation to the BART Board and I did not negotiate the contract with MFS NT for one principal reason – I left BART in March 1994. The procurement was not complete and no recommendation for award to MFS NT was made until August 1994 when my successor Mr. Richard White presented the matter of the award to the BART Board in August 1994, five (5) months after I had left the BART Organization. The contract was negotiated and officially awarded to MFS NT in September 1994, a full six (6) months after I left BART. I had no commercial relationship with MFS-NT and had not and still have not had any working relationship with MFS-NT.

8. There was no intention and no attempts were made to link MFS and Mr. Cole on the EZPass project.

My discussions with Mr. Cole dealt solely with how to approach the business of telecommunications within the state owned roadways for a fiber-cable network only. No regard was given to electronic toll collection. This effort did not necessarily involve the toll roads and did not involve any specific work related to EZPass.

I had no involvement with and did not know that Mr. Cole had been asked to assist the Consortium in the final negotiations or the evaluation of EZPass proposals. This would have been outside the scope of Mr. Cole's contract with NJDOT and I specifically asked him to not become involved in the EZPass project. The statements you site in the report is an accurate statement regarding my directive to Mr. Cole to not become involved with the EZPass project.

Mr. Cole was not to have any role in EZPass according to my directive.

9. The Commission's report appears to imply that I appointed Mr. Margro to "control" the process and diminish the role of the Turnpike. This is not the case. Mr. Margro was given a very limited role precisely to place control with each of the five member agencies in the Consortium. Mr. Margro was to function as the "honest broker" to seek consensus and coordinate the process.

Mr. Margro was not representing the Turnpike in his role of Consortium coordinator. The Turnpike was ably represented by their technical experts on the MET and by Mr. Gross and Board Member Miele at the policy and Executive Council level. Mr. Margro had only an administrative role to coordinate and facilitate the orderly flow of the process – no more. The Turnpike staff was not bypassed in any way. It was their technical staff and engineering consultant among others that reviewed the proposal, scored each bidders offer and cast the meaningful official vote of the Turnpike Authority. Mr. Margro had no vote.

Mr. Margro reported to me only on matters related to schedule, the timing of funding requests, issues dealing with allocation of net cost or net revenue among the three states involved in the program (Delaware, New York and New Jersey). Furthermore, Mr. Margro was to advise me of any legislative action needed to permit the New Jersey Toll Roads to participate legally in the program – for instance – the legal authority to photograph auto licenses. For matters regarding the procurement he was to support and work on behalf of the Consortium.

10. The Commission's report asserts that Mr. Mortimer was not competent to carry out the EZPass procurement assignment I gave him. There clearly is a gross misunderstanding of Mr. Mortimer's and by extension Mr. Margro's role in the process.

Mr. Mortimer was chosen to assume Mr. Margro's role because of his excellent administrative and organizational skills. Mr. Margro's extensive engineering talent notwithstanding, his role was as described above. He was to administer the Consortiums work, not to make a technical contribution, not to control the scoring results and not to make a recommendation.

Mr. Mortimer did not need a degree in engineering, accounting or toll road operations to perform his role. However, Mr. Mortimer did have extensive experience in administering large organizations and projects. I assigned Mr. Mortimer the lead role in managing the merger of DMV and NJDOT when the Governor directed this restructuring. Mr. Mortimer handled this very complex, time critical, and mission critical reorganization of massive proportion technically, financially and operationally. This was a very visible, demanding initiative to

improve DMV service delivery and it was expertly handled by Mr. Mortimer. This, among many other assignments gave me the confidence to assign Mr. Mortimer as the Administrator for the EZPass Consortium.

Others, in addition to myself also valued and respected Mr. Mortimer's professional abilities. The State treasurer appointed Mr. Mortimer to the NJTransit Board – a demanding and vitally important policy role. The Commissioner of Education gave Mr. Mortimer full lead responsibility for the largest school's infrastructure program in the nation. Mr. Mortimer had performed to the highest professional standards in transportation, treasury and education. Mr. Mortimer was fully capable of being the administrator and facilitator of the EZPass Consortium. One should not embellish his role beyond the one I assigned to him. He did not score proposals, he did not vote, he did not make independent recommendations.

11. The Commission's report does not accurately explain the roles of the participants in the Consortium. While the Turnpike's procurement process was used, the Turnpike was never intended to "control" the process. The other two states (Delaware and New York) would not have accepted this arrangement. All five agencies were considered equal partners, with equal and independent votes. NJDOT officials were intended to serve all Consortium members equally and administer the consensus building process.

The Consortium used the Turnpike Authority's procurement regulation because of its flexibility and because it best fit the desire of the Consortium members to pursue a negotiated procurement method. The Turnpike Authority was never intended to control the process. Officials of NJDOT functioned as agents for the Consortium in coordinating and facilitating the achievement of a consensus recommendation for an EZPass vendor. The Turnpike as one of the five principal members of the Consortium having its independent staff and consultants participate on the MET team providing their own evaluation and scoring of proposals. Mr. Gross and a number of his Board Members serving on the Executive council certainly had responsibility for their agency's participation in the process. If Mr. Gross felt he did not control the process that is another matter. No one was supposed to control the process. Mr. Margro and Mr. Mortimer were to serve the Consortium as agents to achieve a consensus selection of a vendor. In short they worked for the Consortium. The testimony you included in this report from Ms. Sharon Landers regarding this matter directly supports this arrangement.

After evaluation and award one of the five agencies needed to serve the same role for the Consortium during contract negotiations and ongoing project implementation management and contract administration. The Turnpike Authority, through Mr. Gross was considered the most appropriate to play this role as agent for the consortium representing the interest of all member agencies

not just the Turnpike's. NJDOT was to have no role during implementation or ongoing operations.

Prior to the EZPass procurement a number of options were considered. Once it was learned that one possible outcome of privatizing the toll collection function could be massive layoffs of Authority employees I agreed not to pursue the privatization concept. However, the most revealing aspect of Mr. Gross's testimony regarding discussions with the Governor was the fact that any authority's Executive Director or any Authority Board Member that disagreed with or had any difficulty with any of my positions or actions could and would seek to amend or stop such actions with a simple appeal to the Governor. Since we were all appointees of the Governor this was the appropriate manner to resolve a difference of opinion. To my knowledge there were no other such appeals to the Governor regarding my participation or actions on the EZPass project from any of the Consortium members. I received no complaints regarding the evaluation and vendor recommendation process from any member of the Consortium. If Mr. Gross felt he had no role in the procurement process this matter also could have been referred to the Governor. It was not.

12. The Commission believes that my recusal letter sent to Governor Whitman should have taken a different form. I explained at great length why I had chosen the form which was used. The decision was a product of much discussion and ultimately advice I received from ECES. There was never any intention to confuse or deceive. The ECES subsequently investigated the efficacy of my recusal notification and actions and found no violations

I proactively sought the guidance of the Executive Commission on Ethical Standards (ECES) to obtain their recommendation on how best to put into effect a recusal notice. We discussed who should receive the notice, and how it would deal with identifying all the parties with whom I would have discussions.

I sought the opinion of my deputy Sharon Landers and the Executive Director of the ECES regarding the use of the parent company to provide the greatest degree of protection from a conflict of interest. There was general agreement that this was the best course of action.

My actions subsequently were consistent with my recusal principle since I announced a potential conflict of interest with both Lockheed's team because of Booz Allen and with MFS's team because of Frederick R. Harris as part of AECOM even though I had no discussions with Frederick R. Harris but with another AECOM subsidiary – namely DMJM.

13. The Commission report does not draw a distinction between vendor selection and the other elements of the entire EZPass program. The program consisted of the following major components:

- a) Program Definition and Development
- b) Prototype Testing and Demonstration
- c) Assessment of Market Feasibility
- d) Procurement Pre-Qualification
- e) Negotiated Procurement
- f) Policy and Program Administration and Management
- g) Contract Negotiations
- h) Implementation
- i) Operations

To avoid a conflict of interest I was required to recuse myself from the negotiated procurement element only. There was no need or requirement to avoid any other program element.

I never received nor did I see or read any EZPass proposal so there was no way for me to know what firms were involved in the procurement. I only became aware of a potential conflict when I was briefed on the project status on September 3, 1996.

As I testified previously, I recused myself from the segment of the procurement process dealing with the scoring, evaluation and recommendation of a preferred bidder because of a potential conflict of interest. Any input needed from NJDOT was to come from Deputy Commissioner Sharon Landers, if needed.

However, I remained involved with the overall administration and policy issues related to the program. These tasks and responsibilities included reallocation of Trust Fund and Federal funding if and when necessary, developing and getting consensus among the three states regarding the allocation formula for distributing cost and/or revenue among the states, and obtaining legislative authority to implement key elements of the EZPass enforcement capability such as the photographing of auto license plates.

This participation in no way involved the proposal evaluation, recommendation or selection of a successful bidder.

There is no connection between who was selected and these administrative and policy issues. The ECES concurred with this fact as a result of their investigation of my conflict of interest situation regarding this procurement as stated in its letter to Mr. Ed Gross dated May 1997.

14. Regarding the potential for the project funding, the testimony the Commission received on this matter reveals that the discussions held with the bidders indicated that it might be possible to obtain a self-financing option. Based on those discussions, Margro, Mortimer and Carris advised me that this may be possible, I did not direct them to make this a mandatory outcome. My response as stated in your report was to simply make the best arrangement possible. It was a general remark, not bidder specific and not intended to demand a specific outcome.

Mr. Carris states clearly in your report that I never said or directed them to make it a zero cost procurement. I simply stated that they should make the best arrangement possible which is a statement that any rational professional would make in this situation.

15. The Commission report stating that I sought to leave an incorrect impression with the Commission regarding initiating contact with staff involved in the procurement process is wrong. Your question was understood by me to mean ... would it be appropriate to routinely make inquiries about deadlines simply to keep in touch or push for meeting deadlines. The answer I gave during my appearance at the Commission was as accurate then as it is now. The reason I initiated the call to Mortimer on October 8, 1996 was because of the intervention of a Lockheed Executive, who was quite aware of my recusal because she had received a copy of the recusal letter. After some confusion as to the purpose of the call, I was able to determine that she was inquiring about the project schedule. Since this inquiry was not specific to any bidder, and since the discussion did not involve the evaluation process I called Mortimer just to verify that there were no schedule problems. No other aspect of the process was discussed with Mr. Mortimer.

16. Deputy Commissioner Sharon Landers did participate in the EZPass procurement process as a member of the Executive Council replacing me because of my desire to avoid any conflict of interest that might arise from discussion of the bidder scoring and evaluation process. Minutes of these Executive Council meeting will indicate her presence and participation providing oversight from a NJDOT perspective.

Regarding her role in the direct supervision of Mr. Mortimer in his role administering the work of the Consortium, her assessment is correct, in that Mr. Mortimer would be working directly with and for the Consortium. If any issues with his work were to arise any Consortium member(s) should have been brought to the attention of the Executive Council or Ms. Landers in her role as a Council member or as Deputy Commissioner. If she reported no need to become involved it was because no issues had been raised.

17. The Commission report describes my employment discussion as an untoward event. This is unwarranted criticism since I followed state requirements to the best of my ability, conducting these discussions under the prescribed terms and conditions specified by ECES.

In the state of New Jersey public officials are permitted to consider other employment as long as there is an appropriate declaration of the subject employment discussions.

I proactively sought the guidance of ECES regarding the acceptability and method for such discussions and under what conditions they could take place. I followed the prescribed process and conducted these deliberations in the manner directed by ECES.

18. The Commission report implies that the state could have avoided accepting future cost risks during the bidder evaluation and selection process.

No shift of risk to the Consortium occurred in September or early October 1996. Risk did not shift from MFS to the Consortium until the contract agreement was structured to include a "true-up" or pay up provision binding all Consortium members to pay any net cost in year seven of the project. When this provision was put in the contract and when the contract was ratified by five public agency's Board of Directors on the recommendation of five agency Executive Directors the risk was shifted to the public agencies. This happened fifteen (15) months after I left state government.

19. The Commission report appears to imply that modifying evaluation criteria compromised the EZPass procurement process in some way. The further implication is that it was done to favor one bidder over another. This leads the reader to draw an incorrect conclusion. The criteria were changed prior to bidder submission of proposals. This did not put any bidder at a disadvantage. No bidder registered a formal complaint when the change was made. Furthermore, there was an important business reason for making the change.

The evaluation criteria was modified to place more importance on project cost for two reasons. Each of the New Jersey toll road Authorities expressed serious concern regarding their shortage of capital and inability to pay for the project without corresponding toll increases. To be responsive to this concern, it became important to tell the bidders cost had become a more serious consideration to relieve the financial pressure on the New Jersey Toll Road Authorities. Additionally, to provide further relief, I agreed to reprogram and reallocate other state and federal funding and made a commitment to Mr. Thurston and other Executive Directors to provide financial assistance from state sources.

The second reason for the elevation of the importance of the cost criteria was the fact that the Consortium had conducted a thorough pre-qualification process to measure and evaluate the technical capability and documented experience of each prospective bidder.

Both Lockheed and MFS had been judged to be highly qualified and able to provide the complete technical package specified by the Consortium. Given this determination it is appropriate to make cost a higher order consideration. This is rather routine and typical in procurements similar in scope and size to EZPass when a pre-qualification process is used as an initial screening technique.

20. The Commission report attempts to turn the strength and benefits of a negotiated procurement method of selection into a weakness. More rigid procurement methods such as very detailed specifications and low bid basis of award have proven to be costly due to change orders, claims and litigation that typically follows. A process that enables the parties to develop a better understanding of requirements, approach and abilities leads to better results. Characterizing the RFP as vague is simply wrong.

The RFP was not vague, it was by definition to be flexible to permit negotiations to proceed on an iterative basis to enable the Consortium and the bidders to reach an optimum balance between project scope, commercial terms and conditions, risk allocation, cost drivers and revenue generation options. Each of these factors goes into making up a blended comprehensive bid. The negotiated procurement process gives the Consortium greater visibility into how the bidder is structuring its offer and therefore more freedom and choice as to elements that are desirable and those that offer no real benefit. This is precisely why more and more public agencies are using the negotiated process in favor of the basic "take it or leave it" single, low bid or high revenue offer. Results from across the industry show that better results are achieved using this process.

21. The Consortium operated on the basis of consensus. The Consortium members could modify the procurement schedule as they saw fit. Additionally, any policy objective whose intent was to expand competition by extending the schedule could have been presented to the EZPass Executive Council for consideration and decision. I did not have nor did I exercise sole control over the schedule. My recollection is that at least one (1) schedule extension had been granted when requested.

22. The Commission report appears to take exception to Mr. Cole's involvement and contribution to NJDOT's effort to advance revenue producing projects which extract more value from the state's roadway system. The combination of fiber

cable networks within public right-of-ways was a newly emerging commercial activity in the early 1990's. Very few individuals and firms had accumulated much real experience in this field. Mr. Cole was one of the few that had a proven track record.

At the direction of two BART Board Members I retained Mr. Cole to assist the agency in implementing a fiber-optic network along BART's right-of-way. The vendor negotiation and evaluation process had begun but was not concluded at the time of my departure from BART. I left the BART organization in March, 1994. At that time no contract had been awarded to any vendor. Subsequently, my successor, Mr. Richard White sought the BART Board's approval to negotiate a contract with MFS. This occurred in August 1994. The contract was ultimately awarded to MFS in September 1994, a full six months after my departure from BART. Therefore, I had no involvement in awarding any work to MFS and no business relationship with that firm.

Mr. Cole's work for BART resulted in an income to BART of \$1 Million per year for pay telephones and \$3 Million per year for fiber cable leases.

Each contract issued to Mr. Cole to assist NJDOT was done so according to the department's and the state's procurement regulations. Sole source contracts of up to \$5,000 were permitted under the regulations. Two such contracts were issued to Mr. Cole for specific limited assignments to explore the technical and market feasibility of partnerships with telecommunication firms that would result in improved services and income to the state.

The initial contract for \$5,000 was to do a preliminary assessment of the feasibility of placing fiber cable in the state's roadways. This work indicated a large potential for future benefit. The second \$5,000 contract was used to permit Mr. Cole to work with the Parkway management to reverse an arrangement with Bell Atlantic who had charged the Parkway \$10 Million to install fiber. Mr. Cole advised that industry standard at the time actually worked in the opposite direction. Landowners were being paid by telecom companies for the right to install cable in their rights of way. Mr. Cole led the discussions and negotiations between the Parkway and Bell Atlantic and successfully obtained the return of the \$10 Million to the Parkway.

This outcome demonstrated a high value return to the state from the rather small cost of Mr. Cole's services.

Subsequent contacts awarded to Mr. Cole for more detailed advisory services regarding how best to procure and secure a fiber-optic system for the state's roadway system were done so by competitive bid.

In each case I and members of NJDOT staff participated in the evaluation and selection process. This was done because the consultancy services were to be

provided essentially to me to help me establish a policy framework for the master program and to assist me in determining the best commercial arrangement to pursue so as to align New Jersey's efforts with the industry's best practices. This was a newly emerging market and no one at NJDOT had any viable experience in designing or implementing this type of program. Therefore, there was no other logical staff available to handle the procurement. However, given the broad potential impact and likely benefit to other state departments I decided to add Treasury officials to the selection team to include a broader perspective on future possible uses for the fiber network.

In both instances the NJDOT and state procurement rules were followed and participants from both NJDOT and Treasury, voted unanimously to award the contracts to Mr. Cole. This was done ostensibly because of his experience nationally and his successful local track record in securing at least \$10 Million for the Parkway.

Under one of these contracts Mr. Cole successfully negotiated four (4) master contracts with Bell Atlantic, AT&T, Omni-point and Cellular One. These contracts while only newly developed were yielding about \$1 million per year and were expected to grow to \$5 Million per year.

Part of Mr. Cole's responsibilities under these contracts was to assess the appetite and ability of various telecommunication providers to offer a viable statewide fiber cable network. By definition Mr. Cole was required to have numerous discussions with potential bidders to gauge how the state could generate maximum competition and the most favorable terms for implementing the communication network. This is a very common, almost mandatory, part of a sophisticated procurement. It is known as an industry review, peer review, pre-qualification process or specification development. This activity enhances the probability of a successful procurement.

As part of Mr. Cole's work product he offered an observation that one of the services that could be supported on a statewide fiber system was electronic toll collection and suggested that we consider this option. Due to the size of the state road way system, and ongoing discussions that I had with Treasury officials regarding their role in the NJDOT roadway fiber system and the consortiums separate and independent process to advance electronic tolls I decided not to pursue Mr. Cole's recommendations.

After more extended discussions with Treasury I decided to suspend all work at NJDOT regarding a statewide fiber system until NJDOT and Treasury developed a more detailed plan for how a statewide fiber system would be used including how much capacity was necessary and which functions would have priority. The Commission report indicated that I issued this directive to Mr. Cole in June 1996 before EZPass proposals were ever received by the Consortium. Therefore, I

directed Mr. Cole to stop work on all aspects of the proposals he had been developing including any work on electronic tolls.

It was my belief that Mr. Cole had ceased all work on the fiber network and any alternate electronic toll collection efforts.

Subsequent to my recusal, Mr. Cole and I had no further discussions regarding any involvement on his part in the EZPass Consortium's evaluations of proposals.

If someone at NJDOT asked Mr. Cole to participate in the evaluation process as part of the services provided by Phoenix Consulting, it was done so without my knowledge or approval and in direct conflict with my directive to Mr. Cole to not be involved with electron toll collection work.

Despite representation made by anyone else I never authorized Mr. Cole's work with the consortium and did not learn of his involvement until the Lockheed protest.

Mr. Cole's letter to Sharon Landers and Stanley Rosenblum wherein he states in part that he was "the Commissioner's liaison to the Authorities for the ETC project..." is both an unauthorized representation and inaccurate. This letter appears to be a marketing effort by Mr. Cole to become involved in the EZPass project. Since I was under a recual he could not have such a discussion with me.

My deputy Sharon Landers certainly knew who my liaison to the Authorities was regarding EZPass since it was her and she was the one who took my place at the Executive Council after my recusal. Records of the Council meetings will confirm this. Mr. Cole' letter may have been an effort to inject himself into the process in a helpful way. At best it was an unnecessary marketing effort on his part at worst it was an effort to circumvent my directive issued about this time to remain uninvolved in the EZPass process.

Regarding the issue of Mr. Cole's use of my name as a reference on a proposal, it is a routine practice of all consultants to list assignment and contracts that can verify that a firm worked for a client to establish their experience base. In the spirit of full disclosure it was highly appropriate for Mr. Cole to reveal that he had done work for my former agency (BART). To do otherwise would have created the impression that he wanted to conceal this fact or hide it in an effort to mislead anyone regarding former business dealings. Full disclosure is generally the best policy. That is what Mr. Cole did ensuring that everyone was aware of our previous work together. To do otherwise would be a form of deceit. I disagreed with the ECES's opinion in 1997 and I still disagree that there was anything inappropriate in telling the truth. At least any evaluator of the EZPass RFP who may have had a problem with Mr. Cole's involvement at BART would be aware of it and could object, score and/or vote accordingly.

The full extent of my relationship with Mr. Cole was certainly widely known including the earliest consideration of Mr. Cole for a consultancy contract. As stated previously, Mr. Cole listed me as a reference to confirm his work at BART. All engagements of Mr. Cole by NJDOT were done according to the prescribed procurement regulations of NJDOT and the state. Mr. Cole performed admirably for the Parkway in obtaining a \$10 Million rebate and he conducted the industry outreach under the scope of his contract. All this was done in an open public manner.

Regarding my relationship with MFS, I had none. I had left the BART organization before MFS was selected, before they were awarded a contract and before they went to work. Therefore, there was and still is no relationship between me and MFS.

Regarding my recusal and contact with procurement officials, as I stated previously they were limited in number and limited to programmatic issues of administration and policy mainly involving the relationship among the three states. I had no discussions with any procurement official regarding proposal scoring, evaluation or recommendation and the Commission report confirms this. As I had testified previously and stated here, my recusal was intended to prevent me from being a part of the selection of a preferred vendor.

It was never intended to cause me to abdicate my responsibility to ensure that the overall program was properly funded and that whatever technical solution was chosen or whatever bidder was chosen that the Consortium reached a consensus on a range of policy issues.

Independent of which bidder was selected, there were other regulatory, cost allocation and regulatory issues that needed to be managed.

The ECES addressed this matter in a letter to Mr. Ed Gross advising him that my discussions with procurement officials did not constitute a breach of my recusal or a conflict of interest.

Summary

The EZPass project had been underway when I arrived in New Jersey to assume the position of Commissioner of NJDOT. I initiated the assessment of a statewide fiber-cable network separate from the EZPass program and prior to learning of the opportunity to develop EZPass as a multi-state consortium. NJDOT retained Mr. Cole to assist with the evaluation of the feasibility of the statewide fiber system in the state's roadways. There was never any intent to have him work on EZPass electron toll collection.

Subsequent to a meeting between Governors Whitman and Pataki, I was asked to advance EZPass as a multi-state Consortium to ensure a wide area compatibility of technology and toll payment systems which is now considered a major success by motorists in the three state region. To comply with this directive, I assumed responsibility to organize the Consortium, address and resolve a host of policy issues, administer the involvement of five operating companies from three states to pursue a unified procurement of the EZPass system. I functioned as an agent of the Consortium to provide overall administrative direction and support and in no way acted to "control" the procurement but to facilitate a consensus outcome.

In this capacity neither myself, Mr. Margro nor Mr. Mortimer who assisted me in the task were never intended to provide technical advice, proposal evaluation, proposal scoring or vote for any particular bidder. Our role was to administer the process not control the outcome. In fact, it would be impossible to control the outcome of the selection process because of the large number of independent personnel numbering 35 staff and consultants from five different public agencies involved in the selection process.

Up to September 3, 1996 I was able to participate in any aspect of the project. Subsequent to this date I voluntarily removed myself from the bidder evaluation and recommendation process. I delegated this responsibility to my Deputy Sharon Landers. I had assigned Mr. Mortimer to replace Mr. Margro prior to my recusal from the procurement process and prior to learning about a potential conflict of interest. In June 1996 I directed Mr. Cole to cease any involvement with the EZPass project and I deferred all work on the statewide cable project until Treasury made a determination regarding its role in participating in the project. They considered leading it because of the numerous state departments that might benefit from the program. They viewed NJDOT as a host for the project but not the only user and I agreed. Therefore, I saw no need for further work by Mr. Cole at that time. Mr. Cole's subsequent involvement in the EZPass evaluation proceeded without my knowledge or approval. We had no discussions regarding EZPass bidder evaluations and he was not representing me.

My representative was Ms. Landers who served on the Executive Council without benefit of discussions with me since she was keenly aware of my recusal due to a potential conflict of interest.

Finally regarding oversight, transparency and decision-making, dozens of technical professionals and policy officials (35) were directly involved in the bidder selection. At least three Executive Directors, three Chairmen and numerous Board Members from the New Jersey toll Authorities had easy and ample access to the Authorities Unit in the Governor's office, the Governor's Chief of Staff and the Governor herself, if they had any serious concerns about how the process was being managed or the process results. To my knowledge

not one of these involved individuals registered any concerns, complaints or opposition. Furthermore, each subsequently voted in separate actions in addition to two other agencies in two other states to ratify the Consortium recommendation. This was completed after my departure from the state. If there had been any meaningful concern about my involvement in the procurement process or any serious objections to any aspect of the schedule, evaluation, scoring or process outcome any member(s) of the Consortium could have appealed to my successor, and new Commissioner of NJDOT, Mr. John Haley. Commissioner Haley assumed this role in the first week in January 1997 which was prior to the NJ Turnpike's Authority's endorsement of the Consortium's recommendations. If he needed more time to evaluation any professed problem areas I'm certain the Consortium would have granted an extension of the schedule. No problems were raised, no appeals were made, no issue was raised about my involvement.

In a final action each of these five Boards of Directors at the recommendation of their respective Executive Directors approved a contract for MFS to implement EZPass fifteen (15) months after I left the state. Surely, this provided ample time to modify, change or overturn the recommendation made by the Consortium prior to my departure. After September 3, 1996 I had no way to effectively influence the outcome of the EZPass procurement and in fact do not do so.