

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.

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May 24, 2004

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State of New Jersey
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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.

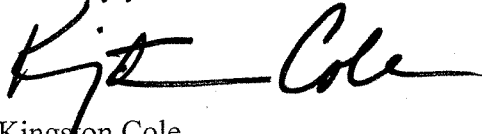
The "fix" was not in. Mr. Wilson and I were not colluding to "fix" the bid for MFS or disadvantage Lockheed. The appropriate conclusion is that Lockheed consistently acted like a bunch of blockheads. And I was simply advising my client on how best to push them harder.

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*.

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 large "K" and a stylized "Cole".

Kingston Cole
Attachment

Sent by US mail and e-mail today

Attachment

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
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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,

A handwritten signature in dark ink, appearing to read "Howard R. Giddens, Jr.", written in a cursive style.

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

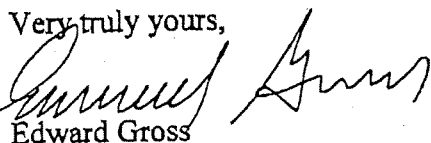
Brian Flanagan, Esq., Counsel
State Commission of Investigation
P.O. Box 045
Trenton, New Jersey 08625-0045

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

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EZ-PASS
RESPONSE TO THE PROPOSED REPORT
OF THE
STATE COMMISSION OF INVESTIGATION

Edward Gross
June 1, 2004

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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 then 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.

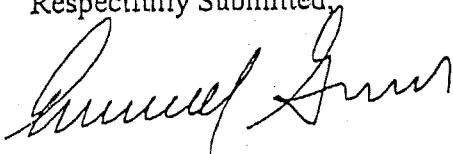
Darryl Bookbinder, Assistant Counsel for the P/ANYNJ. He attended most of the negotiation sessions on the contract and financing terms. The SCI makes no reference to him.

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

Dear Mr. Flanagan:

Thank you for providing
portions of the report relative
to your investigation into
the New Jersey E-Z Pass 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
CFD'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 most 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 would not perform and 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 Fastel



SAN FRANCISCO BAY AREA RAPID TRANSIT DISTRICT

300 Lakeside Drive, P.O. Box 12688
Oakland, CA 94604-2688
(510) 464-6000

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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

Mr. Brian Flanagan
Counsel
State of New Jersey
Commission of Investigation
P.O. Box 045
Trenton, NJ 08625-0045

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

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

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2004 JUN -1 AM 10:19

STATE COMMISSION 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 receipted 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,

A handwritten signature in cursive script, appearing to read "Donald J. Mauer, Jr.", with a long horizontal flourish extending to the right.

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.

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06/04 '04 08:58 NO.383 02/03

GIBBONS, DEL DEO, DOLAN, GRIFFINGER & VECCHIONE

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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

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GIBBONS, DEL DEO, DOLAN, GRIFFINGER & VECCHIONE

Brian Flanagan, Counsel

June 3, 2004

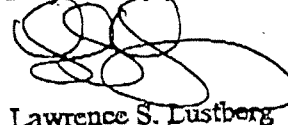
Page 2

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.

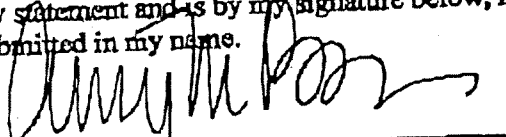
Respectfully yours,



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

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MICHAEL LAPOLLA, *Executive Director*

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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.

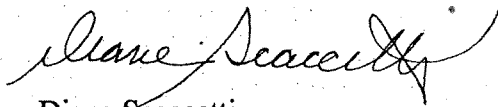
3. On the top of page 3, a meeting between Cathy Coryat, Mr. Gross and me is mentioned. The transition from the previous page does not clearly reflect that this meeting is subsequent to the meeting discussed in Nos. 1 and 2 above. In fact, this meeting (which I mentioned above) was simply called by Mr. 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 black ink, appearing to read "Diane Scaccetti", with a stylized flourish at the end.

Diane Scaccetti
Deputy Executive Director
Administration

c: Robert J. Carroll, Esquire

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□□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.

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June 8, 2004

Mr. Brian Flanagan, Counsel
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Commission of Investigation
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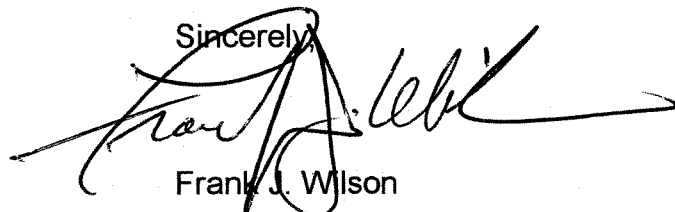
Dear Mr. Flanagan,

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,

A handwritten signature in black ink, appearing to read "Frank J. Wilson", with a long horizontal flourish extending to the right.

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 lead 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 assisting it to arrive at a consensus selection.
- Additionally Rick Mroz lead 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 deadliness 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.