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Case Name (if known)	Application of Virginia Electric and Power Company for approval and certification of electric facilities: Haymarket 230 kV Double Circuit Transmission Line and 230-34.5 kV Haymarket Substation
Document Type	OBJT
Document Description Summary	The Company formally objects to the inclusion of the Staff's new assertions and corresponding legal argument in its post-hearing brief into the record in this proceeding, and respectfully requests that the Hearing Examiner's Report either strike such evidence, or make clear that such evidence was not considered in the determination of the recommended and final decision in this matter.
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160820287

August 18, 2016

BY ELECTRONIC FILING

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*Application of Virginia Electric and Power Company for
approval and certification of electric facilities: Haymarket 230 kV
Double Circuit Transmission Line and 230-34.5 kV Haymarket Substation
Case No. PUE-2015-00107*

Dear Mr. Peck:

Pursuant to Rule 200 of the Rules of Practice and Procedure (“Procedural Rules”) of the State Corporation Commission (the “Commission”), 5 VAC 5-20-200, and the Hearing Examiner’s Ruling of June 22, 2015,¹ the parties to the above-captioned proceeding were directed to file post-hearing briefs on or before August 5, 2016. On August 5, 2016 the Commission Staff (“Staff”), among others, timely filed its post-hearing brief.

The Procedural Rules and the Commission’s December 11, 2015 Order for Notice and Hearing² issued in this proceeding provided the opportunity for the Company, respondents, and the Staff to admit into the record evidence in support of their case in a manner that permits the applicant and other parties to address such evidence. The Commission established a date certain by which “[t]he Staff shall investigate the Application . . . [and] shall file with the Clerk of the Commission . . . testimony and exhibits.”³ Further, the Commission directed that a public hearing on the Company’s Application be held “to receive the testimony of public witnesses and the evidence of the Company, any respondents, and Staff.”⁴

As directed by the Procedural Order, the Staff conducted its investigation of the Application and filed testimony and exhibits on June 2, 2016. In fact, the Hearing Examiner granted a 7-week extension to the Procedural Order in this proceeding to allow “Staff and all

¹ Transcript at 641:10-13.

² As modified by Hearing Examiner’s Rulings issued on February 8, 2016 and March 21, 2016 (collectively, the “Procedural Order”).

³ See Ordering Paragraph (14) of the December 11, 2015 Order for Notice and Hearing.

⁴ See Ordering Paragraph (4) of the December 11, 2015 Order for Notice and Hearing.

180820287

Mr. Joel H. Peck, Clerk
August 18, 2016
Page 2

other parties, sufficient time to fully develop the contested issues in this case, *including the cost recovery issue . . .*”⁵ Staff did not present any evidence regarding rate treatment. The public hearing in this proceeding was convened on June 21-22, 2016. At the conclusion of the proceeding, the evidentiary record was closed. Post-hearing briefs were filed August 5, 2016; and, as in all Commission proceedings, there is no opportunity for a reply to a post-hearing brief. Staff has not requested or obtained leave of the Commission to present any additional evidence.

After the conclusion of the dates and process established by the Procedural Rules and Procedural Order to present evidence in the establishment of its case, the Staff now offers new evidence in its post-hearing brief in support of allocating a large portion of the cost of this transmission project to a single retail customer. Not only was this new evidence not introduced or received into the record in this proceeding, it also contradicts the Staff’s own testimony at hearing that the Staff is not advocating for such a cost allocation.⁶ Specifically, the Staff now offers in its post-hearing brief that it is feasible, in this proceeding seeking a certificate of public convenience and necessity (“CPCN”)⁷ for the construction of proposed 230 kV transmission facilities, for the Commission to employ several “options” for cost allocation of the proposed project. Such new evidence states the following:

[T]he Commission could amend the Line Extension policy to (i) eliminate any ambiguity regarding its application to line extensions requiring new transmission facilities, and (ii) establish a fairer allocation mechanism of the costs of such projects, including the Haymarket project, whether built overhead or underground.

The Commission could issue the CPCN for either the I-66 Overhead or the I-66 Hybrid route on the condition that the Customer step forward and agree to contribute in an appropriate manner to the construction of the Project that it alone at this time needs built. The Commission could even make such a contribution refundable over time (as has at times been the practice with the extension of natural gas facilities) as other, non-customer load dependent on the facilities to be built develops. Either of these options would establish a contribution in aid of construction on the part of the particular customer and reduce costs of the project allocable to other ratepayers.

Finally, . . . the Commission could establish a new rate category as part of the Company’s Rider T, in which DVP recovers from its retail customers the wholesale costs of the NITS service it receives from PJM. The Commission could assign some portion of capital cost recovery or the on-going revenue requirements for the Project to the Customer in a marginally higher Rider T rate to be paid by Customer and thereby recover from Customer, throughout the life of

⁵ Hearing Examiner’s Ruling, at 6 (Mar. 21, 2016)(emphasis added).

⁶ Tr. 260:13-16.

⁷ See Va. Code § 56-265.2 and § 56-46.1.

the Project, an appropriate amount of the costs of the Project which Customer's load alone has caused to be constructed.⁸

The Staff's new evidence as it relates to cost allocation extends to its conclusions in its post-hearing brief. On page 19 of the post-hearing brief, the Staff concludes:

[T]hat the Commission give consideration to the appropriateness of the Company's current Line Extension policy as it applies to projects of this nature and whether such policy should be amended; and, lastly, that the Commission also give consideration to assignment of an appropriate amount of the costs of the Project to the Customer to be recovered either as i) an up-front contribution in aid of construction under the Line Extension policy as it currently exists or as amended or ii) over the life of the Project through appropriate cost assignment to the Customer's Rider T rates.⁹

This new evidence and the corresponding legal arguments supporting "useful options to address this misallocation of costs"¹⁰ now claimed by the Staff to be available to the Commission in this proceeding represent an impermissible attempt to introduce new facts into the record well after the record is closed. As such, Staff's new evidence and their corresponding legal arguments supporting new options for cost allocation represent an improper attempt to introduce evidence through a post-hearing brief. The evidence identified above was first presented by the Staff on August 5, 2016, six weeks after the evidentiary hearing concluded and the record was closed. This is inappropriate and prejudicial to the Company¹¹ and constitutes an improper attempt to introduce new evidence and corresponding legal argument after the close of the evidentiary hearing in contravention of Procedural Rule 240, 5 VAC 5-20-240.

The Company raises this objection in light of the inherent unfairness of Staff's post-hearing submittal and the clear prejudice to the Company. The Hearing Examiner's March 2016 ruling delayed the current proceeding in order to provide sufficient time to develop this exact issue, among others.¹² Had Staff's three additional options for cost allocation been properly raised in its pre-filed testimony or during the evidentiary hearing, the Company would have pointed out the obvious flaws in the Staff's options. For example, the current proceeding is not the proper forum to attempt to revise a line extension policy or any other aspect of the Virginia retail tariff. Such a revision would require a separate proceeding, with public notice of the proposed revision and an opportunity for the Company and the public to be heard. *City of*

⁸ Staff Post-Hearing Brief at 18.

⁹ Staff Post-Hearing Brief at 19.

¹⁰ Staff Post-Hearing Brief at 18.

¹¹ The Company noted in its post-hearing brief that it was at a disadvantage because post-hearing briefs are filed the same day and the Company had not been privy to Staff's legal theory for cost recovery and therefore could not provide a wholly responsive rebuttal. *See* Post-Hearing Brief of Virginia Electric and Power Company, at 55-56 (Aug. 5, 2016). The prejudice raised by Staff's new factual evidence supporting new options for Commission consideration is even more pernicious because the Company was not aware of Staff's new ideas until it read the Staff's post-hearing brief.

¹² *See supra* n.5.

Mr. Joel H. Peck, Clerk
 August 18, 2016
 Page 4

Norfolk v. Virginia Elec. & Power Co., 197 Va. 505, 515 (1955) (“[T]he Commission has the power, upon investigation and due notice to the public, to change, fix and order substituted for any filed schedule, rate rule or regulation”); *see also Central Virginia Elec. Co-op. v. State Corp. Comm’n*, 221 Va. 807, 814 (1981) (holding that a line extension policy is a “filed rate schedule affecting rates” and that the Staff has the burden of proof with respect to revisions to such a policy that are proposed by the Staff). Likewise, the Commission may not revise a rate in a CPCN proceeding, only through a ratemaking proceeding. *See Virginia Elec. & Power Co. v. State Corp. Comm’n*, 226 Va. 541, 547-48 (1984) (recognizing applicant’s right to due process in a ratemaking proceeding and overturning the Commission’s summary rejection of a portion of the applicant’s rate request without giving the applicant formal notice, time to present evidence, and an opportunity to be heard). The Company could have also pointed out that the proposal to condition the CPCN upon the Customer “step[ping] forward and agree[ing] to contribute in an appropriate manner¹³” is vague and unworkable because the proposal does not provide a procedural mechanism or cite any jurisdictional capability for the Commission to require customer payment in this manner. Finally, the third proposal to use a different case mechanism, Rider T, is clearly outside the scope of any option the Commission can execute in the current proceeding. These considerations are important to the Commission’s findings on the cost allocation issue in this case, but could only have been raised by the Company *after* the Staff made these positions and recommendations known at the proper time in the procedural schedule.

Based on the foregoing, the Company formally objects to the inclusion of the Staff’s new assertions and corresponding legal argument in its post-hearing brief identified above into the record in this proceeding, and respectfully requests that the Hearing Examiner’s Report either strike such evidence, or make clear that such evidence was not considered in the determination of the recommended and final decision in this matter.¹⁴

Please do not hesitate to let me know if you have any questions.

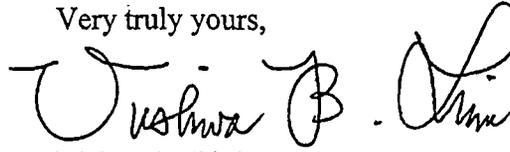
¹³ Staff Post-Hearing Brief at 18.

¹⁴ *See, e.g., Virginia Elec. & Power Co-Application For approval and certification of electric facilities: Remington CT-Warrenton 230 kV Double Circuit Transmission Line, Vint Hill-Wheeler and Wheeler-Loudoun 230 kV Transmission Lines, 230 kV Vint Hill Switching Station, and 230 kV Wheeler Switching Station*, Case No. PUE-2014-00025, Hearing Examiner’s Ruling at 2 (Nov. 4, 2015) (striking respondents attempt through briefing to impermissibly introduce new facts after the conclusion of the evidentiary hearing); *Warrenton-Wheeler*, Final Order, at 7 n.8 (Feb. 11, 2016) (“We likewise decline to consider new evidence submitted after the close of the record, which was included in Morris Farm’s response to Prince William County Board of Supervisor’s comments.”) *Virginia Elec. & Power Co. d/b/a Dominion Virginia Power For approval and certification of electric facilities: Surry-Skiffes Creek 500 kV Transmission Line, Skiffes Creek-Wheaton 230 kV Transmission Line and Skiffes Creek 500 kV-230-kV-115 kV Switching Station*, Case No. PUE-2012-00029, Order, at 66 (Nov. 26, 2013) (Commission noted that it is important to “ensure that [its] procedures remain fair to the applicant and to those who participate in accordance with the Commission’s orders and regulations” and found testimony presented that was not in compliance with Procedural Rules or the Order for Notice and Hearing was not considered in reaching its determination in the proceeding).

Mr. Joel H. Peck, Clerk
August 18, 2016
Page 5

160820287

Very truly yours,

A handwritten signature in cursive script, appearing to read "Vishwa B. Link". The signature is written in black ink and is positioned above the printed name.

Vishwa B. Link

cc: Hon. Glenn P. Richardson, Hearing Examiner
William H. Chambliss, Esq.
Alisson P. Klaiber, Esq.
Andrea B. Macgill, Esq.
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Service List

CERTIFICATE OF SERVICE

I hereby certify that on this 18th day of August, 2016, a true and accurate copy of the foregoing filed in Case No. PUE-2015-00107 was electronically delivered or mailed first class, postage pre-paid, to the following:

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