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COMMONWEALTH OF VIRGINIA
STATE CORPORATION COMMISSION

APPLICATION OF)
)
 VIRGINIA ELECTRIC AND POWER COMPANY)
)
 For approval and certification of electric transmission) CASE NO. PUE-2015-00107
 Facilities: Haymarket 230 kV Double Circuit)
 Transmission Line and 230-34.5 kV Haymarket)
 Substation)
)
)

**SOMERSET CROSSING HOMEOWNERS ASSOCIATION'S
REPLY TO VIRGINIA ELECTRIC AND POWER COMPANY'S RESPONSE TO
PETITIONS FOR REHEARING OR RECONSIDERATION**

COMES NOW, Somerset Crossing Homeowners Association (“Somerset” or “Association”), by counsel, and presents the following Reply to Virginia Electric and Power Company’s (“Dominion”) Response to Somerset and the Coalition to Protect Prince William County’s (the “Coalition”) Petitions For Rehearing or Reconsideration:

ARGUMENT

Subsequent to the Commission’s Final Order of June 23, 2017, additional information has emerged which supports, as recommended by the Commission’s Staff, a rehearing in this matter.¹ Dominion’s Response and pleadings filed subsequent to the entry of the Final Order on June 23, 2017, raise far more concerns than they purport to resolve and independently justify a rehearing. Moreover, for the reasons set forth in both Somerset and the Coalition’s pleadings, the Commission should reconsider its approval of the Carver Road Alternative Road variation.

¹ See, e.g., Staff Response.

I. THE CARVER ROAD ALTERNATIVE ROUTE IS NO LONGER FEASIBLE AND HAS DISPROPORTIONATE ADVERSE IMPACTS

Additional information that has become available after the entry of the Final Order now demonstrates that the Carver Road Alternative Route variation is no longer constructible. Moreover, the Commission must provide stakeholders with an opportunity to be heard regarding the Carver Road Alternative Route variation prior to continuing forward or approving such route. No such opportunity has been provided as the precise routing for the Carver Road Alternative Route variation was not provided by Dominion until June 5, 2017.

A. Feasibility of the Carver Road Alternative Route

Subsequent to the Commission's Final Order of June 23, 2017, it has become apparent that the Carver Road Route (or any variation thereof) is no longer feasible. As originally proposed, the Carver Road Route crossed a parcel of land that has been dedicated to Prince William County (the "Dedicated Parcel").² In addition, approximately 30% of the Carver Road Alternative Route, as originally proposed, crossed non-privately owned land (including road right-of-ways).³

After the close of the Public Hearing, Dominion vaguely suggested a variation to the Carver Road Alternative Route to bypass the Dedicated Parcel⁴ in the event Prince William County declined to grant Dominion an easement over the Dedicated Parcel. Dominion reduced this variation to a plan filed with the Commission on June 5, 2017.⁵ In its Final Order of June 23, 2017, the Commission, without providing an opportunity for a hearing regarding Dominion's proposed variation which significantly impacts Somerset Crossing, approved Dominion's proposed variation in the event that Dominion was unable to obtain an easement from Prince

² See NRG Environmental Routing Study at p. 8.

³ See NRG Environmental Routing Study at p. 66.

⁴ See Dominion's Comments to the Hearing Examiner's Report at p. 25 (describing the variation as a proposal "...in which the route shifted east, toward and into the Somerset Crossing residential development...").

⁵ See Dominion Update to the Commission at Attachment 3.

William County to construct the Carver Road Alternative Route as originally proposed.⁶

As of the date of this filing, Dominion has failed to obtain approval from Prince William County to cross the Dedicated Parcel as originally proposed. Moreover, on August 1, 2017, the Board of Supervisors for Prince William County unanimously passed a resolution reaffirming its commitment to the I-66 Hybrid Alternative Route as the only acceptable route to the County.⁷ Subsequent to the issuance of the Commission's Final Order, Prince William County has further donated \$30,000.00 to The Coalition to fund its legal efforts to oppose the Carver Road Alternative Route before the Commission.⁸

On July 24, 2017, Dominion advised the Commission, that in addition to the Dedicated Parcel around which its proposed variation was routed, Dominion had discovered certain other "land transfers, dedications, easements, and similar property interests" held by Prince William County or its agencies along the Carver Road Alternative Route.⁹ Moreover, Dominion advised the Commission that it had determined that even the Carver Road Alternative Route variation approved by the Final Order and designed to bypass the Dedicated Parcel could no longer be constructed absent affirmative approval from Prince William County.¹⁰ Affirmative approval by Prince William County for Dominion to bypass or cross the Dedicated Parcel or any of the other property interests held by Prince William County identified by Dominion along the Carver Road Alternative Route has not been forthcoming. Consequently, based on the discovery of these additional issues related to bypassing of the Dedicated Parcel and the other additional real property interests held by Prince William County along the Carver Road Alternative Route, Dominion has

⁶ See Final Order at pp. 3-4.

⁷ See Dominion's Response to Petitions for Rehearing or Reconsideration at Attachment 5.

⁸ See Olivo, Antonio (2017, July 18). Prince William to donate \$30,000 to legal effort against proposed power line route. The Washington Post.

⁹ See Dominion Motion to Hold Proceedings in Abeyance For 60 Days at 5.

¹⁰ Id. at 6.

concluded that the Carver Road Route is likely no longer constructible.¹¹ At an absolute minimum, absent affirmative approval from Prince William County, it appears that the Carver Road Alternative Route cannot be constructed as currently approved absent numerous other variations. The nature of these additional variations is unknown. However, it is conceivable that they could fundamentally alter the nature of the Carver Road Alternative Route as originally proposed by Dominion.

B. Adverse Impacts of the Carver Road Alternative Route

Somerset has catalogued at length the overwhelming evidence contravening the Commission's finding that the Carver Road Alternative Route, as originally proposed, will reasonably minimize adverse impact on the scenic assets, historic districts, and environment of the area concerned.¹² In particular, the evidence before the Commission establishes that these adverse impacts are disproportionate to other routes such as the I-66 Overhead or I-66 Hybrid Routes.¹³ In its Response, Dominion attempts to summarily dismiss Somerset's position but fails to offer any targeted rebuttal.¹⁴

In regards to the variation to the Carver Road Alternative Route approved by the Commission in its Final Order, the evidentiary record before the Commission is devoid of evidence to support the variation. Upon information and belief, Dominion first generally described a potential variation to the Carver Road Alternative Route on December 6, 2016, after the conclusion of the Public Hearing.¹⁵ An actual plan depicting the variation to the Carver Road Alternative Route was not filed with the Commission until June 5, 2017.¹⁶ In its Interim Order

¹¹ Id.

¹² See Somerset Petition for Rehearing Or Reconsideration at p. 9 – 15.

¹³ Id.

¹⁴ See Response to Petitions for Rehearing or Reconsideration at p. 22.

¹⁵ See Dominion's Comments to the Hearing Examiner's Report at p. 25; see also Dominion Motion to Hold Proceedings in abeyance at p. 6.

¹⁶ See Dominion Update to the Commission at Attachment 3.

of April 6, 2017, the Commission highlighted that its decision to approve the Carver Road Alternative Route was premised on the assumption that “the Carver Road Route has the least amount of residences within 200 feet of the line” and that the “Carver Road Route was designed specifically to avoid crossing through certain residential areas.”¹⁷ At the time of these interim findings, the precise routing of Dominion’s proposed variation to Carver Road Alternative Route had not been provided by Dominion. A brief review of Dominion’s design of the variation to the Carver Road Alternative Route shows that this variation moves the line approximately 600 feet east to directly run through Somerset Crossing, a concentrated residential community.¹⁸ Dominion has provided no analysis regarding how this variation changes the Carver Road Alternative Route’s impacts on residences relative to other routes or how this variation would alter the scenic, historic, and environmental impacts of the Carver Road Alternative Route relative to other routes. Moreover, Somerset has not been provided with an opportunity to present counter evidence related to the impact of the Carver Road Alternative Route variation as designed by Dominion after the Public Hearing. Nevertheless, Dominion’s proposed plan unquestionably demonstrates that the variation adversely magnifies the negative impacts of the Carver Road Alternative Route. Somerset raised these due process concerns in its Petition for Rehearing or Reconsideration.¹⁹ Moreover, the Commission’s Staff has also concluded that the record would benefit from the inclusion of additional information related to the routing of the Project.²⁰ In its Response, Dominion completely ignores these due process concerns.

¹⁷ See Interim Order at p. 13.

¹⁸ See Dominion Update to the Commission at Attachment 3.

¹⁹ See Somerset Petition at p. 13.

²⁰ See Staff Response at pp. 9 - 10.

II. INSUFFICIENT “NEED” HAS BEEN ESTABLISHED TO SUPPORT THE ISSUANCE OF A CERTIFICATE OF PUBLIC CONVENIENCE AND NECESSITY

New information suggests that the “need” of the single retail customer (“Customer”) originally identified by Dominion to justify the proposed new transmission facilities (the “Project”) may be neither as large nor immediate as suggested. Moreover, the “need” of a single retail customer does not support the taking of private property under Virginia law.

A. The Magnitude and Immediacy of the “Need” Of The Single Retail Customer Is Unknown

As the Commission has determined “[i]t is uncontested that a retail customer of the Company [i.e Dominion] is driving the identified need for this Project.”²¹ From its initial Application, Dominion has based its projections of the load increase required by the Customer, which Dominion has presented to the Commission, on the assumption that the Customer would be expanding its Haymarket Campus by constructing three (3) new buildings / data centers.²² In its Application, Dominion further stated that its proposed new transmission facilities “must be in-service by May 2018” to serve the Customer’s needs.²³

New information has now emerged subsequent to the Commission’s Final Order, that the Customer may not be building three (3) new buildings; that the facilities’ expansion sought by Dominion may not be necessary to support the Customer’s needs; and that the electrical demands of the Customer may not be as immediate as suggested. This new information challenges the fundamental facts which led the Commission to issue the Final Order. Pursuant to four (4) independent affidavits presented by the Coalition, the Customer has gone on record in a parallel proceeding before the U.S. Army Corps of Engineers as recently as March 2017 that:

(1) Building One is complete and is operating using the existing electrical utility

²¹ Interim Order at p. 10.

²² Application, Appendix at p. 1.

²³ Application, Appendix at p. 2.

infrastructure; (2) Building Two could operate without the requirement for additional electrical utility infrastructure including the 230kV transmission lines; (3) The 230kV electric transmission and distribution facilities identified in Dominion's application (CASE NO. PUE-2015-00107) would not be required until such time as Building Three was in operation; (4) Building Two and Three were not projected to be built and operational in the foreseeable future, and construction of 230kV lines would only be needed by the Applicant to operate the data center functions if Building Three were to be built in the future.²⁴

In an attempt to run damage control, Dominion has presented new evidence directly from the Customer's legal counsel that actually corroborates the lack of need by the Customer. Pursuant to the letter from the Customer's counsel, the Customer's expansion at its Haymarket Campus consists of "two scalable phases of independent utility."²⁵ Phase I consists of a single building referred to as "Building One" and Phase II consists of two buildings referred to as "Building Two" and "Building Three."²⁶ Building One is currently operational.²⁷ When the Customer acquired the Project in 2015 (the year of Dominion's Application), it did not commit to building all three buildings.²⁸ Rather, future construction plans would be driven by the Customer's business demands.²⁹ The construction of all three buildings has never been "guaranteed."³⁰ Although the Customer's legal counsel suggests that the Customer is taking steps to initiate the construction of Phase II, it is unclear: (i) what the timing of such construction will be, (ii) what the timing of the Customer's demands for expanded electrical capacity (if any) will be, and (iii) if the Customer will be building all three (3) buildings as originally suggested by Dominion.

The substantial uncertainty regarding the Customer's plans suggested by this new information fundamentally challenges whether the magnitude and immediacy of the Customer's

²⁴ Coalition's Motion for Rehearing Or Reconsideration, Aff. Of Robert G. Marshall at 2.

²⁵ Dominion's Response to Petitions for Rehearing or Reconsideration, Attachment 1 at p. 2.

²⁶ Id. at p. 1.

²⁷ Id. at p. 2

²⁸ Id.

²⁹ Id.

³⁰ Id. at p. 3.

“need” justifies the construction of the transmission facilities sought by Dominion at this time. The Commission’s Staff has expressed similar doubts and has urged the Commission to re-open the record for a re-hearing to consider these issues.³¹

Dominion is precluded at this late juncture from re-casting the Project as one to accommodate the current demands of the Haymarket load area including the alleged development of this load area subsequent to the close of the evidentiary record. The Commission simply cannot consider such information without reopening the record and allowing a rehearing.

B. Under Virginia Statutory and Constitutional Law The “Need” Of A Single Retail Customer Cannot Justify the Taking of Private Property

The Commission cannot act in contravention of the Constitution of the Commonwealth of Virginia. Art. I, Sec. 11 of the Constitution of the Commonwealth of Virginia provides that private property cannot be taken where its “primary use is for private gain, private benefit, private, enterprise, etc...”

Eminent domain is a power derived from the sovereignty of the state. Rudacille v. State Comm'n on Conservation & Dev., etc., 155 Va. 808, 813–14, 156 S.E. 829, 831 (1931). Pursuant to Va. Code § 56-49(2), the General Assembly has delegated certain eminent domain powers to public service corporations to acquire certain property interests “which are deemed necessary. . . for its use in serving the public either directly or indirectly.” However, the General Assembly has simultaneously created the State Corporation Commission to regulate and control public service corporations.³² For example, a public service corporation cannot construct, enlarge, or acquire any facilities for use in public utility service without first obtaining a certificate from the Commission of “public convenience

³¹ Staff’s Response at p. 9 -10.

³² See Jeter v. Vinton-Roanoke Water Co., 114 Va. 769, 76 S.E. 921, 926 (1913) (noting that although the General Assembly has delegated its eminent domain powers to public service companies it has reserved to the state the right and *the duty* to be exercised through the State Corporation Commission to safeguard the interest of the public in the use of private property so taken).

and necessity.” Va. Code § 56-265.2 (B). Consequently, the State Corporation Commission through its power to issue certificates of public convenience and necessity effectively controls the ability of public service corporations to exercise the power eminent domain. Art. I, Sec. 11. The issuance by the Commission of a certificate of public convenience and necessity for a project for private gain would constitute authorization by the Commission for a public service corporation to use eminent domain for purposes in violation of Art. I, Sec. 11. As noted by Dominion and certain of the authorities it cites, the determination of public necessity is effectively unreviewable by the Circuit Courts.³³ The Commission serves as the constitutional gatekeeper on this issue. Consequently, to the extent the final order authorizes the taking of private property for private benefit, it contravenes Virginia statutory and constitutional law.

WHEREFORE, Somerset Crossing Homeowners Association, by Counsel, respectfully requests that the Commission: (i) grant Somerset’s and the Coalition to Protect Prince William County’s Motions for Rehearing or Reconsideration; (ii) open the record for the submission of evidence related to the Carver Road Alternative Route variation proposed by Dominion; and (iii) grant Somerset all further relief that the Commission deems appropriate.

³³ See Dominion’s Response to Petitions for Rehearing or Reconsideration at 19 & fn71.

Respectfully Submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on this 22nd day of September, 2017 a copy of the foregoing **SOMERSET CROSSING HOMEOWNERS ASSOCIATION'S REPLY TO VIRGINIA ELECTRIC AND POWER COMPANY'S RESPONSE TO PETITIONS FOR REHEARING OR RECONSIDERATION** was sent by first class mail and electronic mail to:

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