

COMMONWEALTH OF VIRGINIA
STATE CORPORATION COMMISSION

APPLICATION OF

VIRGINIA ELECTRIC AND POWER COMPANY

CASE NO. PUE-2015-00107

For approval and certification of electric transmission
Facilities: Haymarket 230 kV Double Circuit
Transmission Line and 230-34.5 kV Haymarket Substation

MOTION FOR REHEARING OR RECONSIDERATION

COMES NOW, Somerset Crossing Homeowners Association (“Somerset” or “Association”), by and through counsel, and respectfully presents this Motion for Rehearing or Reconsideration of the Interim Order of the State Corporation Commission (“Commission”) dated April 6, 2017 (“Order”).

SUMMARY OF ARGUMENT

The Commission should reconsider its Order requiring Dominion Virginia Power (“Dominion”), within sixty (60) days of the date of the order to seek all consents necessary to permit Dominion to construct the Haymarket 230 kV Double Circuit Transmission Line (“Transmission Line”) along with the alternative railroad route (“Railroad Route”) located partially within Somerset’s property, or, in the alternative, order a rehearing, for the following reasons: (1) the Order is contrary to the evidence presented to the Hearing Examiner including the recommendations and testimony of the Commission’s own staff; (2) the Commission denied Somerset due process by selecting a route that Somerset could not reasonably anticipate was under consideration due to its withdrawal; and (3) the Order contravenes Virginia statutory and

constitutional law to the extent it authorizes the taking of private property when the Commission has found that the “need” for the Transmission Line is driven by a single retail customer.

ARGUMENT

I. THE ORDER IS CONTRARY TO THE EVIDENCE PRESENTED TO THE HEARING EXAMINER INCLUDING THE RECOMMENDATIONS AND TESTIMONY OF THE COMMISSION’S OWN STAFF

The evidence before the Commission established that the Railroad Route and the alternative Carver Road Route (“Carver Road Route”) would have significant adverse impacts on the scenic assets, historic districts, and environment of the area concerned relative to other routes under consideration (especially the I-66 Overhead and I-66 Hybrid routes). The evidence before the Commission did not support the benefits that the Commission assigned to the Carver Road Route and Railroad Route (i.e. lower impact on local residences and cost savings). Consequently, based on the evidence before the Commission, the Commission erred in determining that the Carver Road Route and Railroad Route met the relevant statutory criteria and were in the public interest.

A. IN ORDER TO APPROVE AN ELECTRICAL TRANSMISSION LINE ROUTE THE COMMISSION MUST DETERMINE THAT THE ROUTE IS IN THE PUBLIC INTEREST BASED ON MULTIPLE FACTORS

Va. Code §§ 56-46.1 and 56-265.2(B) establish the statutory criteria that the Commission must apply when approving an electrical transmission line route. Va. Code § 56-265.2(B) provides in relevant part that:

In exercising its authority under this section, the Commission . . . may permit the construction and operation of electrical generating facilities . . . upon a finding that such generating facility and associated facilities including transmission lines and equipment (i) will have no material adverse effect upon the rates paid by customers of any regulated public utility in the Commonwealth; (ii) will have no material adverse effect upon reliability of electric service provided by any such regulated public utility; and (iii) are not otherwise contrary to the public interest.

In 1971, the citizens of the Commonwealth of Virginia approved the adoption of Virginia Constitution, Article XI, Section I recognizing the policy of the Commonwealth to: “conserve, develop, and utilize its natural resources, its public lands, and its historical sites and buildings . . . to protect its atmosphere, lands, and waters from pollution, impairment, or destruction. . .” In apparent recognition of this public mandate, the following year, the General Assembly enacted Va. Code § 56-46.1(B). See Bd. of Sup'rs of Campbell Cty. v. Appalachian Power Co., 216 Va. 93, 99–100 (1975). Va. Code § 56-46.1(B) creates an absolute requirement that:

As a condition to approval the Commission shall determine that the line is needed and that the corridor or route the line is to follow will reasonably minimize adverse impact on the scenic assets, historic districts and environment of the area concerned.

Reasonable minimization of adverse impacts is determined through weighing multiple factors. BASF Corp. v. State Corp. Com'n, 289 Va. 375, 400-01 (2015). This multifactorial balancing test requires the Commission to “balance” adverse impacts along with other “factors” and “traditional considerations.” Ultimately, the Commission must decide within the parameters of the statute what best serves the “total public interest.” Bd. of Sup'rs of Campbell Cty. v. Appalachian Power Co., 216 Va. 93, 100 (1975).

B. THE EVIDENCE BEFORE THE COMMISSION FAILED TO ESTABLISH THAT EITHER THE CARVER ROAD ROUTE OR THE RAILROAD ROUTE WOULD HAVE LESS IMPACT ON LOCAL RESIDENCES OR ACHIEVE COST SAVINGS RELATIVE TO OTHER ROUTES

The finding by the Commission that the Carver Road Route and Railroad Route posed fewer relative impacts on local residences and enjoyed cost benefits over other routes was not supported by the evidence before the Commission. The Commission’s determination that both the Carver Road Route and Railroad Route were acceptable routes depends on such findings.¹ Moreover, the Commission’s preference for the Railroad Route over the Carver Road Route depends on findings that:

¹ Interim Order, p. 12 – 13.

(i) the route “has a lesser impact on local residences” and (ii) the route would cost \$7 million less than the Carver Road Route.²

Determination of a route’s impact on local residences requires consideration of both a route’s quantitative and qualitative impacts. Respectfully, the Commission erred by solely considering select quantitative evidence and ignoring the overwhelming qualitative evidence in assessing the impact on local residences of the Carver Road Route and Railroad Route.³ The quantitative evidence before the Commission was not conclusive.⁴ Moreover, both the Carver Road Route and Railroad Route cross larger numbers of privately owned parcels than either the I-66 Overhead Route or I-66 Hybrid Route.⁵ However, the impact of the proposed routes cannot be determined solely by looking at the numbers. The qualitative evidence of disproportionate impact to local residences affected by the Carver Road Route and Railroad Route was overwhelming. The Railroad Route impacts communities (i) designed around nature trails and preserves, (ii) with no foreseeable expectation that electrical transmission corridors would ever be sited in their vicinity, and (iii) where extensive governmental takings relative to the other routes would be required.⁶ The Railroad Route and the Carver Road Route would radically alter the nature the communities they would affect.⁷ The communities affected by the Railroad Route

² Interim Order, p. 13-14.

³ Interim Order at p. 12-13 (supporting findings of impact on local residence based on number of single-family homes and condominium / structures located within 200 ft and 500 ft of the route’s ROW centerline).
(...the Carver Road Route has the

⁴ The Commission’s findings appear to be based on the number of “single-family residences,” “townhome / condominium structures” and “apartment buildings” within 100, 200, and 500 feet of a route’s ROW centerline. These metrics come directly from Dominion’s Application. See Application at p. 71 -72. However, the descriptions “townhome / condominium structures” and “apartment buildings” appear to count structures rather than dwelling units. Consequently, Dominion’s numbers do not demonstrate how many dwelling units or households will be affected by the routes making it impossible for the Commission to reach any conclusive finding regarding the quantitative impact on local residences.

⁵ Application, p. 71-72 (I-66 Overhead Route crosses 36 private parcels; I-66 Hybrid Route crosses 35 private parcels, Carver Road Route crosses 75 parcels, and Railroad Route crosses 43 parcels).

⁶ Pre-filed Testimony of Somerset Crossing HOA, p. 15-17; Pre-Filed Testimony of McCoy, 15:3-4.

⁷ The Commission’s contention that heavily wooded area along the Railroad Route would aid in minimizing the visual impacts of this line was contradicted by the testimony of Wayne D, McCoy, the Commission’s own independent environmental analyst. McCoy testified that the Railroad Route would actually require the partial clearing a wooded buffer along the 100-foot ROW and make the towers along this route visible to both the Town of Haymarket and St. Paul’s Church. See McCoy Pre-Filed Testimony, 15:5-10.

and Carver Road Route are desirable because of their greenspace and distance from industrial development.

Locating the proposed electrical lines through these communities would also disproportionately negatively impact property values. Somerset provided an impact of 3-10% on the median tax assessed value of homes in its community (an aggregate financial impact ranging between \$7,074,000 and \$23,580,000) if a route passing through its community was selected.⁸ Significantly, Dominion cites research that suggests that "all markets do not react in the same way to HVTL proximity."⁹ Although communities along the Railroad Route and Carver Road Route, and the I-66 routes are arguably in the same general market, the characteristics of the two submarkets could not be more different. The I-66 routes under consideration impact communities located along existing right of ways ("ROW") that contain power lines, telephone lines, noise attenuation walls and other structures of a public nature.¹⁰ Indeed, 90% of the I-66 Overhead Route is collocated along existing ROW and 94% of the I-66 Hybrid Route is collocated along existing ROW.¹¹ Future infrastructure development along the I-66 corridor has been reasonable foreseeable.¹² Moreover, neither the I-66 Overhead Route nor the I-66 Hybrid Route will radically alter the existing nature of the communities they affect. Consequently, even if the I-66 Overhead Route or the I-66 Hybrid Route impact numerically more residences, the extent and nature of these impacts on affected residences are less significant than the impacts of the Railroad Route or the Carver Road Route. The Railroad Route and Carver Road Route's greater adverse qualitative impacts on local residences outweigh the debatable quantitative impacts of the I-66

⁸ Hrg. Tr. 98:21-25.

⁹ Lenhoff Rebuttal Testimony, 5:11-12.

¹⁰ Pre-filed Testimony of Somerset, p. 15-17.

¹¹ Pre-filed Testimony of McCoy, 10:11-13 & 13:5-6.

¹² Id.

Overhead and I-66 Hybrid routes. Consequently, the Commissions’ findings related to relative impact on local residences lacked a basis in the evidence.

The Commission’s justification of its selection of the Carver Road Route and the Railroad Route on the basis of cost is also contrary to the evidence before the Commission. The evidence before the Commission established the following estimated costs for the five routes under consideration:

Cost Breakdowns for Routes ¹³					
	I-66 Overhead (Proposed)	I-66 Hybrid	Carver	Madison	Railroad
Total Costs	\$51 million	\$166.7 million	\$61.9 million	\$67.8 million	\$55.1 million

Based on the evidence before the Commission, neither the Carver Road Route nor the Railroad Route was the least costly route. The estimated cost of the I-66 Overhead Route was \$4.1 million less than the Railroad Route and \$10.9 million less than the Carver Road Route. Consequently, the Commission erroneously depended on the factor of cost to support its selection of the Carver Road Route and the Railroad Route over the I-66 Overhead Route.

Moreover, the anticipated cost savings of the Railroad Route over the Carver Road Route provide an insufficient basis for the Commission to prefer the Railroad Route. The Railroad Route’s anticipated cost savings of \$6.8 million as compared to the Carver Road Route represents less than an 11% total project savings. These minor anticipated cost savings do not outweigh the significant relative adverse impacts of the Railroad Route.

Consequently, the totality of the evidentiary record before the Commission failed to demonstrate that either the Carver Road Route or the Railroad Route would have less of an impact on local residences or achieve cost savings when compared to other routes (especially the I-66 Overhead Route).

C. NEITHER THE CARVER ROAD ROUTE NOR THE RAILROAD ROUTE REASONABLY MINIMIZE ADVERSE IMPACT ON THE SCENIC ASSETS, HISTORIC DISTRICTS, AND ENVIRONMENT OF THE AREA CONCERNED

¹³ Joshipura Pre-Filed Testimony, p. 16.

The evidence before the Commission conclusively established that the Carver Road Route and the Railroad Route pose the greatest adverse impact on the scenic assets, historic districts, and environment of the area concerned (especially when compared to the I-66 Overhead and I-66 Hybrid routes).

1. ADVERSE IMPACT ON THE ENVIRONMENT

Relative to the other routes under consideration (including the I-66 Hybrid and I-66 Overhead routes) both the Railroad Route and the Carver Road Route pose significant adverse environmental impacts. Dominion’s analysis indicated that the routes under consideration would have the following land use impacts:

Land Use Impacts of Routes¹⁴					
	I-66 Overhead (Proposed)	I-66 Hybrid	Carver	Madison	Railroad
Privately Owned Parcels (#)	36	35	75	75	43
Forested Land (miles)	1.4	1.6	3.8	4.4	2.9
Developed Land (miles)	3.4	3.5	2.8	3.4	2.6
Cropland (miles)	0.2	0.1	0.1	0.3	0.1
Open Land (miles)	0.1	0.1	0.1	0.1	0.1
Wetlands (acres)	5.9	5.1	11.5	11.3	20.8
Forested Wetlands (acres)	3.9	3.6	8.3	7.8	18.9
Battlefield Study Area (miles)	3.1	3.3	4.2	4.9	4.2
Potential NRHP Area (miles)	1.0	1.1	1.7	2.5	1.6
Battlefield Core Area (miles)	0.4	0.4	0.5	0.5	0.7

As Dominion’s own data demonstrates, the Carver Road Route and especially the Railroad Route have the greatest identified impact on wetlands of any of the other proposed routes. The Railroad Route’s identified impact on wetlands (20.8 acres), much of which is forested wetlands (18.9 acres), is particularly significant. The project is upstream from the Broad Run Stream Conservation Unit (classified as a site of biodiversity significance) which is a habitat for various endangered and threatened aquatic species including the Brook Floater (classified by VDGIF as endangered) and the Yellow Lance (classified by USFWS as threatened).¹⁵ The Railroad Route would involve the partial

¹⁴ Data from Application, p. 71-72.

¹⁵ McCoy Testimony (Virginia Department of Conservation and Recreation Letter of December 14, 2015, p. 1).

clearing of wooded buffers along the 100-foot ROW including on Somerset Crossing's common areas.¹⁶ Such clearing would result in the destruction of forested wetlands which would revert to emergent or scrub shrub habitat.¹⁷ The destruction of these forested wetlands would cause precisely the type of habitat fragmentation that the Virginia Department of Conservation and Recreation warned about in connection with this project.¹⁸

All institutional stakeholders recognize that the significant adverse environmental impacts of the Railroad Route (and to a lesser extent the Carver Road Route) outweigh their benefits relative to the other routes. The Commission's own independent environmental consultants concluded that they could not recommend the Railroad Route due to its adverse environmental impacts.¹⁹ The Virginia Department of Environmental Quality ("DEQ") recommended either the I-66 Hybrid Route as having the lowest probability of damaging wetlands or the I-66 Overhead Route as having a significantly lower probability of damaging wetlands than the alternative routes.²⁰ Even Dominion now maintains that the adverse impacts of the Carver Road Route (including its environmental impacts) outweigh its benefits.²¹ Dominion has further abandoned the Railroad Route and notes that neither Dominion nor any party to this proceeding currently advocates for its selection.²² In short, the overwhelming weight of the evidence before the Commission including the testimony and recommendations of its own staff support the conclusion that the Railroad Route and Carver Road Route will have far greater detrimental impacts upon the environment than either the I-66 Overhead Route or I-66 Hybrid Route.

2. ADVERSE IMPACT ON SCENIC AND HISTORIC DISTRICTS

¹⁶ McCoy Pre-Filed Testimony, 14:3-8.

¹⁷ Id.

¹⁸ McCoy Pre-Filed Testimony (Virginia Department of Conservation and Recreation Letter of December 14, 2015, p. 2).

¹⁹ McCoy Pre-Filed Testimony, 21:1-2 (noting "MAE cannot recommend the Railroad Alternative").

²⁰ DEQ Letter of November 30, 2015.

²¹ Dominion's Comments to the Hearing Examiner's Report of December 6, 2016, p. 22.

²² Id. at 26.

The evidence before the Commission established that both the Carver Road Route and Railroad Route will have significantly greater adverse impacts on historic districts than other proposed routes (especially the I-66 Hybrid and I-66 Overhead routes). The project itself is located in one of the most historically significant areas of the United States due to its central role in the American Civil War. Indeed, the Manassas National Battlefield Park will be impacted by the project. Other than the Madison Route, the Carver Road Route and Railroad Routes will have the greatest impact on historic battlefield areas of any of the other routes. The Carver Road Route will impact 4.2 miles of battlefield study area, of which 1.7 miles is in potential National Register of Historic Places (“NRHP”) area and 0.5 miles is battlefield core area.²³ The Railroad Route will also impact 4.2 miles of battlefield study area, of which 1.6 miles is potential NRHP area and 0.7 miles is battlefield core area.²⁴ The Carver Road Route and Railroad Route will impact 21% more battlefield study area than the I-66 Hybrid Route and 35% more battlefield study area than the I-66 Overhead Route.²⁵

The Virginia Department of Historic Resources (“DHR”) found that both the Carver Road Route and the Railroad Route would have moderate impact (considered to be an adverse impact for which mitigation is requested) on two (2) historic resources and minimal impacts on four (4) historic resources.²⁶ Both routes threaten moderate impacts to the “Buckland Mills Battlefield” and the “Second Battle of Manassas.”²⁷ In contrast, the I-66 Hybrid Route poses moderate impacts to only one historic resource.²⁸ Consequently, DHR concluded that the I-66 Hybrid Route posed the least potential impact on historic resources.

²³ Dominion Application, p. 71-72.

²⁴ Id.

²⁵ Id. (The I-66 Overhead Route will impact 3.1 miles of Battlefield Study Area and the I-66 Hybrid Route will impact 3.3 miles of Battlefield Study Area).

²⁶ McCoy Pre-filed Testimony (DHR Letter of December 15, 2015, p.1-3).

²⁷ McCoy Pre-filed Testimony (DHR Letter of December 15, 2015, attachments 1 & 5).

²⁸ McCoy Pre-filed Testimony (DHR Letter of December 15, 2015, attachment 2).

In evaluating the project, Prince William County noted that three historic battlefields would be affected by the project including the Buckland Mills Battlefield, the Thoroughfare Gap Battlefield, and the Manassas Station Operations Battlefield.²⁹ Prince William County urged the use of underground transmission lines to the greatest extent possible to mitigate the adverse impact on these and other important cultural resources.³⁰ Consequently, Prince William County additionally urged the selection of the I-66 Hybrid Route and concluded that all other routes (including Carver Road and Railroad) posed “unacceptable” negative impacts to the County’s cultural resources and to existing and planned communities and businesses.³¹

In conclusion, the complete evidentiary record before the Commission failed to establish that either the Carver Road Route or the Railroad Route would have less of an impact on local residences or achieve cost savings when compared to other routes (especially the I-66 Overhead Route). The evidence before the Commission further established that both the Carver Road Route and the Railroad Route have significantly greater adverse impacts on historic districts than other proposed routes (especially the I-66 Hybrid and I-66 Overhead routes). Consequently, the findings made by the Commission in support of its determination that the Railroad Route and Carver Road Route best meet the statutory criteria of Va. Code §§ 56-46.1 and 56-265.2(B) were contrary to the evidence.

II. THE COMMISSION DENIED SOMERSET DUE PROCESS BY SELECTING A ROUTE THAT SOMERSET COULD NOT REASONABLY ANTICIPATE WAS UNDER CONSIDERATION DUE TO ITS WITHDRAWAL

In addition to the due process rights they enjoy under both the United States and Virginia Constitutions, parties affected by the findings and orders of the Commission have certain statutory due process rights. Of particular significance, Va. Code § 12.1-28 provides that:

Before the Commission shall enter any finding, order, or judgment against any

²⁹ McCoy Pre-filed Testimony (Prince William County Letter of December 17, 2015, p. 1).

³⁰ McCoy Pre-filed Testimony (Prince William County Letter of December 17, 2015, p. 1).

³¹ McCoy Pre-filed Testimony (Prince William County Letter of December 17, 2015, p. 2).

person, it shall afford such person reasonable notice of the time and place at which he shall be afforded an opportunity to introduce evidence and be heard.

Moreover, Va. Code § 56-46.1 provides that prior to the approval of an electrical transmission line of 138 kV or more, if “any interested party shall request a public hearing, the Commission shall, as soon as reasonably practicable after such request, hold such hearing...”

Although an evidentiary hearing was held in this matter on June 21-22, 2016, the hearing failed to provide Somerset an opportunity to present evidence and argument on the Railroad Route selected by the Commission. Based on Dominion’s withdrawal of this route in its opening statement before the Commission, Somerset lacked reasonable notice that such route was still under consideration by the Commission.

During opening arguments at the evidentiary hearing before the Hearing Examiner, Dominion withdrew the Railroad Route from consideration by the Commission.³² As the evidentiary hearing progressed, Vishwa Link, a representative of Dominion, presented the following oral statement regarding the Railroad Route:

Although the route was included in the application and included for public notice, based on correspondence with Prince William County dated May 26, 2016, Chairman Stewart informed the Company “the Board does not intend to give the permission necessary for installation of an overhead transmission line with an open-spaced easement, as this would be contrary to the spirit and purpose of such easement”. That letter is attached as Ms. Diana Faison’s rebuttal schedule six. With this latest communication, the Company concludes that the railroad alternative is not a viable route for Commission consideration.³³

Similarly, John Berkin, another witness providing testimony for Dominion, also stated on the record at the evidentiary hearing that the Railroad Route was not a viable option.³⁴

In his testimony, Mr. McCoy affirmed that collocating transmission line routes along a major transportation highway is a “good routing practice.”³⁵ This position was also affirmed by

³² Hrg. Tr. 71:7-19.

³³ Id.

³⁴ Hrg. Tr. 599:18-20.

³⁵ Hrg. Tr. 216:12-15.

John Berkin, who expressed his agreement with that practice and testified: “I think as was previously discussed with Mr. McCoy, we always try to collocate facilities with existing corridors.”³⁶ Indeed, during the evidentiary hearing, it was apparent that Dominion removed the Railroad Route from the Commission’s consideration. Moreover, based on such representations, it is further apparent from the witness testimony that Somerset considered the Railroad Route to have been withdrawn by Dominion, and, accordingly, not under consideration as a “viable route for Commission consideration.”³⁷ Additionally, multiple representatives of Dominion testified that Dominion did not view the Railroad Route as viable. The general lack of testimony at the evidentiary hearing regarding the Railroad Route demonstrates the understanding of all parties to this proceeding that such route was not under consideration by the Commission.

In reliance on Dominion’s withdrawal of the Railroad Route, Somerset pursued its case addressing only the four remaining routes.³⁸ Consequently, Somerset was not provided with a meaningful opportunity to present evidence and argument on the Railroad Route at the evidentiary hearing or in its post hearing briefs. In particular, the evidentiary hearing represented an important opportunity for Somerset to directly interact with the Hearing Examiner and press its case. Somerset had no warning or reasonable expectation that the Commission would select a route that had been previously withdrawn and, thus, was unable to meaningfully participate in the evidentiary hearing to challenge the propriety of the Railroad Route.

The Virginia Supreme Court has recognized that a lack of fairness exists when the Commission takes action against a party that either the party was not aware was before the Commission or otherwise does not have notice that the Commission would consider such a matter.

³⁶ Hrg. Tr. 601:15-17.

³⁷ Hrg. Tr. 100:12-13.

³⁸ See Final Argument of Somerset Crossing Homeowners Association, fn 1.

Indeed, in Virginia Elec. & Power Co. v. State Corp. Comm'n, 226 Va. 541 (1984), the Virginia Supreme Court considered whether adequate due process was afforded a public utility seeking a rate change from the Commission. Id. at 543. In that case, VEPCO filed an application for a two-step rate increase and filed numerous schedules and volumes of testimony in support of its application. Id. at 543-44. Three weeks after the filing of the application for a change in rates, without a hearing, the Commission entered an order denying one component of VEPCO's two-step request and severing another. Id. at 548. As the Court noted, VEPCO was “unaware that summary action was under consideration. The Commission proceeded *sua sponte*, reached its decision in camera, and in the process afforded VEPCO, an ‘interested person’ entitled to ‘full and fair participation’, no opportunity to be heard.” Id. Because VEPCO had no warning that the Commission contemplated summary disposition of its application, VEPCO had no reason to file a brief or seek an audience to present oral argument in support of its request. Id. In that case, the Virginia Supreme Court found that the ability to submit pre-filed evidence and move for consideration *ex post facto* did not supply VEPCO with sufficient due process and ordered the Commission to reinstate VEPCO’s application as to the component of VEPCO’s application that was summarily denied. Id. at 548-50.

The facts in this case similarly reflect that, due to its withdrawal by Dominion, the Railroad Route was no longer before the Commission. First, the Commission previously suggested to Dominion that it again seek clarification as to whether Prince William County would release its easement rights within the Railroad Route that obstruct any implementation of the Railroad Route. By letter dated May 26, 2016, Prince William County affirmed its prior decisions that it is not willing to release its easement rights. Indeed, the Honorable Corey A. Stewart, Chairman of the Prince William Board of Supervisors, stated: “Regarding the Railroad Alternative, the Board does

not intend to give the permission necessary for installation of an overhead transmission line within the open space easement, as this would be contrary to the spirit and purpose of such easement.”³⁹

Additionally, by Letter to the Commission dated June 17, 2016, Senior Assistant County Attorney Curt Spear advised the Commission:

In September 2015, before the application was filed, the Board advised Dominion that it would not consent to the installation of any transmission lines through the Open-Space Easement. More recently, and presumably as a result of Mr. Gestl’s testimony, Dominion approached the County to ask again whether the county would consider conveying an Overhead Easement through the encumbered portion of the Railroad Route. The Board again declined to do so. . . . In order to establish this in the record, I would like to advise any parties to this proceeding that the Board will not consent to the use of its Open-Space Easement for the installation lines. It is the Board’s hope that this will end any further consideration of the Railroad Route as a viable route.⁴⁰

The correspondence from Prince William County, statements from representatives of Dominion, actions from the parties, and explicit representations of detrimental reliance by Somerset make it clear that all parties considered the Railroad Route to not be viable, and, indeed, no longer under consideration at the time the evidentiary hearing was conducted and final briefs were filed. Virginia courts have recognized the lack of fairness when an administrative tribunal makes an award to a party when the other parties in the matter were led to believe that such an award was not under consideration. Indeed, Virginia courts have determined that a tribunal’s *sua sponte* award of unrequested relief fails to comport with due process. See WLR Foods, Inc. v. Cardosa, 26 Va. App. 220, 229 (1997) (finding that the Workers Compensation Commission’s *sua sponte* award of unrequested benefits denied employer an opportunity to investigate and contest claim and “fails to comport with due process notions of fair play and substantial justice.”).

In summary, by selecting a route that Somerset could not reasonable anticipate was under

³⁹ Comments from Prince William County Board of Supervisors dated June 27, 2016, Attachment D.

⁴⁰ Comments from Prince William County Board of Supervisors dated June 27, 2016, p.2.

consideration by the Commission at the time of the evidentiary hearing and the filing of post hearing briefs, the Commission acted in contravention of basic principles of fairness and due process.

III. THE ORDER CONTRAVENES VIRGINIA STATUTORY AND CONSTITUTIONAL LAW TO THE EXTENT IT AUTHORIZES THE TAKING OF PRIVATE PROPERTY WHEN THE COMMISSION HAS FOUND THAT THE “NEED” FOR THE TRANSMISSION LINE IS DRIVEN BY A SINGLE RETAIL CUSTOMER

The Commission cannot approve Dominion’s application in the absence of a finding that there is a clear need for the Transmission Line. VA Code § 56-265.2A provides that "it shall be unlawful for any public utility to construct . . . facilities for use in public utility service ... without first having obtained a certificate from the Commission that the public convenience and necessity require the exercise of such right or privilege." Additionally, VA Code § 56-46.1 provides, in part, that: “As a condition to approval the Commission shall determine that the line is needed and that the corridor or route the line is to follow will reasonably minimize adverse impact on the scenic assets, historic districts and environment of the area concerned. . . .” The question in this case is whether there is a need.

The question of need has not been adequately addressed by the Commission in the context of the facts and circumstances of this case. All parties, including the Commission itself, recognize that this application is driven by the alleged need of a single retail customer that has entered into a private contract with Dominion for the construction of the Transmission Line.⁴¹ Yet, in issuing the Order, the Commission simply made a conclusory determination of need without engaging in any analysis of the multitude of evidence before the Commission that Dominion has failed to demonstrate a need for this Transmission Line in accordance with the

⁴¹ Interim Order at p. 10.

requirements of Virginia law.

Indeed, a careful review of the record reflects that there is insufficient evidence to establish a need for the new proposed 230 kV double circuit Transmission Line and Haymarket substation. It is clear from the Application and the evidence in the record that the sole purpose of the proposed Transmission Line is to provide service to a single end-user, referred to in the Application as the “Customer.”⁴² This raises a legitimate question as to whether there is a need for the construction of any of the proposed routes to provide service to the existing customer base and the anticipated customer base that is consistent with Prince William County’s long term land use plan or whether the entire Application is about the need of one private customer.

Indeed, the Commission’s own staff recognized that the proposed Transmission Line’s construction to serve a single customer’s projected load raises doubt that there is a need for the Transmission Line that is in the public interest⁴³. In its comments, the Commission’s Staff recognized that: “Even when load for a single customer does materialize, retail customers still bear a disproportionate share of the environmental and construction costs associated with the necessary transmission line, while one customer enjoys the benefits⁴⁴.” Additionally, during its opening statements at the evidentiary hearing, the Commission’s staff stated that: “what this case boils down to” is: “[C]an a retail customer, currently receiving perfectly adequate service at distribution levels, demand an increase in its service so significant that it requires construction of new transmission facilities without incurring any financial responsibility for its request?”⁴⁵ It is clear that the Commission Staff found that the only reason for the subject application is due to one single retail

⁴² Application, p. 2; Application Appendix, DEQ Supplement, Direct Testimony and Exhibits of Virginia Electric and Power Company, p. 2; and Appendix to Application, p. 1.

⁴³ See Staff Comments Dated December 6, 2016 at p. 3.

⁴⁴ Id.

⁴⁵ Hwy. Tr. 102:3 – P.

customer's dramatic increase in electricity use, and a private contract between Dominion and that retail customer to address that increase in electricity use.

The Application itself establishes that the alleged "need" only exists due to a private agreement between Dominion and a third party. Dominion states that Line #124 is currently being operated at 115 kV.⁴⁶ Dominion states that the Customer requires a load of 120 MVA.⁴⁷ Dominion states that once the proposed Project is complete, the total load of Line #124, at full buildout of the Customer's campus, will be 160 MVA.⁴⁸ In other words, Line #124 is perfectly adequate for the current load and indeed, all anticipated future development, if such future development does not include Customer's data center that eats up the entire load.⁴⁹

In responding to the Staff's discovery questions regarding necessity, Dominion failed to provide clear or adequate answers to establish the need for the Transmission Line. For instance, Staff's First Set of Discovery, Interrogatory No. 13 asks: "Would NERC or PJM requirements prohibit the Company from amending its Transmission Planning Criteria to create a different load limit for radial transmission lines that are need for a line extension to serve a single customer, such as a data center?" In other words, why are these load limit "standards" in place and is it because it will maximize Dominion's profits or, in the alternative, because there is a federally-mandated requirement for them to be in place? Dominion's response was revealing. The response indicated that there is no reason Dominion cannot change its load requirements, except that Dominion believes "that making an exception based entirely on the type of customer (i.e., data centers) or number of customers that make up the 100+ MW load *could* ultimately reduce reliability and negatively impact economic

⁴⁶ Application, p. 2.

⁴⁷ Application, p. 2.

⁴⁸ Application, p. 2.

⁴⁹ It should be noted that there is data center customer already being served by Line #124 whose demand is 19.5. See, Dominion's responses to Staff's First Set Discovery, Interrogatory No. 12.

development, as well as *could be* inconsistent with the Company's responsibility to provide non-discriminatory service."⁵⁰ (emphasis added). Dominion bears the burden to demonstrate the need for this Project. That the Project "could be" necessary is simply insufficient. Dominion has submitted no evidence that the proposed 230 kV double circuit Transmission Line is necessary to meet its obligation as a public utility to provide electricity service to customers located in and around the proposed routes. Dominion simply speculates that it *might* require additional service in the future to meet the needs of future economic development. On this point, the Commission's own staff raised legitimate concerns regarding whether there was evidence of an actual need given the lack of certainly of future economic development. In its Brief, the Staff stated: "while DVP is confident that the single Customer's load will be developed as scheduled, Staff is aware (as is the Company) of at least two recent cases in which a transmission line was built for one customer's projected load, but that load failed to materialize."⁵¹

Similarly, Staff's First Set of Discover, Interrogatory No. 6 requests, "[p]lease provide the Company's basis for uprating Line #124 from 115 kV to 230 kV." Dominion's response does not focus on any actual need for the Transmission Line but rather provides a basis for why it believes that Dominion is entitled to receive an upgrade of its infrastructure: "Converting Line #124 from 115 kV to 230 kV is consistent with the Company's practice of using 230 kV to support demand growth in northern Virginia." Dominion goes on to cite several cases wherein it's "upgrade approach" has been

⁵⁰ Dominion responses to Staff's First Set Discovery Interrogatory No. 13.

⁵¹ See Staff Brief at p. 15-17; see Application of Virginia Electric and Power Company d/b/a Dominion Virginia Power, For approval and certification of electric transmission facilities in Prince William County and the City of Manassas: Cannon Branch-Cloverhill 230 kV Transmission Line and Cloverhill Substation, Case No, PUE-2011-0001 1, 2017 S.C.C. Ann. Rept. 428, Final Order (Dec. 21, 2011) (this project was constructed but as of November 2015, the loads anticipated for this project, Unicom "planned data center campus[]," had not been realized); Application of Virginia Electric and Power Company d/b/a Dominion Virginia Power for approval and certification of electric facilities: Waxpool 230 kV Double Circuit Transmission Line, Brambleton- BECO 230 kV Transmission Line and 2i0-34.5 kV Waxpool Substation, Case No. PUE-2011-00129, 2012 S.C.C. Ann. Rept, 353, Final Order (Dec. 28, 2012) (this project was also constructed but as of November 2015 the loads anticipated for this project, Integrate Ashburn I LLC's "planned data center campus[]," had not been realized).

approved in multiple transmission projects. Not one of those projects involved an upgrade to provide power to a single customer, without real evidence of additional necessity. See Case Nos. PUE-2009-00134 (replacing a deteriorating line), PUE-2011-00011 (building a new 230 kV line, but with no objections as to necessity), PUE-2012-0065 (inapplicable case because not an application to construct transmission lines but rather a transfer of transmission line assets to WMATA), PUE-2014-00025 (the need for the transmission solution was unchallenged).

This is not a case where the need for the Transmission Line exists due to the progress and growth of development within Prince William County. Indeed, Dominion has admitted to representatives of the Association and representatives of Prince William County that, but for the third-party contract, Dominion would not have proposed this Transmission Line. Instead, Dominion has submitted the Application based solely on its obligation to fulfill a private contractual obligation to a third-party. In that regard, this is not a situation where Dominion is submitting an application to satisfy a need. Instead, Dominion acted on its own to enter into a for-profit contract to artificially create the alleged need for the proposed Transmission Line. In doing so, Dominion has not acted as a public utility, but instead as a private speculator.

Accordingly, the Application is dependent upon a false assumption that it can meet the requisite need for the construction of a high voltage transmission line by creating the need itself, rather than in satisfying the need of existing energy consumers. It is notable that this case is lacking in any engineering analysis demonstrating that a need for additional infrastructure currently exists. There is no evidence that Dominion's transmission system has been stress-evaluated under federal and Virginia regulatory requirements or that there has been a significant volume of transmission system overloads due to an overstressed transmission system.⁵² Simply put, there is no evidence that the proposed

⁵² In contrast, in *Application of Virginia Electric and Power Company D/B/A Dominion Virginia Power*, (Case No. PUE-2012-00029, 2013 Va. PUC LEXIS 874 (November 26, 2013), the Commission based its ruling on the fact that

Transmission Line is necessary to permit Prince William County to continue to have reliable electric service. Dominion has attempted to establish the “need” for the line by entering into a private, third-party agreement to construct a Transmission Line that is: (1) unnecessary to meet anticipated growth; (2) is not required to address a condition of overstress; and, (3) is in direct conflict with the public priorities as established by the local governments. It is unconscionable for the Commission to find that a need exists in this case where the alleged need would permit Dominion to take private property, damage the environment and irrevocably reduce the value of hundreds of homes, solely for the benefit of Dominion’s profit margins. In this regard, the Interim Order treads on dangerous ground. Any approval of the Transmission Line will result in a need for Dominion to take Somerset’s land through eminent domain. In that regard, Article I, Section 11 of the Virginia Constitution states, in part:

That the General Assembly shall pass no law whereby private property, the right to which is fundamental, shall be damaged or taken except for public use. . . . No more private property may be taken than necessary to achieve the stated public use. . . . A public service company, public service corporation, or railroad exercises the power of eminent domain for public use when such exercise is for the authorized provision of utility, common carrier, or railroad services. In all other cases, a taking or damaging of private property is not for public use if the primary use is for private gain, private benefit, private enterprise, increasing jobs, increasing tax revenue, or economic development, except for the elimination of a public nuisance existing on the property. The condemner bears the burden of proving that the use is public, without a presumption that it is.

The Commission has indicated its preference through the Interim Order for a transmission route running through Somerset’s private property that is subject to a public conservation easement and is for the private gain, private benefit, private enterprise, increasing jobs, increasing tax revenue, or economic development. If the Commission’s final order selects the Railroad Route, it will create a justiciable question as to whether a public utility can take private land for the primary purpose of

Dominion had been able to establish need based on engineering studies establishing that the existing transmission system was over-stressed, thus creating overloads where a loss of electric service was to be expected.

providing utility services to a single private retail customer when the justification for such a take is primarily to facilitate such private retail user's private enterprise and economic development.

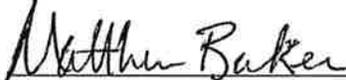
CONCLUSION

In summary, the evidence in the record does not support the Interim Order's finding of need. The two routes selected in the Interim Order have a greater adverse impact on the environment and historical resources than either of the I-66 routes, and are more expensive than the I-66 Overhead Route, which is the first choice of the applicant and recommended by the Commission's own staff. Accordingly, it is clear that the Hearing Examiner's Report impermissibly deviates from the requirements of VA Code §§ 56-265.2 & 56-46.1. Additionally, in selecting the Railroad Route, notwithstanding its withdrawal from consideration by Dominion, the Commission has denied Somerset due process. Additionally, the evidence in the record fails to demonstrate that there is a need for the Transmission Line. In the absence of need, Dominion will not have the authority to use the Railroad Route, and any attempt to do so will violate both the Virginia Code and Virginia Constitution. Accordingly, the Commission must grant Somerset's Motion for Rehearing or Reconsideration.

Respectfully Submitted,

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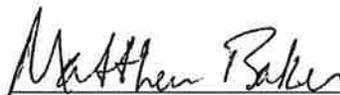
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