

IN THE
Supreme Court of Virginia

RECORD NO. 021998

NORTHERN VIRGINIA ELECTRIC COOPERATIVE,

v.

VIRGINIA ELECTRIC & POWER COMPANY,
d/b/a DOMINION VIRGINIA POWER, et al.,

Appellant,

Appellees.

RECORD NO. 022023

OLD DOMINION ELECTRIC COOPERATIVE, et al.,

Appellants,

v.

VIRGINIA STATE CORPORATION COMMISSION, et al.,

Appellees.

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COMMONWEALTH OF VIRGINIA
STATE CORPORATION COMMISSION

Northern Virginia Electric Cooperative,
Petitioner,

v.

Case No.: PUE _____

Virginia Electric and Power Company
d/b/a Dominion Virginia Power

Smithsonian Institution

U.S. General Services Administration
Respondents.

PETITION FOR DECLARATORY JUDGMENT AND
MOTION FOR INJUNCTION

I. PETITION

Northern Virginia Electric Cooperative ("NOVEC"), hereby petitions the Virginia State Corporation Commission (the "Commission"), pursuant to provision 5 VAC 5-20-100, Rules of Practice and Procedure of the Commission, to declare that the proposed sale of electric energy by Virginia Electric and Power Company, d/b/a Dominion Virginia Power ("Dominion"), to the Smithsonian Institution ("Smithsonian") and/or U.S. General Services Administration ("GSA"), for consumption at a facility to be constructed on a parcel of real estate deeded to GSA and located in Fairfax County, Virginia, with the footprint of the facility situated within the allotted service territory of NOVEC and thus the bulk of the load to be consumed in NOVEC's certificated territory, violates Virginia law and NOVEC's property rights under the Certificate of

Public Convenience and Necessity granted by the Commission under the Utility Facilities Act, Chapter 10.1 of Title 56 of the Code of Virginia.

NOVEC also petitions the Commission to temporarily and permanently enjoin Dominion from selling and delivering directly or indirectly any power to the Smithsonian and/or GSA pursuant to Va. Code Ann. § 12.1-13. In support of its Petition and its Request for Injunctive Relief, NOVEC states as follows:

Petitioner:

1. NOVEC, whose address is Post Office Box 2710, Manassas, Virginia 20108-0875, is an electric cooperative organized and existing under Article 1, Chapter 9.1, §§ 56-231.15 to 56. 231.37 of the Code of Virginia, which article is referred to as the “Utility Consumer Services Property Act.”

2. NOVEC, as a public utility, has a statutory duty to “...furnish reasonably adequate [electric] service and facilities at reasonable and just rates to any person, firm or corporation along its lines desiring [electric services.]” See Va. Code Ann. § 56-234.

3. NOVEC is the holder of various certificates of public convenience and necessity¹ issued by and on file with the Commission authorizing NOVEC to serve various counties, towns and cities in Northern Virginia. See Exhibit 1 for a copy of the most recent map indicating NOVEC’s entire service territory.

4. Specifically relating to this Petition, NOVEC holds a Certificate of Public Convenience and Necessity, Number E51 (“Certificate E-51”), which authorizes it to provide electric service and facilities in those areas described pictorially on the attached map, which is a copy of the map on file with the SCC.

¹ In 1983 Prince William Electric Cooperative and Tri-County Electric Cooperative formed NOVEC.

5. A Master Plan Phase IIB map, dated October 17, 1994 and shown as **Exhibit 2**, was given to NOVEC around 1996 by representatives of the Smithsonian to indicate the facility site plan. The colored boundary lines were drawn by NOVEC representatives.

6. NOVEC has recently obtained from Fairfax County, a map, showing siting and permitting of the Smithsonian facility. This map shows the overall water and sanitary sewer plan and it is dated September 26, 2000. It indicates that the footprint of the Smithsonian facility is situate virtually entirely within NOVEC's certificated territory. See Exhibit 3 for a copy of the map, dated September 26, 2000. The colored boundary lines were drawn by NOVEC representatives.

7. These NOVEC Certificates of Public Convenience and Necessity are important property rights "entitled to the protection of the courts"², this Commission and the legislature. See Order On Petitions For Declaratory Judgment, dated June 25, 1998, in "Prince George Electric Cooperative for declaratory judgment and Petition of RGC (USA) Mineral Sands, Inc. and RGC (USA) Minerals, Inc. for declaratory judgment", Case Number: PUE 960295, pp 16-19; Final Order dated March 31, 1999 in "Petition of Kentucky Utilities Company d/b/a Old Dominion Power Company," Case Number: PUE 960303, pp. 19-20 and Va. Code Ann. §§ 56-265.3, 56-265.4, 56-265.5 and 56-265.6.

Respondents:

8. The Smithsonian was created by an Act of Congress for the "increase and diffusion of knowledge among men...." 20 U.S.C. § 41. Although NOVEC has had all of its contact with representatives of the Smithsonian, and specifically as regards the Smithsonian's National Air and Space Museum's annex at Dulles International Airport, according to the deed

² Town of Culpepper v. Virginia Elec. Power and Elec. Co., 215 Va. 189, 193-194, 207 S.E. 2d. 864, 867-868 (1974).

filed in the County of Fairfax, Deed Book 01685 at page 0142, the property is owned by the GSA. The GSA is an agency of the Executive Branch of the federal government established pursuant to 40 U.S.C. § 751 and it was established by the Federal Property and Administrative Service Act on July 1, 1949. The mission of the GSA is to “provide other federal agencies the work space, products, services, technology and policy they need to accomplish their missions.” It does so by procuring and supplying real and personal property and nonpersonal services. See 40 U.S.C. § 751. Based upon information and belief, the GSA procured this property on behalf of the Smithsonian and this parcel of real estate is located in the County of Fairfax, Virginia, its legal description is DULLES INTERNATL AIRPORT 1984 35 3174 11. Attached is a map of Certificate E51, which is a copy of the map on file with the Commission. The Smithsonian parcel boundary is identified by green markings on the map with the actual footprint location of the facility shown with an X. See Exhibit 5 for a copy of the map. The colored lines and markings were drawn by NOVEC representatives.

9. Dominion is a Virginia public service corporation authorized to transact business as an electric utility under the laws of the Commonwealth. Based upon information and belief, Dominion is also the holder of certain Certificates of Public Convenience and Necessity issued by the Commission pursuant to the Utility Facilities Act which authorize it to furnish electric service and facilities in many areas of Virginia, including a portion of the area applicable to the matter designated as “VA PWR”, “DOMINION VA PWR” or “VEPCO SERVICE AREA”, shown on **Exhibits 2, 3, 4 and 5**.

II. JURISDICTION

10. This case is within the jurisdiction of the Commission, and it has the authority to adjudicate this dispute because the controversy involves the right and authority of NOVEC to furnish electric service within NOVEC's certificated territory. See Final Order in Case Number: PUE960303. Moreover, respondents Smithsonian and GSA are subject to the Commission's jurisdiction. See Public Law 100-202, § 101(b) (Title VIII, § 8093), 101 Stat. 1329-79.

11. An action for declaratory judgment is proper pursuant to 5 VAC.5-20-100(C) because there is a controversy between the Petitioner and Respondents as to their rights, obligations and remedies. Adjudication of this declaratory judgment action will afford relief to the parties from the uncertainty attendant upon their legal rights and will allow the parties to avoid invading or unlawfully violating their rights under the Utility Facilities Act and, therefore, will guide them in their actions. Further, there is no adequate remedy at law that will practically and effectively allow the parties to attain a timely resolution of these disputes.

III. FACTS AND LEGAL AUTHORITY

12. NOVEC began working with the Smithsonian, on or about August 6, 1996, to obtain specifications for the facility and appropriate time lines for phases of construction in order to provide a plan for furnishing electric service to the Smithsonian, which is located in NOVEC's certificated territory.

13. In November 1996, NOVEC met with HOK Architects, Inc. ("HOK"), the architects working with the Smithsonian on its design. During 1996 and periodically, when appropriate, NOVEC informed the Smithsonian, through written communications and telephone conversations, that the bulk of the facility's usage of electric power is in NOVEC's certificated territory and that NOVEC is the proper entity to provide electric service. See letter, dated

December 20, 1996, shown as **Exhibit 7**, providing preliminary information concerning NOVEC's ability to serve the Smithsonian. See also letters, dated August 21, 1996 and November 17, 1998, shown as **Exhibit 6** and **Exhibit 8** respectively, which indicate NOVEC's continued written communications with the Smithsonian and/or its representatives and its desire to serve the Smithsonian.

14. On or about January 25, 1999, NOVEC learned, upon receiving a copy of a letter from Dominion to the Smithsonian, that it had service facilities available in the area of the proposed facility and, importantly, two-thirds (2/3) of the site was in Dominion's service area. See Exhibit 9 for a copy of the letter, dated January 25, 1999. However, this information did not take into account that the bulk of the load and the majority of the footprint of the facility was situate in NOVEC's certificated territory. See the map, shown as **Exhibit 3** and dated September 26, 2000, for the location of the facility.

15. On November 22, 2000, NOVEC, through Old Dominion Electric Cooperative ("ODEC"), sent a Cooperative Delivery Point Request, dated November 17, 2000, to Dominion requesting a new delivery point consistent with the Network Operating Agreement between ODEC and Dominion. ODEC requested a response from Dominion by December 8, 2000. This practice was consistent with prior practices by NOVEC when it requested new delivery points. See Exhibit 10 for a copy of the request.

16. On or about February 7, 2001, NOVEC was advised that Dominion intended to provide electrical service to the Smithsonian. NOVEC did not receive this information from the Smithsonian, but rather, was copied on a letter addressed to the Smithsonian representative from Dominion. This letter indicated that Dominion had received a February 1, 2001 request for electrical service from the Smithsonian and that Dominion, in this February 7th correspondence,

was acknowledging that it would be in a position to provide service once it was able to “obtain all applicable permits, easements or approvals required for the construction and placement of our facilities.” See Exhibit 11 for a copy of the February 7, 2001 letter.

17. On or about April 6, 2001, NOVEC received a letter addressed to ODEC from Dominion denying the requested delivery point. The reasons cited for the denial included (a) the assertion that the Smithsonian had requested that Dominion provide the electric service, and (b) the assertion that the facility was located largely in Dominion’s territory. Additionally Dominion advised NOVEC, through ODEC, that the service arrangements between Dominion and the Smithsonian were being finalized. See Exhibit 12 for a copy of the April 6, 2001 letter.

18. NOVEC has made a good faith effort to resolve the territorial dispute with Dominion, consistent with past practices between the two companies. Additionally, NOVEC initiated a meeting in June 2001, between representatives of Dominion, NOVEC and Commission staff in an attempt to resolve the dispute. At all times, NOVEC made it clear to the Smithsonian and Dominion that it was ready, willing and able to provide electric service and that indeed the footprint of the building was in NOVEC’s certificated territory. Nonetheless, Dominion continued its dealing with the Smithsonian and offered to provide service to the Smithsonian, in violation of NOVEC’s rights under the certificate.

19. By letter dated August 1, 2001, ODEC on behalf of NOVEC, rejected Dominion’s denial of the delivery point as being contrary to the Network Operating Agreement. See Exhibit 14 for a copy of the August 1, 2001 letter.

20. At all times, since it became aware of the Smithsonian’s intention to construct and operate the museum within its certificated territory, NOVEC has advised the Smithsonian of its

exclusive duty and obligation to serve the facility and its willingness and ability to discharge that duty.

21. Virginia law provides a method for a public utility to provide service in the territory of another certificate holder. Dominion has failed to comply with the requirements of this statute. See Va. Code Ann. § 56-265.4.

22. Virginia law prohibits a public utility from furnishing public utility service within the Commonwealth of Virginia, unless it first obtains from the Commission, a Certificate of Public Convenience and Necessity authorizing it to furnish such service. See Va. Code Ann. § 56-265.3. Dominion does not hold a Certificate of Public Convenience and Necessity to furnish public utility service to the Smithsonian. Dominion's authorized service area is merely adjacent to the service territory of NOVEC.

23. Dominion and the Smithsonian cannot lawfully contract or agree that Dominion will provide the electric service to the Smithsonian when virtually all of the load will be in NOVEC's certificated territory. The Commission has not granted Dominion the authority to provide the service. All such electric energy will be used and consumed in the operation of the museum located in NOVEC's certificated territory as shown on **Exhibits 2, 3 and 5**.

24. NOVEC has continually made efforts to obtain specifications on the facility from the Smithsonian, but the Smithsonian has declined to provide such information.

25. NOVEC believes, based on correspondence received from Dominion, dated February 7, 2001 and April 6, 2001, that the Smithsonian entered into an agreement with Dominion that Dominion should provide this service to the Smithsonian, to the exclusion of NOVEC. See **Exhibit 12** for a copy of the April 6, 2001 letter.

26. Thereafter, NOVEC attempted to move forward to develop its delivery point to service the Smithsonian, but Dominion has declined to permit such a delivery point to NOVEC.

27. Dominion should not be permitted to enter NOVEC's service territory and take the Smithsonian load, as the majority of the load is in NOVEC's certificated territory.

28. For the reasons stated in this Petition, any agreement between Dominion and the Smithsonian, stating that Dominion would furnish electric service to the Smithsonian within NOVEC's certificated territory, is in violation of Virginia law and infringes upon NOVEC's valuable property right.

29. Dominion's infringement on NOVEC's certificated territory constitutes an actual controversy, which is solely within the jurisdiction of the Commission to adjudicate. NOVEC has no other adequate remedy at law other than this declaratory judgment proceeding.

IV. INJUNCTIVE RELIEF

30. NOVEC believes that the Commission must enjoin Dominion from any permanent construction at the facility. In the spirit of trying to resolve this territorial dispute with Dominion and during the period that the parties were meeting together with Commission staff in an attempt to resolve this controversy, NOVEC permitted Dominion to construct temporary power to the facility. The bulk of the temporary power load is in NOVEC's certificated territory. This permission was evidenced by a letter, dated July 3, 2001 from James C. Moxley of NOVEC to Ed Wickham of Dominion. See Exhibit 13 for a copy of the July 3, 2001 letter. If permanent construction is performed by Dominion, there is the potential for higher costs for Virginia ratepayers and the respective public service corporations as well as and other damages that could be avoided with the imposition of an injunction.

31. Petitioner seeks an injunction pendente lite to maintain the status quo and respective positions of the parties to this action until the Commission considers the evidence and rules on the merits of this dispute and the propriety of a permanent injunction. NOVEC ultimately seeks a permanent prohibitory injunction to prevent Dominion from constructing facilities and providing electric service to the Smithsonian/GSA within NOVEC's certificated territory.

32. NOVEC is entitled to a temporary and permanent injunction because there is a threat of injury and damage to NOVEC if construction is allowed to proceed and Dominion is allowed to provide electric service within NOVEC's certificated territory; NOVEC will suffer irreparable injury if injunctive relief is not provided forthwith; NOVEC has a cognizable property right in Certificate E-51; NOVEC's property rights should be equitably protected; there is no adequate remedy at law; and equitable relief is appropriate.

V. PRAYER FOR RELIEF

WHEREFORE, NOVEC petitions the Commission and respectfully requests (a) that it issue an order which provides for the necessary notice, responsive pleadings, participation by interested parties and that the Commission establish a schedule for the consideration of the issues presented by this Petition, consistent with 5 VAC 5-20-100 of the Commission's Rules of Practice and Procedure; (b) that the Commission enter an order declaring that Dominion has violated the Utility Facilities Act; (c) that the Commission declare that the Smithsonian and/or GSA project is within NOVEC's certificated territory; (d) that the Commission declare that NOVEC is the proper and rightful provider of electrical service to the Smithsonian and/or GSA and grant NOVEC the ability to provide electrical service to the Smithsonian and/or GSA at its

museum site, which is within the certificated territory of NOVEC; (e) that the Commission declare that Dominion may not unreasonably deny this delivery point to ODEC on behalf of NOVEC and that Dominion's denial of the delivery point is not in the best interest of Virginia ratepayers and is not lawful; (f) that the Commission declare that any transactions or contracts between Dominion and the Smithsonian and/or GSA are unlawful under the Utility Facilities act and therefore unenforceable or void; (g) that the Commission declare that any provision of service by Dominion in NOVEC's certificated territory is unlawful and violates, interferes and infringes upon NOVEC's rights granted by this Commission in the certificate it granted to NOVEC; (h) that the Commission temporarily and permanently enjoin Dominion from building any further permanent infrastructure until such time as the Commission can make a determination in this matter; (i) that the Commission enter an order temporarily and permanently enjoining Dominion from delivering or selling, directly or indirectly, any electrical power or providing any service to the Smithsonian or GSA within NOVEC's certificated territory; (j) that the Commission enter an order declaring that Dominion has wrongfully and tortuously interfered with NOVEC's contractual rights, prospective contractual rights and potential economic relationship with its customers; (k) that the Commission declare that Dominion must pay the damages sustained by NOVEC because of Dominion's unlawful actions; and (l) such other relief as the Commission determines is appropriate and just.

Respectfully submitted.

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Dated: September 17, 2001

CERTIFICATE

I hereby certify that a true and exact copy of the foregoing "Petition for Declaratory Judgment and Motion for Injunction" was: (i) mailed, postage pre-paid; (ii) certified mail, return receipt requested; or (iii) hand-delivered on September 17, 2001 to the following:

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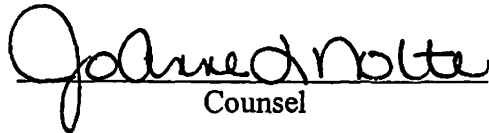
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Washington, DC 20560-0012
(By Certified Mail Number: 7099 3220 0007 6203 3830
Return Receipt Requested)


Counsel

COMMONWEALTH OF VIRGINIA
STATE CORPORATION COMMISSION

Northern Virginia Electric Cooperative,

Petitioner,

v.

Case No.: PUE _____

Virginia Electric and Power Company
d/b/a Dominion Virginia Power

Smithsonian Institution

U.S. General Services Administration

Respondents.

PETITION FOR DECLARATORY JUDGMENT AND
MOTION FOR INJUNCTION

INDEX TO EXHIBITS

EXHIBIT 1	Most recent map indicating NOVEC's entire service territory
EXHIBIT 2	Master Plan Phase IIB map, dated October 17, 1994
EXHIBIT 3	Overall Water and Sanitary Sewer Plan map, dated September 26, 2000
EXHIBIT 4	State Corporation Commission map showing E-51
EXHIBIT 5	State Corporation Commission map showing E-51 with Parcel X
EXHIBIT 6	Letter addressed to HOK Architects from NOVEC, dated August 21, 1996
EXHIBIT 7	Letter addressed to the Smithsonian from NOVEC, dated December 20, 1996
EXHIBIT 8	Letter addressed to the Smithsonian from NOVEC, dated November 17, 1998

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- EXHIBIT 9 Letter addressed to NOVEC from Dominion, dated January 25, 1999
- EXHIBIT 10 Cooperative Point Delivery Request, dated November 17, 2000
- EXHIBIT 11 Letter addressed to the Smithsonian from Dominion, dated February 7, 2001
- EXHIBIT 12 Letter addressed to ODEC from Dominion, dated April 6, 2001
- EXHIBIT 13 Letter addressed to Dominion from NOVEC, dated July 3, 2001
- EXHIBIT 14 Letter addressed to Dominion from ODEC, dated August 1, 2001

MAP LAYOUT

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B

C

D

E

F

G

H

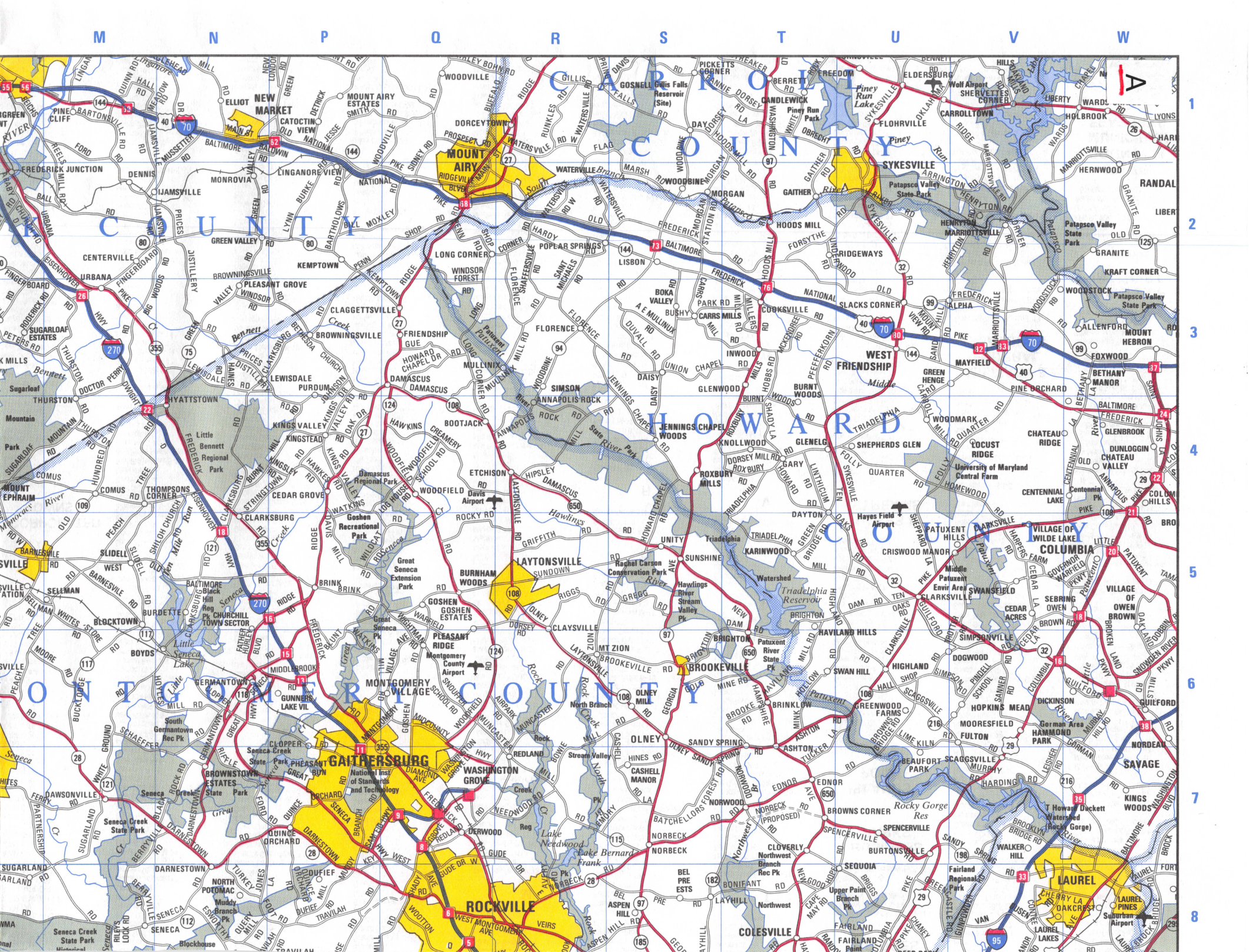
~~NOVEC~~

NORTHERN VIRGINIA ELECTRIC COOPERATIVE

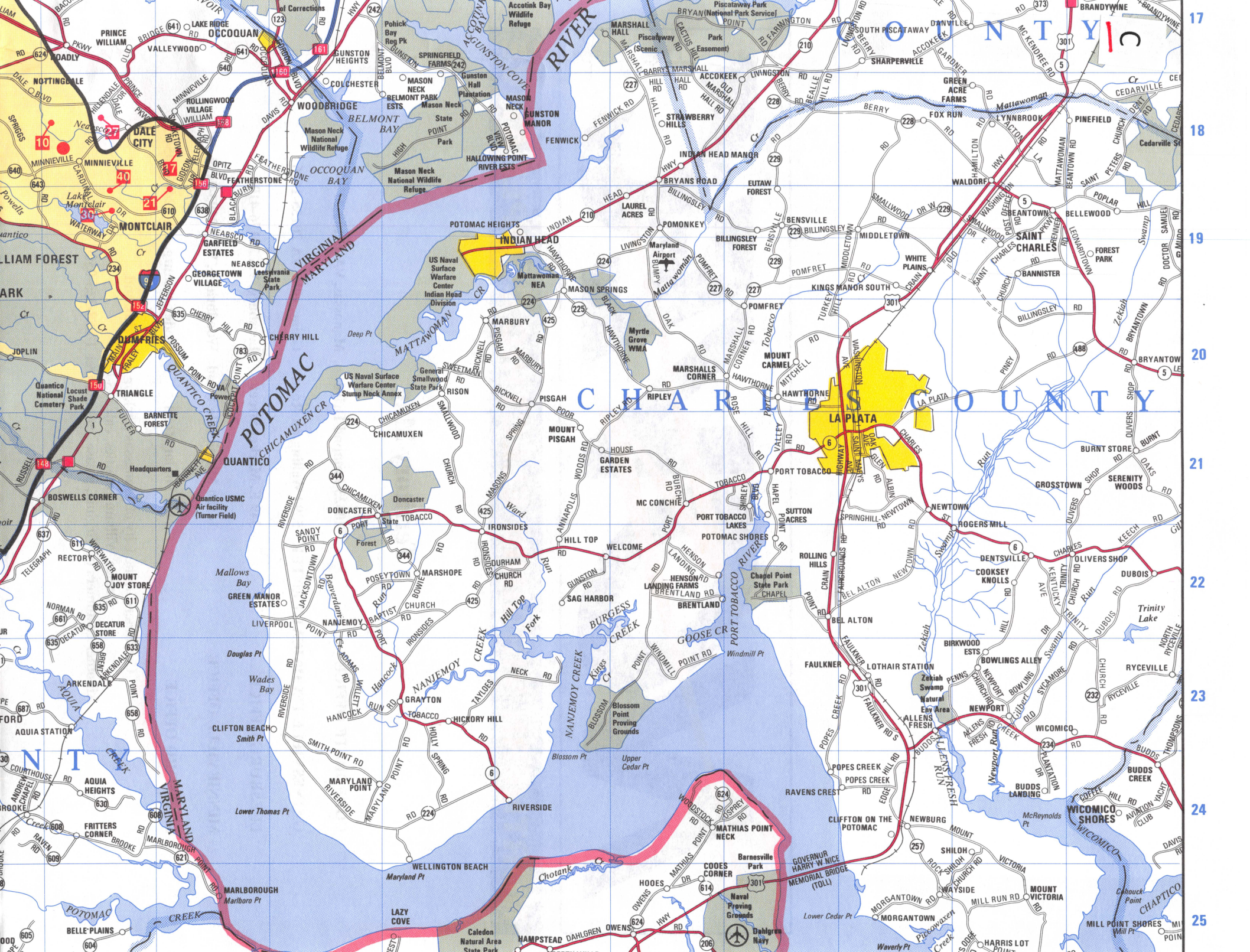
Territory Map

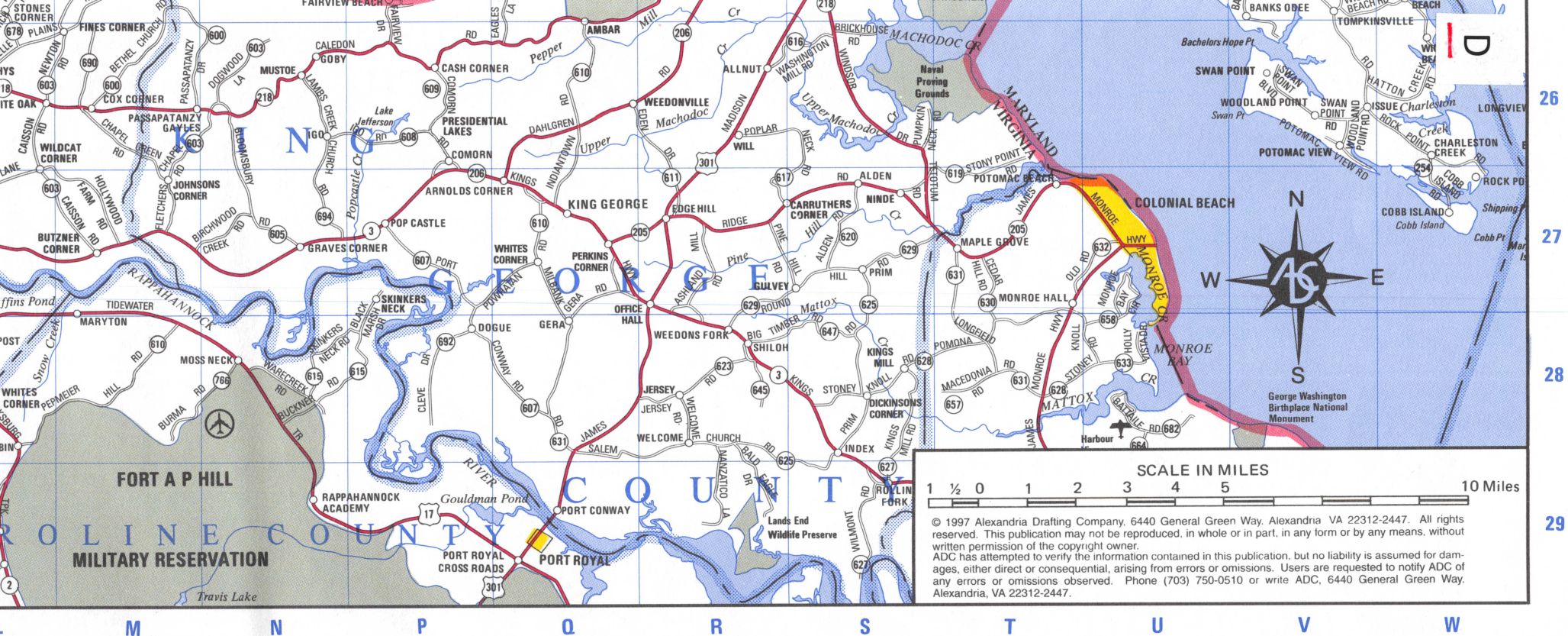
CORPORATE OFFICE	10323 Lomond Drive	Manassas, VA 20109-3173
GAINESVILLE TECHNICAL CENTER	5399 Wellington Road	Gainesville, VA 20155-1616
LEESBURG OFFICE	349 E. Market Street	Leesburg, VA 20176-4102
MINNIEVILLE OFFICE	14500 Minnieville Road	Woodbridge, VA 22193-0459
STAFFORD OFFICE	2430 Poplar Road	Fredericksburg, VA 22406-4054

Customers in the City of Manassas Park or in Fairfax and
Prince William counties, call 335-0500
All other customers in Virginia, please call toll-free 1-888-335-0500



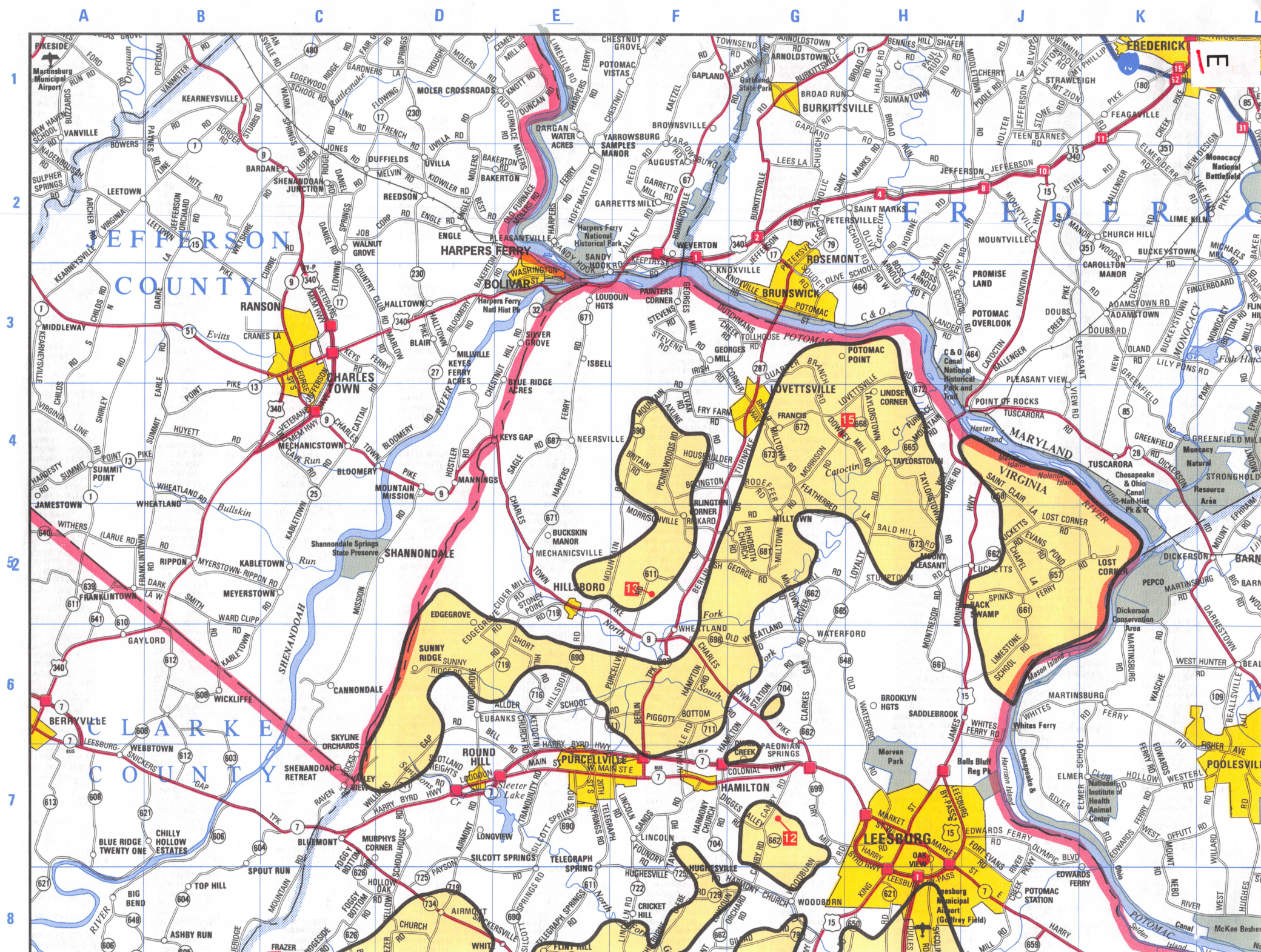


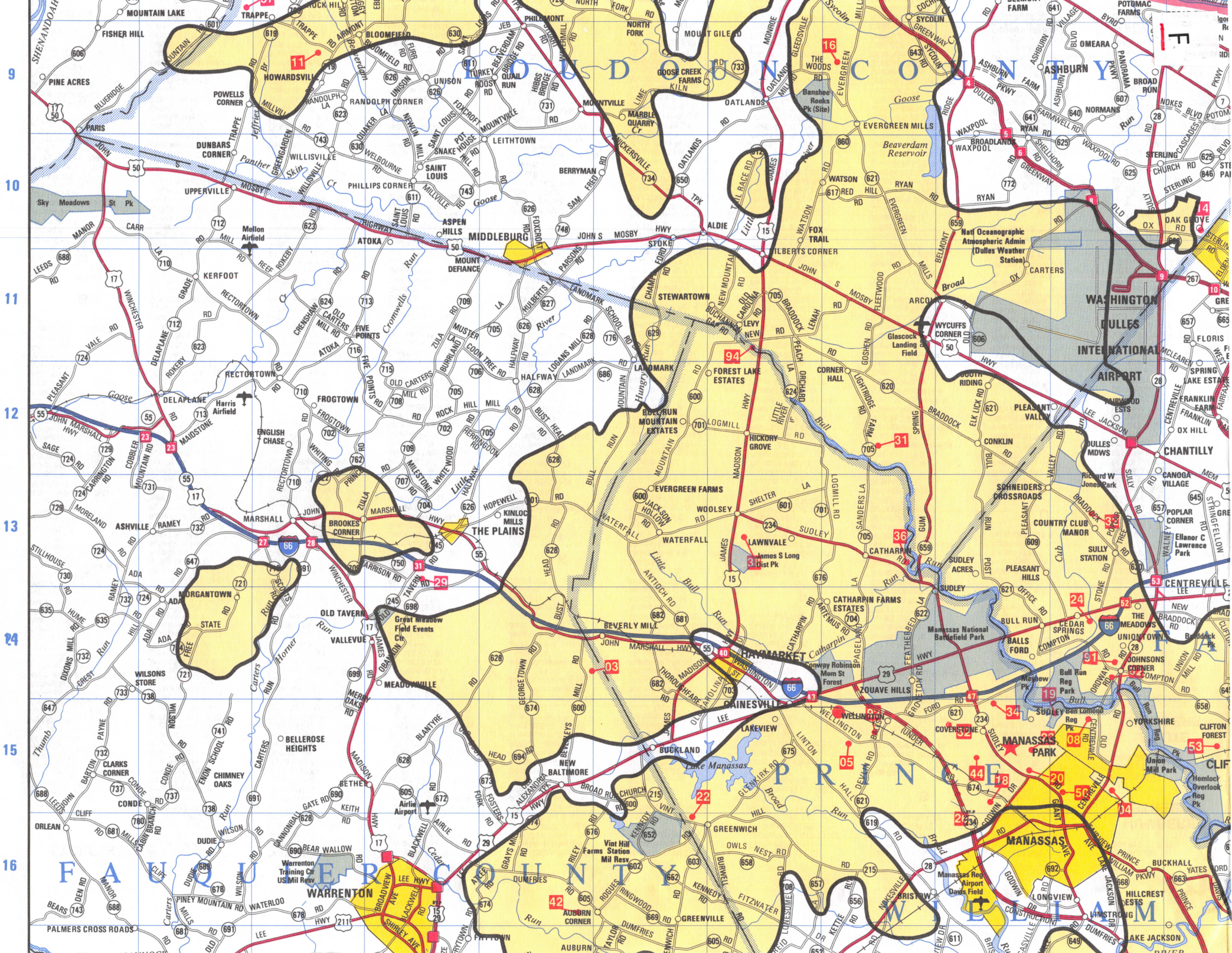




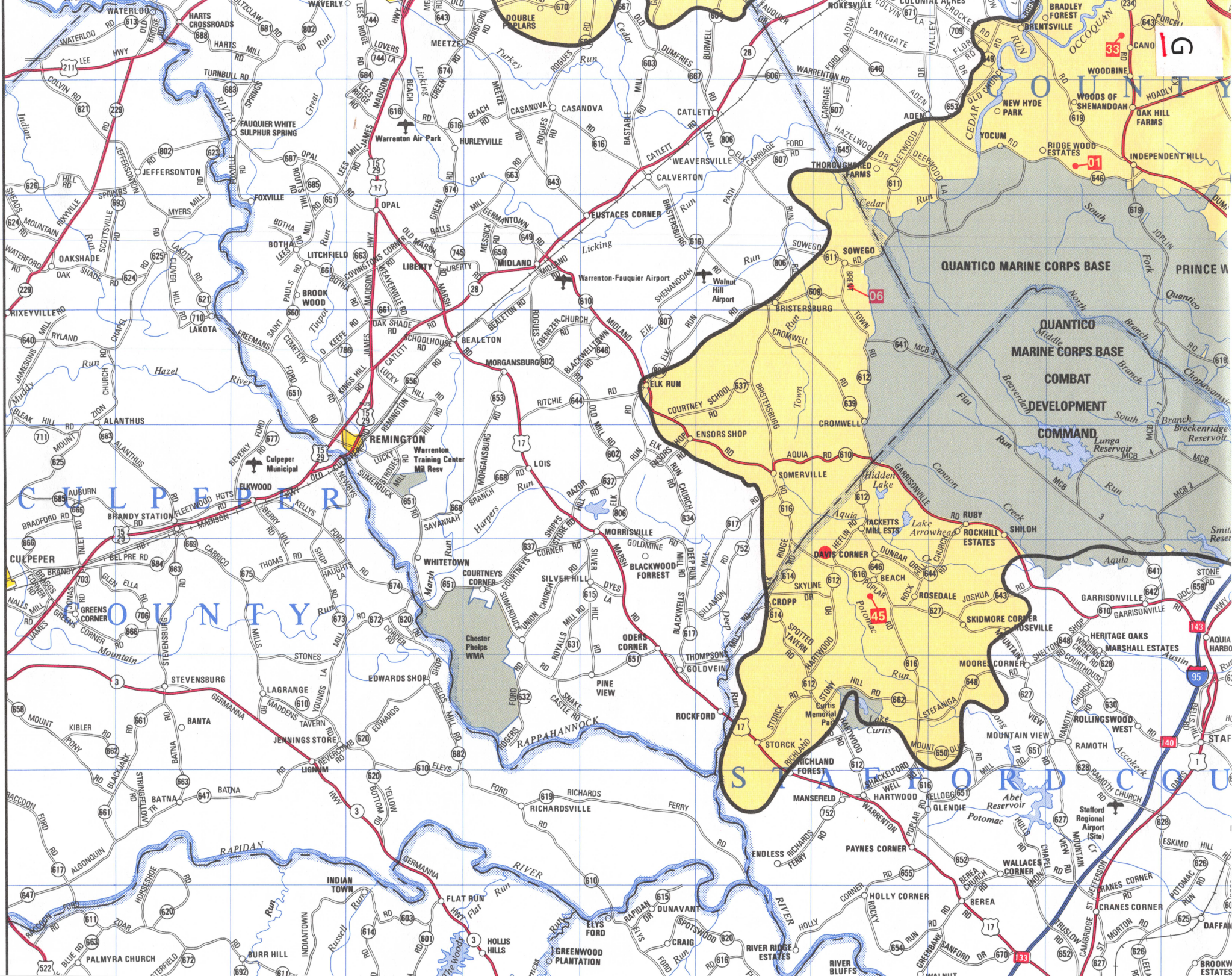
SUBSTATIONS

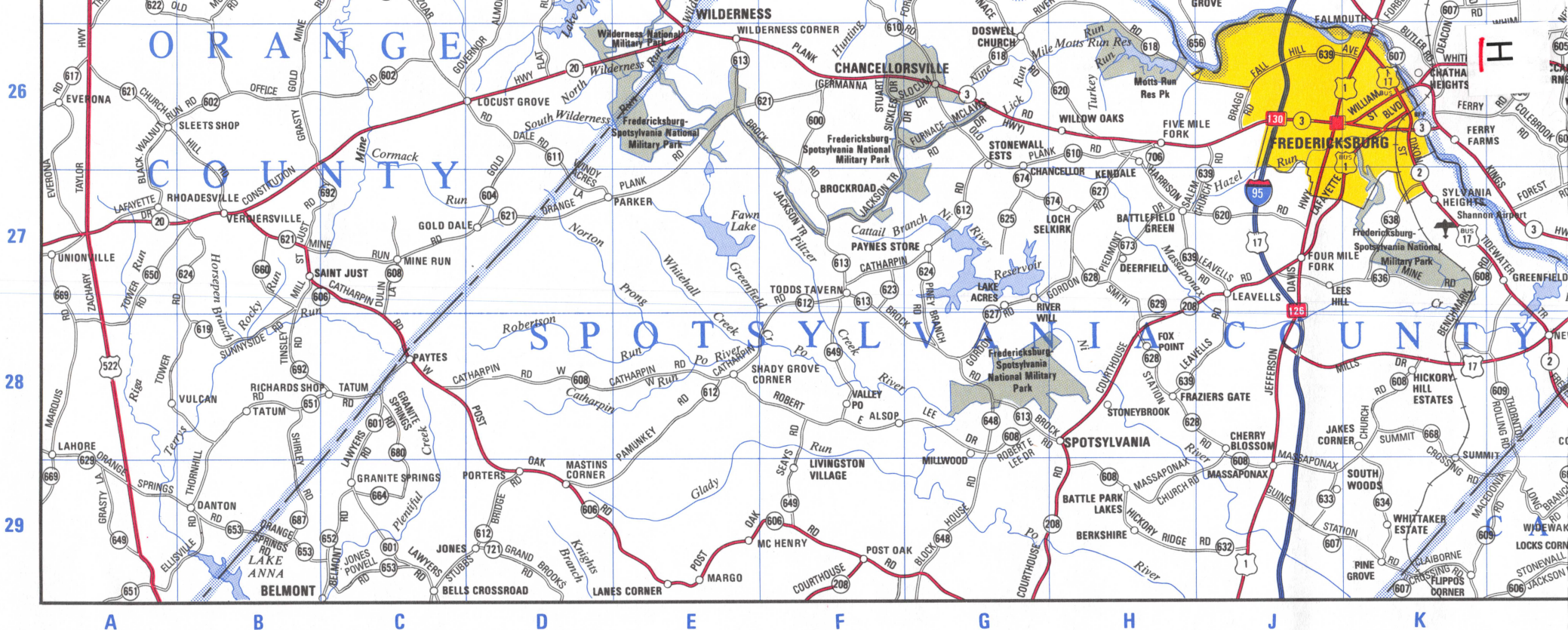
Independent Hill (01)	K18	Godwin (18)	J15	Balls Ford (34)	J15
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Smoketown (17)	N18	Coles (33)	K17	Cedar Grove (94)	G11





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STOCK NO. 310119

MAP LEGEND

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- Substation.....
- District Offices.....
- Corporate Office.....
- Service Area.....
- Interstate.....
- Other Controlled Access Highway.....
- Exit; Exit Number.....
- U.S.; State or County.....
- Major Through Route.....
- Highway Proposed or Under Construction.....
- Street.....
- Proposed Street.....
- Railroad.....

BOUNDARIES

- State.....
- County.....
- Incorporated.....
- Place Names.....

OUTDOOR FEATURES & PUBLIC FACILITIES

- Special Property Limits.....
- Airports: Public; Military.....
- Points of Interest.....
- Lakes; Rivers.....

NORTHERN VIRGINIA ELECTRIC COOP

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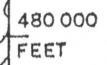
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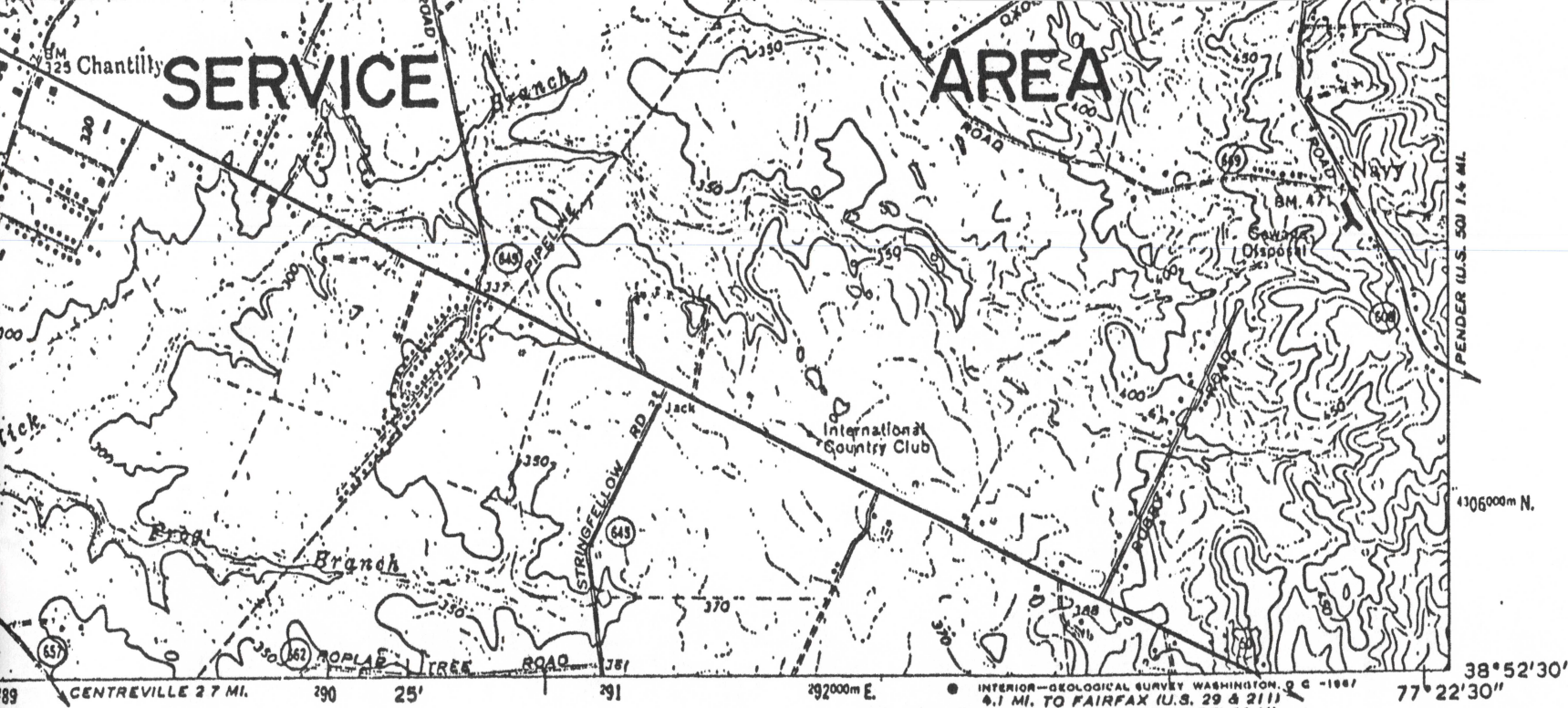
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SERVICE AREA SHOWN AGREED CORRECT AS OF

E51

ELECTRIC UTILITIES SERVING THIS AREA

VIRGINIA ELECTRIC AND POWER CO.

NORTHERN VIRGINIA
TRI-COUNTY ELECTRIC COOP.

BY _____ DATE _____

BY *Benjamin H. Hefner* DATE _____

(FAIRFAX)
3561 N 5E

REVISED 4-8-83

REVISED 7-2-86

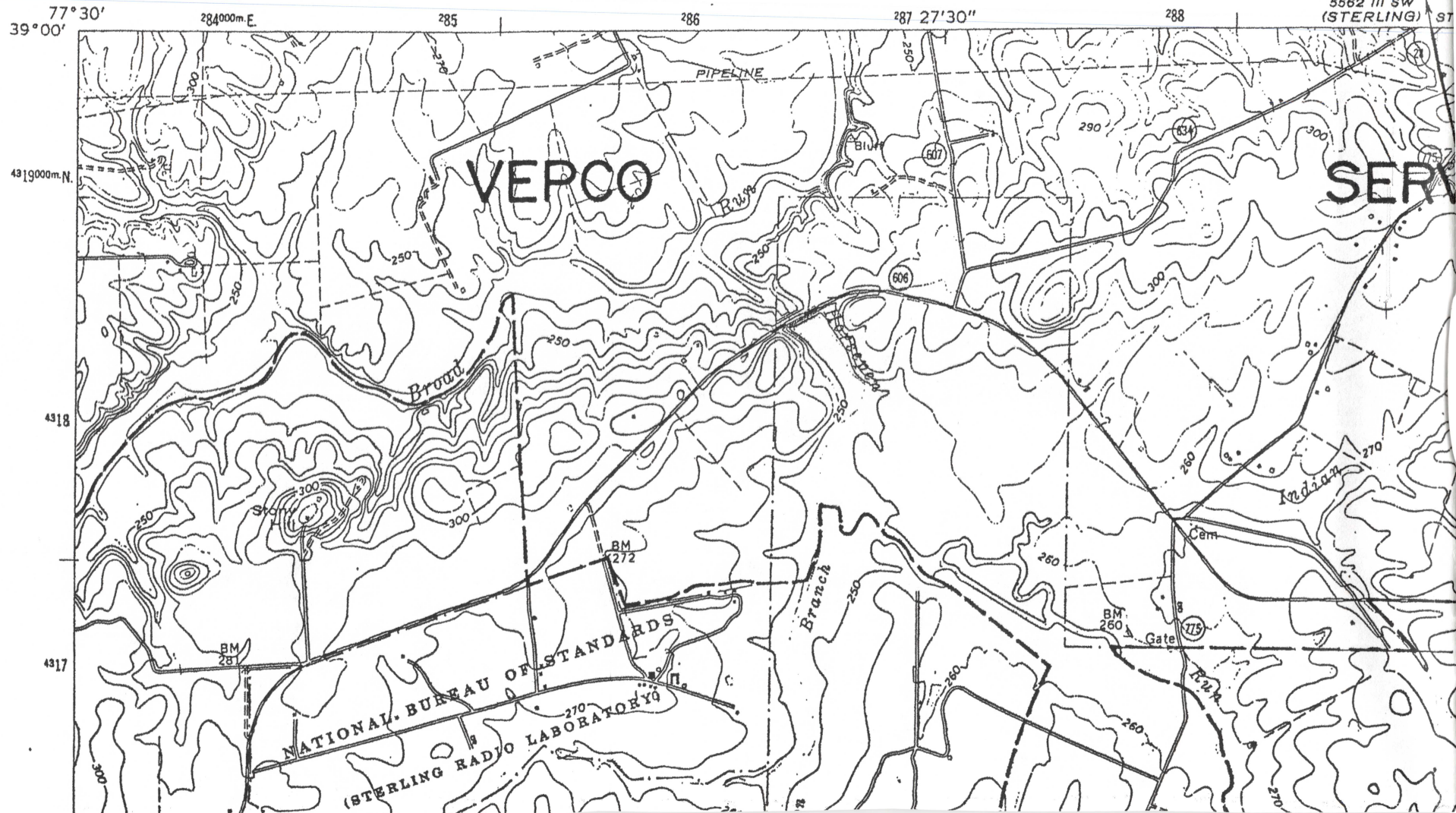
REVISED 6-3-91

REVISED 2-4-97

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(LEESBURG)

UNITED STATES
DEPARTMENT OF THE INTERIOR
GEOLOGICAL SURVEY

177



NVEC
SERVICE

AREA

Stallion Farm

Sewage
Disposal

Parking

DULLES INTERNATIONAL AIRPORT

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57°30"

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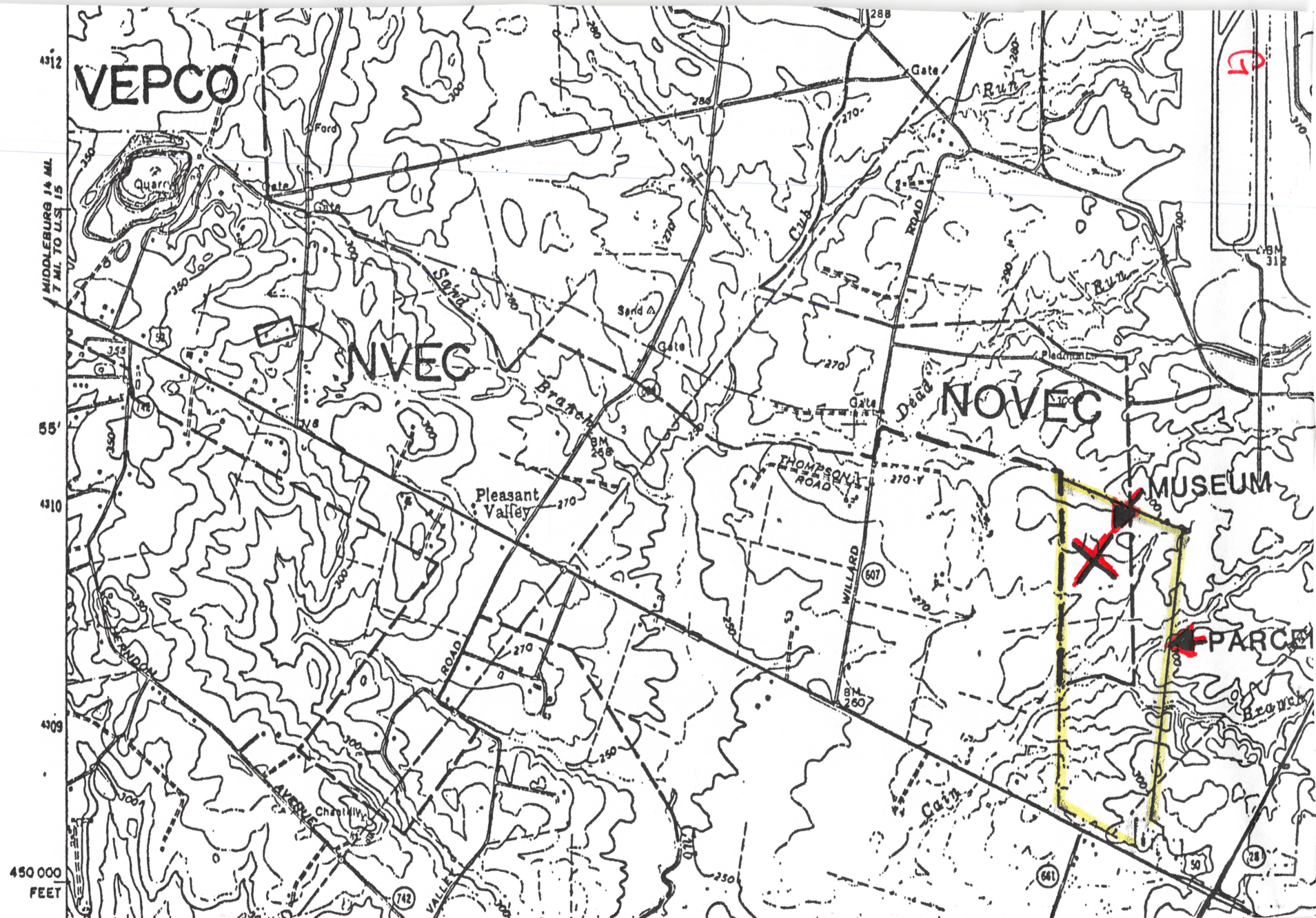
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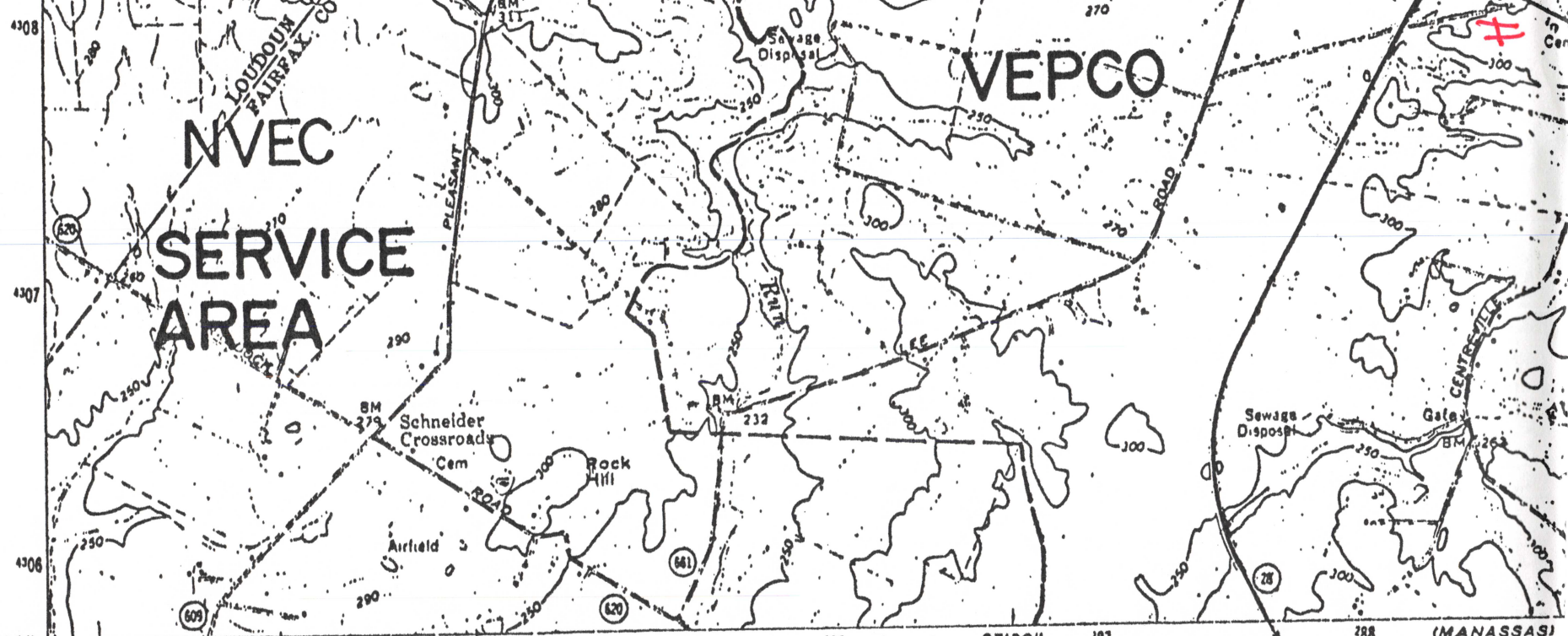
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COMPILED FROM U. S. GEOLOGICAL SURVEY MAP

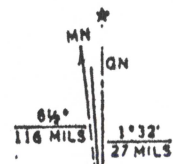
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ELECTRIC UTILITY SERVICE AREAS COMMONWEALTH OF VIRGINIA

STATE CORPORATION COMMISSION
RICHMOND, VIRGINIA



UTM GRID AND 1966 MAGNETIC NORTH
DECLINATION AT CENTER OF SHEET



CONTOUR INTERVAL 1
DATUM IS MEAN SEA

MAP LAYOUT

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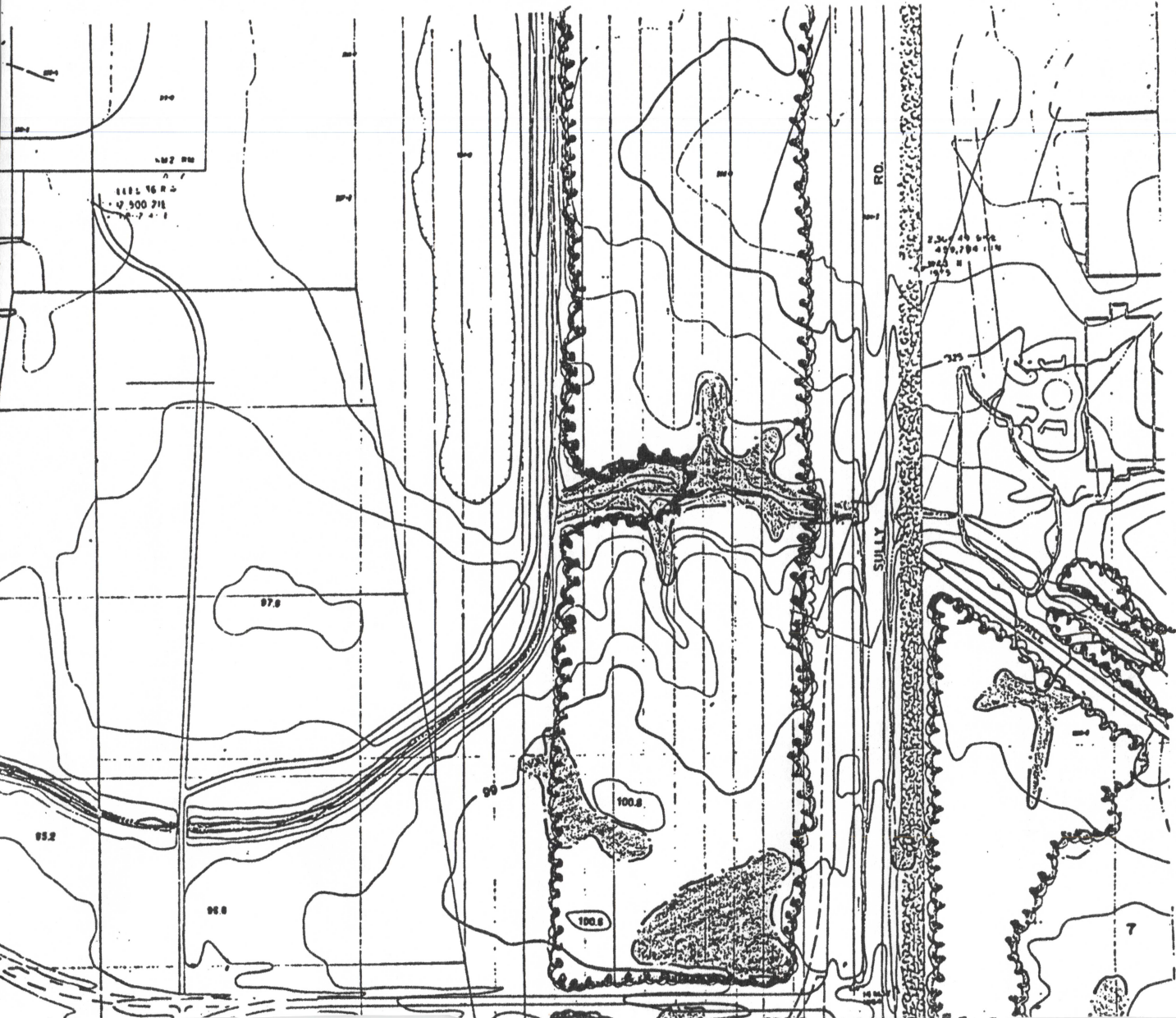
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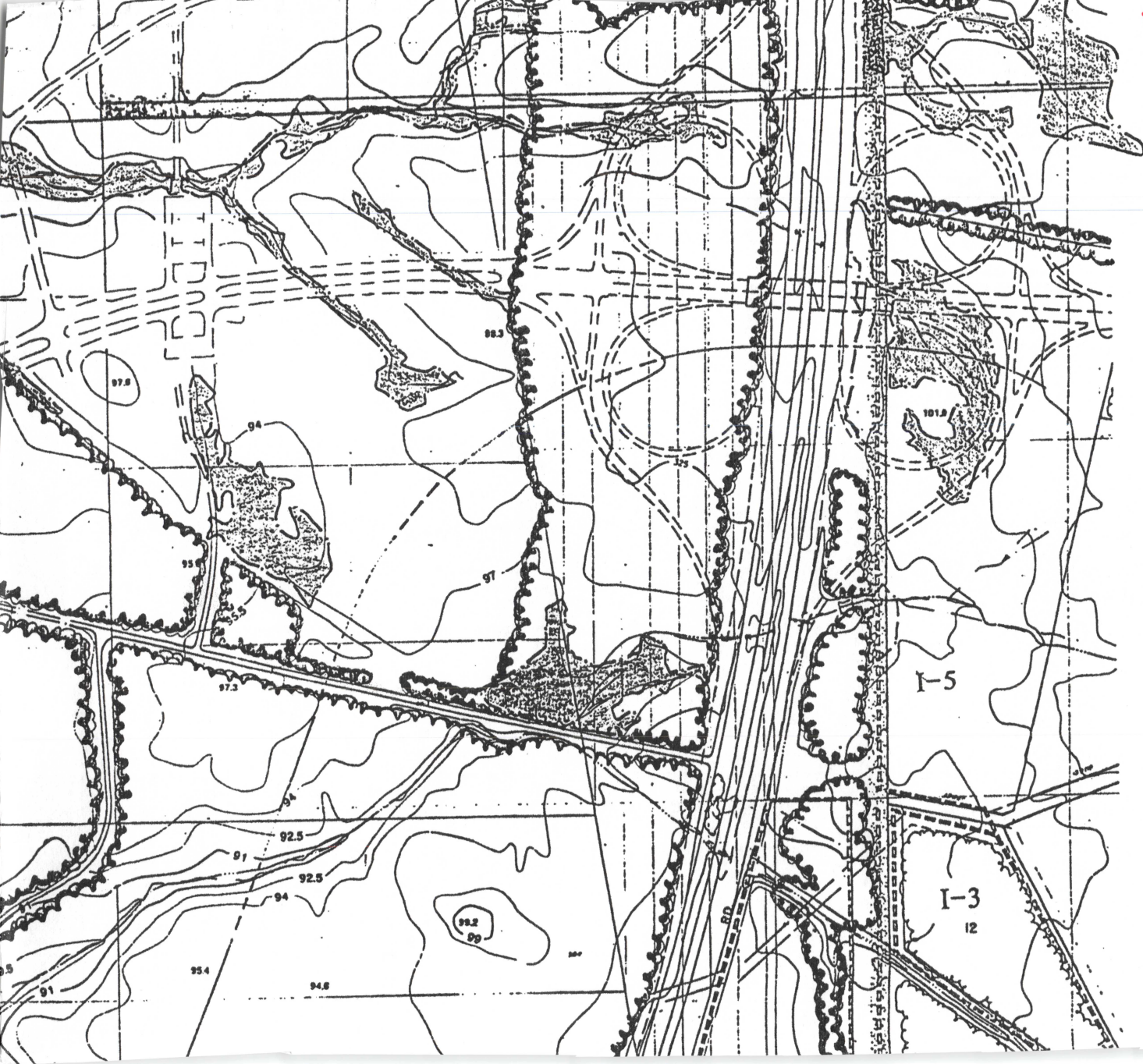
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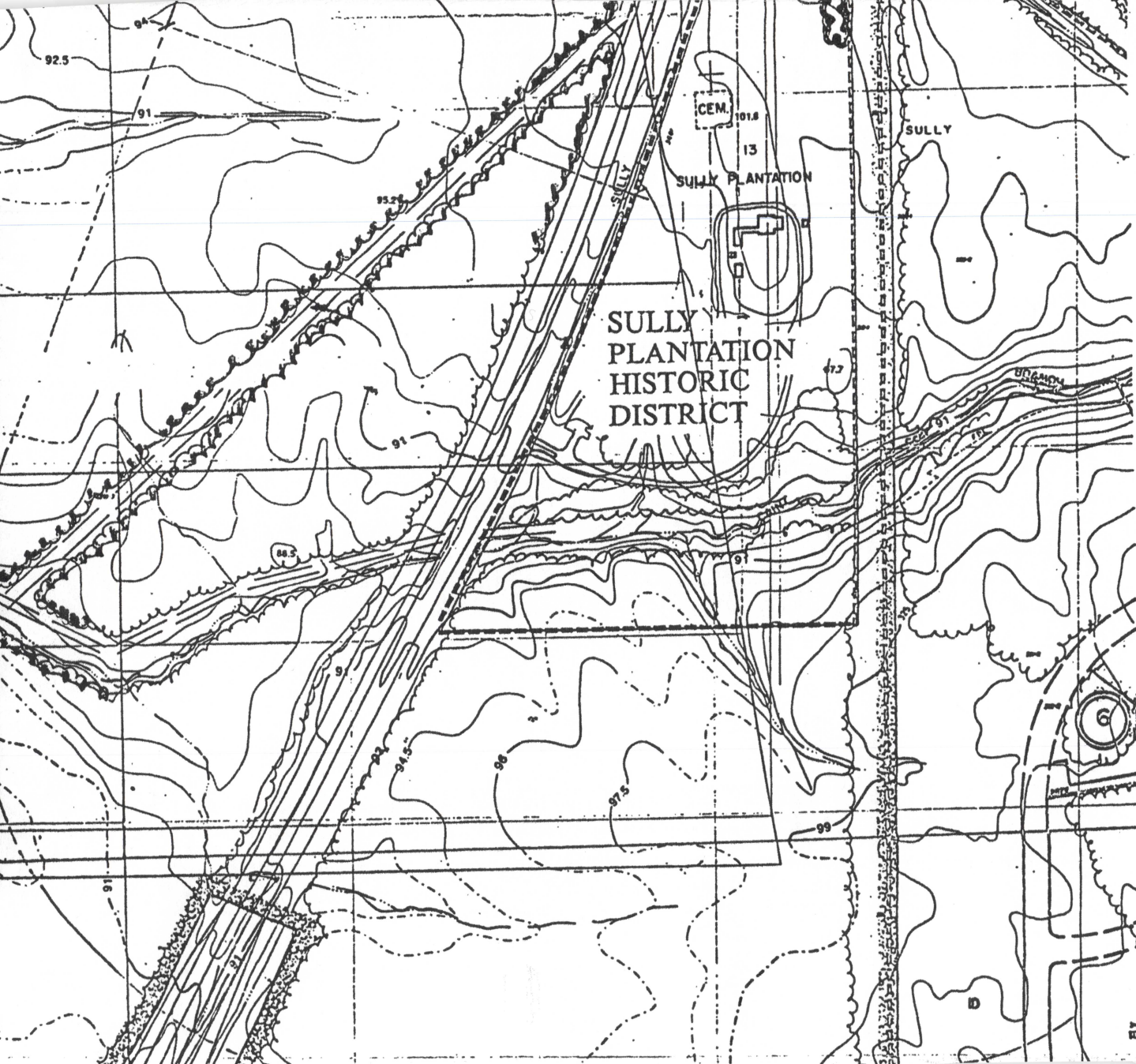
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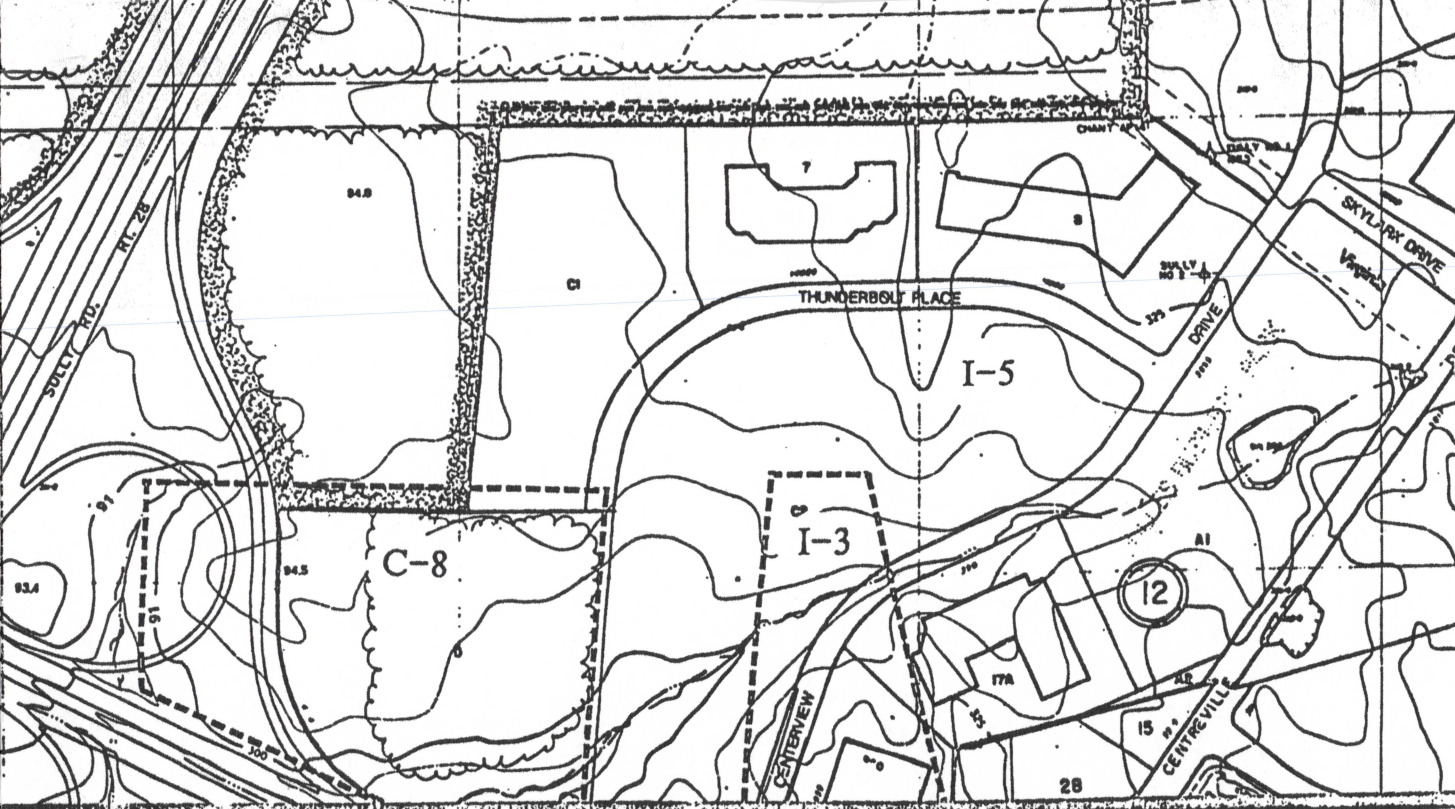
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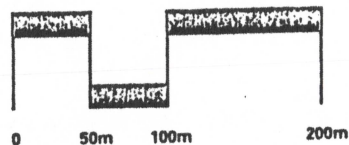




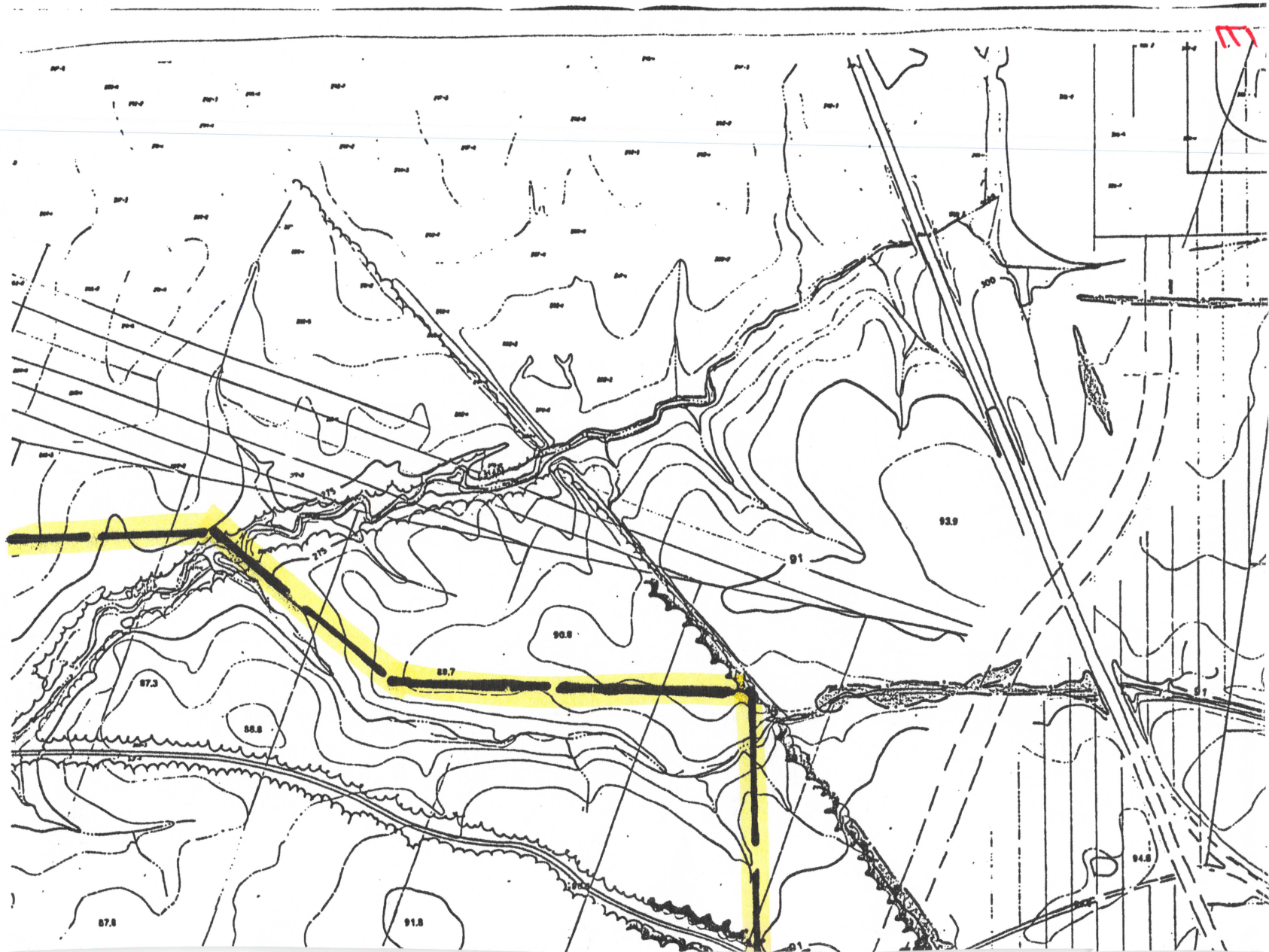




254
35.4



October 17, 1994
Hellmuth, Obata & Kassabaum, P.C.



NOVEC

ACCESS TO RUNWAY

SMITHSONIAN
AIR & SPACE
EXTENSION

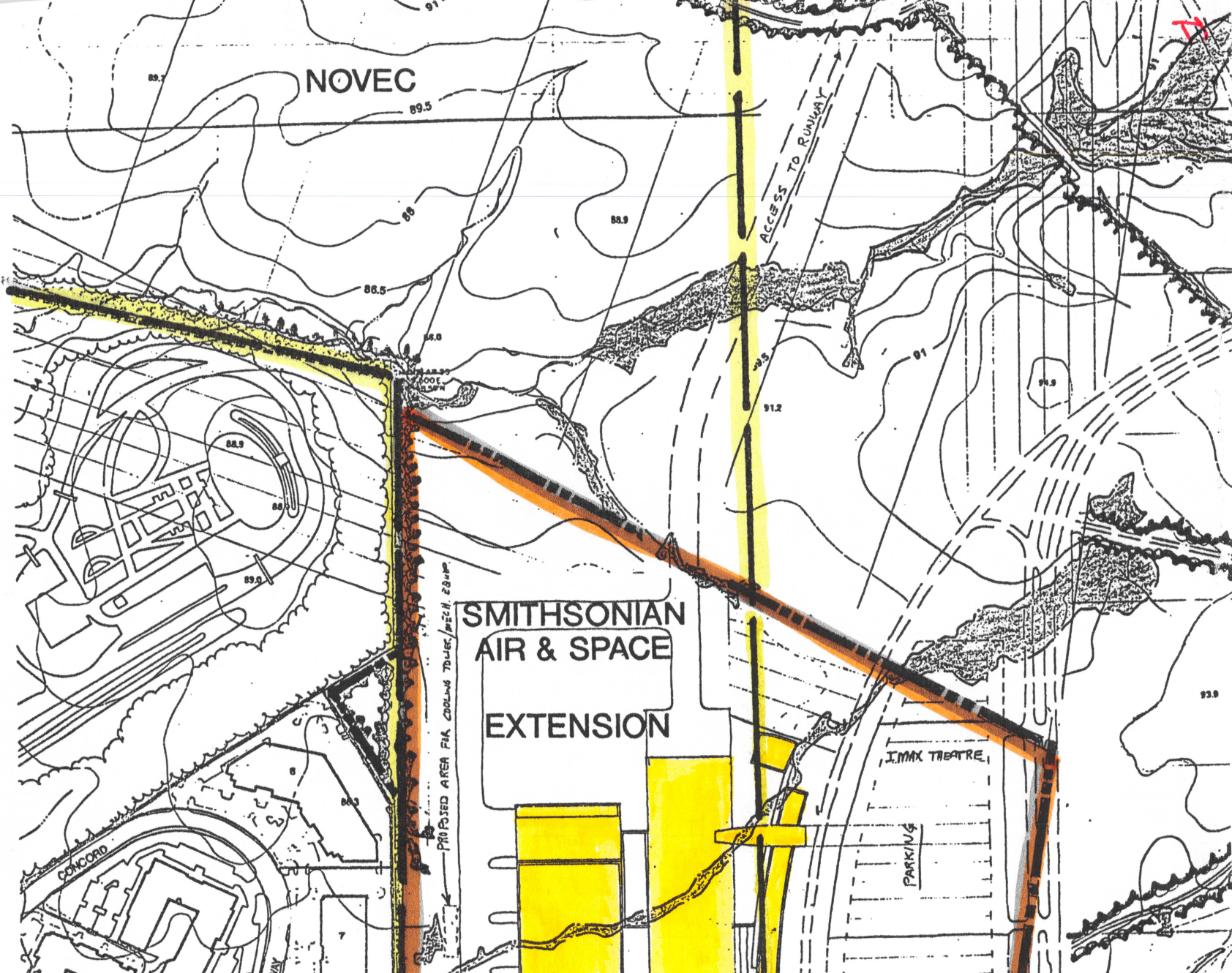
IMAX THEATRE

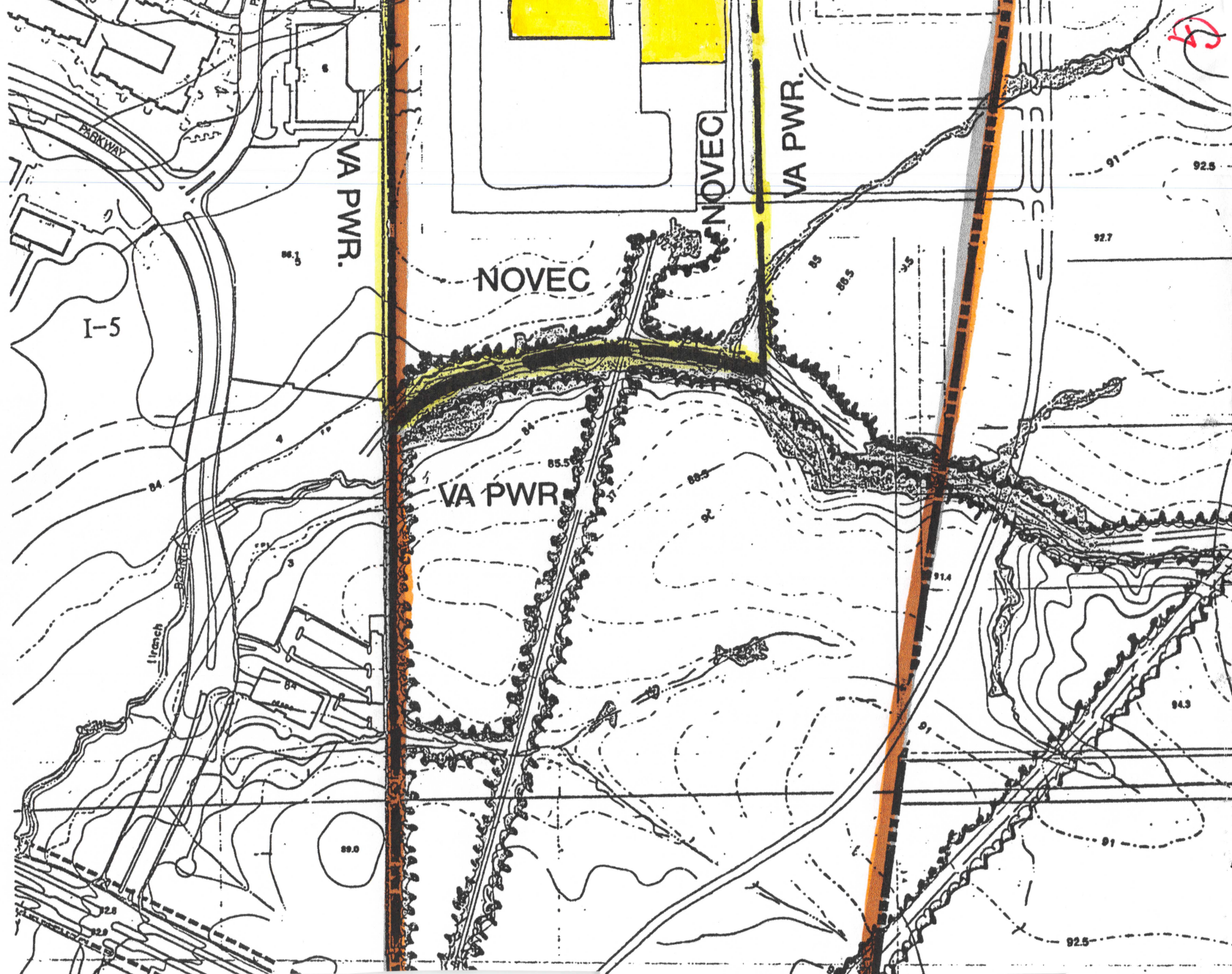
PARKING

PROPOSED AREA VIA COLLING TOWER/NEIGH E&W

CONCORD

WAY





MAP LAYOUT

A

B

C

D

E

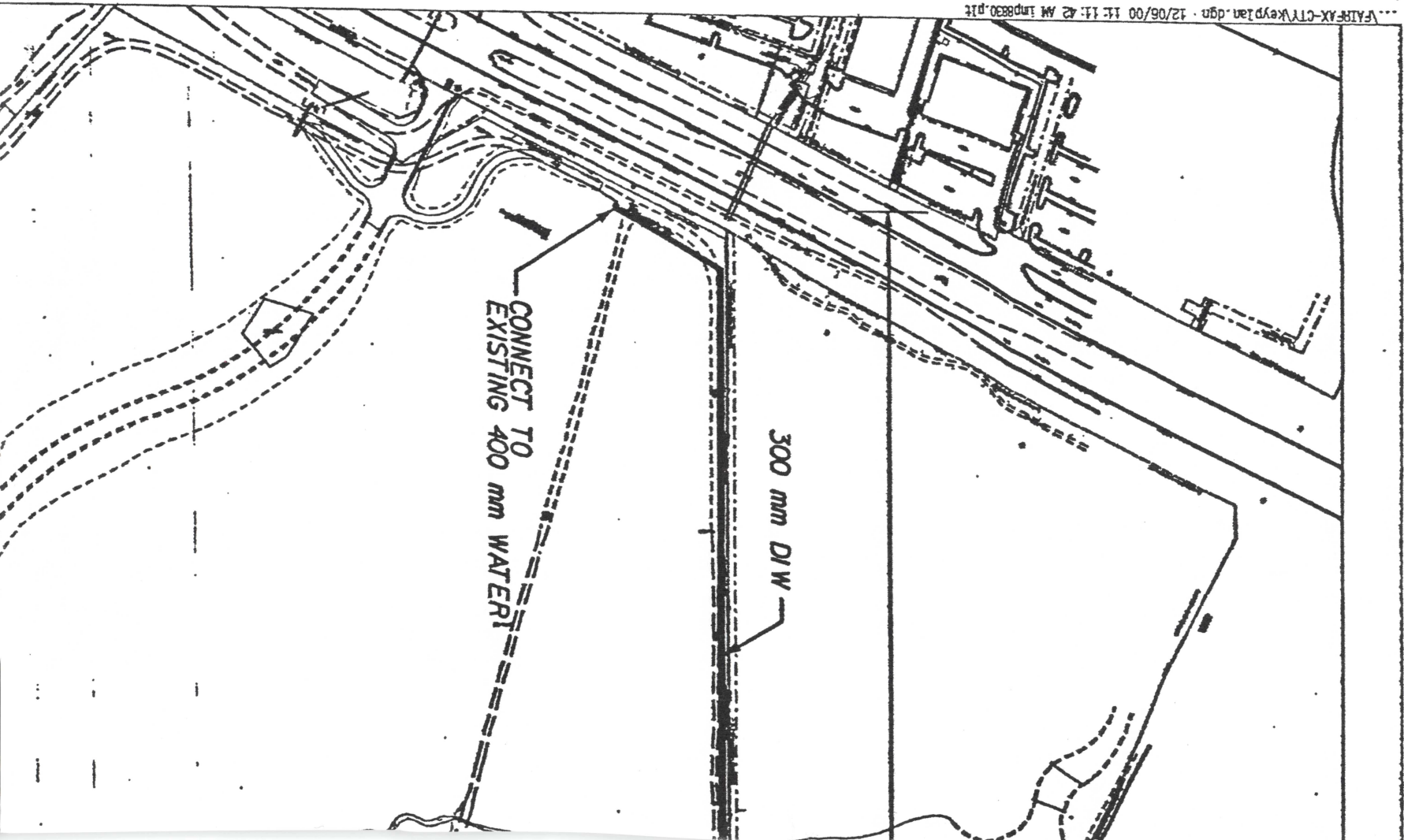
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G

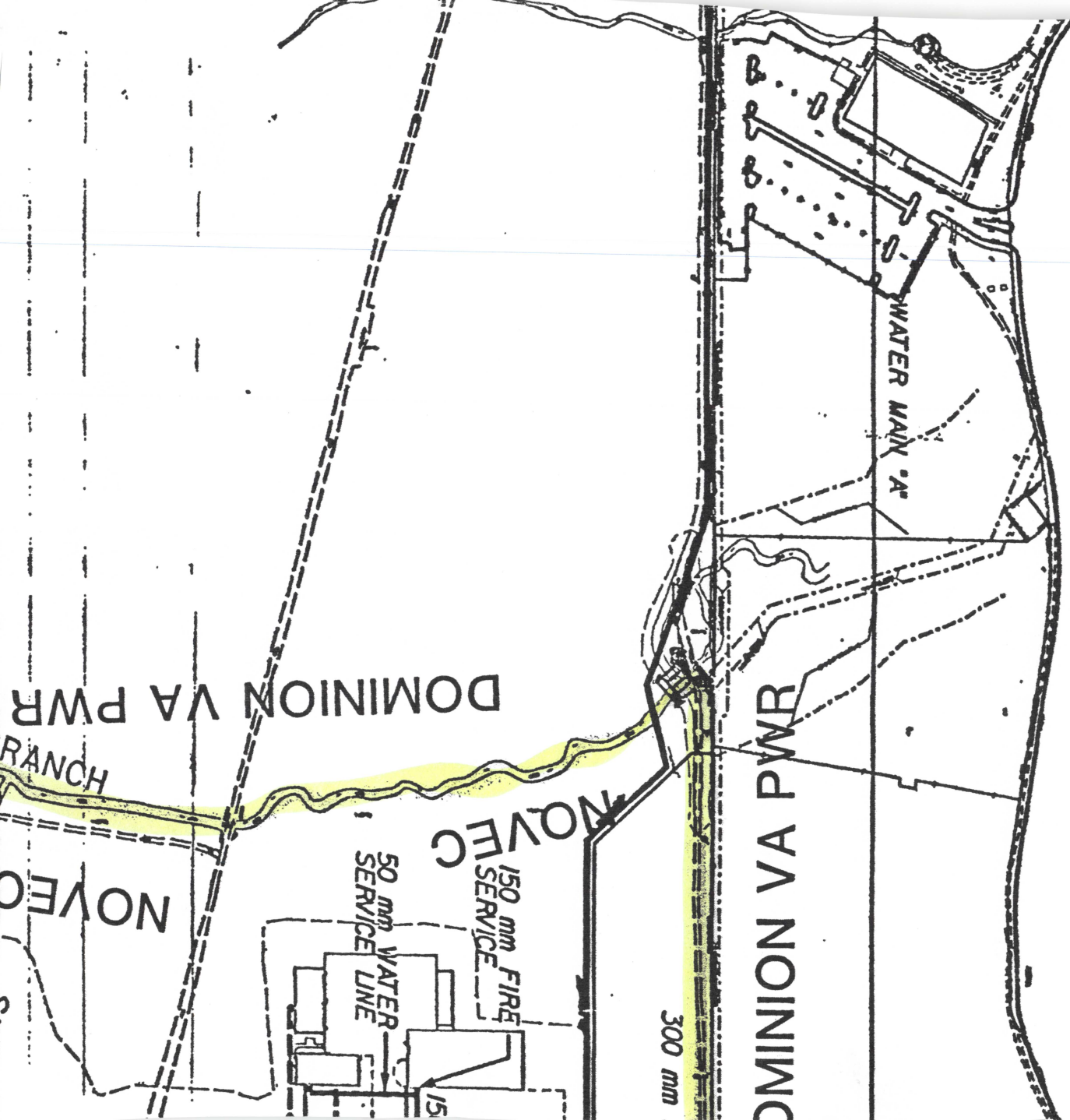
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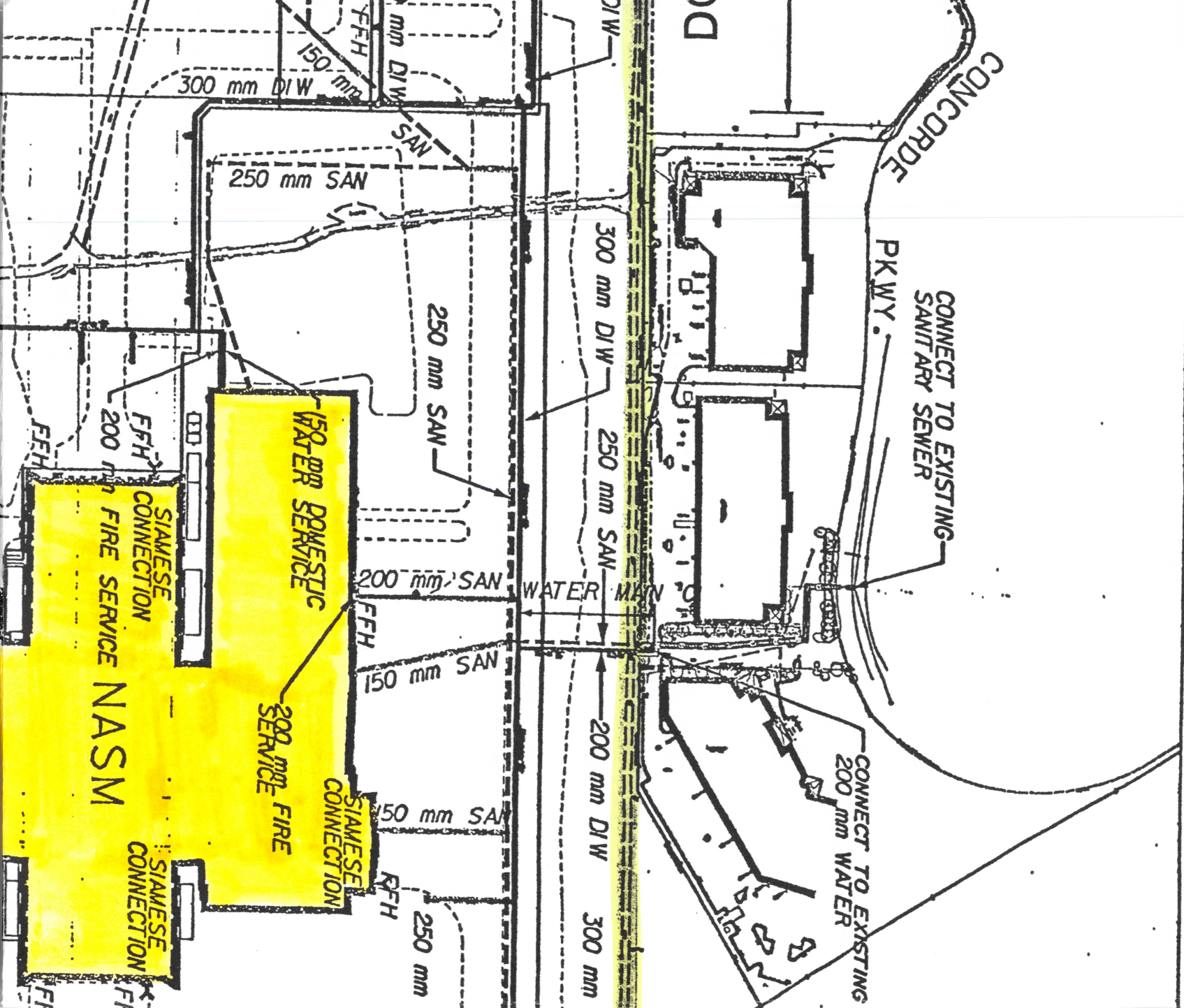
A

...FAIR-AX-CITY\keyplan.dgn - 12/06/00 11:11:42 AM Imp8830.plt

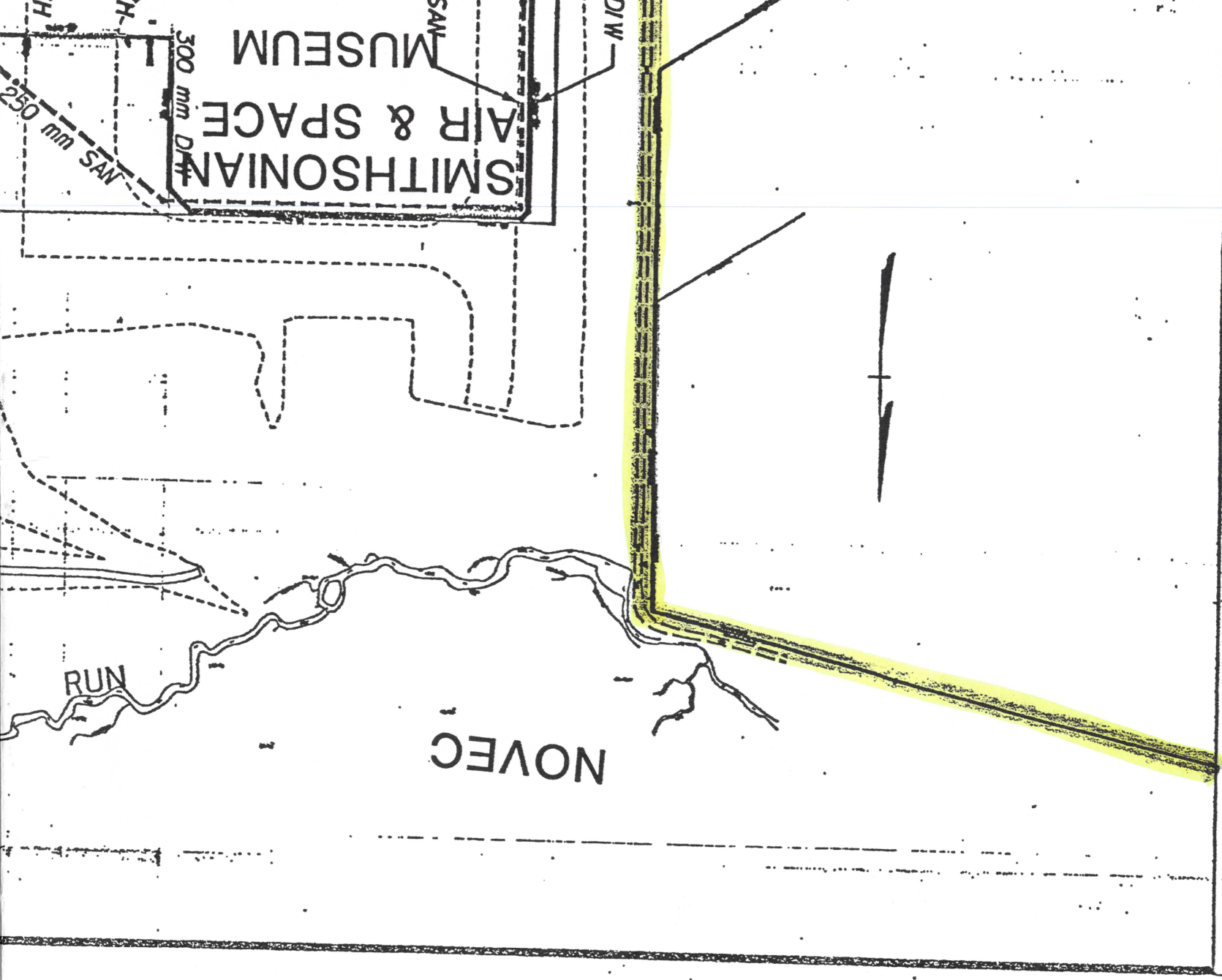


B





1



Dashed line: PROPOSED WATER LINE
 Solid line: PROPOSED SANITARY SEWER
 Dashed line with cross: FLUSH FIRE HYDRANT
 Solid line with cross: FIRE HYDRANT

Intergovernmental Panel on Climate Change

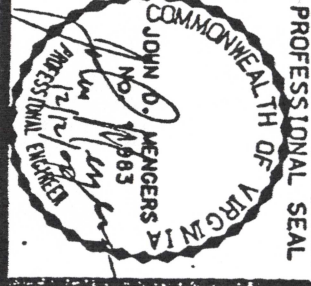
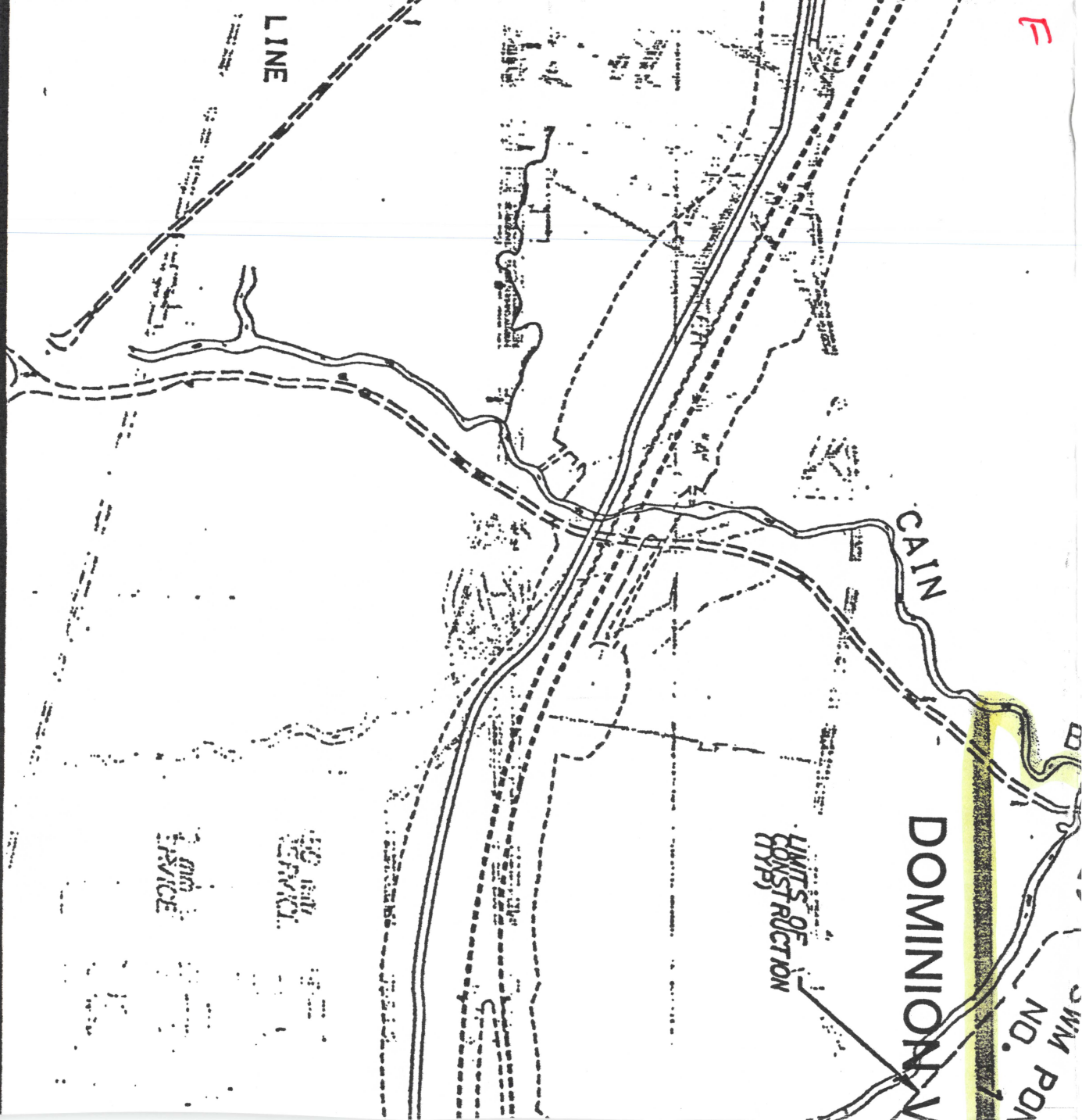
RESEARCH DESIGN

FFH

FH.

[illegible]

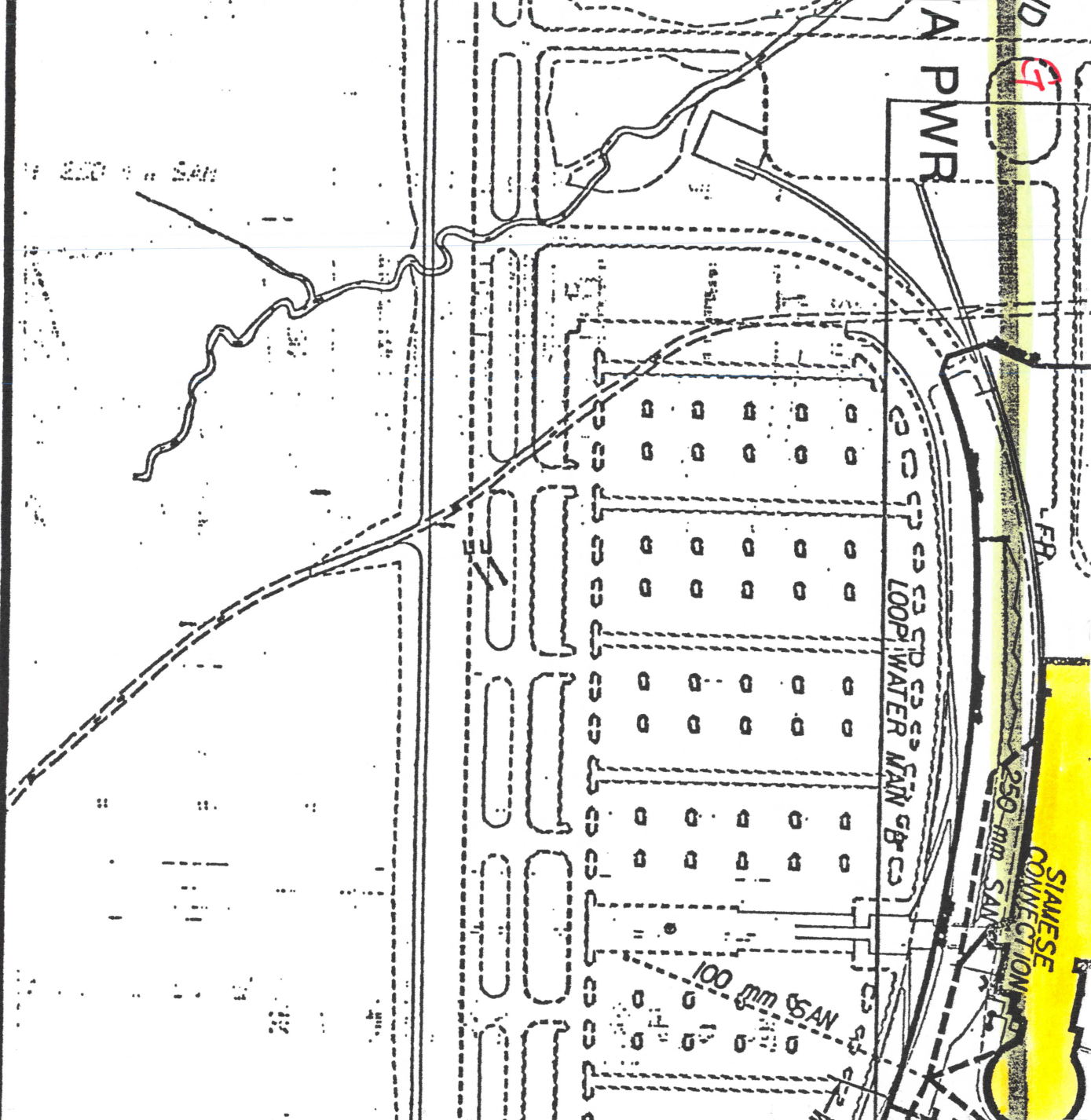
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PROJECT

NATIONAL AIR AND
SPACE MUSEUM
SULLY DISTRICT
FAIRFAX COUNTY, VA

N

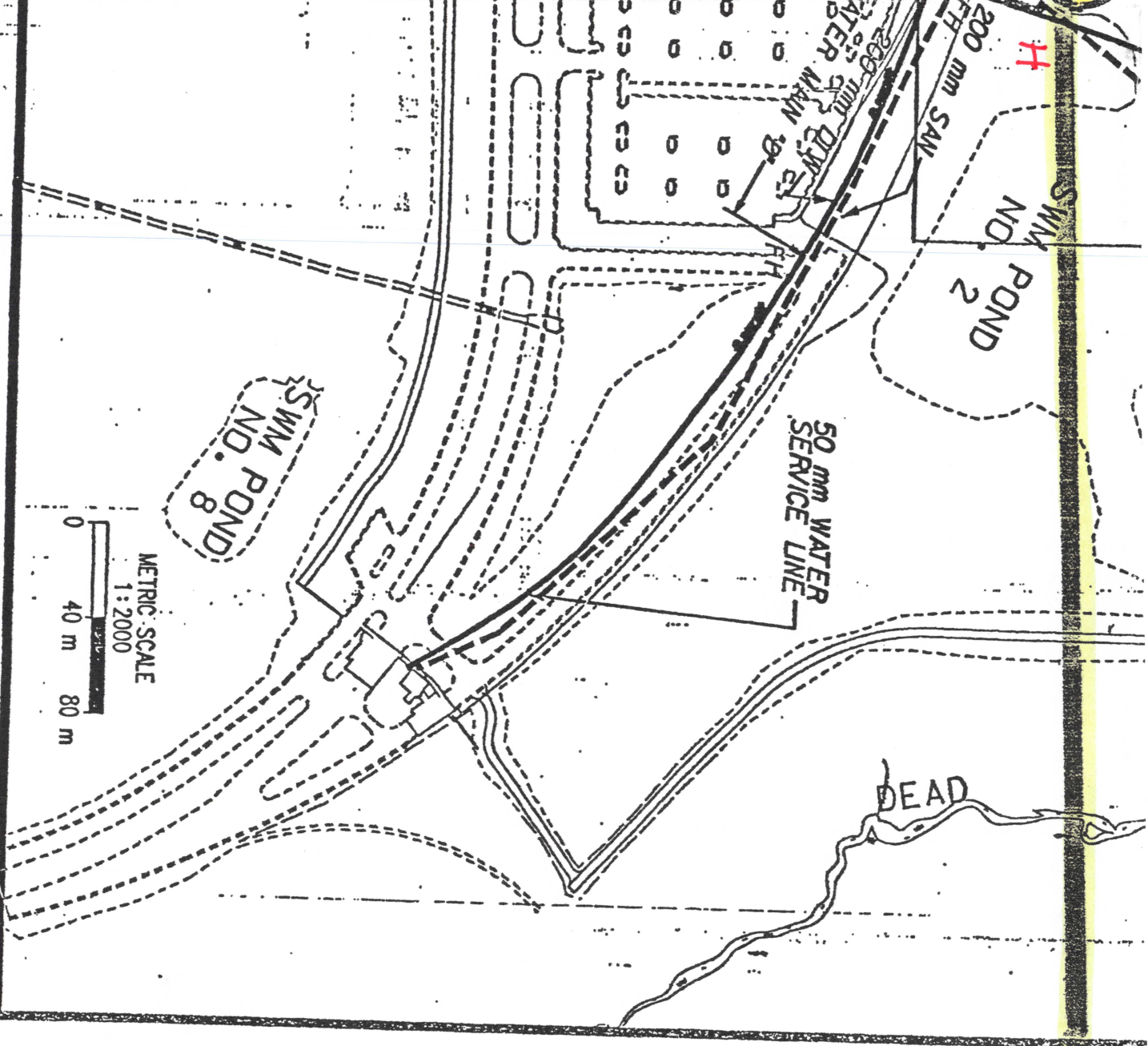


TITLE

OVERALL WATER & SANITARY SEWER PLAN

PHR&

Potton Horrell's Rust
Engineers, Surveyors, Planners
14532 Lee Road,
Chantilly, Virginia 20151
703-449-6700



METRIC SCALE
1:2000
0 40 m 80 m

Associates, P.C.
Landscape Architects
1679

Offices:
Bridgewater, Va.
Leesburg, Va.
Virginia Beach, Va.
Chantilly, Va.
Winchester, Va.
Woodbridge, Va.
Martinsburg, W.V.

DESIGN	PHR&A	DATE	9/26/00
DRAWN	JMS	SCALE	1 : 2000
CHECKED	PDN/JDM	FILE NO.	06154-1-3
SHEET	4 OF 45	DRAWING NO.	C140

MAP LAYOUT

A

B

C

D

E

F

G

H

HERNDON QUADRANGLE
VIRGINIA
7.5 MINUTE SERIES (TOPOGRAPHIC)

380211 92
(S) 54524

(ii SW
RLING) STERLING 0.5 MI.

290

25'

291

2 310 000 FEET

292

293

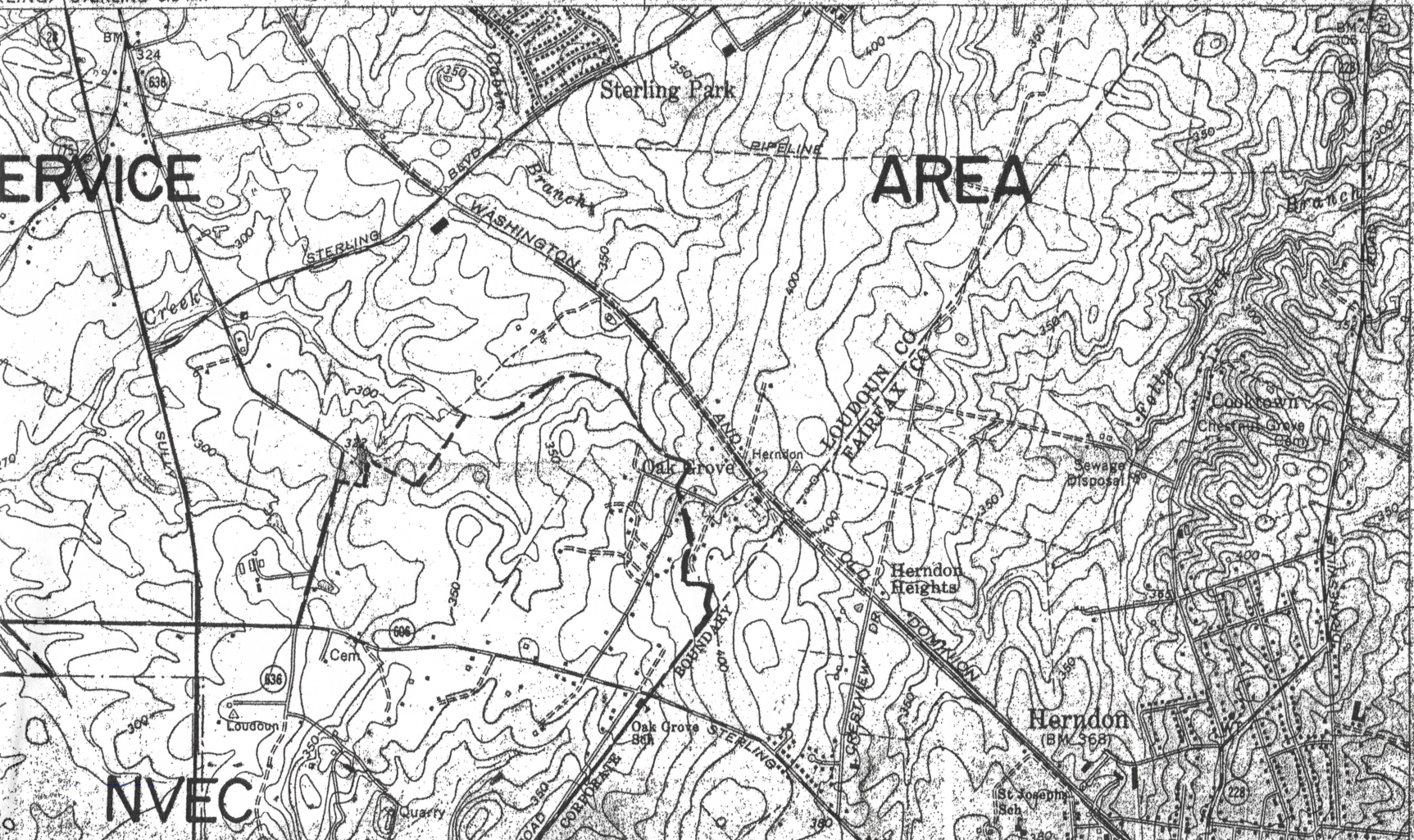
1 MI. TO VA 7

22°30'

39°00'

ERVICE

AREA



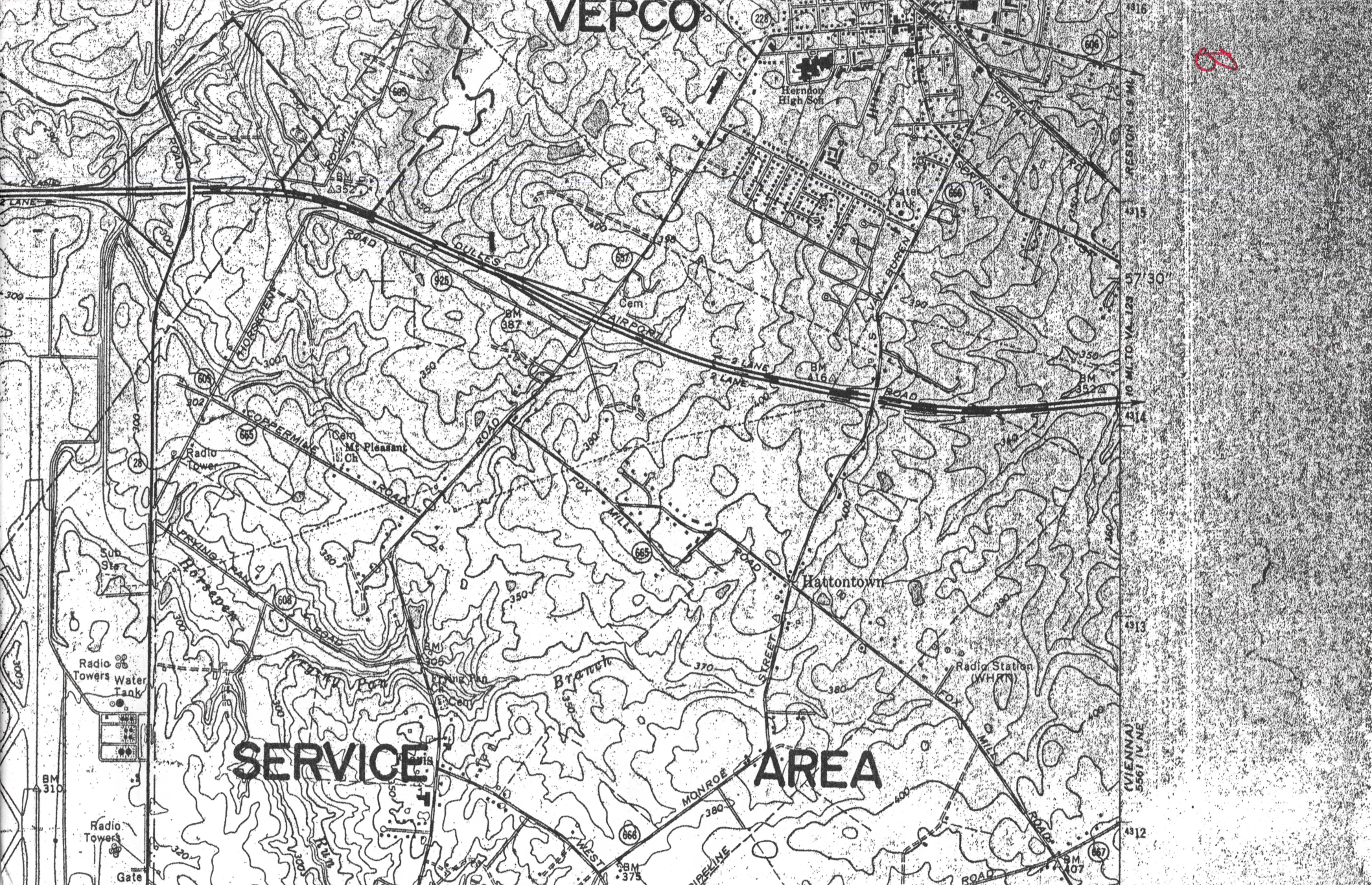
4319

4318

480 000

FEET

NVEC



VEPCO

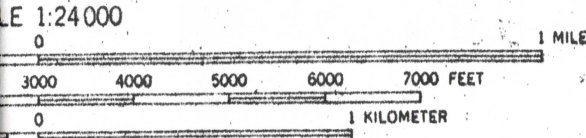
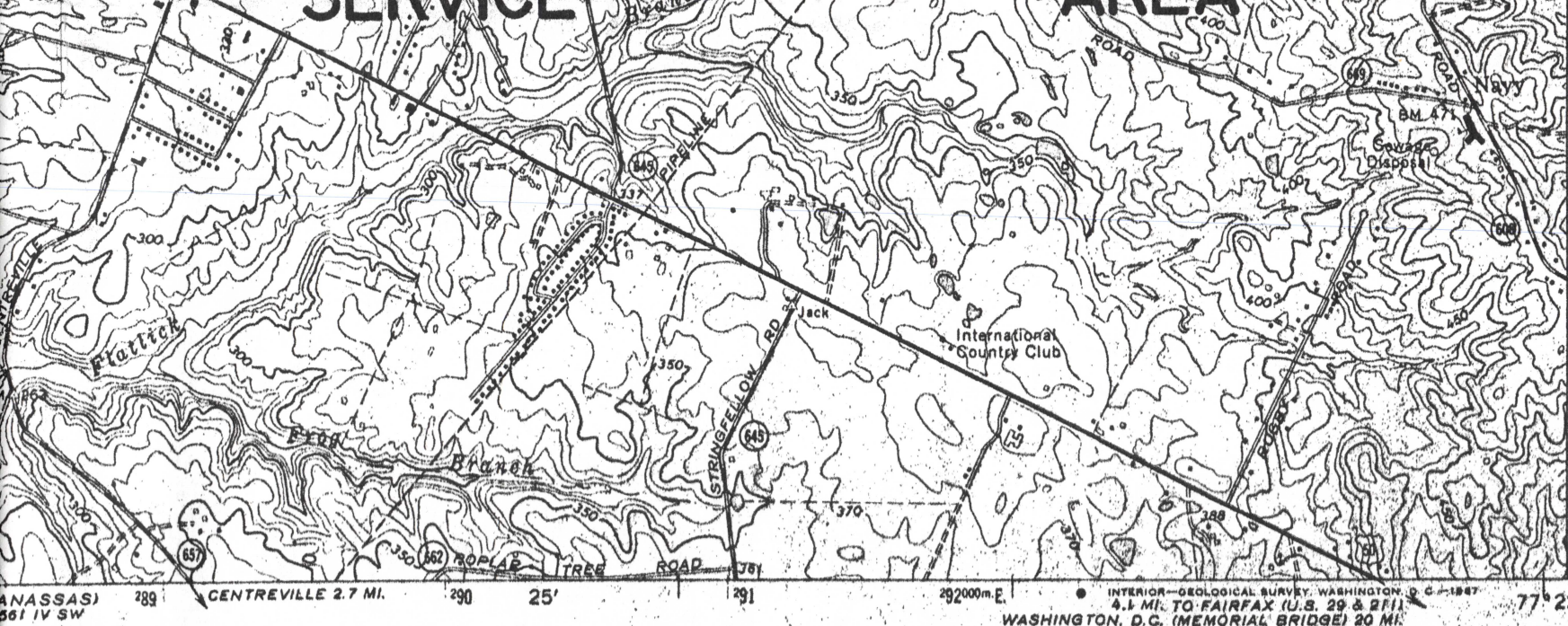
AREA

SERVICE

82

(VIENNA)
5667 IV NE





INTERVAL 10 FEET
MEAN SEA LEVEL

SERVICE AREA SHOWN AGREED CORRECT AS OF

E51

ELECTRIC UTILITIES SERVING THIS AREA

VIRGINIA ELECTRIC AND POWER CO.

NORTHERN VIRGINIA
TRI-COUNTY ELECTRIC COOP.

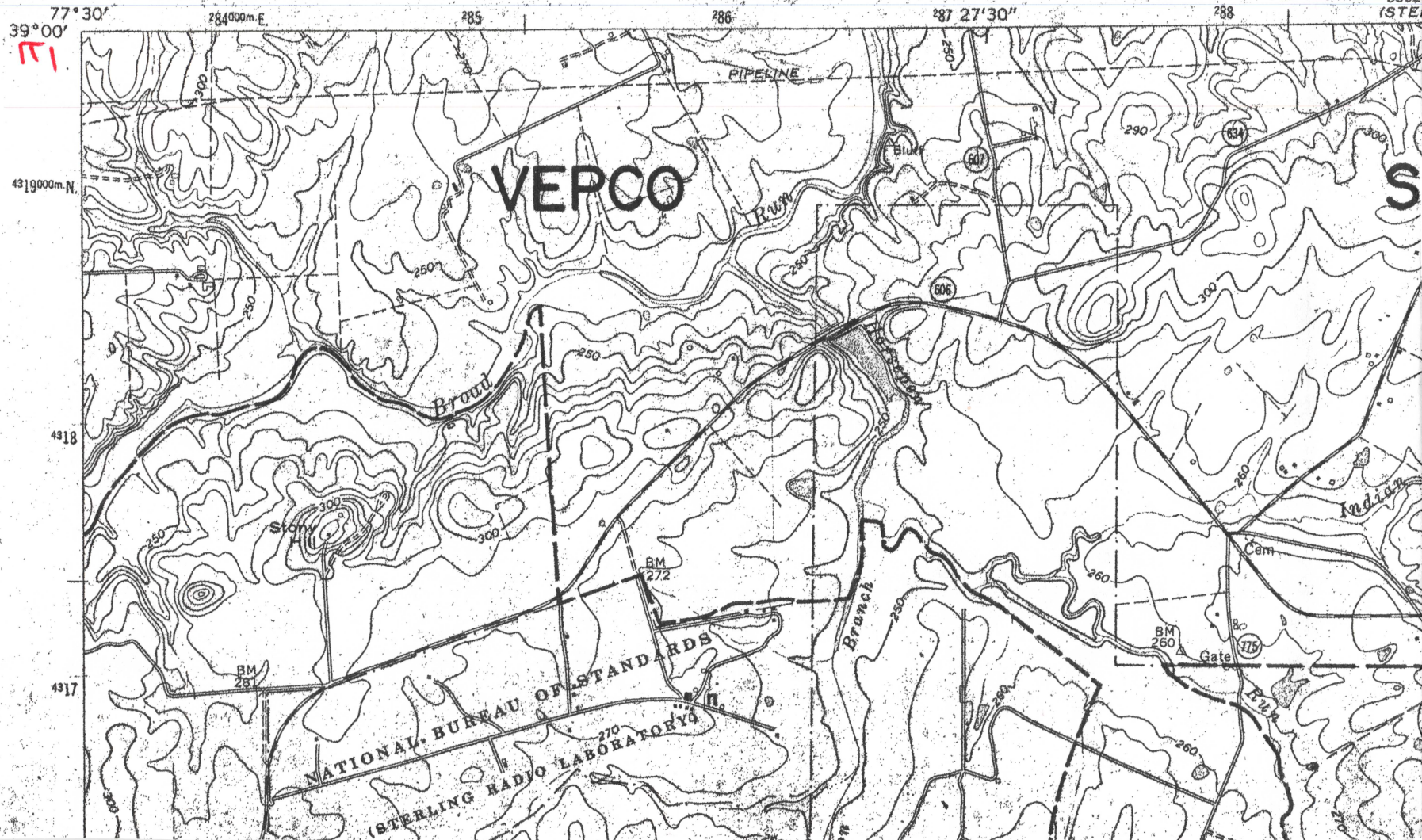
BY H. S. Little DEC 9 1977
DATE

BY Benjamin H. Hefner DEC 9 1977
DATE

REVISED 4-8-83
REVISED 7-2-86
REVISED 6-3-91
REVISED 2-4-97

Sheet 11 SE
(LEESBURG)

UNITED STATES
DEPARTMENT OF THE INTERIOR
GEOLOGICAL SURVEY



**NVEC
SERVICE
AREA**

DULLES INTERNATIONAL AIRPORT

VEPCO

Sewage
Disposal

Parking

Stallion Cem

BM
311

BM
287

BM
288

BM
294

Gravel
Pit

57°30"
ARCOLA 2.7 MI

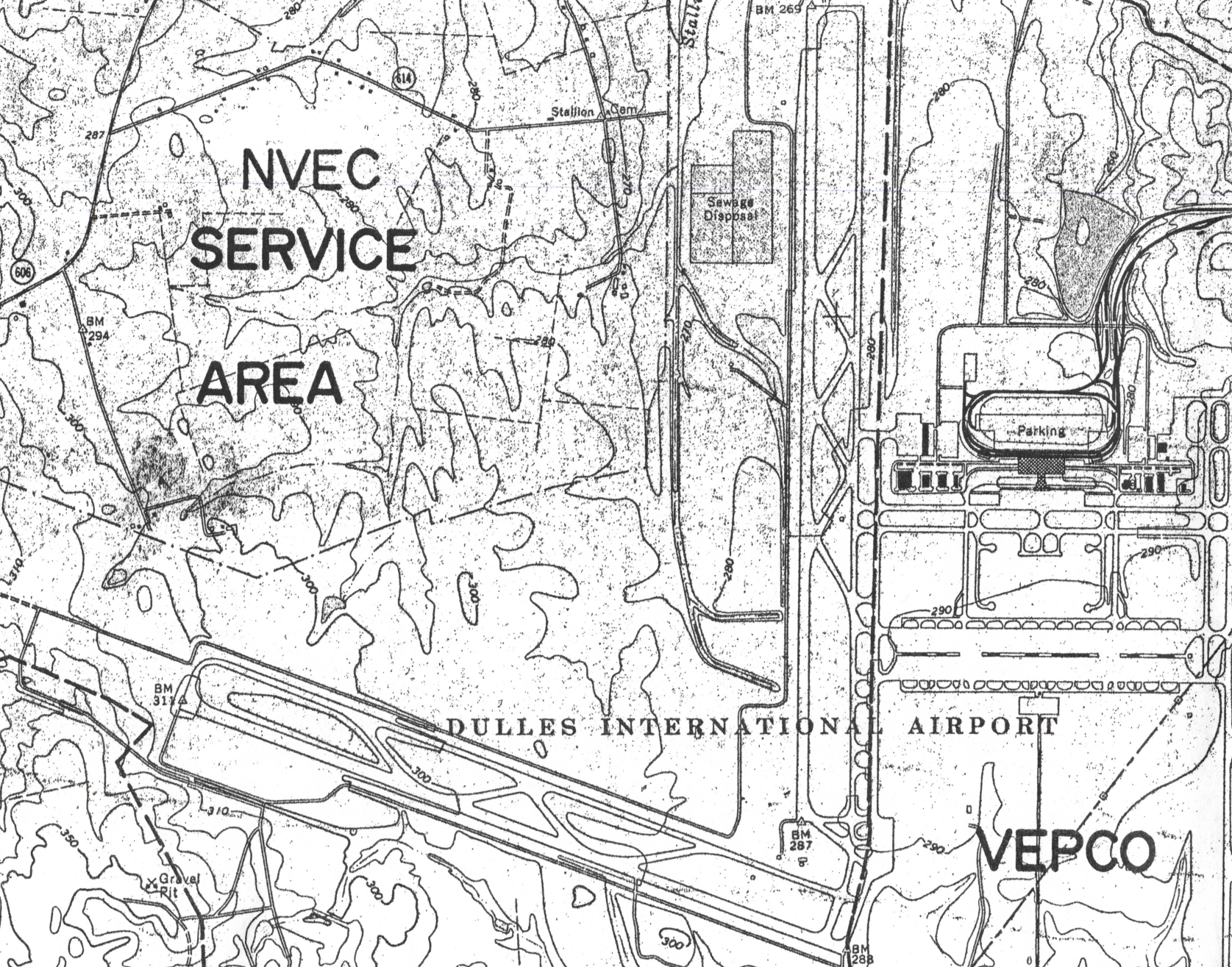
5461 (NE
ARCOLA)

4316

4315

4314

4313



4312



VEPCO

MIDDLEBURG 14 MI.
7 MI. TO U.S. 15

55'

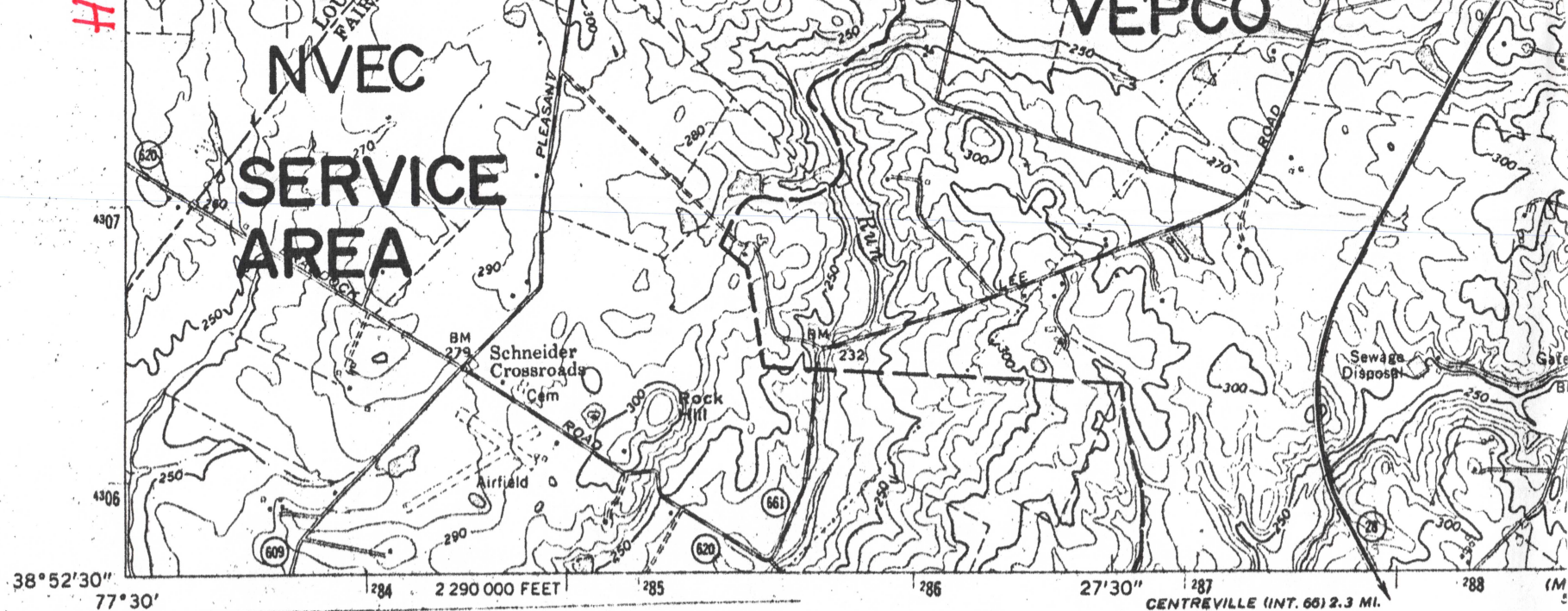
4310

4309

450 000
FEET

4308





COMPILED FROM U. S. GEOLOGICAL SURVEY MAP

ELECTRIC UTILITY SERVICE AREAS COMMONWEALTH OF VIRGINIA

**STATE CORPORATION COMMISSION
RICHMOND, VIRGINIA**



Corporate Office
10323 Lennard Drive
P.O. Box 2710
Manassas, VA 22110
(703) 335-0900

Gainesville Technical Center
5399 Wellington Road
P.O. Box 310
Gainesville, VA 22065
(703) 754-6700

Leesburg Office
349 East Market Street
P.O. Box 1320
Leesburg, VA 22075
(703) 777-7041

Middleville Office
14500 Middleville Road
P.O. Box 1499
Woodbridge, VA 22193
(703) 878-8100

Stafford Office
2430 Poplar Road
P.O. Box 721
Friedricksburg, VA 22406
(703) 752-5008

August 21, 1996

Mr. Wayne H. Atkinson
HOK Architects, Inc.
300 Executive Center Drive
Greenville, SC 29615

Dear Mr. Atkinson:

The following is information regarding the proposed National Air & Space Museum Extension at the Dulles International Airport in Fairfax County, Virginia. For your information I have enclosed a copy of both NOVEC's Large Power Service Rate Schedule (PS-10A) and Interruptible/Curtailable Service Rate Schedule (IS-3). Also enclosed is a copy of the site plan depicting the service boundary between NOVEC and Virginia Power. As we discussed briefly on Friday morning, both rate schedules allow for a 10 percent discount on energy and demand charges if service is received at primary voltage. NOVEC's primary voltage available for this site is 34.5 kV/19.9 kV. If service is taken at the primary voltage, NOVEC does offer an operations and maintenance agreement for the customer's primary voltage distribution system.

In reviewing the alternatives for the central plant, I noticed that ice storage was an alternative listed for meeting the museum's cooling requirements (Page M-5-26). NOVEC is an electric distribution cooperative, and our purchased power costs are driven primarily by a monthly peak demand charge which is determined when the statewide transmission grid is at its maximum capacity for the month (referred to as the coincident peak). One way NOVEC has chosen to reduce this demand charge is by implementing an interruptible/curtailable rate schedule. NOVEC's large industrial customers who can reduce their power requirements during our coincident peak with the statewide grid each month are credited \$8.10 per kW that is shifted off peak. Although at this time NOVEC does not offer a thermal rate schedule, the Customer Services Division does welcome the opportunity to develop such a rate schedule that would result in a win/win situation for your client and NOVEC. I have also enclosed a rate comparison between NOVEC's Large Power Rate Schedule and the Interruptible/Curtailable Rate Schedule applying various load factors with a set demand of 7.5 MW. A reduction of 1200 kW - 3500 kW was assumed for peak purposes.

Equal Opportunity Employer

Mr. Wayne K. Atkinson
HOK Architects, Inc.
August 21, 1996
Page 2

I hope this information will be of value to you and your client. If you have questions or need further clarification regarding NOVEC's rates or services, please feel free to call me directly at (703) 392-1504.

Sincerely,



Gilbert D. Jaramillo
Director, Commercial/Industrial Services

Enclosures

cc: R. Skewes
J. Moxley

bcc: M. Dailey
F. Mezzanotte

Corporate Office
10321 Lomond Drive
Manassas, VA 20109
Mailing Address
P.O. Box 2710
Manassas, VA 20108
(703) 315-0500

Gainesville Technical Center
5399 Wellington Road
Gainesville, VA 20155

Leesburg Office
349 East Market Street
Leesburg, VA 20176

Minerva Office
14500 Minerva Road
Woodbridge, VA 22193

Stafford Office
2430 Poplar Road
Fredericksburg, VA 22406

December 20, 1996

Robert A. Weisman
Chief, Energy Management Branch
Smithsonian Institution
955 L'Enfant Plaza, SW
Suite 3230
Washington, DC 20024

Dear Mr. Weisman:

First of all, let me say it was a pleasure to finally meet the staff from the Smithsonian Institution and the National Renewable Energy Laboratory. I truly respect and admire the commitment that the NREL has made to building the world's largest operating photovoltaic system.

As a follow-up to our meeting, I have estimated the electrical cost (\$/kWh) that the Smithsonian may incur on a monthly basis using NOVEC's present Interruptible/Curtailable Rate Schedule (IS). Customers costs billed under the IS rate schedule are driven primarily by a coincident peak that is established each billing period. The coincident peak demand is the real power demand (kW) that is measured during the time period in which maximum power requirements are needed throughout the state of Virginia. This time period is also our load control period in which we call upon our load curtailable customers to switch over to stand-by generators or reduce their kW demand by shutting down their operations. NOVEC purchases its power based on the coincident peak demand set each month. By controlling the coincident peak demand, NOVEC is able to avoid the cost of \$16.51 per kW that is reduced. For this reason, NOVEC is also able to pass on to the interruptible/curtailable customers a credit for reducing NOVEC's coincident demand.

NOVEC's IS rate is offered to all customers that have the capability to curtail/interrupt their power demands and have a monthly kW demand of at least 300 kW. NOVEC at the present time has nine industrial type customers on this rate tariff. Luck Stone, Vulcan Materials, Loudoun Quarry, Bull Run Stone Co., Health Textile Services, County of Loudoun, Upper Occoquan Sewage Authority, Julius Branscome Paving, and the Virginia Paving Co. These businesses have been able to realize significant savings by reducing their electrical demand during NOVEC's coincident peak period. Reduction has been either by partial on-site generation or by curtailing demand. If the Air & Space Museum were to utilize ice storage at this facility, whereby the centrifugal chillers electrical demand would be off-peak, substantial savings could be realized under a curtailable/interruptible rate schedule. Control periods are very predictable, whereby the notification and schedule to make ice or not can be achieved to assure that the peak demand is reduced.

Equal Opportunity Employer

The following assumptions were used for this analysis:

1. 7.5 MW maximum demand
2. Wholesale power cost adjustment -.00194 \$/kWh (1996 average)
3. Electric Service is taken at the primary voltage (10% Discount on energy and demand charges)

Scenario #1A.

Customer's monthly load factor is 40%
Customer is able to shift off peak 2000 kW
Customer cost: .0608 \$/kWh

Scenario #1B.

Customer's monthly load factor is 40%
Customer is able to shift off peak 3000 kW
Customer cost: .0570 \$/kWh

Scenario #2A.

Customer's monthly load factor is 50%
Customer is able to shift off peak 2000 kW
Customer cost: .0551 \$/kWh

Scenario #2B.

Customer's monthly load factor is 50%
Customer is able to shift off peak 3000 kW
Customer cost: .0521 \$/kWh

Scenario #3A.

Customer's monthly load factor is 60%
Customer is able to shift off peak 2000 kW
Customer cost: .0513 \$/kWh

Scenario #3B.

Customer's monthly load factor is 60%
Customer is able to shift off peak 3000 kW
Customer cost: .0488 \$/kWh

As you can see, unit costs (\$/kWh) under this rate schedule are driven primarily by load factor and on the available curtailable capacity. One NOVEC customer has been able to reduce electric costs to as low as \$.04/kWh by utilizing existing standby generators and maintaining a load factor of 80%.

As you are probably aware of, the electric utility industry is going through a dramatic change in the way in which electric service is marketed. Investor-owned electric utilities are frantically positioning themselves for deregulation by unbundling their services into generation (GENCOS), transmission (TRANCOS), distribution (DISCOS), and energy (ESCOS) type services. As you may know, NOVEC is one of twelve distribution cooperatives in the state of Virginia, Maryland, and Delaware that purchase all their power requirements through the Old Dominion Electric Cooperative (ODEC). ODEC is a generation and transmission company operating in the State of Virginia with the sole purpose of providing power to the twelve distribution cooperatives. With this relationship between the distribution cooperatives and ODEC, NOVEC is already structured to provide local distribution services to our customers.

As a cooperative, the customers are the owners of NOVEC. Providing excellent customer service is not a new concept for NOVEC, we realize that keeping the power on is of paramount importance to our customers as well as delivering it at a reasonable cost. Also, as a small company in respect to the larger investor-owned utilities, NOVEC is able to quickly address any customer problems or concerns that may arise from time to time.

Some services that NOVEC offer include:


- Power Quality • Power Factor Correction • Demand Limiting Controls
- Energy Audits • Real-time metering data
- Maintenance & Operation Agreements • 24 hr direct access to account representative
- Design Engineering & Construction for privately owned electric distribution facilities

Currently, NOVEC is re-building a government owned electric distribution system. Our scope of energy services are by no means limited to those listed, but should serve as a basis for our core services offered. NOVEC has taken the stance that we are here to assist our commercial/industrial/government customers be more competitive and efficient in their respective markets. Energy costs are generally a significant cost item for any business. NOVEC stands ready to assist our customers evaluate their energy needs and offer recommendations that are energy wise and have proven to be environmentally friendly.

Also, as we discussed during our meeting, the Smithsonian Institution would be a federal government agency operating in the state of Virginia, thereby not falling within the jurisdiction of the State Corporation Commission as it pertains only to the purchase price of electric service. NOVEC's position is that we have the obligation to serve all electrical loads that are within NOVEC's service territory as defined by the State Corporation Commission of Virginia. With this in mind, we look forward to working with the Smithsonian Institution in the coming new year and developing a rate schedule that would mutually benefit the Smithsonian and NOVEC.

I hope that this information will be of value to you and your organization and has answered your specific questions. If you have any further questions or would like further clarification on any item I have discussed, please feel free to call me at your earliest convenience. My direct number is (703) 392-1504.

Sincerely,



Gilbert D. Jaramillo
Director
Commercial/Industrial Services

Enclosures

cc: Melinda Humphry
Barry D. Jones



Corporate Office
10323 Lomond Drive
P.O. Box 1710
Manassas, VA 22110
(703) 335-0500

Gainesville Technical Center
5399 Wellington Road
P.O. Box 310
Gainesville, VA 22065
(703) 754-6700

Leesburg Office
349 East Market Street
P.O. Box 1320
Leesburg, VA 22075
(703) 777-2041

Mineralville Office
14500 Mineralville Road
P.O. Box 1459
Woodbridge, VA 22193
(703) 878-6100

Stafford Office
2430 Poplar Road
P.O. Box 221
Fredericksburg, VA 22406
(703) 752-1008

November 17, 1998

Mr. Robert A. Weisman, C.E.M.
Smithsonian Institution
955 L'Enfant Plaza, SW
Suite 3230
Washington, DC 20024

Dear Mr. Weisman:

First of all, let me state that NOVEC is pleased to hear that the Smithsonian Institution is moving forward with the National Air & Space Museum Extension at the Dulles International Airport in Fairfax, Virginia. We believe the presence of such an institution in Fairfax County will add tremendous value to the citizens of the Commonwealth as well as provide an ideal location for your museum and exhibits.

As I have stated previously, it is NOVEC's belief that we are the electric utility entitled to serve the Smithsonian's facility in Fairfax County. Our understanding of Virginia Codes §56-265.3 and §56-265.4 provides for exclusive service territory protection. The commission and the courts have interpreted that Virginia Law provides for the utmost protection of territorial grants. The Virginia Supreme Court has even stated that the exclusive right to serve is a "franchise" and "a valuable property right" that "is entitled to the protection of the courts."

To further affirm NOVEC's position, the Virginia Commission recently denied RGC Mineral Sands, Inc.'s petition to have Virginia Power serve their facility in Sussex County, Virginia. RGC owned contiguous property within the service territory of Virginia Power and Prince George Electric Cooperative. It was RGC's intention to build and operate a processing plant in Prince George Electric Co-op's service territory with a 34.5 kV electric distribution system extending to Virginia Power's service territory for delivery of power. The commission ruled against the point of delivery as a means to establish the supplying utility. The commission further stated, "We cannot allow the parties to use this device to do indirectly what clearly cannot be done directly." Please see attached copy of the order issued June 25, 1998, Case No. PUE960295.

Mr. Robert A. Weisman, C.E.M.
Smithsonian Institution
November 17, 1998
Page 2

This information is in no way intended to create an adversarial relationship but rather to display NOVEC's genuine interest and commitment to serve all our customers within our certificated territory. We are ready and look forward to developing a mutually rewarding rate schedule that would leverage the innovative electro-technologies planned for this facility.

Please feel free to call me at your earliest convenience to arrange for an appointment so that we may begin to address your specific needs for temporary power and permanent service. My direct number is (703) 392-1504.

Sincerely,

A handwritten signature in black ink, appearing to read "Gilbert D. Jaramillo", written over a horizontal line.

Gilbert D. Jaramillo, C.E.M.
Director, Commercial/Industrial Services

Attachment

cc: M. Dailey
J. Moxley

January 25, 1999



VIRGINIA POWER

Mr. Robert A. Weisman
Chief, Energy Management Branch
Smithsonian Institution
Office of Physical Plant
955 L'Enfant Plaza, SW, Suite 3230
Washington, DC 20024-2119

Re: Proposed Dulles Smithsonian Facility

Dear Bob,

As discussed by phone, Virginia Power has the facilities available on Route 50 adjacent to the Smithsonian property to provide both normal and when required, an alternate source of electricity to your proposed facility.

Approximately two-thirds of the site is in Virginia Power's service area whose boundaries are on three sides. A map of the service area is attached for your information.

If you have any questions, Please call me at 703 359 3055.

Cordially,
Original Signed by:
E. D. Cowell, Jr.
Edward D. Cowell, Jr.
Contracts Administrator

Attachment

cc: NOVEC
Wayne Atkinson
Sam Watkins
Harold Payne *ret*

COOPERATIVE DELIVERY POINT REQUEST

Cooperative NOVEC	Delivery Point Smithsonian	Date of Request 11/17/2000	Target Date 2/28/01
----------------------	-------------------------------	-------------------------------	------------------------

PROJECT DESCRIPTION

☒ New ☐ Conversion ☐ Retirement ☐ Modification

New 34.5 KV delivery point required to supply power to the Smithsonian Air & Space Museum.

PROJECT NECESSITY (include one line, maps, load data, load source(s), other del. points involved, etc.)

Provide service to the new Smithsonian Air & Space Museum. A new delivery point is required because it is more economical than extending existing NOVEC facilities to this remote portion of NOVEC's service territory.

A map showing the proposed location of the delivery point is attached.

DELIVERY POINT INFORMATION

Delivered Voltage (kV)	34.5 kV	Transformer Information		Virginia Power:	Contact:
Metered Voltage (kV)	34.5 kV	Owner	N/A		Tel.
Summer Load (MW)	7.5 Yr 2001	Pri. Voltage	N/A		
Winter Load (MW)	7.5 Yr: 2001	Sec. Voltage	N/A	Cooperative:	Contact: Frank Mezzanotte
# Customers (approx.)	1(Initially)	KVA	N/A	NOVEC	Tel. 703-754-6773

CONSTRUCTION REQUIREMENTS

Virginia Power:

-Virginia Power to extend one of the existing 34.5 KV circuits along Route 50 up to the boundary of NOVEC's service territory behind the Museum building. The required extension is expected to be less than 0.5 miles.

-Metering to be located at the new delivery point.

Cooperative:

NOVEC to extend necessary system beyond the delivery point.

CHARGES/COMMENTS (if applicable)

NOVEC requests data pulses for kWh and kQh.

Point of Interconnection (see attached one-line)

APPROVALS

VIRGINIA ELECTRIC AND POWER COMPANY

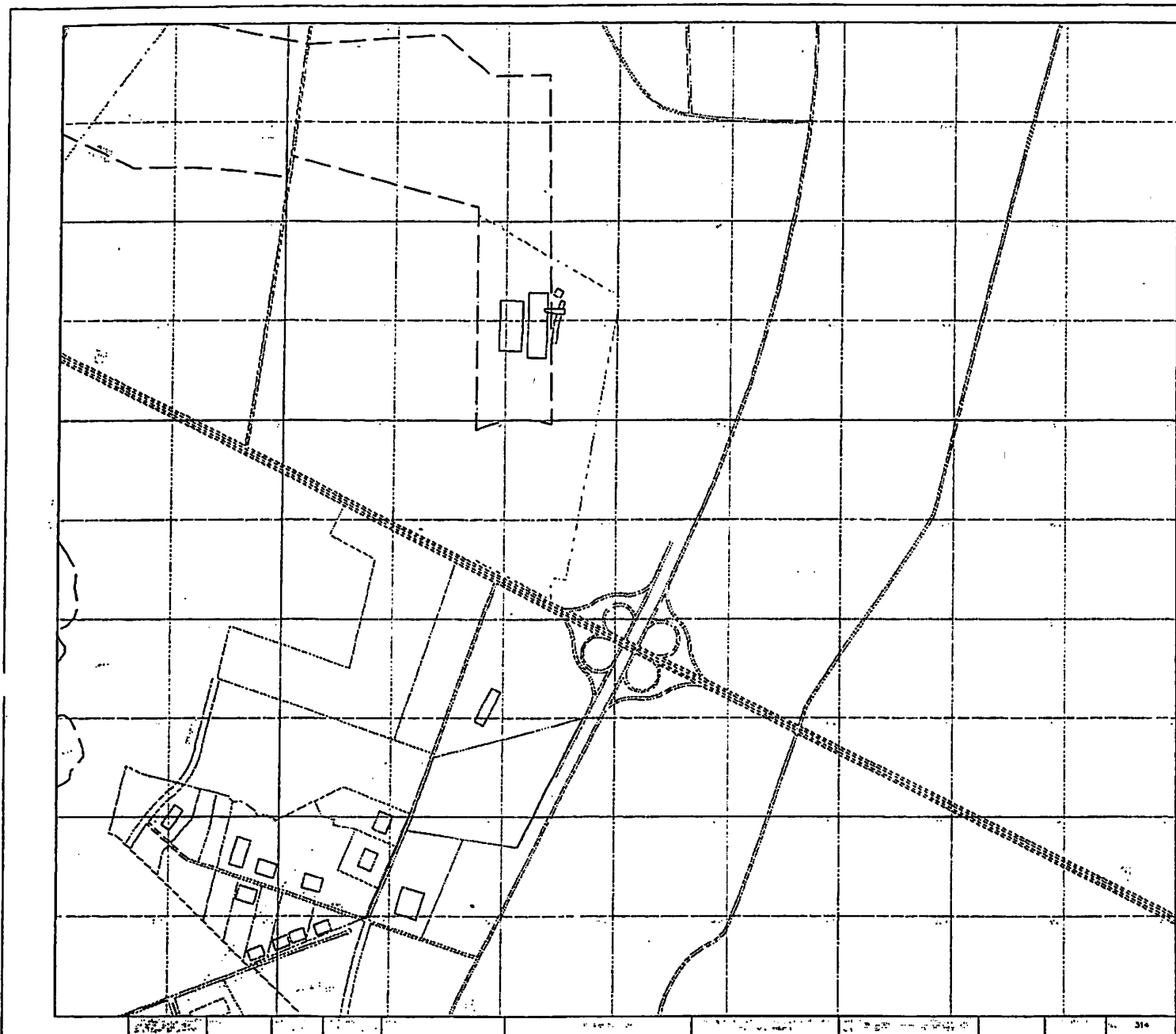
OLD DOMINION ELECTRIC COOPERATIVE

NAME DATE

NAME DATE

TITLE

TITLE





February 7, 2001

Mr. Robert A. Weisman
Chief, Energy Management
Smithsonian Institution
750 9th Street N.W.
Washington, DC 20560-0908

RE: Electrical Service Request – Smithsonian Museum at Dulles

Dear Mr. Weisman:

Dominion Virginia Power has received your request for electrical service dated February 1, 2001. We will be in position to provide the service requested provided we are able to obtain all applicable permits, easements or approvals required for the construction and placement of our facilities.

We will coordinate the details of the final design with Mr. Golden as directed in your letter. We anticipate these details and specifications are similar to the specifications and electrical load requirements provided previously by Mr. David Chow of HOK engineering. If this is the case, we anticipate there will be no line extension charges for providing underground service. We will prepare and forward the associated "Agreement for the Purchase of Electricity" covering this service installation once our engineering has been completed.

It is our understanding that the electrical ductbank is being constructed by VDOT in accordance with MWAA's requirements and HOK's design. A representative of Dominion Virginia Power should be provided the opportunity to inspect the ductbank construction. This activity may be coordinated by contacting Mr. Jeff Garrison, Fairfax Construction Supervisor, at 703-934-2584.

With regards to the application of the Tax Effect Recovery Factor (TERF) to the fair market value of the ductbank: TERF is not a tax imposed on our customers. It is an approved tariff to recovery the tax implications imposed upon Dominion Virginia Power for contributions in aid of construction (CIAC) as defined by the IRS subsequent to the Tax Reform Act of 1986 (these CIAC's may be in monetary or non-monetary form). In this specific case, the requirement of the ductbank was stipulated by MWAA, not Dominion Virginia Power. For instances such as this, where the customer will also continue to own and maintain the ductbank asset, Dominion Virginia Power may avoid initial collection of the TERF. This is accomplished by executing an "Agreement for the Installation, Maintenance, Alteration and Use of Fixed Items" (example copy attached).

We look forward to meeting the electrical service needs of the Smithsonian facility at Dulles International Airport. Should you have any questions, please feel free to contact me at 703-359-3055, or Mr. John Caskey, Dominion's Account Manager assigned to Smithsonian, at 703-359-3059.

Cordially,

Original Signed By
E. D. COWELL, JR.

Edward D. Cowell, Jr.
Customer Contracts Administrator
Dominion Virginia Power

Cc: Mr. John Caskey
Mr. Jeff Garrison
Mr. James C. Moxley – NOVEC

April 6, 2001

VIA FEDERAL EXPRESS

Ms. Cynthia D. Bothwell, P.E.
Transmission Planning Engineer
Old Dominion Electric Cooperative
Innsbrook Corporate Center
4201 Dominion Boulevard
Glen Allen, Virginia 23060

Dear Cindy:

This is in response to your November 22, 2000, request for a new delivery point to enable your member cooperative, Northern Virginia Electric Cooperative ("NOVEC"), to provide electric service to the Smithsonian Institution's new museum facility at Dulles (the "Facility"). For the following reasons, Dominion Virginia Power is denying Old Dominion's request.

As you know, the Smithsonian has requested that Dominion Virginia Power provide electric service to the Facility. In addition, the Facility is located largely in Dominion Virginia Power's certificated service territory. For these reasons, and in accordance with the Smithsonian's stated preference, Dominion Virginia Power will be serving this load.

Specifically, on February 1, 2001, Dominion Virginia Power received a formal written request from the Smithsonian to provide electric service to the Facility. As already noted, a significant portion of the Facility is located within the certificated service territory of Dominion Virginia Power. Accordingly, under Virginia law, Dominion Virginia Power has both the right, and the obligation, to provide service to those portions of the Facility located within its service territory.

Furthermore, the Smithsonian requested that Dominion Virginia Power provide electric service to the entire Facility. In a letter dated February 6, 2001, responding to the Smithsonian's request for service, Dominion Virginia Power agreed to serve the Facility, provided that Dominion Virginia Power is able to obtain all applicable permits, easements or approvals required for the construction and placement of the necessary distribution facilities. (We provided a copy of our February 6, 2001 response to NOVEC.) The service arrangements between Dominion Virginia Power and the Smithsonian are now being finalized.

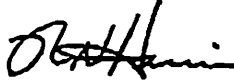
Ms. Cynthia D. Bothwell, P.E.

Page 2

April 6, 2001

If you have any questions, please let me know.

Sincerely,

A handwritten signature in black ink, appearing to read "R. N. Harris". The signature is stylized with a large, looped "H" and a trailing flourish.

R. N. Harris

Sr. Customer Contracts Administrator

cc: Mr. James C. Moxley - NOVEC



Corporate Office
10323 Lumcod Drive
Manassas, VA 20109
Mailing Address
P.O. Box 2710
Manassas, VA 20108
(703) 344-0500

Gallopville Technical Center
5399 Wellington Road
Gallopville, VA 20155

Leesburg Office
349 East Market Street
Leesburg, VA 20176

Minerva Office
14500 Minerva Road
Woodbridge, VA 22193

Stafford Office
2430 Poplar Road
Fredericksburg, VA 22406

July 3, 2001

Mr. Ed Wickham
Director - Distribution Operations
Dominion Virginia Power
One James River Plaza
701 East Cary Street
Richmond, VA 23261-6666

Re: Smithsonian, your letter of June 28, 2001

Dear Mr. Wickham;

Thank you for your June 28, 2001 letter and for your offer to resolve the matter of electric service to the Smithsonian's Steven F. Udvar-Hazy Center. NOVEC has reviewed your offer for NOVEC to serve the portion of the South Riding development in Dominion Virginia Power's service area that is designated for future commercial development and which represents 2 to 3 MW of electric load. We conclude that we cannot accept your offer. However, we propose an alternate resolution.

According to the official State Corporation Commission (SCC) territory map of the area in question as well as the museum site plan information available to NOVEC, we have determined that approximately 85% of the museum facility load lies within the NOVEC's franchised service territory. NOVEC has apportioned the museum's electrical load using a total electrical load of about 6-7 MW, based on information obtained from Dominion Virginia Power since the actual technical requirements have not been made available to NOVEC from the Smithsonian. The portion of the load in NOVEC's service territory is therefore approximately 5+ MW while Dominion Virginia Power's portion is approximately 1 MW.

NOVEC is willing to compensate Dominion Virginia Power for the portion of the museum that seems to be in Dominion Virginia Power's territory, consistent with our recent discussions with the SCC about this issue. NOVEC has identified planned developments in its service territory that would represent approximately 1 MW of electric load that could be served by Dominion Virginia Power. The specific areas consist of approximately 100,000 square feet of planned retail development in the Parkway Crossing East, in the Potomac Mills area, plus 112 residential single family lots in the Stokely development in Prince William County. These two developments represent electric load in excess of 1 MW and they are currently in need of a service territory boundary adjustment.

NOVEC is concerned about the Smithsonian's immediate power needs to support its construction schedule. NOVEC is prepared to install permanent power cables

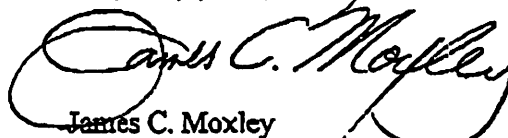
Equal Opportunity Employer

in the existing duct system as early as next week. However, the specific technical requirements have not been made available that would enable NOVEC to assess the transformer requirements. In addition, NOVEC anticipates that Dominion Virginia Power will provide the necessary delivery point to NOVEC as requested on November, 2000.

In the interim, and in the interests of meeting the Smithsonian's immediate need for temporary power to the construction site, NOVEC proposes to allow Dominion Virginia Power to provide temporary service in NOVEC's service territory until such time that the permanent power is required.

NOVEC looks forward to your response to our proposal.

Very truly yours,

A handwritten signature in black ink, appearing to read "James C. Moxley", is written over a circular stamp or seal.

James C. Moxley
Senior Vice President for Electric and
Telecommunication Systems Development

Cc: Mr. Keith Kaier, Dominion Virginia Power
Mr. Tim Faherty, SCC
Mr. Gil Jaramillo, NOVEC



Old Dominion
Electric Cooperative

August 1, 2001

Mr. R. N. Harris
Sr. Customer Contracts Administrator
Dominion Virginia Power
Post Office Box 26666
Richmond, Virginia 23261-6666

Re: *New Delivery Point Request – Smithsonian National Air and Space Museum*

Dear Ron:

By letter dated April 6, 2001, you responded to the November 22, 2000, request, submitted on behalf of Old Dominion Electric Cooperative ("Old Dominion"), for a new delivery point through which Northern Virginia Electric Cooperative ("NOVEC") could provide electric distribution service to the Smithsonian National Air and Space Museum's new facility ("Smithsonian Facility") at Dulles International Airport ("Dulles"). In that letter you stated that Dominion Virginia Power ("DVP") was "denying" Old Dominion's request, and you stated your reasons for that purported denial. Please be advised that Old Dominion rejects both your denial of the requested delivery point and the reasons for that denial.

In your letter you allege that a significant portion of the Smithsonian Facility is located within the certificated service territory of DVP and that DVP therefore has the right and the obligation to provide service "to those portions of the Facility located within its service territory." You further allege that the Smithsonian Institution requested that DVP provide service to the entire Facility and that DVP agreed to serve.

Your purported denial of Old Dominion's request is not consistent with the terms of the *Network Operating Agreement Between Virginia Electric and Power Company and Old Dominion Electric Cooperative* dated July 29, 1997 ("Network Operating Agreement"), which was made effective January 1, 1998, by order of the Federal Energy Regulatory Commission issued March 12, 1998, in Docket No. ER98-467-000. Specific procedures for establishing new delivery points are provided in section 8.4, Future Delivery Points, of the Network Operating Agreement.

Under the Network Operating Agreement, the Network Operating Committee, comprising Virginia Power's Manager – Power Supply and Old Dominion's Vice President – Engineering and Operations, is to coordinate the planning of delivery points according to prescribed procedures. Those procedures state that Old Dominion, the "Transmission Customer," is to determine its need for a new delivery point and provide notice to Virginia Power, the "Transmission Provider." While the Network Operating Committee is to review the proposed plan (for reasonableness and consistency with Good Utility Practice only) and the Transmission Provider may propose modifications, there is nothing in the Network

Mailing Address:
P. O. Box 2310
Glen Allen, Virginia 23058-2310

Innsbrook Corporate Center
4201 Dominion Boulevard
Glen Allen, Virginia 23060
Telephone: 804/747-059.
FAX: 804/747-:

Mr. R. N. Harris
August 1, 2001
Page 2

Operating Agreement suggesting that Virginia Power may simply "deny" a request for a new delivery point. Further, while the Agreement states that new delivery points are to be established at 115 kV or higher, service at lower voltage levels, if consistent with Good Utility Practice, are not to be unreasonably withheld.

In addition, according to NOVEC's analysis, as stated in an April 20, 2001, letter from Mr. James C. Moxley, Senior Vice President for Electric and Telecommunications Systems Development at NOVEC, to Mr. Ed Cowell of DVP's Fairfax, Virginia office, approximately 85 to 90% of the structures associated with the Facility (and likely the majority of the electric load) are in fact located in NOVEC's service territory. This analysis is based on an examination of the site layout provided by the Smithsonian Institution with a carefully applied overlay of the current, official electric service area map on file at the Virginia State Corporation Commission.

As you are aware, regardless of the relationship of property boundaries of a given facility to the boundaries of the local electric service territory, the location of the *electric load* is key in determining what distribution service provider will serve the load. The Virginia State Corporation Commission's has affirmatively adopted and applied the "point of use test" regarding disputes over service near territorial borderlines. While the Commission has stated that it was not adopting an "absolute test," the practical realities of this situation, where the majority of the load is in NOVEC's service territory, support NOVEC's claim of a right to serve, at a minimum, the majority of the load.

Old Dominion understands that NOVEC and DVP are discussing this dispute and attempting to find a resolution. Please be aware that Old Dominion maintains its request for a delivery point, does not accept DVP's denial of its request, and will assist and support NOVEC in whatever course of action it chooses with regard to DVP's efforts to obtain any applicable permits, easements or other approvals required for the construction and placement of the necessary permanent distribution facilities.

Sincerely,



for K. N. Kappatos
Senior Vice President of Engineering & Operations
Old Dominion Electric Cooperative

cc: James C. Moxley
D. Richard Beam
Cynthia D. Bothwell

STATE CORPORATION COMMISSION

AT RICHMOND, OCTOBER 2, 2001

COMMONWEALTH OF VIRGINIA, ex rel.

NORTHERN VIRGINIA ELECTRIC COOPERATIVE,

Petitioner,

v.

CASE NO. PUE010512

VIRGINIA ELECTRIC AND POWER COMPANY
d/b/a DOMINION VIRGINIA POWER,
SMITHSONIAN INSTITUTION, AND U. S.
GENERAL SERVICES ADMINISTRATION,

Respondents.

For a Petition for Declaratory Judgment
and Motion for Injunction

PRELIMINARY ORDER

On September 17, 2001, Northern Virginia Electric Cooperative ("NOVEC" or "the Cooperative") filed a Petition with the State Corporation Commission ("Commission"), requesting the Commission to declare that the proposed sale of electric energy by Virginia Electric and Power Company, d/b/a Dominion Virginia Power ("Virginia Power," "Dominion," or "the Company") to the Smithsonian Institution ("Smithsonian") or, alternatively, to the U. S. General Services Administration ("GSA"), for consumption at a facility to be constructed on a parcel of real estate located in Fairfax County, Virginia, is within service territory allotted to NOVEC and violates NOVEC's property rights under the certificate of public convenience and necessity granted to the Cooperative by the Commission under the Utility

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Facilities Act, Chapter 10.1 (§ 56-265.1, et seq.) of the Code of Virginia. NOVEC has also requested the Commission to enjoin Virginia Power temporarily and permanently from selling and delivery directly or indirectly any power to the Smithsonian or GSA at the site.

In support of its Petition, among other things, NOVEC contends that it holds Certificate of Public Convenience and Necessity No. E-51 which, it maintains, authorizes it to provide electric service and facilities on the areas described pictorially on the map. The Cooperative alleges that the "footprint" for the Smithsonian facility is virtually entirely within NOVEC's certificated service territory, based on Fairfax County's map, showing siting and permitting of the Smithsonian facility. NOVEC asserts that its certificates of public convenience and necessity are important property rights entitled to the protection of the courts, the Commission, and the legislature. The Cooperative cites Town of Culpeper v. Virginia Electric and Power Co., 215 Va. 189, 193-194 (1974), as well as Prince George Electric Cooperative, For declaratory judgment and Petition of RGC (USA) Minerals, Inc. and RGC (USA) Minerals, Inc., For declaratory judgment, Case No. PUE960295, 1998 S.C.C. Ann. Rept. 344, 348; and Petition of Kentucky Utilities Company, d/b/a Old Dominion Power Company, For injunctive relief and/or declaratory judgment against Powell Valley Electric Cooperative,

Case No. PUE960303, 1999 S.C.C. Ann. Rept. 368, 375-376, in support of this proposition.

NOVEC alleges that it began working with the Smithsonian on or about August 6, 1996, to obtain specifications for the proposed museum facility and appropriate timelines for phases of construction in order to provide a plan for furnishing electric service to the Smithsonian. It maintains that during 1996, and "periodically, when appropriate," NOVEC informed the Smithsonian, through written communications and telephone conversations, that the bulk of the facility's usage of electric power was in NOVEC's certificated territory and that the Cooperative was the proper entity to provide electric service to the Smithsonian. September 17, 2001 Petition at 5-6.

NOVEC contends that, on or about January 25, 1999, it learned upon receiving a copy of a letter from Virginia Power to the Smithsonian, that Virginia Power had service facilities available in the area of the proposed facility, and that two-thirds of the site was in Virginia Power's service area. However, according to the Cooperative, this information did not take into account that the bulk of load and the majority of the footprint of the facility was situated in NOVEC's certificated territory.

NOVEC further alleges that on November 22, 2000, it, through Old Dominion Electric Cooperative ("ODEC"), sent a

Cooperative Delivery Point Request, dated November 17, 2000, to Virginia Power, requesting a response by December 8, 2000. The Cooperative notes that it was advised in a copy of a letter by Virginia Power to the Smithsonian that Virginia Power intended to provide electric service to the Smithsonian on or about February 7, 2001. According to the Cooperative, this letter indicated that Virginia Power had received a February 1, 2001, request for electric service from the Smithsonian.

NOVEC further contends that on or about April 6, 2001, Virginia Power denied ODEC's requested delivery point. According to NOVEC, the reasons cited for the denial included (a) the assertion that the Smithsonian had requested that Virginia Power provide electric service and (b) the assertion that the facility was largely in Virginia Power's territory. Additionally, Dominion advised NOVEC, through ODEC, that service arrangements between Virginia Power and the Smithsonian were being finalized.

NOVEC maintains that Dominion does not hold a certificate of public convenience and necessity to furnish public utility services to the Smithsonian and that Dominion's authorized service area is merely adjacent to NOVEC's service territory. NOVEC asserts that, based on correspondence received from Dominion, dated February 7, 2001 and April 6, 2001, the Smithsonian entered into an agreement with Dominion that

Virginia Power should provide the electric service to the Smithsonian, to the exclusion of NOVEC.

The Cooperative seeks an injunction pendente lite to maintain the status quo and respective positions of the parties to this action until the Commission considers the evidence and rules on the propriety of a permanent injunction. Additionally, the Cooperative requests the Commission to enter an Order declaring that: (i) Virginia Power has violated the Utility Facilities Act; (ii) the Smithsonian and/or GSA project is within NOVEC's certificated territory; (iii) NOVEC is the proper provider of electric service to the Smithsonian and/or GSA and grant NOVEC the ability to provide electric service at the facility site; (iv) Virginia Power may not unreasonably deny a delivery point to ODEC on behalf of NOVEC and that Dominion's denial of the delivery point is not in the best interest of Virginia ratepayers and is not lawful; (v) the Commission declare that any transactions or contracts between Virginia Power and the Smithsonian and/or GSA are unlawful under the Utility Facilities Act and, therefore, unenforceable or void; and (vi) any provision of service by Dominion in NOVEC's certificated territory is unlawful and violates NOVEC's rights granted by the Commission in the certificate it granted to NOVEC.

NOVEC has also asked the Commission to enter an Order temporarily and permanently enjoining Virginia Power from delivering or selling any electrical power or providing any service to the Smithsonian or GSA within NOVEC's certificated territory. Further, the Cooperative requested that the Commission enter an Order declaring Virginia Power has wrongfully and tortuously interfered with NOVEC's contractual rights, prospective contractual rights, and potential economic relationship with its customers and declaring that Virginia Power must pay the damages sustained by NOVEC because of the Company's unlawful actions. NOVEC served a copy of its Petition and Motion on: Virginia Power's registered agent and two directors; Kenneth Melson, United States Attorney; John Ashcroft, United States Attorney General; the Administrator of the General Services Administration, as well as the Secretary, and the General Counsel for the Smithsonian Institute.

NOW, UPON CONSIDERATION of NOVEC's Petition and Motion, the Commission is of the opinion and finds that this matter should be docketed; that a Hearing Examiner should be appointed to this proceeding; that Virginia Power, the GSA, and the Smithsonian should be permitted to file an Answer to the Petition and a pleading responsive to the Cooperative's Motion for an injunction pendente lite; that inasmuch as the gravamen of the Cooperative's complaint is with Virginia Power's alleged

provision of service to a customer, the bulk of whose load NOVEC contends is in its service territory, Virginia Power and NOVEC should jointly file a stipulation of facts and issues upon which they agree, together with a list of facts and issues upon which they disagree; and that an oral argument on the Cooperative's request for an injunction pendente lite should be held. It is our expectation that the Hearing Examiner will issue a prompt ruling on the injunction pendente lite and schedule such further proceedings as may be necessary with regard to this matter.

Further, we will permit our Staff to participate in this proceeding to the same extent permitted by 5 VAC 5-20-80 D of the Commission's Rules of Practice and Procedure ("the Rules").

Accordingly, IT IS ORDERED THAT:

(1) This matter is hereby docketed and assigned Case No. PUE010512.

(2) As provided by § 12.1-31 of the Code of Virginia and Rule 7:1, 5 VAC 5-20-120, a Hearing Examiner is appointed to conduct further proceedings on behalf of the Commission and to file a final report with a transcript of this proceeding.

(3) An oral argument is hereby scheduled before a Hearing Examiner for October 25, 2001, at 10:00 a.m., in the Commission's second floor courtroom, located in the Tyler Building, 1300 East Main Street, Richmond, Virginia 23219, for

the purpose of hearing argument on NOVEC's request for an injunction pendente lite.

(4) On or before October 12, 2001, Virginia Power shall file with the Clerk of the Commission, Joel H. Peck, Clerk, State Corporation Commission, c/o Document Control Center, P.O. Box 2118, Richmond, Virginia 23218, an original and fifteen (15) copies of its answer or other pleadings responsive to NOVEC's Petition, together with an original and fifteen (15) copies of its response to the Cooperative's Motion. Dominion shall serve these documents on or before October 12, 2001, on all parties of record to this proceeding and shall hand-deliver a copy of the same to counsel for the Staff. Service upon NOVEC shall be directed to JoAnne L. Nolte, Esquire, PennStuart, P. O. Box 617, Richmond, Virginia 23218-0617. Service upon the counsel for the Commission Staff shall be directed to Sherry H. Bridewell, Senior Counsel, and Wayne Smith, Senior Counsel, Office of General Counsel, State Corporation Commission, Tyler Building, Tenth Floor, 1300 East Main Street, Richmond, Virginia 23219.

(5) On or before October 12, 2001, the GSA and/or Smithsonian may file with the Clerk of the Commission at the address noted above an original and fifteen (15) copies of their answer or other pleading responsive to NOVEC's Petition, together with an original and fifteen (15) copies of any responses to the Cooperative's Motion for an injunction pendente

lite. The GSA and Smithsonian shall serve these documents on or before October 12, 2001, on all parties of record, and counsel for the Cooperative, and shall arrange for overnight delivery of the answer and response upon counsel for the Commission Staff at the address set forth in Ordering Paragraph (4) above.

(6) On or before October 16, 2001, NOVEC and Virginia Power shall file with the Clerk of the Commission a joint stipulation of the facts and issues upon which they both agree, and shall in the same document also identify the facts and issues upon which they do not agree. On or before October 16, 2001, NOVEC and Dominion shall serve a copy of the foregoing document upon the Staff and all parties of record.

(7) NOVEC and Virginia Power shall respond to written interrogatories within three (3) business days after the receipt of the same. Except as so modified, discovery shall be in accordance with Part VI of the Rules.

AN ATTESTED COPY hereof shall be sent by the Clerk of the Commission by CERTIFIED MAIL, RETURN RECEIPT REQUESTED, to:
JoAnne L. Nolte, Esquire, PennStuart, P. O. Box 617, Richmond, Virginia 23218-0617; Commonwealth Legal Services Corporation, Registered Agent for Virginia Electric and Power Company, d/b/a Dominion Virginia Power, 4701 Cox Road, Suite 301, Glen Allen, Virginia 23060; Keith E. Kaier, Director, Dominion Virginia Power, 701 East Cary Street, Richmond, Virginia 23219; E. P.

Wickham, Jr., Director, Dominion Virginia Power, P. O. Box 26666, Richmond, Virginia 23261; Kenneth Melson, First Deputy, Eastern District of Virginia, 2100 Jamieson Avenue, Alexandria, Virginia 22314; Paul J. McNulty, United States Attorney, Eastern District of Virginia, 2100 Jamieson Avenue, Alexandria, Virginia 22314; John Ashcroft, United States Attorney General, U. S. Department of Justice, 950 Pennsylvania Avenue, N.W., Washington, D.C. 20530-0001; Stephen A. Perry, Administrator, General Services Administration, 1800 F Street, N.W., Washington, D.C. 20405; Lawrence M. Small, Secretary, Smithsonian Institute, 1000 Jefferson Drive, S.W., Washington, D.C. 20560-0012; General Counsel, Smithsonian Institute, 1000 Jefferson Drive, S.W., Suite 302, Washington, D.C. 20560-0012.

AN ATTESTED COPY of this Order shall also be sent by the Clerk of the Commission to: Kodwo Gharthey-Tagoe, Esquire, McGuireWoods, One James Center, 901 East Cary Street, Richmond, Virginia 23219; Pamela Walker, Deputy General Counsel, Virginia Electric and Power Company, P. O. Box 26532, Richmond, Virginia 23621; John F. Dudley, Senior Assistant Attorney General and Chief, Division of Consumer Counsel, Office of the Attorney General, 900 East Main Street, Second Floor, Richmond, Virginia; and the Commission's Office of General Counsel and Division of Energy Regulation.

COMMONWEALTH OF VIRGINIA
STATE CORPORATION COMMISSION

NORTHERN VIRGINIA ELECTRIC COOPERATIVE,

Petitioner,

v.

CASE NO. PUE10512

VIRGINIA ELECTRIC AND POWER COMPANY
d/b/a DOMINION VIRGINIA POWER,
SMITHSONIAN INSTITUTION, AND U.S.
GENERAL SERVICES ADMINISTRATION,

Respondents.

THE UNITED STATES' RESPONSE TO
THE COMMISSION'S OCTOBER 1, 2001 ORDER

In response to the Virginia State Corporation Commission's order, dated October 1, 2001, and Petitioner's Petition for Declaratory Judgment and Motion for Injunction ("Petition"), dated September 17, 2001, the Smithsonian Institution and the General Services Administration respectfully submit the following memorandum regarding the sale and distribution of electricity to the Steven F. Udvar-Hazy Center ("Udvar-Hazy Center" or "Center"), National Air and Space Museum, in Dulles, Virginia.

Pursuant to section 8093, Pub. L. 101-202, the United States recognizes that Federal agencies and instrumentalities must not use appropriated funds to "purchase electricity in a manner inconsistent with State law governing the provision of electric utility service, including State utility commission rulings" In order to assist the Commission in determining the appropriate Electricity provider to the Udvar-Hazy Center, the Smithsonian, in its capacity as customer, submits the following information, addressing our practical concerns, in support of

Virginia Electric and Power Company ("Virginia Power").¹ See In re RGC (USA) Minerals Sands, Inc., No. PUB960295 (Va. State Corp. Commn. 1998), at 19-20 (the Commission "will always consider the practical realities of the situation").

Of paramount and "practical" importance to the Smithsonian is that the phased construction schedule of the Udvar-Hazy Center not be compromised. Only the timely completion of each of the project's phases will ensure that the Undvar-Hazy Center opens in

¹ Pursuant to the Supremacy Clause of the United States Constitution, the United States questions whether the Virginia Corporation Commission has jurisdiction to *directly* regulate the conduct of Federal agencies and instrumentalities such as the Smithsonian Institution and the General Services Administration. While we recognize that Section 8093 of Public Law 100-202 prohibits a Federal Agency from expending appropriated funds on electricity that is contrary to State law, this does not subject the Federal Government to suit in a state regulatory agency. The United States, as sovereign, is immune from suit save as it consents to be sued, and the terms of its consent to be sued in any fora define that fora's jurisdiction to entertain the suit. *Affiliated Ute Citizens v. United States*, 406 U.S. 128, 142 (1972); *United States v. Mitchell*, 445 U.S. 535, 538-39 (1980). That consent must be express and unequivocal. *United States v. Mitchell*, 445 U.S. at 538-39; *United States v. Nordic Village, Inc.*, 503 U.S. 30, 31 (1992); *United States v. Sherwood*, 312 U.S. 584, 586 (1941) ("The United States, as sovereign, is immune from suit save as it consents to be sued, . . . and the terms of its consent to be sued in any court define the court's jurisdiction to entertain that suit"); *Block v. North Dakota*, 461 U.S. 273, 287 (1983) (only Congress can waive the sovereign immunity of the United States); *Hawaii v. Gordon*, 373 U.S. 57 (1963); *Dugan v. Rank*, 372 U.S. 609 (1963) (waivers apply to lawsuits against the United States, its agencies, and its official sued in their individual capacities); *McNutt v. GMAC*, 298 U.S. 178, 182, 189 (1936) (burden of pleading and proving subject matter jurisdiction is on the plaintiff). Here, NOVEC cites to not authority that permits the Virginia Corporation Commission to entertain a law suit against a Federal agency or instrumentality. Further, Section 8093 of Public Law 100-202 does not create a private cause of action. Notwithstanding our concerns over whether the Commission has the jurisdiction to entertain a petition against a Federal agency or instrumentality, we construe the Commission's order as a an invitation to the Smithsonian Institution as a electricity customer to provide comments regarding the issues in these proceedings.

We also note that the General Services Administration has played no role in the operative events that have led to the dispute in this case, and, as such, NOVEC's decision to name it as a respondent is inexplicable.

December 2003 -- the centennial of the first powered flight by the Wright Brothers on December 17, 1903. Meeting that date is a very significant concern of the Smithsonian for three reasons: (1) many individual and corporate donors who provide funding for the Center's construction expect the center to be completed by that date; (2) the project's critical path, which is the time line for completion of various phases of construction, could be endangered by scheduling changes; and (3) the Museum plans to take advantage of the unique educational opportunities associated with the centennial of the Wright brother's first flight. As discussed below, significant planning has been completed and related infrastructure installed in anticipation that Virginia Power would provide the site with electricity. Those plans would need to be re-examined and the infrastructure modified or replaced should the Commission issue an injunction, *pendente lite*, that will disrupt electricity service or if the Commission holds that Northern Virginia Electric Cooperative ("NOVEC") should be the exclusive provider. The resulting impact would greatly endanger the scheduled opening of the Udvar-Hazy Center.

Specifically, the construction schedule is based, in part, upon the planned delivery and installation by Virginia Power of its first transformer during November 2001. The installation will make permanent power available to the Smithsonian's construction contractor, Hensel Phelps Construction Company ("HPCC"), well beyond the current, and temporary, power capacity. To permit construction and start-up of mechanical and electrical equipment necessary for construction of the Center's buildings, HPCC must have this additional power, at the latest, by April 1, 2002. These tasks are on the construction project's critical path, and, as a result, must

be performed on schedule in order to preserve the time line established in the construction plan.²

Similarly, Virginia Power has sized its transformers for the Smithsonian's building loads, and the concrete pads for the transformers also have been designed and installed in accordance with Virginia Power's requirements. Should the Commission conclude that NOVEC is the proper provider, it must confirm these calculations or re-size its transformers, and the Smithsonian may need to redesign the concrete pads for the transformers. This process could create additional delays to the start of electrical service to the building, threatening the construction completion dates. Likewise, ductbank for carrying service conductors has been designed and installed in accordance with Virginia Power's requirements. At minimum, NOVEC must also confirm that the ductbank meets its requirements, and if it does not, time-consuming and potentially costly changes to the ductbank must be made, again jeopardizing the construction time line and the completion dates of the various phases.

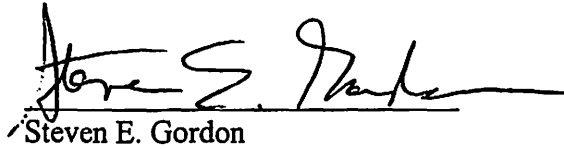
In sum, the Smithsonian's primary concern is to ensure that the current construction schedule is not disrupted and that the Udvar-Hazy Center is open by December 2003. Failure to do so will result in monetary losses resulting from possible delay claims by the construction contractor, frustration of the expectations of individual and corporate donors to the Museum and the loss of intangible and unquantifiable educational opportunities for the National Air and Space Museum to publicly celebrate the centennial of a seminal historical event, the first powered flight by the Wright Brothers on December 17, 1903.

² Nowhere in NOVEC's petition has the utility represented that it can provide the Smithsonian the necessary support to complete the project on schedule. On the contrary, NOVEC concedes that it would need access to Virginia Power's lines to service the Udvar-Hazy site. Petition at 15.

Respectfully submitted,

Paul J. McNulty
United States Attorney

By



Steven E. Gordon
Appearing Pursuant To 28 U.S.C. § 517
Assistant U.S. Attorney
2100 Jamieson Avenue
Alexandria, Virginia 22314
(703) 299-3817

Of Counsel:

John K. Lapiana
Assistant General Counsel
Smithsonian Institution
Washington, DC 20560

Dated: October 11, 2001

CERTIFICATE OF SERVICE

I hereby certify that I caused a true and correct copy of the forgoing United States Response to the Commissions October 1st 2001 Order to be sent by overnight delivery on this 11th day of October, 2001, to:

Commonwealth Legal Services Corporation
Registered Agent for Virginia Electric and Power Company
d/b/a Dominion Virginia Power
4701 Cox Road, Suite 301
Glen Allen, VA 23060

Keith E. Kaier, Director
Dominion Virginia Power
701 East Cary Street
Richmond, VA 23219

E.P. Wickham, Jr., Director
Dominion Virginia Power
701 East Cary Street
Richmond, VA 23219

Sherry H. Bridewell, Esquire
Virginia State Corporation Commission
Office of General Counsel
1300 East Main Street, 10th Floor
Richmond, VA 23219

Mr. Timothy R. Faherty
Virginia State Corporation Commission
Manager of Consumer Services
Division of Energy Regulation
1300 East Main Street, 4th Floor
Richmond, VA 23219

Ms. Rosemary M. Henderson
Virginia State Corporation Commission
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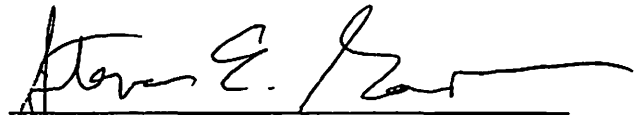
John F. Dudley, Esquire
Sr. Assistant Attorney General
Division of Consumer Counsel
Office of Attorney General
900 East Main Street, 2nd Floor
Richmond, VA 23219

Kodwo Ghartey-Tagoe, Esquire
McGuire, Woods, Battle & boothe
One James Center
901 East Cary Street
Richmond, VA 23219

JoAnne L. Nolte
PennStuart
801 E. Main Street
Suite 1110
Richmond, VA 23219

and

Joel H. Peck, Clerk
State Corporation Commission, DCC
1300 East Main Street
Richmond, VA 23219


Steven E. Gordon
Assistant United States Attorney

**COMMONWEALTH OF VIRGINIA
STATE CORPORATION COMMISSION**

COMMONWEALTH OF VIRGINIA, ex rel.

NORTHERN VIRGINIA ELECTRIC COOPERATIVE,

Petitioner,

v.

CASE NO. PUE010512

VIRGINIA ELECTRIC AND POWER COMPANY
d/b/a DOMINION VIRGINIA POWER,
SMITHSONIAN INSTITUTION, AND U. S.
GENERAL SERVICES ADMINISTRATION

Respondents.

2001 OCT 12 P 3:36

DOCUMENT CONTROL

**MEMORANDUM IN OPPOSITION
TO MOTION FOR INJUNCTION**

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Kodwo Ghartey-Tagoe
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Richmond, Virginia 23219
Telephone: (804) 775-1000
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**COMMONWEALTH OF VIRGINIA
STATE CORPORATION COMMISSION**

COMMONWEALTH OF VIRGINIA, ex rel.

NORTHERN VIRGINIA ELECTRIC COOPERATIVE,

Petitioner,

v.

CASE NO. PUE010512

VIRGINIA ELECTRIC AND POWER COMPANY
d/b/a DOMINION VIRGINIA POWER,
SMITHSONIAN INSTITUTION, AND U. S.
GENERAL SERVICES ADMINISTRATION

Respondents.

**MEMORANDUM IN OPPOSITION
TO MOTION FOR INJUNCTION**

I. INTRODUCTION

Petitioners' request for preliminary injunctive relief is confused. On the one hand, petitioner recognizes that the Smithsonian requires power for construction activities and that NOVEC has consented to the erection of temporary power facilities by Dominion Virginia Power for this purpose. Petition for Declaratory Judgment and Motion for Injunction ¶ 30 and Exhibit 13. Consistent with this history, NOVEC, in item (b) of its Prayer for Relief, seeks only to temporarily and permanently "enjoin Dominion Virginia Power from building any further permanent infrastructure until such time as the Commission can make a determination in this matter." (emphasis added).

On the other hand, in item (i) of its Prayer for Relief, NOVEC, without any temporal limitation or qualification, asks "that the Commission enter an order temporarily and permanently enjoining Dominion Virginia Power from delivering or selling, directly or

indirectly, any electrical power or providing any service to the Smithsonian or GSA within NOVEC's certified territory." This suggests that NOVEC is seeking to interrupt temporary service, as well as permanent electric service, to the Smithsonian.

NOVEC's prayer for a temporary injunction either to enjoin temporary power or to prevent the construction of permanent facilities should be denied because the balance of equities does not support either remedy.

II. The Applicable Legal Standard.

A preliminary injunction is a form of extraordinary relief. Wright v. Castles, 232 Va. 218, 224; 349 S.E.2d 125, 129 (1986). Where the applicant for such relief merely wishes to preserve the status quo, it must show that the balance of equities favors such relief. The factors to be considered are: (1) irreparable harm to the applicant if the injunction is withheld, (2) harm to the nonmovant if it is granted, (3) the likelihood of the movant's success on the merits of the case when it is finally resolved and (4) the public interest. MFS Network Technologies v. Commonwealth of Virginia, 33 Va. Cir. 406 (1994). See also, Blackwelder Furniture Co. v. Serlig Manufacturing Co., 550 F.2d 189 (4th Cir. 1977). Where the applicant seeks to change the status quo and receive affirmative relief, its burden is heightened. Simpson v. City of Hampton, 919 F. Supp. 212, 214 (E.D. Va. 1996) (citing X Corp. v. Doe, 805 F. Supp. 1298, 1303 (E.D. Va. 1992), *aff'd.* under Seal v. Under Seal, 17 F.3d 1435 (4th Cir. 1992)). Such relief is disfavored and is reserved for the most extraordinary cases. Simpson, 919 F. Supp. at 214. (citing Taylor v. Freeman, 34 F.3d 266, 270 n.2 (4th Cir. 1994)).

III. Here, the Balance of Equities does not Favor NOVEC.

A. There is no Threat of Irreparable Harm to NOVEC.

With respect to the prayer to interrupt temporary power, NOVEC consented to the status quo under which Dominion Virginia Power is providing temporary construction power. NOVEC can hardly claim that the temporary continuation of a situation which it invited threatens it with irreparable harm. With respect to the prayer to enjoin Dominion Virginia Power from constructing permanent facilities, NOVEC cannot demonstrate the requisite harm. Just as in the RGC Mineral Sands proceedings upon which NOVEC relies, declaratory relief would be sufficient to protect NOVEC's interests were it to prevail on the merits. In its Order on Petitions for Declaratory Judgment in Case No. PUE960295, the Commission did not grant an injunction, nor did it grant an accounting. It only granted Prince George's petition "insofar as we have determined that Virginia Power cannot provide electric service to RGC for its mineral processing plant." 1998 S.C.C. Ann. Rep. at 349, ordering paragraph (1). Indeed, Virginia Power provided electric service to RGC beginning on May 7, 1997. 1998 S.C.C. Ann. Rep. at 344. In its June 25, 1998 final order, the Commission prescribed procedures to effectuate an orderly transfer of service from Virginia Power to Prince George. 1998 S.C.C. Ann. Rep. at 349, ordering paragraph (2). Thus, the SCC never awarded any sort of injunctive relief, and injunctive relief was unnecessary in any event. NOVEC has made no showing, on the basis of the bare factual allegations in its petition, that injunctive relief *pendente lite* is either appropriate or necessary in this case.

B. Altering the Status Quo Would Harm Dominion Virginia Power.

Dominion Virginia Power has erected facilities for providing temporary construction power to the Smithsonian. Cutting that service short via temporary injunction would cause harm to Dominion Virginia Power. Not permitting Dominion Virginia Power to begin construction of permanent facilities would harm Dominion Virginia Power by delaying its ability to ensure that the Smithsonian can timely receive reliable permanent power in accordance with the Smithsonian's stated wishes and preferences.

C. NOVEC Cannot Show that it is Likely to Succeed on the Merits Because this Case Presents Complex Questions of First Impression and Dominion Virginia Power Will Likely Prevail on its Claim to a Right to Provide Some or all of the Smithsonian's Power Needs.

The Commission has never had occasion to consider in a contested case a collision of territorial service rights as complex as the one presented here. In Petition of Prince George Electric Cooperative, For declaratory judgment, and Petition of RGC (USA) Minerals, Inc., For declaratory relief, Case No. PUE960295, 1998 S.C.C. Ann. Rept. 344, 348 (Jun. 25, 1998), the Commission rejected a point of delivery test for resolving territorial disputes on the basis of a set of facts in which a potential customer had manipulated its land holdings to reach a provider's territory through a narrow strip that caused only 4% of the customer's parcel to be in the territory of its preferred provider, with fully 96.6% of the parcel, including all points of use, falling outside of that territory. Even in that unique factual setting, the Commission cautioned that it was not adopting "any absolute test" but would "always consider the practical realities of each situation."

According to the Commission, its guiding policy is to “enforce the Code’s requirement of strong protection for the exclusive service territories of utilities in Virginia.” Thus, the RGC Mineral Sands decision in no way foreshadows how the Commission will balance practical considerations against the policy for strong protection of exclusive territories where, as here, without any manipulation, a parcel falls overwhelmingly within Dominion Virginia Power’s territory, where some points of use are wholly within Dominion Virginia Power’s territory, where no points of use are wholly outside Dominion Virginia Power’s territory, where the customer prefers Dominion Virginia Power and where Dominion Virginia Power’s existing facilities are closer to the points of use. The one resolution that the Commission is least likely to adopt is the geographic load center test sought by NOVEC.¹ However the Commission decides this case, it is unlikely that NOVEC can totally prevail on its petition; such a ruling would deprive Dominion Virginia Power of its right to provide electric service in its territory contrary to the Commission’s policy of protecting exclusive territories.

The Commission’s decision in Petition of Kentucky Utilities Company, d/b/a Old Dominion Power Company, for Injunctive Relief and/or Declaratory Judgment against Power Valley Electric Cooperative, Case No. PUE960303, 1999 S.C.C. Ann. Rept. 368, 375-76, neither provides greater guidance nor dictates the outcome of this proceeding. There, the Commission viewed the issue presented to be one of customer manipulation and similarly viewed the RGC Mineral Sands holding as rooted in such manipulation.

¹ In RGC, the Commission rejected the point of entry or point of service test finding “the cases adopting the point of use test persuasive.” Order at 17. One of the cases cited, Public Service v. PUC, 765 P.2d 1015, 1022 (Colo. 1988), discussed and rejected a third “geographic load center” test as being inconsistent with a statutory requirement for exclusive territories.

In short, neither of the cases principally relied upon by NOVEC establishes a likelihood of success on the merits under the peculiar facts of this case. Accordingly, no temporary injunction should issue in this proceeding, any more than it did in RGC Mineral Sands. NOVEC's ultimate entitlement to relief is just too uncertain for such drastic and extraordinary relief.

D. The Public Interest would not be Served Either by an Interruption of Existing Temporary Power or by a Temporary Injunction Against Permanent Construction.

In 1877, Congress granted a charter to the Smithsonian Institution as "an establishment . . . for the increase and diffusion of knowledge among men. . . ." 20 U.S.C. §41. Thus, the Smithsonian is a public institution which is of national public concern. Delaying construction while awaiting the resolution of a territorial dispute between parties who have provided for the temporary provision of construction power manifestly would be contrary to the public interest. Likewise, the public interest would not be served by enjoining construction of permanent facilities. When it opens, the Smithsonian should have timely access to whatever electricity and electric facilities Dominion Virginia Power is entitled to provide.

CONCLUSION

For the reasons set forth above, NOVEC's Motion for a Temporary Injunction should be denied.

Respectfully submitted,

VIRGINIA ELECTRIC AND POWER COMPANY
d/b/a DOMINION VIRGINIA POWER

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CERTIFICATE OF SERVICE

I hereby certify that I have filed with the Clerk of the Commission, Joel H. Peck, Clerk, State Corporation Commission, c/o Document Control Center, P.O. Box 2118, Richmond, Virginia 23218, an original and fifteen (15) copies of the foregoing and have also served it on all parties of record to this proceeding by first class, postage prepaid mail to the addresses shown below and have hand-delivered a copy of the same to counsel for the Staff on this 12th day of October, 2001.

JoAnne L. Nolte, Esq., PennStuart, P.O. Box 617, Richmond, Virginia 23218-0617; Kenneth Melson, First Deputy, Eastern District of Virginia, 2100 Jamieson Avenue, Alexandria, Virginia 22314; Paul J. McNulty, United States Attorney, Eastern District of Virginia, 2100 Jamieson Avenue, Alexandria, Virginia 22314; Steven E. Gordon, Assistant U.S. Attorney, 2100 Jamieson Avenue, Alexandria, Virginia 22314; John Ashcroft, United States Attorney General, U.S. Department of Justice, 950 Pennsylvania Avenue, N.W., Washington, D.C. 20530-0001; Stephen A. Perry, Administrator, General Services Administration, 1800 F. Street, N.W., Washington, D.C. 20405; Lawrence M. Small, Secretary, Smithsonian Institute, 1000 Jefferson Drive, S.W., Washington, D.C. 20560-0012; General Counsel, Smithsonian Institute, 1000 Jefferson Drive, S.W., Suite 302, Washington, D.C. 20560-0012; and to John F. Dudley, Senior Assistant Attorney General and Chief, Division of Consumer Counsel, Office of the Attorney General, 900 East Main Street, Second Floor, Richmond, Virginia 23219.

E. Duncan Gettelly, Jr.

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Virginia Electric and Power Company, d/b/a Dominion Virginia Power ("Dominion Virginia Power"), pursuant to the Commission's Preliminary Order of October 2, 2001, responds to Northern Virginia Electric Cooperative's ("NOVEC's") Petition for Declaratory Judgment and Motion for Injunction as follows.

By way of introduction, Dominion Virginia Power disputes the contention that this case is controlled by the cases cited at page 2 in the Preliminary Order. Instead, this is a case of first impression where (1) the parcel to be served lies primarily in Dominion Virginia Power's service territory, (2) points of the use are wholly or partly in Dominion Virginia Power's territory, (3) the principal structure on the parcel lies partly in the territory of Dominion Virginia Power and

partly in that of NOVEC, (4) the customer desires service from Dominion Virginia Power, and (5) Dominion Virginia Power is better-equipped with existing facilities to serve the customer.

1. Dominion Virginia Power admits that NOVEC's address is Post Office Box 2710, Manassas, Virginia 20108-0875. The remaining allegations constitute conclusions of law to which no response is required.

2. The allegations of Paragraph 2 constitute conclusions of law to which no response is required.

3. The allegations of Paragraph 3 constitute conclusions of law to which no response is required. Dominion Virginia Power does not admit the accuracy of the map attached to NOVEC's petition as Exhibit 1.

4. The allegations of Paragraph 4 constitute conclusions of law to which no response is required.

5. Dominion Virginia Power is without sufficient knowledge or information to form a belief as to the truth of the averments of Paragraph 5, and therefore it denies them.

6. Dominion Virginia Power is without sufficient knowledge or information to form a belief as to the truth of the averments of Paragraph 6, and therefore it denies them. Dominion Virginia Power does not admit the accuracy of the map attached to NOVEC's petition as Exhibit 3.

7. The allegations of Paragraph 7 constitute conclusions of law to which no response is required.

8. Dominion Virginia Power is without sufficient knowledge or information to form a belief as to the truth of the averments of Paragraph 8, and therefore it denies them.

9. Dominion Virginia Power admits that it is a Virginia public service corporation authorized to transact business as an electric utility under the laws of the Commonwealth. Dominion Virginia Power is also the holder of certain Certificates of Public Convenience and Necessity issued by the Commission pursuant to the Utility Facilities Act which it contends, authorize it to furnish electric service and facilities to the Smithsonian Institution ("Smithsonian"). Dominion Virginia Power does not admit that Exhibits 2, 3, 4 and 5 attached to NOVEC's petition accurately represent Dominion Virginia Power's certificated service territory.

10. The allegations of Paragraph 10 constitute conclusions of law to which no response is required.

11. The allegations of Paragraph 11 constitute conclusions of law to which no response is required.

12. Dominion Virginia Power is without sufficient knowledge or information to form a belief as to the truth of the averments of Paragraph 12, and therefore it denies them.

13. Dominion Virginia Power is without sufficient knowledge or information to form a belief as to the truth of the averments of Paragraph 13, and therefore it denies them.

14. Dominion Virginia Power is without sufficient knowledge or information to form a belief as to the truth of the averments of Paragraph 14, and therefore it denies them except to admit that a majority of the parcel is within Dominion Virginia Power's territory.

15. Dominion Virginia Power admits that on or about November 17, 2000, Old Dominion Electric Cooperative ("ODEC") sent a Cooperative Delivery Point Request to Dominion Virginia Power. The request speaks for itself. Dominion Virginia Power does not admit the accuracy of the map attached to NOVEC's petition as Exhibit 10.

16. Dominion Virginia Power admits that on or about February 7, 2001, NOVEC was copied on a letter addressed to the Smithsonian from Dominion Virginia Power. The letter speaks for itself.

17. Dominion Virginia Power admits that Dominion Virginia Power wrote a letter dated April 6 to ODEC, on which NOVEC was copied. The letter speaks for itself.

18. Dominion Virginia Power is without sufficient knowledge or information to form a belief as to the truth of the averments of the first sentence of Paragraph 18, and therefore it denies them. Dominion Virginia Power admits the truth of the averments of the remaining sentences of Paragraph 18 except to deny that it violated NOVEC's rights. Although NOVEC contended that the hangar building is in its territory, Dominion Virginia Power denies that all of that building lies within NOVEC's territory.

19. The letter dated August 1, 2001 speaks for itself.

20. Dominion Virginia Power is without sufficient knowledge or information to form a belief as to the truth of the averments of Paragraph 20 and therefore it denies them.

21. The allegations of Paragraph 21 constitute conclusions of law to which no response is required.

22. The allegations of the first sentence of Paragraph 22 constitute conclusions of law to which no response is required. Dominion Virginia Power denies the remaining averments of Paragraph 22.

23. The allegations of the first sentence of Paragraph 23 constitute conclusions of law to which no response is required. Dominion Virginia Power denies the remaining averments of Paragraph 23.

24. Dominion Virginia Power is without sufficient knowledge or information to form a belief as to the truth of the averments of Paragraph 24, and therefore it denies them.

25. Dominion Virginia Power lacks any knowledge of what NOVEC "believes," and therefore denies the averments of Paragraph 25.

26. Dominion Virginia Power is without sufficient knowledge or information to form a belief as to the truth of the averments of Paragraph 26, and therefore it denies them.

27. The allegations of Paragraph 27 are denied.

28. The allegations of Paragraph 28 constitute conclusions of law to which no response is required.

29. The allegations of Paragraph 29 constitute conclusions of law to which no response is required.

30. Dominion Virginia Power admits that NOVEC did not object to Dominion Virginia Power's providing temporary power to the facility and that James C. Moxley of NOVEC sent a letter dated July 3, 2001 to Edmond P. Wickham, Jr. of Dominion Virginia Power. The letter speaks for itself. The remaining averments of Paragraph 30 are denied.

31. The allegations of Paragraph 31 constitute conclusions of law to which no response is required.

32. The allegations of Paragraph 32 are denied.

33. All allegations not expressly admitted are denied.

Dominion Virginia Power denies that NOVEC is entitled to any relief on any ground. Dominion Virginia Power also denies that the State Corporation Commission ("Commission") has jurisdiction to enter an order declaring that Dominion Virginia Power has wrongfully and tortiously interfered with NOVEC's contractual rights, prospective contractual rights and

potential economic relationships or that the Commission has jurisdiction to declare that Dominion Virginia Power must pay the damages allegedly sustained by NOVEC because of Dominion Virginia Power's conduct. Additionally, NOVEC has failed to state a claim upon which relief can be granted on those theories. Dominion Virginia Power also denies that the State Corporation Commission has jurisdiction to resolve NOVEC's delivery point claim as that dispute lies wholly within the jurisdiction of the Federal Energy Regulatory Commission.

COUNTERPETITION

1. As the attached affidavit of John F. Caskey reveals, the Smithsonian will be a new customer for electricity because the Smithsonian will be constructing several points of use on a parcel that is primarily in Dominion Virginia Power's territory. Those points of use include a hangar building, the IMAX Theater and a parking lot. The parking lot lies entirely within Dominion Virginia Power's territory and the IMAX Theater lies wholly or mostly within Dominion Virginia Power's territory. The hangar building lies partially in Dominion Virginia Power's territory. Dominion Virginia Power, by virtue of its certificates of public convenience and necessity, has a valuable property right to serve customers in its territory. Where, as here, (a) all points of use lie wholly or partially within Dominion Virginia Power's territory on a parcel that itself lies mostly within Dominion Virginia Power's territory, (b) the new customer has not manipulated its land holdings or point of delivery to change service territories, (c) the customer desires service from Dominion Virginia Power, and (d) Dominion Virginia Power's facilities are closer than NOVEC's, Dominion Virginia Power should have the right to serve that customer.

WHEREFORE, Dominion Virginia Power prays that the Commission declare that
(1) Dominion Virginia Power has the statutory and legal right and obligation to provide electric service to the entire Smithsonian facility; and (2) Dominion Virginia Power may honor Smithsonian's request for permanent electric service.

Respectfully submitted,

VIRGINIA ELECTRIC AND POWER COMPANY
d/b/a DOMINION VIRGINIA POWER VIRGINIA
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E. Duncan Gethell, Jr.

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DOCUMENT CONTROL

AFFIDAVIT OF JOHN CASKEY

COMMONWEALTH OF VIRGINIA
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Affidavit of John Caskey

1. I am the Dominion Virginia Power ("Dominion") Account Manager for the Smithsonian Institution, including the museum annex under construction near Dulles Airport.
2. On July 19, 2001, I visited the site to determine where the boundary between the service territories of Northern Virginia Electric Cooperative {"NOVEC"} and Dominion crossed the Smithsonian site. I referred to service area map E51 that was signed on December 9, 1977. I also looked at a rough building site plan provided by the Smithsonian. I was able to locate the southeast corner of the NOVEC territory, but could not identify where the east boundary line crossed the building site. From our rough estimates, it appeared that the boundary line went through the middle of the main hanger. However, it was difficult to locate the north/south

boundary on the east side of the NOVEC territory because this boundary wasn't exactly parallel to the fence line on the west side of the area.

3. On July 23, 2001, I went back to the site with a surveyor equipped with a Global Position Satellite (GPS) receiver to refine our estimate of the location of the territory boundary relative to the building site. I felt that the best approach was to locate the corners of the NOVEC territory and then take a few GPS measurements from the actual building site. We were able to locate the northwest, southwest and southeast corners of the service area with a high degree of confidence. According to service area map E51, the northwest corner was where the fence line took an almost 90 degree turn to the west. The southwest corner was where the fence line crossed the creek. The southeast corner was where the east/west creek had a branch going to the north. The surveyor took GPS measurements at these three locations. I also "walked-off" the distance between the southwest and southeast corners of the NOVEC territory and estimated this distance to be about 345 yards.
4. We were not able to locate the northeast corner of the NOVEC territory because the point is well within the airport's property and because there was no clear physical boundary to identify. I walked-off about 345 yards from the northwest corner and we took a GPS measurement at that location. We also took a GPS measurement about 265 yards from the northwest corner to represent the fact that the north/south boundary on the east side of the territory was not exactly parallel to the west side. We also


took several GPS measurements where the buildings were being constructed. The surveyor then took all these measurements and provided me a file with each data point and the corresponding latitude and longitude. He also provide a topographic map with the data points plotted on the map. (See attachment A.)

5. After reviewing all this data and additional topographic maps, I concluded that the front of the building, the IMAX theater and the entire parking lot was in Dominion's territory and that part of the hanger and the chiller plant was in NOVEC's territory. At this point, I cannot estimate a particular percentage for each utility area because we were not able to locate the northeast corner of the NOVEC service area.
6. In my opinion the boundary line goes through the hanger and the maps were not detailed enough to anticipate this kind of construction in the area. Electric cooperatives were set up to serve very rural areas and the people establishing the boundaries did not expect large buildings in this area. At this point, Dominion Virginia Power is best suited to serve the entire Smithsonian complex because it has the infrastructure available to serve the complex and because the Smithsonian has requested such service.
7. In Paragraph 18 of its petition NOVEC indicates it is willing and "able" to provide service. However, NOVEC's ability to provide service is contingent on receiving a delivery point from Dominion. The closest NOVEC source is approximately 1.25 miles away. To my knowledge NOVEC has not begun to extend that line. In contrast, Dominion's

facilities are adjacent to the Smithsonian property and our delivery point near the buildings is only about 1500 feet away from our existing three-phase overhead line. This Dominion three-phase line (circuit 450) is already being used to provide temporary service to the Smithsonian construction site. The Smithsonian is situated at the farthest point in a very narrow portion of NOVEC's territory. Dominion's territory bounds NOVEC's territory on three sides.

8. Based upon information and belief, the parcel just to the west of NOVEC's western boundary line was initially in NOVEC territory. NOVEC gave up the parcel because it did not have adequate distribution facilities in the immediate area to serve a customer at the end of its service territory. Dominion was already serving the Avion office park just to the south. The area given up by NOVEC was closer to its then existing facilities than the Smithsonian. A copy of the SCC order in Case No. (PUE830030 dated 6/3/91) granting the territory revision is attached. (See Attachment B.)

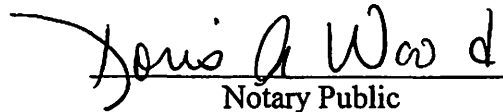
9. The GPS survey shows that the northeast corner of the boundary line has no clear physical marker. Until the northeast corner is officially decided, the exact boundary cannot be known by any party. However, knowing the exact boundary will not change the fact that part of the Smithsonian facility is in NOVEC's territory and part is in Dominion's territory. Since the facility is not entirely within NOVEC's territory and since Dominion has the capability to serve the facility now and since the Smithsonian requested that Dominion serve the facility, I recommend that Dominion provide permanent service to the facility.


John Caskey

City/County of Fairfax, Virginia:

to wit:

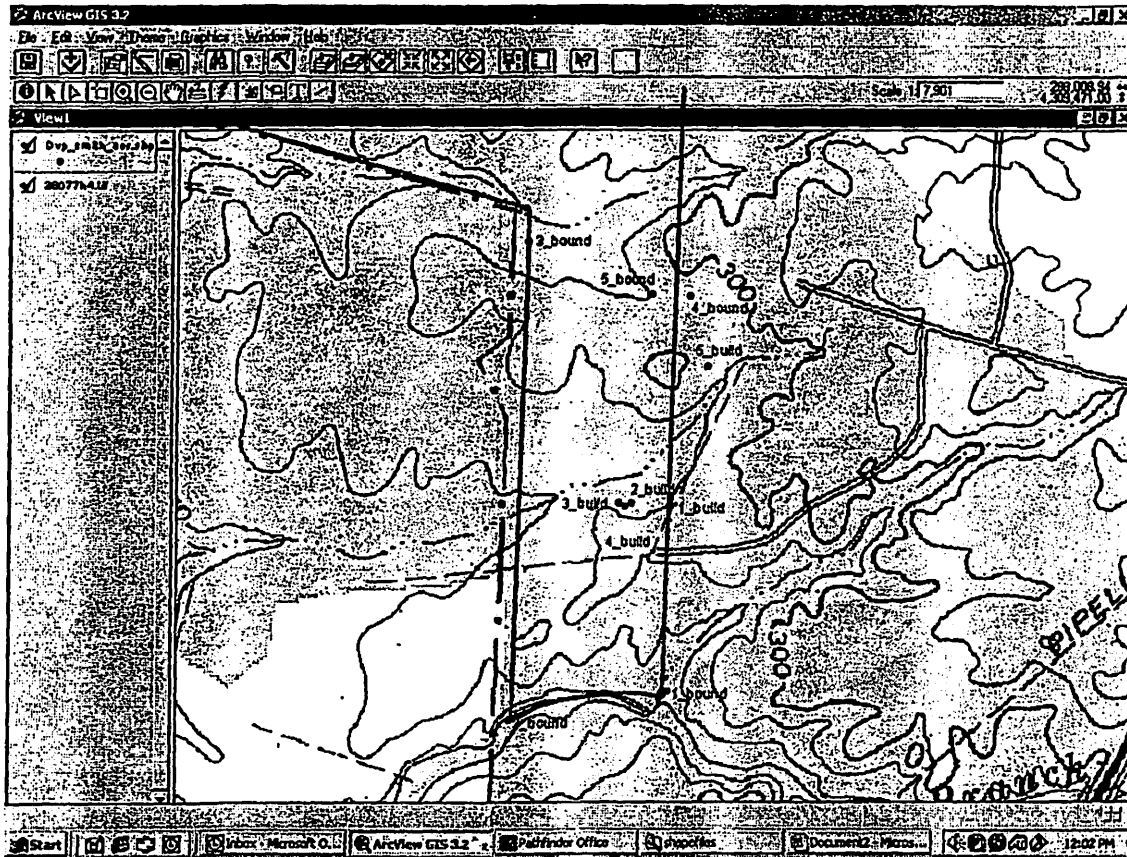
Subscribed and sworn before me on this 11 day of October, 2001 by John Caskey.


Notary Public

My commission expires: 1-31-05

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Attachment A



red = best estimate of
territory boarder using
topography of original
territory map.

- 1 build = SE Corner of Hanger
- 2 build = SW Corner of Hanger
- 3 build = SW side of chiller plant
- 4 build = Center of chiller plant
- 5 build = NE side of IMAX theater

J. Caskey 7/24/01

ID_NUM	ID	GPS_DATE	GPS_TIME	UNFILT	NORTHING	EASTING	LATITUDE	LONGITUDE
1_bound	se corner 01	07/23/2001	09:24:29AM	14	4219512.634104360	11783598.737667300	-77.443723363	38.906428416
2_bound	sw corner 01	07/23/2001	09:35:30AM	21	4219295.676613810	11782596.818829400	-77.447251246	38.905863673
3_bound	nw corner fence	07/23/2001	10:44:56AM	33	4222262.356348160	11782600.281153900	-77.447122856	38.914005894
4_bound	ne rough	07/23/2001	10:54:30AM	25	4221956.274508500	11783643.510453600	-77.443470024	38.913133836
5_bound	approx ne border	07/23/2001	11:10:29AM	28	4221963.907185000	11783401.116531800	-77.444321244	38.913162228
1_build	se corner hanger	07/23/2001	09:50:14AM	25	4220656.721793230	11783568.803093500	-77.443783548	38.909569393
2_build	sw corner hanger	07/23/2001	09:56:11AM	26	4220658.514684420	11783319.116639800	-77.444660574	38.909581978
3_build	sw end chiller plant	07/23/2001	10:00:42AM	26	4220660.029827680	11783231.060762900	-77.444969836	38.909588838
4_build	center chiller plant	07/23/2001	10:04:06AM	25	4220639.442280650	11783277.646799900	-77.444806998	38.909530904
5_build	ne imax	07/23/2001	10:12:17AM	25	4221528.136514180	11783769.634341200	-77.443043795	38.911954899

DOCUMENT CONTROL CENTER
COMMONWEALTH OF VIRGINIA
STATE CORPORATION COMMISSION

Attachment E

1991 JUN 10 PM 2:51

AT RICHMOND, JUNE 3, 1991

APPLICATION OF

VIRGINIA ELECTRIC AND POWER COMPANY / CASE NO. 11655
AND
NORTHERN VIRGINIA ELECTRIC COOPERATIVE CASE NO. PUE830030

For revision to certificate under
the Utility Facilities Act

Came the applicants by letter of agreement and requested a
revision to territorial boundary Map E51 and Certificate E-E51.

Northern Virginia Electric Cooperative does not have
adequate distribution facilities in the immediate area to serve a
customer at the end of its service territory. Virginia Electric
and Power Company is already serving an adjacent office park
complex and has agreed to serve the customer. Accordingly,

IT IS ORDERED:

(1) That Map E51 and Certificate E-E51 be revised as
requested in the letter of agreement.

(2) That a copy of this Order with a copy of the revised
map and revised certificate be sent to Virginia Electric and
Power Company, in care of Mr. T. J. O'Neil, Vice President,
Regulation, P. O. Box 26666, Richmond, Virginia 23261; to
Northern Virginia Electric Cooperative, in care of Mr. Harry K.
Bowman, General Manager, P. O. Box 2710, 10323 Lomond Drive,
Manassas, Virginia 22110, and that a copy of this Order be sent
to the Commission's Division of Energy Regulation.

A True Copy
Teste:

William J. Bridge

Clerk of the
State Corporation Commission

**COMMONWEALTH OF VIRGINIA
STATE CORPORATION COMMISSION**

COMMONWEALTH OF VIRGINIA, ex rel.

NORTHERN VIRGINIA ELECTRIC COOPERATIVE,

Petitioner,

v.

CASE NO. PUE010512

VIRGINIA ELECTRIC AND POWER COMPANY
d/b/a DOMINION VIRGINIA POWER,
SMITHSONIAN INSTITUTION, AND U. S.
GENERAL SERVICES ADMINISTRATION

Respondents.

2001 OCT 16 P 4: 25

2001 OCT 16 P 4: 25

**JOINT STIPULATION OF FACTS
AND LIST OF FACTS AND LEGAL ISSUES IN DISPUTE**

Pursuant to the Rules of Practice and Procedure of the State Corporation Commission and the Commission's Preliminary Order of October 2, 2001, Northern Virginia Electric Cooperative (NOVEC), and Virginia Electric and Power Company d/b/a/ Dominion Virginia Power ("Dominion Virginia Power"), by counsel, present to the Commission as set forth herein this Joint Stipulation of Facts and List of Facts and Legal Issues in Dispute ("Joint Stipulation").

By signing this Joint Stipulation, which may be signed in counterparts, NOVEC and Dominion Virginia Power do not waive any rights to assert that any jointly stipulated facts, or any other alleged fact, is not relevant to the legal issues in dispute in this case. Because this Joint Stipulation of Facts and List of Facts and Legal Issues in Dispute is

preliminary, the parties reserve the right to supplement it on reasonable notice as these proceedings develop.

I.

Joint Stipulation of Facts.

A. Parties.

Petitioner:

1. NOVEC is an electric cooperative organized and existing under Article 1, Chapter 9.1 §§ 56-231.15 to 56.231.37 of the Code of Virginia, which article is referred to as the “Utility Consumer Services Property Act.”

Respondents:

2. Dominion Virginia Power is a Virginia public service corporation authorized to transact business as an electric utility in this Commonwealth.
3. The Smithsonian Institution was created by an Act of Congress for the “increase and diffusion of knowledge among men . . .” 20 U.S.C. § 41. The Smithsonian is constructing a National Air and Space Museum annex at Dulles International Airport.

B. Stipulated Facts.

1. The Smithsonian is currently being provided with temporary power for construction by Dominion Virginia Power.
2. NOVEC has made efforts to obtain specifications on the facility from the Smithsonian, but the Smithsonian has declined to provide such information.

II.

Factual Issues in Dispute.

A. NOVEC's Statement of Facts and Chronology of Events:

1. According to the map on file with the Commission, the overwhelming bulk of the load for the Smithsonian facility is within NOVEC's certificated territory.
2. All or virtually all of the facility buildings, including the "hangar area" are solely within NOVEC's certificated territory.
3. Upon information and belief, the facility buildings including the "hangar area" are the physical structures that will consume approximately 95% or more of the electricity supplied to the entire Smithsonian facility.
4. NOVEC is ready, willing, and able to supply electricity to the Smithsonian's facility.
5. NOVEC is ready, willing and able to distribute electricity to distribute electricity to the Smithsonian facility.
6. Dominion has denied NOVEC, through Old Dominion Electric Cooperative (ODEC), a delivery point requested pursuant to contract between ODEC, on behalf of NOVEC, and Dominion.
7. In 1996, NOVEC representatives learned that the Smithsonian planned to construct a National Air and Space Museum at its annex at Dulles International Airport.
8. NOVEC began its communications with the Smithsonian on or about August 6, 1996 to obtain specifications for the facility and appropriate

time lines for phases of construction so that NOVEC could develop and implement a plan for furnishing electric service to the new Smithsonian museum, because it was to be located in NOVEC's certificated territory. Information and documents in NOVEC's files establish that during 1996 NOVEC believed that over 85% of the facility was within NOVEC's service territory. Today NOVEC believes, based upon the information that it has received from Fairfax County that over 95% of the facility is within its certificated territory.

9. On about August 15, 1996, HOK Architects, Inc., the facility design, engineering/architect firm under contract to the Smithsonian, sent a letter to NOVEC. This letter contained preliminary design information. Importantly this correspondence predicted that, "Mechanical and electrical load information will change as the design develops."
10. On or about August 21, 1996, NOVEC sent a letter to HOK providing initial rate information and service territory boundary information.
11. On October 9, 1996, Dominion, Old Dominion Electric Cooperative, and NOVEC discussed the planned Smithsonian Annex during a regularly scheduled quarterly meeting.
12. On November 8, 1996, NOVEC met with HOK at HOK offices in District of Columbia to discuss technical requirements of the project.

-
13. On November 21, 1996, NOVEC received a fax from the National Renewable Energy Laboratory (NREL) which advised NOVEC of a meeting to be held on December 11, 1996. The fax stated that, "The meeting will address which utility (NOVEC and Virginia Power both have service available at the site) can best serve the Smithsonian's National Air and Space Museum Dulles Center at Dulles International Airport. Of course, service reliability and energy costs are key factors to be considered. Construction is slated to begin on the 740,000 square foot facility in 1999. As I mentioned, a 1 MW Building Integrated Photovoltaic (BIPV) system is proposed for the site."
 14. On December 11, 1996, NOVEC, NREL, and Smithsonian officials met at the Smithsonian L'enfant Plaza office in Washington D.C. At that meeting, NOVEC advised Smithsonian it was ready, willing, and able to provide service to the facility. NOVEC described the territory boundary issues. NOVEC informed the Smithsonian of its strongly held belief that it was the certificated provider of electrical service.
 15. On December 20, 1996, NOVEC forwarded a letter to the Smithsonian again providing rate information and emphasizing NOVEC's obligation to serve all customers and provide all electrical loads within NOVEC's territory as defined by the Commission.
 16. On or about July 10, 1997, representatives of NOVEC again met with the Smithsonian.
 17. On November 17, 1998, NOVEC met with the Smithsonian in Washington D.C. NOVEC sent a confirmatory follow up letter dated November 17, 1998 to the

Smithsonian asserting its right to serve the facility and referencing the RGC Mineral Sands case.

18. On or about January 25, 1999 NOVEC received a letter from Dominion to the Smithsonian. NOVEC learned for the first time that Dominion had service facilities available in the area of the proposed facility and importantly that while the facility was in NOVEC's territory, two thirds of the site was in Dominion's service territory. Dominion's contentions were not accurate according to the information that NOVEC had obtained.
19. On November 22, 2000, NOVEC, through Old Dominion Electric Cooperative, sent a Cooperative Delivery Point Request dated November 17, 2000, to Dominion requesting a new delivery point consistent with the Network Operating Agreement between Old Dominion Electric Cooperative and Dominion. ODEC requested that Dominion respond to its request by December 8, 2000.
20. On or about February 7, 2001, Dominion advised NOVEC that Dominion intended to provide electrical service to the Smithsonian. NOVEC did not receive this information directly from the Smithsonian. Rather, NOVEC received a copy of a letter addressed to a Smithsonian representative from Dominion. This letter indicated that Dominion had received a February 1, 2001 request for electrical service from the Smithsonian and that in this February 7th correspondence, Dominion acknowledged that it would be in a position to provide service once it was able to "obtain all applicable permits, easements, or approvals required for the construction and placement of [the Dominion] facilities."

-
21. On or about April 6, 2001, NOVEC received a letter addressed to ODEC from Dominion denying the requested delivery point. The reasons cited for the denial included the assertion that the Smithsonian had requested that Dominion provide the electric service. Dominion further advised NOVEC, through ODEC, that the service arrangements between Dominion and the Smithsonian were being finalized.
 22. Subsequent to April 6, 2001, Mr. Jim Moxley, Senior Vice President for Electric and Telecommunication Systems Development, of NOVEC contacted the Smithsonian to request building plans and specifications, to include, energy design requirements. Initially Mr. Moxley's request was made of Mr. Robert A. Weisman, Chief, Energy Management of the Smithsonian. Mr. Weisman referred Mr. Moxley to Mr. Justin Estoque . Mr. Estoque advised NOVEC that the Smithsonian counsel would not permit him to release any additional information to NOVEC.
 23. NOVEC had several conversations with Dominion in an attempt to resolve the dispute. NOVEC sent letter to Dominion proposing various compromise arrangements to resolve the dispute between NOVEC and Dominion, culminating in NOVEC's request for a meeting between NOVEC, Dominion and the Staff of the Commission, which was held in June 2001.
 24. By letter dated July 3, 2001, NOVEC advised Dominion that in the interests of meeting the Smithsonian's immediate need for temporary power NOVEC would permit Dominion to provide temporary service in NOVEC's service territory.

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25. By letter dated August 1, 2001 ODEC, on behalf of NOVEC, rejected Dominion's denial of a delivery point as being contrary to the Network Operating Agreement.
 26. NOVEC will suffer irreparable harm if Dominion is permitted to provide permanent power to the Smithsonian.
 27. Granting a preliminary injunction will harm neither Dominion nor the Smithsonian.
 28. A preliminary injunction maintaining the status quo--allowing continuation of temporary service, but prohibiting further development of permanent facilities--will not endanger the Smithsonian's construction schedule, and is in the interest of justice.
 29. Contrary to Dominion's contentions, Dominion will not suffer any harm from a preliminary injunction maintaining the status quo.
 30. A preliminary injunction will prevent Dominion from proceeding with expense that should not and need not be incurred by anyone at this point, thereby avoiding a waste of resources.
 31. Dominion, knowing that there has been and is a continuing legal dispute with respect to electricity service to the Smithsonian facility, if it begins building permanent facilities, does so at its own peril.

B. Dominion Virginia Power's Statement of Facts and Chronology of Events:

1. The Smithsonian has in this proceeding expressed a preference for Dominion Virginia Power to provide it with electric service.
2. NOVEC did not object to Dominion Virginia Power's providing temporary power to the facility as evidenced by a letter from NOVEC dated July 3, 2001 sent to Edmond P. Wickham, Jr. of Dominion Virginia Power, attached as Exhibit 1.
3. Of paramount and practical importance to the Smithsonian is that the phased construction schedule of the Unvar-Hazy Center not be compromised. Only the timely completion of each of the project's phases will ensure that the Undvar-Hazy Center opens in December, 2003 -- the centennial of the first powered flight by the Wright Brothers on December 17, 1903. Meeting that date is a very significant concern of the Smithsonian for three reasons: (1) many individual and corporate donors who provide funding for the Center's construction expect the center to be completed by that date; (2) the project's critical path, which is the timeline for completion of various phases of construction, could be endangered by scheduling changes; and (3) the Museum plans to take advantage of the unique educational opportunities associated with the centennial of the Wright brothers' first flight. As discussed below, significant planning has been completed and related infrastructure installed in anticipation that Dominion Virginia Power would provide the site with electricity. Those plans would need to be re-examined and the infrastructure modified or replaced should the Commission issue an injunction, *pendente lite*, that will disrupt electricity service or if the

Commission holds that NOVEC should be the exclusive provider. The resulting impact would greatly endanger the scheduled opening of the Udvar-Hazy Center.

4. Specifically, the construction schedule is based, in part, upon the planned delivery and installation by Virginia Power of its first transformer during November, 2001. The installation will make permanent power available to the Smithsonian's construction contractor, Hensel Phelps Construction Company ("HPCC"), well beyond the current, and temporary, power capacity. To permit construction and start-up of mechanical and electrical equipment necessary for construction of the Center's buildings, HPCC must have this additional power, at the latest, by April 1, 2002. These tasks are on the construction project's critical path, and, as a result, must be performed on schedule in order to preserve the timeline established in the construction plan.
5. Similarly, Virginia Power has sized its transformers for the Smithsonian's building loads, and the concrete pads for the transformers also have been designed and installed in accordance with Dominion Virginia Power's requirements. Should the Commission conclude that NOVEC is the proper provider, it must confirm these calculations or re-size its transformers, and the Smithsonian may need to redesign the concrete pads for the transformers. This process could create additional delays to the start of electrical service to the building, threatening the construction completion dates. Likewise, ductbank for carrying service conductors has been designed and installed in accordance with Dominion Virginia Power's requirements. At a minimum, NOVEC must also confirm that the ductbank meets its requirements, and if it does not, time-consuming and

potentially costly changes to the ductbank must be made, again jeopardizing the construction timeline and the completion dates of the various phases. Dominion Virginia Power's lead time for new transformers of this size is six months. NOVEC's lead time is at least that long and it has not yet ordered the transformers.

6. The Smithsonian's primary concern is to ensure that the current construction schedule is not disrupted and that the Udvar-Hazy Center is open by December 2003. Failure to do so will result in monetary losses resulting from possible delay claims by the construction contractor, frustration of the expectations of individual and corporate donors to the Museum and the loss of intangible and unquantifiable educational opportunities for the National Air and Space Museum to publicly celebrate the centennial of a seminal historical event, the first powered flight by the Wright Brothers on December 17, 1903.
7. The granting of a temporary injunction either against the provision of temporary or permanent power or the construction of permanent facilities would harm the Smithsonian, Dominion Virginia Power, and the public interest.
8. Denial of a temporary injunction would not irreparably harm NOVEC.
9. John Caskey, the Dominion Virginia Power Account Manager for the Smithsonian Institution, including the museum annex under construction near Dulles Airport, visited the site July 19, 2001 to determine where the boundary between the service territories of NOVEC and Dominion Virginia Power crossed the Smithsonian site. He referred to service area map E51 that was signed on December 9, 1977. He also looked at a rough building site plan provided by the

Smithsonian. He was able to locate the southeast corner of the NOVEC territory, but could not identify where the east boundary line crossed the building site. From his rough estimates, it appeared that the boundary line went through the middle of the main hangar. However, it was difficult to locate the north/south boundary on the east side of the NOVEC territory because this boundary was not exactly parallel to the fence line on the west side of the area.

10. On July 23, 2001, he went back to the site with a surveyor equipped with a Global Position Satellite (GPS) receiver to refine his estimate of the location of the territory boundary relative to the building site. He felt that the best approach was to locate the corners of the NOVEC territory and then take a few GPS measurements from the actual building site. He was able to locate the northwest, southwest and southeast corners of the service area with a high degree of confidence. According to service area map E51, the northwest corner was where the fence line took an almost 90 degree turn to the west. The southwest corner was where the fence line crossed the creek. The southeast corner was where the east/west creek had a branch going to the north. The surveyor took GPS measurements at these three locations. Mr. Caskey also walked-off the distance between the southwest and southeast corners of the NOVEC territory and estimated this distance to be about 345 yards.
11. He and the surveyor were not able to locate the northeast corner of the NOVEC territory because the point is well within the airport's property and because there is no clear physical boundary to identify. They walked-off about 345 yards from the northwest corner and took a GPS measurement at that location. They also

took a GPS measurement about 265 yards from the northwest corner to represent the fact that the north/south boundary on the east side of the territory was not exactly parallel to the west side. They also took several GPS measurements where the buildings were being constructed. The surveyor then took all these measurements and provided Mr. Caskey a file with each data point and the corresponding latitude and longitude. He also provide a topographic map with the data points plotted on the map, attached as Exhibit 2.

12. The greater part of Smithsonian's parcel, the IMAX theater and the entire parking lot, are in Dominion Virginia Power's territory and that part of the hangar is also in that territory. It is not possible to calculate the particular percentage of the hangar area in each utility area because the northeast corner of the NOVEC service area has not been located on the ground.
13. In Paragraph 18 of its petition NOVEC indicates it is willing and "able" to provide service. However, NOVEC's ability to provide service is contingent on receiving a delivery point from Dominion. The closest NOVEC source is approximately 1.25 miles away. NOVEC has not begun to extend that line. In contrast, Dominion Virginia Power's facilities are adjacent to the Smithsonian property and its delivery point near the building is only about 1500 feet away from its existing three-phase overhead line. The Dominion Virginia Power three-phase line (circuit 450) is already being used to provide temporary service to the Smithsonian construction site. The Smithsonian is situated at the farthest point in a very narrow portion of NOVEC's territory. Dominion Virginia Power's territory bounds NOVEC's territory on three sides. Dominion Virginia Power has

facilities available for a normal and alternate service. NOVEC does not even have facilities available for a normal service.

14. The parcel just to the west of NOVEC's western boundary line was initially in NOVEC territory. NOVEC gave up the parcel because it did not have adequate distribution facilities in the immediate area to serve a customer at the end of its service territory. Dominion was already serving the Avion office park just to the south. The area given up by NOVEC was closer to its then existing facilities than the Smithsonian. A copy of the SCC order in Case No. (PUE830030 dated 6/3/91) granting the territory revision is attached as Exhibit 3.
15. NOVEC is unlikely to prevail on the merits of its claim.

III.

Legal Issues in Dispute.

The parties have not reached an agreement on the legal issues in dispute in this case. Thus, the parties present the following legal issues for consideration by the Commission at this stage in this proceeding:

A. NOVEC presents the following legal issues:

NOVEC believes that Dominion has set forth legal questions that are irrelevant to the proceeding that is currently before this Commission, namely a request for a preliminary injunction to maintain the parties in a status quo position. NOVEC is entitled to such an injunction, and any other questions of law are beyond the scope of the hearing scheduled for October 25, 2001.

B. Dominion Virginia Power presents the following legal issues.

Dominion Virginia Power disagrees that the legal issues presented in the case at large are irrelevant to the motion for a preliminary injunction. They are clearly relevant to NOVEC's likelihood of success on the merits. The issues in this proceeding include the following:

1. Whether the Commission has jurisdiction to enter an order declaring that Dominion Virginia Power has wrongfully and tortiously interfered with NOVEC's contractual rights, prospective contractual rights and potential economic relationships?
2. Whether the Commission has jurisdiction to declare that Dominion Virginia Power must pay damages on account of any claim of tortious interference?
3. Whether NOVEC has stated a claim upon which relief can be granted for tortious interference with any rights?
4. Whether the Commission has jurisdiction to resolve NOVEC's delivery point claim or whether that claim falls within the exclusive jurisdiction of the Federal Energy Regulatory Commission?
5. Whether the granting of a preliminary mandatory injunction is disfavored and is reserved for the most extraordinary cases?
6. Whether the balance of equities flowing from consideration of (1) possible irreparable harm to NOVEC, (2) harm to Dominion Virginia Power, (3) the lack of a likelihood of success on the merits for NOVEC and (4) the public interest weighs against the award of extraordinary relief to NOVEC?
7. Where it is established with respect to new construction on a parcel of land that (a) all points of use lie wholly or partially within Dominion Virginia Power's

territory on a parcel that itself lies mostly within Dominion Virginia Power's territory, (b) the new customer has not manipulated its land holdings or point of delivery to change service territories, (c) the customer desires service from Dominion Virginia Power, and (d) Dominion Virginia Power's facilities are the closest, and best equipped to provide prompt, reliable service, should Dominion Virginia Power have the right to serve that customer?

IV.

Joint Submission.

Counsel for NOVEC have authorized counsel for Dominion Virginia Power to represent that they join in this submission. Counsel for NOVEC are executing it in counterpart and will overnight it to the Commission.

Respectfully submitted,

VIRGINIA ELECTRIC AND POWER COMPANY
d/b/a DOMINION VIRGINIA POWER VIRGINIA
POWER

By: E. Duncan Getchell, Jr.
Counsel

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CERTIFICATE OF SERVICE

I hereby certify that I have filed with the Clerk of the Commission, Joel H. Peck, Clerk, State Corporation Commission, c/o Document Control Center, P.O. Box 2118, Richmond, Virginia 23218, an original and fifteen (15) copies of the foregoing and have also served it on all parties of record to this proceeding by first class, postage prepaid mail to the addresses shown below and have hand-delivered a copy of the same to counsel for the Staff on this 16th day of October, 2001.

JoAnne L. Nolte, Esq., PennStuart, P.O. Box 617, Richmond, Virginia 23218-0617; Kenneth Melson, First Deputy, Eastern District of Virginia, 2100 Jamieson Avenue, Alexandria, Virginia 22314; Paul J. McNulty, United States Attorney, Eastern District of Virginia, 2100 Jamieson Avenue, Alexandria, Virginia 22314; Steven E. Gordon, Assistant U.S. Attorney, 2100 Jamieson Avenue, Alexandria, Virginia 22314; John Ashcroft, United States Attorney General, U.S. Department of Justice, 950 Pennsylvania Avenue, N.W., Washington, D.C. 20530-0001; Stephen A. Perry, Administrator, General Services Administration, 1800 F. Street, N.W.,

Washington, D.C. 20405; Lawrence M. Small, Secretary, Smithsonian Institute, 1000 Jefferson Drive, S.W., Washington, D.C. 20560-0012; General Counsel, Smithsonian Institute, 1000 Jefferson Drive, S.W., Suite 302, Washington, D.C. 20560-0012; and to John F. Duttley, Senior Assistant Attorney General and Chief, Division of Consumer Counsel, Office of the Attorney General, 900 East Main Street, Second Floor, Richmond, Virginia 23219.

E. Norman Gatchell, Jr.



Exhibit 1

July 3, 2001

Corporate Office
10323 Linnwood Drive
Manassas, VA 20109

Mailing Address
P.O. Box 2710
Manassas, VA 20108
(703) 314-0500

Guineville Technical Center
5399 Wellington Road
Guineville, VA 20155

Leesburg Office
349 East Market Street
Leesburg, VA 20176

Minerva Office
14500 Minerva Road
Woodbridge, VA 22193

Stafford Office
2430 Poplar Road
Fredericksburg, VA 22406

Mr. Ed Wickham
Director - Distribution Operations
Dominion Virginia Power
One James River Plaza
701 East Cary Street
Richmond, VA 23261-6666

Re: Smithsonian, your letter of June 28, 2001

Dear Mr. Wickham;

Thank you for your June 28, 2001 letter and for your offer to resolve the matter of electric service to the Smithsonian's Steven F. Udvar-Hazy Center. NOVEC has reviewed your offer for NOVEC to serve the portion of the South Riding development in Dominion Virginia Power's service area that is designated for future commercial development and which represents 2 to 3 MW of electric load. We conclude that we cannot accept your offer. However, we propose an alternate resolution.

According to the official State Corporation Commission (SCC) territory map of the area in question as well as the museum site plan information available to NOVEC, we have determined that approximately 85% of the museum facility load lies within the NOVEC's franchised service territory. NOVEC has apportioned the museum's electrical load using a total electrical load of about 6-7 MW, based on information obtained from Dominion Virginia Power since the actual technical requirements have not been made available to NOVEC from the Smithsonian. The portion of the load in NOVEC's service territory is therefore approximately 5+ MW while Dominion Virginia Power's portion is approximately 1 MW.

NOVEC is willing to compensate Dominion Virginia Power for the portion of the museum that seems to be in Dominion Virginia Power's territory, consistent with our recent discussions with the SCC about this issue. NOVEC has identified planned developments in its service territory that would represent approximately 1 MW of electric load that could be served by Dominion Virginia Power. The specific areas consist of approximately 100,000 square feet of planned retail development in the Parkway Crossing East, in the Potomac Mills area, plus 112 residential single family lots in the Stokely development in Prince William County. These two developments represent electric load in excess of 1 MW and they are currently in need of a service territory boundary adjustment.

NOVEC is concerned about the Smithsonian's immediate power needs to support its construction schedule. NOVEC is prepared to install permanent power cables

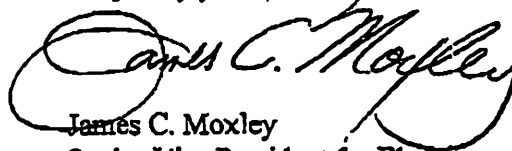
Equal Opportunity Employer

in the existing duct system as early as next week. However, the specific technical requirements have not been made available that would enable NOVEC to assess the transformer requirements. In addition, NOVEC anticipates that Dominion Virginia Power will provide the necessary delivery point to NOVEC as requested on November, 2000.

In the interim, and in the interests of meeting the Smithsonian's immediate need for temporary power to the construction site, NOVEC proposes to allow Dominion Virginia Power to provide temporary service in NOVEC's service territory until such time that the permanent power is required.

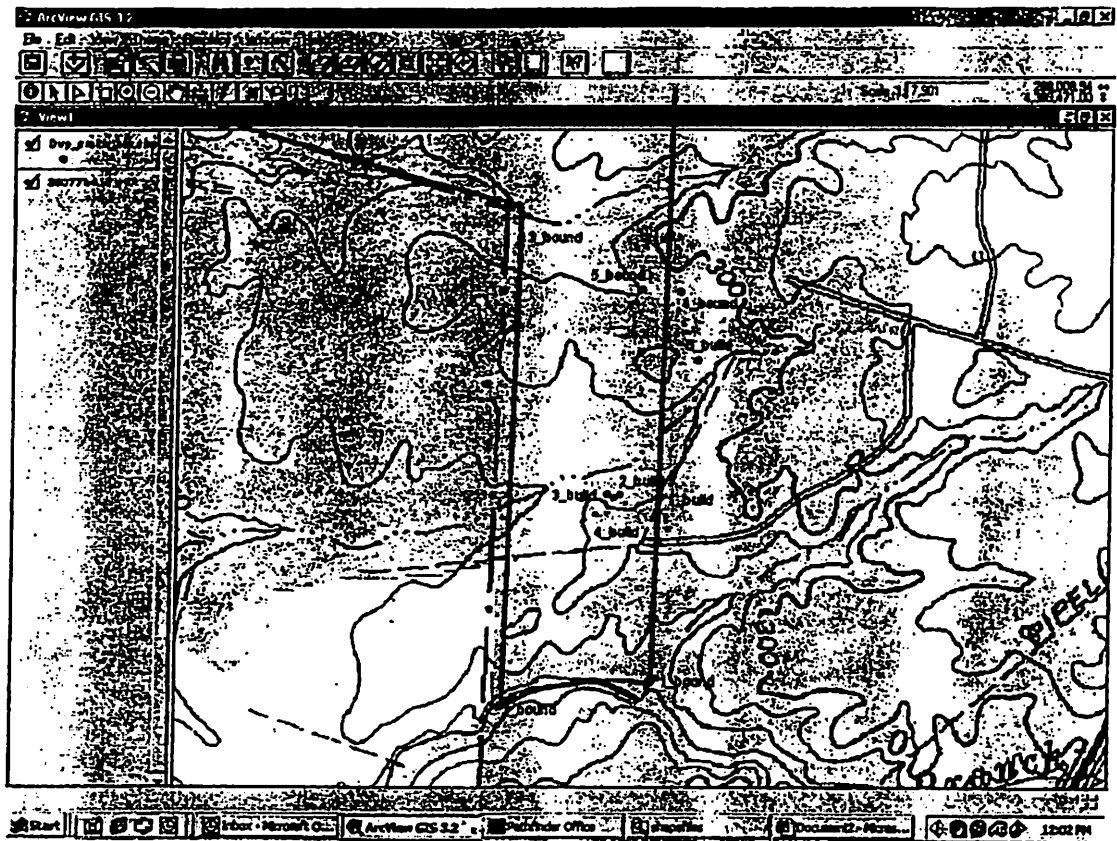
NOVEC looks forward to your response to our proposal.

Very truly yours,

A handwritten signature in black ink, appearing to read "James C. Moxley". The signature is fluid and cursive, with a large loop at the end.

James C. Moxley
Senior Vice President for Electric and
Telecommunication Systems Development

Cc: Mr. Keith Kaier, Dominion Virginia Power
Mr. Tim Faherty, SCC
Mr. Gil Jaramillo, NOVEC



red = best estimate of
territory boarder using
topography of original
territory map.

- 1 build = SE Corner of Hanger
- 2 build = SW Corner of Hanger
- 3 build = SW side of chiller plant
- 4 build = Center of chiller plant
- 5 build = NE side of IMAX theater

J. Caskey 7/24/01

ID_NUM	ID	GPS_DATE	GPS_TIME	UNFILT	NORTHING	EASTING	LATITUDE	LONGITUDE
1_bound	se corner 01	07/23/2001	09:24:29AM	14	4219512.634104360	11783598.737667300	-77.443723363	38.906428416
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4_bound	ne rough	07/23/2001	10:54:30AM	25	4221956.274508500	11783643.510453600	-77.443470024	38.913133836
5_bound	approx ne border	07/23/2001	11:10:29AM	28	4221963.907185000	11783401.116531800	-77.444321244	38.913162228
1_build	se corner hanger	07/23/2001	09:50:14AM	25	4220656.721793230	11783568.803093500	-77.443783548	38.909569393
2_build	sw corner hanger	07/23/2001	09:56:11AM	26	4220658.514684420	11783319.116639800	-77.444660574	38.909581978
3_build	sw end chiller plant	07/23/2001	10:00:42AM	26	4220660.029827680	11783231.060762900	-77.444969836	38.909588838
4_build	center chiller plant	07/23/2001	10:04:06AM	25	4220639.442280650	11783277.646799900	-77.444806998	38.909530904
5_build	ne imax	07/23/2001	10:12:17AM	25	4221528.136514180	11783769.634341200	-77.443043795	38.911954899

Ex 4.47+3

SCC-62

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COMMONWEALTH OF VIRGINIA
STATE CORPORATION COMMISSION

Attachment E

1991 JUN 10 PM 2:51

AT RICHMOND, JUNE 3, 1991

APPLICATION OF

VIRGINIA ELECTRIC AND POWER COMPANY / CASE NO. 11655
AND
NORTHERN VIRGINIA ELECTRIC COOPERATIVE CASE NO. PUE830030

For revision to certificate under
the Utility Facilities Act

Came the applicants by letter of agreement and requested a
revision to territorial boundary Map E51 and Certificate E-E51.

Northern Virginia Electric Cooperative does not have
adequate distribution facilities in the immediate area to serve a
customer at the end of its service territory. Virginia Electric
and Power Company is already serving an adjacent office park
complex and has agreed to serve the customer. Accordingly,

IT IS ORDERED:

(1) That Map E51 and Certificate E-E51 be revised as
requested in the letter of agreement.

(2) That a copy of this Order with a copy of the revised
map and revised certificate be sent to Virginia Electric and
Power Company, in care of Mr. T. J. O'Neil, Vice President,
Regulation, P. O. Box 26666, Richmond, Virginia 23261; to
Northern Virginia Electric Cooperative, in care of Mr. Harry K.
Bowman, General Manager, P. O. Box 2710, 10323 Lomond Drive,
Manassas, Virginia 22110, and that a copy of this Order be sent
to the Commission's Division of Energy Regulation.

A True Copy
Teste:

William J. Bridge
Clerk of the
State Corporation Commission

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JoAnne L. Nolte, Esq.
PENN, STUART & ESKRIDGE
801 E. Main Street, Suite 1110
Richmond, VA 23219
Phone: 804/819-1770
Fax: 804/819-1753

By: JoAnne L. Nolte
JOANNE L. NOLTE
Counsel for Petitioner

CERTIFICATE OF SERVICE

I hereby certify that I have mailed the foregoing Joint Stipulation of Facts and Issues via UPS Next Day Air to Joel H. Peck, Clerk of the Commission, State Corporation Commission c/o Document Control Center, 1300 E. Main Street, Richmond, VA 23219 and mailed a true copy of the foregoing to E. Duncan Getchell, Jr., Esq. and Kodwo Gharthey-Tagoe, Esq., McGuireWoods, One James Center, 901 East Cary Street, Richmond, VA 23219; Steven E. Gordon, Esq., Assistant U.S. Attorney, 2100 Jamison Avenue, Alexandria, VA 22314; John K. Lapiana, Esq., Assistant General Counsel, Smithsonian Institution, Washington, DC 20560; Paul J. McNulty, Esq., United States Attorney, Eastern District of Virginia, 2100 Jamison Avenue, Alexandria, VA 22314; and Sherry H. Bridewell, Esq., Senior Counsel and Wayne Smith, Senior Counsel, P.O. Box 1197, Richmond, VA 23218-1192 this 17th day of October, 2001,

JoAnne L. Nolte
JOANNE L. NOLTE

COMMONWEALTH OF VIRGINIA
STATE CORPORATION COMMISSION

COMMONWEALTH OF VIRGINIA, ex rel.

NORTHERN VIRGINIA ELECTRIC COOPERATIVE,

Petitioner,

v.

CASE NO. PUE010512

VIRGINIA ELECTRIC AND POWER COMPANY
d/b/a DOMINION VIRGINIA POWER,
SMITHSONIAN INSTITUTION, AND U. S.
GENERAL SERVICES ADMINISTRATION

Respondents.

**JOINT STIPULATION OF FACTS
AND LIST OF FACTS AND LEGAL ISSUES IN DISPUTE**

Pursuant to the Rules of Practice and Procedure of the State Corporation Commission and the Commission's Preliminary Order of October 2, 2001, Northern Virginia Electric Cooperative (NOVEC), and Virginia Electric and Power Company d/b/a/ Dominion Virginia Power ("Dominion Virginia Power"), by counsel, present to the Commission as set forth herein this Joint Stipulation of Facts and List of Facts and Legal Issues in Dispute ("Joint Stipulation").

By signing this Joint Stipulation, which may be signed in counterparts, NOVEC and Dominion Virginia Power do not waive any rights to assert that any jointly stipulated facts, or any other alleged fact, is not relevant to the legal issues in dispute in this case. Because this Joint Stipulation of Facts and List of Facts and Legal Issues in Dispute is

preliminary, the parties reserve the right to supplement it on reasonable notice as these proceedings develop.

I.

Joint Stipulation of Facts.

A. Parties.

Petitioner:

1. NOVEC is an electric cooperative organized and existing under Article 1, Chapter 9.1 §§ 56-231.15 to 56.231.37 of the Code of Virginia, which article is referred to as the “Utility Consumer Services Property Act.”

Respondents:

2. Dominion Virginia Power is a Virginia public service corporation authorized to transact business as an electric utility in this Commonwealth.
3. The Smithsonian Institution was created by an Act of Congress for the “increase and diffusion of knowledge among men . . .” 20 U.S.C. § 41. The Smithsonian is constructing a National Air and Space Museum annex at Dulles International Airport.

B. Stipulated Facts.

1. The Smithsonian is currently being provided with temporary power for construction by Dominion Virginia Power.
2. NOVEC has made efforts to obtain specifications on the facility from the Smithsonian, but the Smithsonian has declined to provide such information.

II.

Factual Issues in Dispute.

A. NOVEC's Statement of Facts and Chronology of Events:

1. According to the map on file with the Commission, the overwhelming bulk of the load for the Smithsonian facility is within NOVEC's certificated territory.
2. All or virtually all of the facility buildings, including the "hangar area" are solely within NOVEC's certificated territory.
3. Upon information and belief, the facility buildings including the "hangar area" are the physical structures that will consume approximately 95% or more of the electricity supplied to the entire Smithsonian facility.
4. NOVEC is ready, willing, and able to supply electricity to the Smithsonian's facility.
5. NOVEC is ready, willing and able to distribute electricity to distribute electricity to the Smithsonian facility.
6. Dominion has denied NOVEC, through Old Dominion Electric Cooperative (ODEC), a delivery point requested pursuant to contract between ODEC, on behalf of NOVEC, and Dominion.
7. In 1996, NOVEC representatives learned that the Smithsonian planned to construct a National Air and Space Museum at its annex at Dulles International Airport.
8. NOVEC began its communications with the Smithsonian on or about August 6, 1996 to obtain specifications for the facility and appropriate

time lines for phases of construction so that NOVEC could develop and implement a plan for furnishing electric service to the new Smithsonian museum, because it was to be located in NOVEC's certificated territory. Information and documents in NOVEC's files establish that during 1996 NOVEC believed that over 85% of the facility was within NOVEC's service territory. Today NOVEC believes, based upon the information that it has received from Fairfax County that over 95% of the facility is within its certificated territory.

9. On about August 15, 1996, HOK Architects, Inc., the facility design, engineering/architect firm under contract to the Smithsonian, sent a letter to NOVEC. This letter contained preliminary design information. Importantly this correspondence predicted that, "Mechanical and electrical load information will change as the design develops."
10. On or about August 21, 1996, NOVEC sent a letter to HOK providing initial rate information and service territory boundary information.
11. On October 9, 1996, Dominion, Old Dominion Electric Cooperative, and NOVEC discussed the planned Smithsonian Annex during a regularly scheduled quarterly meeting.
12. On November 8, 1996, NOVEC met with HOK at HOK offices in District of Columbia to discuss technical requirements of the project.

-
13. On November 21, 1996, NOVEC received a fax from the National Renewable Energy Laboratory (NREL) which advised NOVEC of a meeting to be held on December 11, 1996. The fax stated that, "The meeting will address which utility (NOVEC and Virginia Power both have service available at the site) can best serve the Smithsonian's National Air and Space Museum Dulles Center at Dulles International Airport. Of course, service reliability and energy costs are key factors to be considered. Construction is slated to begin on the 740,000 square foot facility in 1999. As I mentioned, a 1 MW Building Integrated Photovoltaic (BIPV) system is proposed for the site."
 14. On December 11, 1996, NOVEC, NREL, and Smithsonian officials met at the Smithsonian L'enfant Plaza office in Washington D.C. At that meeting, NOVEC advised Smithsonian it was ready, willing, and able to provide service to the facility. NOVEC described the territory boundary issues. NOVEC informed the Smithsonian of its strongly held belief that it was the certificated provider of electrical service.
 15. On December 20, 1996, NOVEC forwarded a letter to the Smithsonian again providing rate information and emphasizing NOVEC's obligation to serve all customers and provide all electrical loads within NOVEC's territory as defined by the Commission.
 16. On or about July 10, 1997, representatives of NOVEC again met with the Smithsonian.
 17. On November 17, 1998, NOVEC met with the Smithsonian in Washington D.C. NOVEC sent a confirmatory follow up letter dated November 17, 1998 to the

Smithsonian asserting its right to serve the facility and referencing the RGC Mineral Sands case.

18. On or about January 25, 1999 NOVEC received a letter from Dominion to the Smithsonian. NOVEC learned for the first time that Dominion had service facilities available in the area of the proposed facility and importantly that while the facility was in NOVEC's territory, two thirds of the site was in Dominion's service territory. Dominion's contentions were not accurate according to the information that NOVEC had obtained.
19. On November 22, 2000, NOVEC, through Old Dominion Electric Cooperative, sent a Cooperative Delivery Point Request dated November 17, 2000, to Dominion requesting a new delivery point consistent with the Network Operating Agreement between Old Dominion Electric Cooperative and Dominion. ODEC requested that Dominion respond to its request by December 8, 2000.
20. On or about February 7, 2001, Dominion advised NOVEC that Dominion intended to provide electrical service to the Smithsonian. NOVEC did not receive this information directly from the Smithsonian. Rather, NOVEC received a copy of a letter addressed to a Smithsonian representative from Dominion. This letter indicated that Dominion had received a February 1, 2001 request for electrical service from the Smithsonian and that in this February 7th correspondence, Dominion acknowledged that it would be in a position to provide service once it was able to "obtain all applicable permits, easements, or approvals required for the construction and placement of [the Dominion] facilities."

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21. On or about April 6, 2001, NOVEC received a letter addressed to ODEC from Dominion denying the requested delivery point. The reasons cited for the denial included the assertion that the Smithsonian had requested that Dominion provide the electric service. Dominion further advised NOVEC, through ODEC, that the service arrangements between Dominion and the Smithsonian were being finalized.
 22. Subsequent to April 6, 2001, Mr. Jim Moxley, Senior Vice President for Electric and Telecommunication Systems Development, of NOVEC contacted the Smithsonian to request building plans and specifications, to include, energy design requirements. Initially Mr. Moxley's request was made of Mr. Robert A. Weisman, Chief, Energy Management of the Smithsonian. Mr. Weisman referred Mr. Moxley to Mr. Justin Estoque. Mr. Estoque advised NOVEC that the Smithsonian counsel would not permit him to release any additional information to NOVEC.
 23. NOVEC had several conversations with Dominion in an attempt to resolve the dispute. NOVEC sent letter to Dominion proposing various compromise arrangements to resolve the dispute between NOVEC and Dominion, culminating in NOVEC's request for a meeting between NOVEC, Dominion and the Staff of the Commission, which was held in June 2001.
 24. By letter dated July 3, 2001, NOVEC advised Dominion that in the interests of meeting the Smithsonian's immediate need for temporary power NOVEC would permit Dominion to provide temporary service in NOVEC's service territory.

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25. By letter dated August 1, 2001 ODEC, on behalf of NOVEC, rejected Dominion's denial of a delivery point as being contrary to the Network Operating Agreement.
 26. NOVEC will suffer irreparable harm if Dominion is permitted to provide permanent power to the Smithsonian.
 27. Granting a preliminary injunction will harm neither Dominion nor the Smithsonian.
 28. A preliminary injunction maintaining the status quo--allowing continuation of temporary service, but prohibiting further development of permanent facilities--will not endanger the Smithsonian's construction schedule, and is in the interest of justice.
 29. Contrary to Dominion's contentions, Dominion will not suffer any harm from a preliminary injunction maintaining the status quo.
 30. A preliminary injunction will prevent Dominion from proceeding with expense that should not and need not be incurred by anyone at this point, thereby avoiding a waste of resources.
 31. Dominion, knowing that there has been and is a continuing legal dispute with respect to electricity service to the Smithsonian facility, if it begins building permanent facilities, does so at its own peril.

B. Dominion Virginia Power's Statement of Facts and Chronology of Events:

1. The Smithsonian has in this proceeding expressed a preference for Dominion Virginia Power to provide it with electric service.
2. NOVEC did not object to Dominion Virginia Power's providing temporary power to the facility as evidenced by a letter from NOVEC dated July 3, 2001 sent to Edmond P. Wickham, Jr. of Dominion Virginia Power, attached as Exhibit 1.
3. Of paramount and practical importance to the Smithsonian is that the phased construction schedule of the Unvar-Hazy Center not be compromised. Only the timely completion of each of the project's phases will ensure that the Unvar-Hazy Center opens in December, 2003 -- the centennial of the first powered flight by the Wright Brothers on December 17, 1903. Meeting that date is a very significant concern of the Smithsonian for three reasons: (1) many individual and corporate donors who provide funding for the Center's construction expect the center to be completed by that date; (2) the project's critical path, which is the timeline for completion of various phases of construction, could be endangered by scheduling changes; and (3) the Museum plans to take advantage of the unique educational opportunities associated with the centennial of the Wright brothers' first flight. As discussed below, significant planning has been completed and related infrastructure installed in anticipation that Dominion Virginia Power would provide the site with electricity. Those plans would need to be re-examined and the infrastructure modified or replaced should the Commission issue an injunction, *pendente lite*, that will disrupt electricity service or if the

- Commission holds that NOVEC should be the exclusive provider. The resulting impact would greatly endanger the scheduled opening of the Udvar-Hazy Center.
4. Specifically, the construction schedule is based, in part, upon the planned delivery and installation by Virginia Power of its first transformer during November, 2001. The installation will make permanent power available to the Smithsonian's construction contractor, Hensel Phelps Construction Company ("HPCC"), well beyond the current, and temporary, power capacity. To permit construction and start-up of mechanical and electrical equipment necessary for construction of the Center's buildings, HPCC must have this additional power, at the latest, by April 1, 2002. These tasks are on the construction project's critical path, and, as a result, must be performed on schedule in order to preserve the timeline established in the construction plan.
 5. Similarly, Virginia Power has sized its transformers for the Smithsonian's building loads, and the concrete pads for the transformers also have been designed and installed in accordance with Dominion Virginia Power's requirements. Should the Commission conclude that NOVEC is the proper provider, it must confirm these calculations or re-size its transformers, and the Smithsonian may need to redesign the concrete pads for the transformers. This process could create additional delays to the start of electrical service to the building, threatening the construction completion dates. Likewise, ductbank for carrying service conductors has been designed and installed in accordance with Dominion Virginia Power's requirements. At a minimum, NOVEC must also confirm that the ductbank meets its requirements, and if it does not, time-consuming and

potentially costly changes to the ductbank must be made, again jeopardizing the construction timeline and the completion dates of the various phases. Dominion Virginia Power's lead time for new transformers of this size is six months. NOVEC's lead time is at least that long and it has not yet ordered the transformers.

6. The Smithsonian's primary concern is to ensure that the current construction schedule is not disrupted and that the Udvar-Hazy Center is open by December 2003. Failure to do so will result in monetary losses resulting from possible delay claims by the construction contractor, frustration of the expectations of individual and corporate donors to the Museum and the loss of intangible and unquantifiable educational opportunities for the National Air and Space Museum to publicly celebrate the centennial of a seminal historical event, the first powered flight by the Wright Brothers on December 17, 1903.
7. The granting of a temporary injunction either against the provision of temporary or permanent power or the construction of permanent facilities would harm the Smithsonian, Dominion Virginia Power, and the public interest.
8. Denial of a temporary injunction would not irreparably harm NOVEC.
9. John Caskey, the Dominion Virginia Power Account Manager for the Smithsonian Institution, including the museum annex under construction near Dulles Airport, visited the site July 19, 2001 to determine where the boundary between the service territories of NOVEC and Dominion Virginia Power crossed the Smithsonian site. He referred to service area map E51 that was signed on December 9, 1977. He also looked at a rough building site plan provided by the

Smithsonian. He was able to locate the southeast corner of the NOVEC territory, but could not identify where the east boundary line crossed the building site. From his rough estimates, it appeared that the boundary line went through the middle of the main hangar. However, it was difficult to locate the north/south boundary on the east side of the NOVEC territory because this boundary was not exactly parallel to the fence line on the west side of the area.

10. On July 23, 2001, he went back to the site with a surveyor equipped with a Global Position Satellite (GPS) receiver to refine his estimate of the location of the territory boundary relative to the building site. He felt that the best approach was to locate the corners of the NOVEC territory and then take a few GPS measurements from the actual building site. He was able to locate the northwest, southwest and southeast corners of the service area with a high degree of confidence. According to service area map E51, the northwest corner was where the fence line took an almost 90 degree turn to the west. The southwest corner was where the fence line crossed the creek. The southeast corner was where the east/west creek had a branch going to the north. The surveyor took GPS measurements at these three locations. Mr. Caskey also walked-off the distance between the southwest and southeast corners of the NOVEC territory and estimated this distance to be about 345 yards.
11. He and the surveyor were not able to locate the northeast corner of the NOVEC territory because the point is well within the airport's property and because there is no clear physical boundary to identify. They walked-off about 345 yards from the northwest corner and took a GPS measurement at that location. They also

took a GPS measurement about 265 yards from the northwest corner to represent the fact that the north/south boundary on the east side of the territory was not exactly parallel to the west side. They also took several GPS measurements where the buildings were being constructed. The surveyor then took all these measurements and provided Mr. Caskey a file with each data point and the corresponding latitude and longitude. He also provide a topographic map with the data points plotted on the map, attached as Exhibit 2.

12. The greater part of Smithsonian's parcel, the IMAX theater and the entire parking lot, are in Dominion Virginia Power's territory and that part of the hangar is also in that territory. It is not possible to calculate the particular percentage of the hangar area in each utility area because the northeast corner of the NOVEC service area has not been located on the ground.
13. In Paragraph 18 of its petition NOVEC indicates it is willing and "able" to provide service. However, NOVEC's ability to provide service is contingent on receiving a delivery point from Dominion. The closest NOVEC source is approximately 1.25 miles away. NOVEC has not begun to extend that line. In contrast, Dominion Virginia Power's facilities are adjacent to the Smithsonian property and its delivery point near the building is only about 1500 feet away from its existing three-phase overhead line. The Dominion Virginia Power three-phase line (circuit 450) is already being used to provide temporary service to the Smithsonian construction site. The Smithsonian is situated at the farthest point in a very narrow portion of NOVEC's territory. Dominion Virginia Power's territory bounds NOVEC's territory on three sides. Dominion Virginia Power has

facilities available for a normal and alternate service. NOVEC does not even have facilities available for a normal service.

14. The parcel just to the west of NOVEC's western boundary line was initially in NOVEC territory. NOVEC gave up the parcel because it did not have adequate distribution facilities in the immediate area to serve a customer at the end of its service territory. Dominion was already serving the Avion office park just to the south. The area given up by NOVEC was closer to its then existing facilities than the Smithsonian. A copy of the SCC order in Case No. (PUE830030 dated 6/3/91) granting the territory revision is attached as Exhibit 3.
15. NOVEC is unlikely to prevail on the merits of its claim.

III.

Legal Issues in Dispute.

The parties have not reached an agreement on the legal issues in dispute in this case. Thus, the parties present the following legal issues for consideration by the Commission at this stage in this proceeding:

A. NOVEC presents the following legal issues:

NOVEC believes that Dominion has set forth legal questions that are irrelevant to the proceeding that is currently before this Commission, namely a request for a preliminary injunction to maintain the parties in a status quo position. NOVEC is entitled to such an injunction, and any other questions of law are beyond the scope of the hearing scheduled for October 25, 2001.

B. Dominion Virginia Power presents the following legal issues.

Dominion Virginia Power disagrees that the legal issues presented in the case at large are irrelevant to the motion for a preliminary injunction. They are clearly relevant to NOVEC's likelihood of success on the merits. The issues in this proceeding include the following:

1. Whether the Commission has jurisdiction to enter an order declaring that Dominion Virginia Power has wrongfully and tortiously interfered with NOVEC's contractual rights, prospective contractual rights and potential economic relationships?
2. Whether the Commission has jurisdiction to declare that Dominion Virginia Power must pay damages on account of any claim of tortious interference?
3. Whether NOVEC has stated a claim upon which relief can be granted for tortious interference with any rights?
4. Whether the Commission has jurisdiction to resolve NOVEC's delivery point claim or whether that claim falls within the exclusive jurisdiction of the Federal Energy Regulatory Commission?
5. Whether the granting of a preliminary mandatory injunction is disfavored and is reserved for the most extraordinary cases?
6. Whether the balance of equities flowing from consideration of (1) possible irreparable harm to NOVEC, (2) harm to Dominion Virginia Power, (3) the lack of a likelihood of success on the merits for NOVEC and (4) the public interest weighs against the award of extraordinary relief to NOVEC?
7. Where it is established with respect to new construction on a parcel of land that (a) all points of use lie wholly or partially within Dominion Virginia Power's

territory on a parcel that itself lies mostly within Dominion Virginia Power's territory, (b) the new customer has not manipulated its land holdings or point of delivery to change service territories, (c) the customer desires service from Dominion Virginia Power, and (d) Dominion Virginia Power's facilities are the closest, and best equipped to provide prompt, reliable service, should Dominion Virginia Power have the right to serve that customer?

IV.

Joint Submission.

Counsel for NOVEC have authorized counsel for Dominion Virginia Power to represent that they join in this submission. Counsel for NOVEC are executing it in counterpart and will overnight it to the Commission.

Respectfully submitted,

VIRGINIA ELECTRIC AND POWER COMPANY
d/b/a DOMINION VIRGINIA POWER VIRGINIA
POWER

By: E. Duncan Getchell, Jr.
Counsel

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CERTIFICATE OF SERVICE

I hereby certify that I have filed with the Clerk of the Commission, Joel H. Peck, Clerk, State Corporation Commission, c/o Document Control Center, P.O. Box 2118, Richmond, Virginia 23218, an original and fifteen (15) copies of the foregoing and have also served it on all parties of record to this proceeding by first class, postage prepaid mail to the addresses shown below and have hand-delivered a copy of the same to counsel for the Staff on this 16th day of October, 2001.

JoAnne L. Nolte, Esq., PennStuart, P.O. Box 617, Richmond, Virginia 23218-0617;
Kenneth Melson, First Deputy, Eastern District of Virginia, 2100 Jamieson Avenue, Alexandria, Virginia 22314; Paul J. McNulty, United States Attorney, Eastern District of Virginia, 2100 Jamieson Avenue, Alexandria, Virginia 22314; Steven E. Gordon, Assistant U.S. Attorney, 2100 Jamieson Avenue, Alexandria, Virginia 22314; John Ashcroft, United States Attorney General, U.S. Department of Justice, 950 Pennsylvania Avenue, N.W., Washington, D.C. 20530-0001; Stephen A. Perry, Administrator, General Services Administration, 1800 F. Street, N.W.,

Washington, D.C. 20405; Lawrence M. Small, Secretary, Smithsonian Institute, 1000 Jefferson Drive, S.W., Washington, D.C. 20560-0012; General Counsel, Smithsonian Institute, 1000 Jefferson Drive, S.W., Suite 302, Washington, D.C. 20560-0012; and to John F. Dutley, Senior Assistant Attorney General and Chief, Division of Consumer Counsel, Office of the Attorney General, 900 East Main Street, Second Floor, Richmond, Virginia 23219.

E. Norman Getchell, Jr.



Exhibit 1

Corporate Office
10323 Lynwood Drive
Manassas, VA 20109
Mailing Address
P.O. Box 2710
Manassas, VA 20108
(703) 314-0500

Guineville Technical Center
5399 Wittington Road
Guineville, VA 20155

Leesburg Office
349 East Market Street
Leesburg, VA 20176

Minerva Office
14500 Manneville Road
Woodbridge, VA 22193

Stafford Office
2430 Poplar Road
Fredericksburg, VA 22406

July 3, 2001

Mr. Ed Wickham
Director - Distribution Operations
Dominion Virginia Power
One James River Plaza
701 East Cary Street
Richmond, VA 23261-6666

Re: Smithsonian, your letter of June 28, 2001

Dear Mr. Wickham;

Thank you for your June 28, 2001 letter and for your offer to resolve the matter of electric service to the Smithsonian's Steven F. Udvar-Hazy Center. NOVEC has reviewed your offer for NOVEC to serve the portion of the South Riding development in Dominion Virginia Power's service area that is designated for future commercial development and which represents 2 to 3 MW of electric load. We conclude that we cannot accept your offer. However, we propose an alternate resolution.

According to the official State Corporation Commission (SCC) territory map of the area in question as well as the museum site plan information available to NOVEC, we have determined that approximately 85% of the museum facility load lies within the NOVEC's franchised service territory. NOVEC has apportioned the museum's electrical load using a total electrical load of about 6-7 MW, based on information obtained from Dominion Virginia Power since the actual technical requirements have not been made available to NOVEC from the Smithsonian. The portion of the load in NOVEC's service territory is therefore approximately 5-7 MW while Dominion Virginia Power's portion is approximately 1 MW.

NOVEC is willing to compensate Dominion Virginia Power for the portion of the museum that seems to be in Dominion Virginia Power's territory, consistent with our recent discussions with the SCC about this issue. NOVEC has identified planned developments in its service territory that would represent approximately 1 MW of electric load that could be served by Dominion Virginia Power. The specific areas consist of approximately 100,000 square feet of planned retail development in the Parkway Crossing East, in the Potomac Mills area, plus 112 residential single family lots in the Stokely development in Prince William County. These two developments represent electric load in excess of 1 MW and they are currently in need of a service territory boundary adjustment.

NOVEC is concerned about the Smithsonian's immediate power needs to support its construction schedule. NOVEC is prepared to install permanent power cables

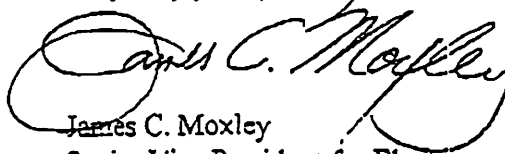
Equal Opportunity Employer

in the existing duct system as early as next week. However, the specific technical requirements have not been made available that would enable NOVEC to assess the transformer requirements. In addition, NOVEC anticipates that Dominion Virginia Power will provide the necessary delivery point to NOVEC as requested on November, 2000.

In the interim, and in the interests of meeting the Smithsonian's immediate need for temporary power to the construction site, NOVEC proposes to allow Dominion Virginia Power to provide temporary service in NOVEC's service territory until such time that the permanent power is required.

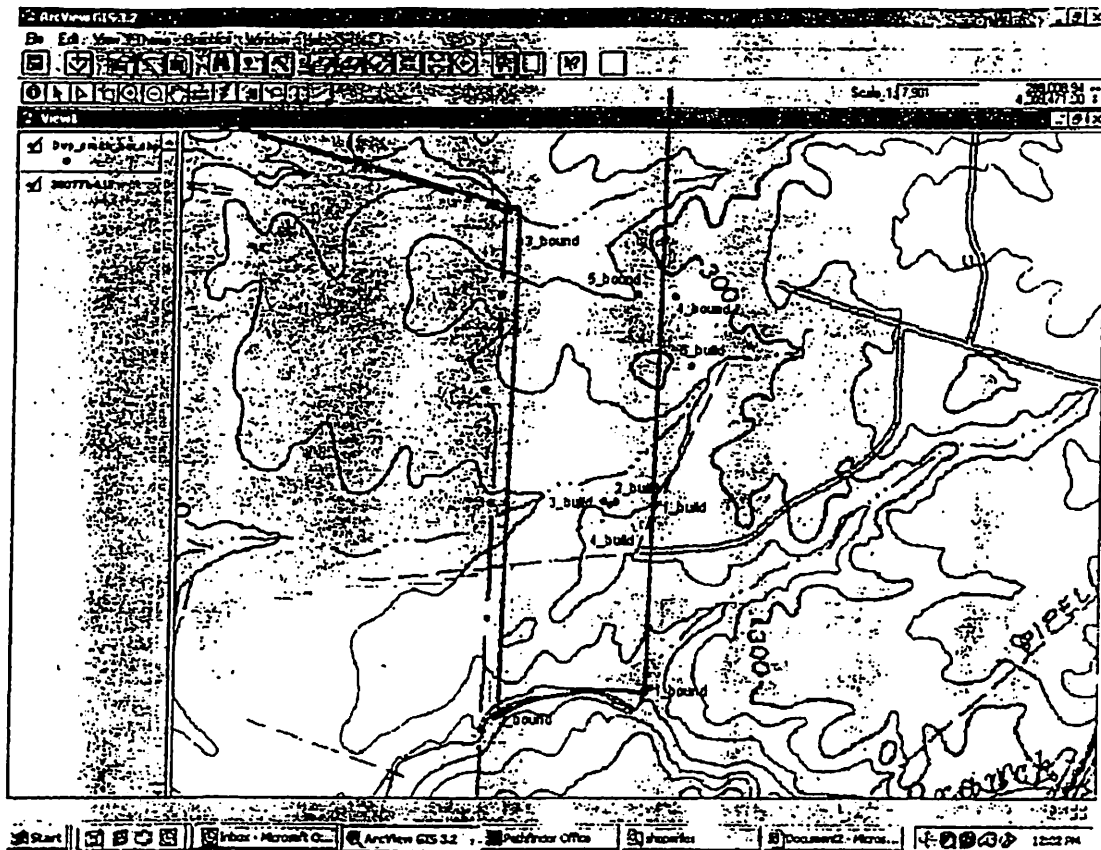
NOVEC looks forward to your response to our proposal.

Very truly yours,

A handwritten signature in dark ink, appearing to read "James C. Moxley". The signature is fluid and cursive, with a large initial "J" and "M".

James C. Moxley
Senior Vice President for Electric and
Telecommunication Systems Development

Cc: Mr. Keith Kaier, Dominion Virginia Power
Mr. Tim Faherty, SCC
Mr. Gil Jaramillo, NOVEC



red = best estimate of
territory boarder using
topography of original
territory map.

- 1 build = SE Corner of Hanger
- 2 build = SW Corner of Hanger
- 3 build = SW side of chiller plant
- 4 build = Center of chiller plant
- 5 build = NE side of IMAX theater

J Caskey 7/24/01

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STATE CORPORATION COMMISSION

Attachment E

1991 JUN 10 PM 2:51

AT RICHMOND, JUNE 3, 1991

APPLICATION OF

VIRGINIA ELECTRIC AND POWER COMPANY / CASE NO. 11655
AND
NORTHERN VIRGINIA ELECTRIC COOPERATIVE CASE NO. PUE830030

For revision to certificate under
the Utility Facilities Act

Came the applicants by letter of agreement and requested a
revision to territorial boundary Map E51 and Certificate E-E51.

Northern Virginia Electric Cooperative does not have
adequate distribution facilities in the immediate area to serve a
customer at the end of its service territory. Virginia Electric
and Power Company is already serving an adjacent office park
complex and has agreed to serve the customer. Accordingly,

IT IS ORDERED:

(1) That Map E51 and Certificate E-E51 be revised as
requested in the letter of agreement.

(2) That a copy of this Order with a copy of the revised
map and revised certificate be sent to Virginia Electric and
Power Company, in care of Mr. T. J. O'Neil, Vice President,
Regulation, P. O. Box 26666, Richmond, Virginia 23261; to
Northern Virginia Electric Cooperative, in care of Mr. Harry K.
Bowman, General Manager, P. O. Box 2710, 10323 Lomond Drive,
Manassas, Virginia 22110, and that a copy of this Order be sent
to the Commission's Division of Energy Regulation.

A True Copy
Teste:

William J. Bridge
Clerk of the
State Corporation Commission

COMMONWEALTH OF VIRGINIA
STATE CORPORATION COMMISSION
At Richmond

COMMONWEALTH OF VIRGINIA,
ex rel.

NORTHERN VIRGINIA ELECTRIC
COOPERATIVE,
Petitioner,

v.

VIRGINIA ELECTRIC AND POWER
COMPANY d/b/a DOMINION VIRGINIA
POWER, SMITHSONIAN INSTITUTION,
AND U.S. GENERAL SERVICES
ADMINISTRATION,
Respondents.

For a Petition for Declaratory Judgment and
Motion for injunction

CASE NO. PUE010512

**MOTION OF OLD DOMINION ELECTRIC COOPERATIVE AND THE
VA., MD. & DEL. ASSOCIATION OF ELECTRIC COOPERATIVES
FOR LEAVE TO PARTICIPATE AS INTERESTED PARTIES,
STATEMENT OF INTEREST AND MOTION FOR EXPEDITED
CONSIDERATION**

Old Dominion Electric Cooperative ("Old Dominion") and the Va., Md.
& Del. Association of Electric Cooperatives ("Association") hereby move for
leave to participate as interested parties in this proceeding and move for
expedited consideration of this motion, and state the following in support.

BACKGROUND

1. On September 11, 2001, pursuant to 5 VAC 5-20-100, Northern
Virginia Electric Cooperative ("Northern Virginia") filed its Petition for

Declaratory Judgment and Motion for Injunction, seeking, among other things, a determination of its right to provide electric service to the Steven F. Udvar-Hazy Center ("Facility") being developed in Fairfax County, Virginia, by the Smithsonian Institute ("Smithsonian") on property titled to the United States General Services Administration ("GSA").

2. On October 2, 2001, the Commission issued its Preliminary Order in this matter, establishing a docket, appointing a hearing examiner, setting a hearing date, and directing Dominion Virginia Power to answer and allowing the Smithsonian and the GSA to respond. The Preliminary Order did not provide for notice to, or responsive pleadings or participation by, interested parties other than the petitioner and respondents.

3. On October 11, 2001, the United States responded to Northern Virginia's Petition.

4. On October 12, 2001, Virginia Electric and Power Company, d/b/a Dominion Virginia Power ("Dominion Virginia Power") filed its Answer and Counter Petition.

STATEMENT OF INTEREST

5. Section 5 VAC 5-20-100 (C) governs petitions to the Commission for declaratory judgment. The last sentence provides that "the commission shall by order provide for the necessary notice, responsive pleadings, and participation by interested parties." Old Dominion Electric Cooperative and the Va., Md. & Del. Association of Electric Cooperatives are critically

interested parties in this proceeding, and their participation is necessary to the adjudication of the matters in controversy herein.

6. Old Dominion serves as the exclusive wholesale electric power supplier for Northern Virginia Electric Cooperative. Thus, Old Dominion's wholesale sales will be affected by this proceeding, at least until the implementation of full electric energy choice in the Northern Virginia's service territory. Old Dominion also provides, through its contractual arrangements, for Northern Virginia's wholesale power transmission requirements, including arrangements for new delivery points.

7. Both Old Dominion and the Association have a significant interest in defending the integrity of Virginia's electric utility territories. Each member of the Association has a certificated service territory in Virginia and is vitally interested in protecting the integrity of that territory. In addition, most of the members of the Association, including Northern Virginia, are borrowers from the United States Rural Utility Service. Any assault on the integrity of Virginia's electric utility territories potentially threatens the United States' secured interests in the assets and on-going operations of its electric cooperative borrowers in Virginia.

8. Northern Virginia's Petition and Motion specifically refer to Old Dominion in paragraphs 15, 17 and 19 and in clause (e) of its prayer for relief. In addition exhibits 10, 12 and 14 are documents generated by or addressed to Old Dominion.

9. In its Response, the United States alleges that Northern Virginia cannot arrange to provide service in a timely manner and implies that the “practical” considerations of timely fulfilling the Smithsonian’s educational mission should supercede the legal requirements of Virginia’s Utility Facilities Act. These unsupported factual allegations of the United States implicate Old Dominion, the entity responsible for securing wholesale transmission service for Northern Virginia.

10. In the second introductory paragraph of its Answer and Counter Petition, Dominion Virginia Power argues, among other things, that it “is better-equipped with existing facilities to serve the customer.” In paragraphs 15, 17 and 19 of its Answer Dominion Virginia Power declares that its correspondence with Old Dominion concerning Old Dominion’s order under its Network Operating Agreement for a delivery point to serve the Facility “speaks for itself,” and contends in the last paragraph before its counter petition that “NOVEC’s delivery point claim . . . lies wholly within the jurisdiction of the Federal Energy Regulatory Commission.” These matters directly concern Old Dominion and its interests.

11. Dominion Virginia Power has challenged Northern Virginia’s ability to provide service to the Facilities, but its refusal to honor Old Dominion’s new delivery point request under the Network Operating Agreement is a direct cause of any difficulty or delay Northern Virginia might face in providing service on the Smithsonian’s schedule. Even if ultimate

resolution of the dispute over the delivery point may be jurisdictional to the Federal Energy Regulatory Commission,¹ this Commission must evaluate whether Dominion Virginia Power and the Smithsonian have sufficiently clean hands to argue for a “practical” resolution on equity grounds. Dominion Virginia Power cannot both cause and profit from a potential impediment to Northern Virginia’s ability to serve the Facility. Old Dominion’s testimony and argument are critical to the Commission’s adjudication of this issue.

12. The Commission has previously recognized Old Dominion’s interest in the territorial disputes of its members, when its motion to intervene in *Petition of Prince George Electric Cooperative, for Declaratory Judgment and Petition of RGC (USA) Mineral Sands, Inc. and RGC (USA) Minerals, Inc., for Declaratory Judgment*, was granted by the Hearing Examiner. Case No. PUE960295, 1998 S.C.C Ann. Rept. 344, 345.²

MOTION FOR EXPEDITED CONSIDERATION

13. Movants wish to become active, effective participants as soon as possible and in any event, in time to participate in oral argument scheduled for 10:00 a.m., October 25, 2001, in this proceeding.

¹ While the subject matter of the Network Operating Agreement is under FERC’s jurisdiction, in past proceedings FERC has commonly deferred rulings on matters involving the interpretation of the meaning of contract language and other contractual disputes to state courts.

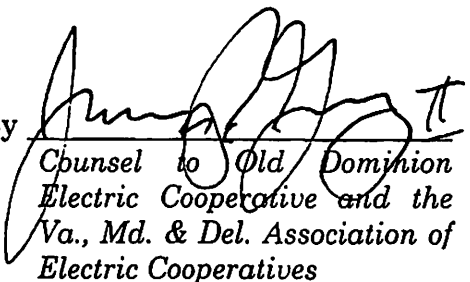
² See also, Case No. PUE960295, Report of Deborah V. Ellenberg, Chief Hearing Examiner, November 24, 1997. “By Ruling dated February 26, 1997, Glenn P. Richardson, Senior Hearing Examiner, found that ODEC has standing to participate in the case as a party in interest and therefore granted its Motion to Intervene.”

WHEREFORE, Old Dominion Electric Cooperative and the Va., Md. & Del. Association of Electric Cooperatives request:

1. That the Commission or its Hearing Examiner consider this Motion on an expedited basis and rule on it in time to permit Movants' participation in Oral Argument on October 25, 2001;
2. That the Commission or its Hearing Examiner grant Movants leave to participate fully in this proceeding, as interested parties; and
3. That the Commission or its Hearing Examiner provide such other relief or remedies as are appropriate under the circumstances.

Respectfully submitted,

Filed: October 18, 2001

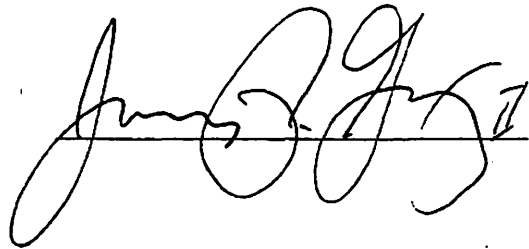
By 
*Counsel to Old Dominion
Electric Cooperative and the
Va., Md. & Del. Association of
Electric Cooperatives*

JOHN A. PIRKO
JAMES PATRICK GUY II
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SUITE TWO HUNDRED
4201 DOMINION BOULEVARD
GLEN ALLEN, VIRGINIA 23060

CERTIFICATE OF SERVICE

I hereby certify that a true copy of the foregoing Application was hand-delivered or mailed, postage prepaid, this 18th day of October, 2001, to all parties on the service list in this proceeding.

A handwritten signature in black ink, appearing to read "James G. O'Donoghue", is written over a horizontal line.

F:\JGUY\ODEC\NOVEC\Smithsonian\Motion.doc

0110 2 0280

GEO. E. PENN (1895-1931)
WM. A. STUART (1922-1976)

WM. W. ESKRIDGE
STEPHEN M. HODGES
W. CHALLEN WALLING VI
WAGE W. MABBIE VI, VII
DANIEL H. CALDWELL
MICHAEL F. BLAIR
WILLIAM M. MOFFET
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PENNSTUART

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Richmond, Virginia

All Attorneys Licensed in Virginia Except as Noted
Additional Bar Memberships:
VA DC KY MD NO TN WV

October 19, 2001

G.R.C. STUART (RETIRED)
JOHN B. HEMMING (RETIRED)

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RAMESH MURTHY VI
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MARK E. FRYE VI
ELIZABETH R. WALTERS VI
ERIC R. THIESSEN
LESLIE S. BLANCHARD I
LISA FRISINA CLEMENT
ANDREW M. HANSON VI
J. JASEN EIGER
DANIELLE L. SMITH VI
FREDRICK A. ROWLETT
TARIS A. ZAIDI V, VI
*NOT LICENSED IN VIRGINIA

3:55

DOCUMENT CONTROL

VIA FAX AND U.S. MAIL
Hon. Debra V. Ellenberg
Senior Hearing Examiner
P.O. Box 1197
Richmond, VA 23218-1197

Re: Northern Virginia Electric Cooperative v. Virginia Electric
and Power Co., et al
Case No.: PUE010512
PS&E File No.: 4685-6

Dear Ms. Ellenberg:

This letter is to inform you NOVEC did receive a copy of Old Dominion Electric Cooperatives' Motion of October 18, 2001. NOVEC does not oppose Old Dominion Electric Cooperative's appearance as a party in this case.

In reviewing the interrogatories, request for production of documents, and the cover letters to the Commission with those documents, I noticed that there was a typographical error in the case number referenced on those documents. Rather than Case No.: PUE010612 referenced on those documents, the appropriate Case No. should be PUE010512. I apologize for any confusion which this may have caused. This confusion was occasioned by the fact that the document control center stamp was imprinted over the Case Number making it appear to be a six.

Thank you for your assistance.

Sincerely yours,

PENN, STUART, & ESKRIDGE

Eric R. Thickman

JoAnne L. Nolte
As counsel for Northern Virginia
Electric Cooperative ("NOVEC")

COMMONWEALTH OF VIRGINIA
STATE CORPORATION COMMISSION

COMMONWEALTH OF VIRGINIA, ex rel.

NORTHERN VIRGINIA ELECTRIC COOPERATIVE,

Petitioner,

v.

CASE NO. PUE010512

VIRGINIA ELECTRIC AND POWER COMPANY
d/b/a DOMINION VIRGINIA POWER,
SMITHSONIAN INSTITUTION, AND U. S.
GENERAL SERVICES ADMINISTRATION,

Respondents.

For a Petition for Declaratory Judgment
and Motion for Injunction

HEARING EXAMINER'S RULING

October 22, 2001

On October 18, 2001, Old Dominion Electric Cooperative ("Old Dominion") and the Va., Md. & Del. Association of Electric Cooperatives ("the Association") filed a Motion for Leave to Participate as Interested Parties, Statement of Interest and Motion for Expedited Consideration. Therein they assert they are critically interested parties and their participation is necessary to the adjudication of the matters in controversy in this case. Old Dominion asserts that it serves as the exclusive wholesale electric power supplier for Northern Virginia Electric Cooperative ("NOVEC"), and thus its wholesale sales will be affected by this proceeding. Old Dominion also provides, by contract, for NOVEC's wholesale power transmission requirements including new delivery points. Old Dominion and the Association also assert that they have a significant interest in this case to defend the integrity of Virginia's electric utility territories.

On October 19, 2001, NOVEC advised, in writing, that it did not oppose the motion. Virginia Electric and Power Company d/b/a Dominion Virginia Power ("Dominion Virginia Power") also responded on October 19. Dominion Virginia Power advised that it did not oppose the motion for leave to participate but objected to the request for expedited consideration "to the extent that it assumes a right ... to independently argue" the motion for temporary injunction. The Smithsonian Institution, the affected customer, took no position on the motion.


The Commission has recognized the standing of Old Dominion to participate in a territorial dispute involving one of its member cooperatives.¹ In the *Prince George* case

¹ *Petition of Prince George Electric Cooperative for Declaratory Judgment and Petition of RGC (USA) Mineral Sands, Inc. and RGC (USA) Minerals, Inc. for Declaratory Judgment ("Prince George case")*, Hearing Examiner's Ruling, Case No. PUE960295 (February 26, 1997).

the hearing examiner concluded that Old Dominion had standing to participate as a party in interest because it had an immediate, pecuniary and substantial interest. Here, as in the *Prince George* case, Old Dominion is the retail cooperative's wholesale power supplier. Old Dominion also provides for NOVEC's transmission requirements and arrangements that would include a new delivery point if NOVEC provided service to the Smithsonian's Steven F. Udvar-Hazy Center in Fairfax County, Virginia. I find that Old Dominion has an immediate, pecuniary and substantial interest in this litigation.

The Association does not aver a similar direct interest; however, no party opposes granting it leave to participate. Accordingly, I find that the Association should also be allowed to participate in this proceeding.

IT IS DIRECTED that the Movants be, and hereby are, granted leave to participate fully in this proceeding.


Deborah V. Ellenberg
Chief Hearing Examiner

Document Control Center is requested to mail or deliver a copy of the above Ruling on October 22, 2001, to: JoAnne L. Nolte, Esquire, P. O. Box 617, Richmond, VA 23218-0617; Commonwealth Legal Services Corporation, 4701 Cox Rd., Ste. 301, Glen Allen, VA 23060; Keith E. Kaier, 701 E. Cary St., Richmond, VA 23219; E. P. Wickham, Jr., P. O. Box 26666, Richmond, VA 23261; Kenneth Melson, 2100 Jamieson Ave., Alexandria, VA 22314; Paul J. McNulty, and Steven E. Gordon, 2100 Jamieson Ave., Alexandria, VA 22314; John Ashcroft, 950 Pennsylvania Ave., NW, Washington, DC 20530-0001; Stephen A. Perry, 1800 F St., NW, Washington, DC 20405; Lawrence M. Small, 1000 Jefferson Dr., SW, Washington, DC 20560-0012; General Counsel, Smithsonian Institute, 1000 Jefferson Dr., SW, Ste. 302, Washington, DC 20560-0012; Kodwo Ghartey-Tagoe, Esquire, One James Center, 901 E. Cary St., Richmond, VA 23219; Pamela Walker, Esquire, P. O. Box 26532, Richmond, VA 23621; John F. Dudley, Esquire, 900 E. Main St., 2nd Fl., Richmond, VA 23219; John D. Sharer, Esquire, P. O. Box 26532; James Patrick Guy, II, Esquire, LeClair Ryan, 4201 Dominion Blvd., Ste. 200, Glen Allen, VA 23060; Sherry Bridewell, Esquire, Office of General Counsel; and to the Commission's Division of Energy Regulation.

COMMONWEALTH OF VIRGINIA
STATE CORPORATION COMMISSION
At Richmond

COMMONWEALTH OF VIRGINIA,
ex rel.

NORTHERN VIRGINIA ELECTRIC
COOPERATIVE,
Petitioner,

v.

VIRGINIA ELECTRIC AND POWER
COMPANY d/b/a DOMINION VIRGINIA
POWER, SMITHSONIAN INSTITUTION,
AND U.S. GENERAL SERVICES
ADMINISTRATION,
Respondents.

CASE NO. PUE010512

For a Petition for Declaratory Judgment and
Motion for injunction

AFFIDAVIT OF D. RICHARD BEAM

This day in the County of Henrico, Virginia, **D. Richard Beam**, personally appeared before me, Susan T. Friedman, a Notary Public of and for the County of Henrico, Commonwealth of Virginia, and made oath as follows:

1. He is Assistant Vice President of Power Supply & Operations of Old Dominion Electric Cooperative and his office is located at 4201 Dominion Boulevard, Glen Allen, Virginia.

2. Old Dominion Electric Cooperative is responsible for procuring power transmission services, including new delivery points, for Northern Virginia Electric Cooperative.

3. Old Dominion Electric Cooperative, on or about November 17, 2000, pursuant to the *Network Operating Agreement Between Virginia Electric and Power Company and Old Dominion Electric Cooperative* dated July 29, 1997 ("Network Operating Agreement"), properly and timely submitted a request for a new delivery point to enable Northern Virginia Electric Cooperative to provide electric service to the Smithsonian Steven F. Udvar-Hazy Center, National Air and Space Museum in Dulles, Virginia.

4. Old Dominion Electric Cooperative was notified by Virginia Electric and Power Company in a letter dated April 6, 2001, almost 5 months later, that Virginia Electric and Power Company "denied" the service point request, citing its own intention to provide service to the Smithsonian Steven F. Udvar-Hazy Center, National Air and Space Museum in Dulles, Virginia.

5. Virginia Electric and Power Company's purported denial was, and remains, inconsistent with the terms of the Network Operating Agreement, under which only Old Dominion Electric Cooperative has authority to determine its need for a new delivery point, under which only the Network Operating Committee (comprising an equal number of representatives of Old Dominion Electric Cooperative and Virginia Electric

and Power Company) can review the request for reasonableness and consistency with good utility practice, and under which Virginia Electric and Power Company may only propose modifications. There are no provisions in the Network Operating Agreement that permit Virginia Electric and Power Company to flatly deny a delivery point request.

D. Richard Beam
D. Richard Beam

COMMONWEALTH OF VIRGINIA
County of Henrico

Subscribed and sworn before me this 23d day of October, 2001. In testimony whereof, I have hereunto set my hand the day, month and year aforesaid.

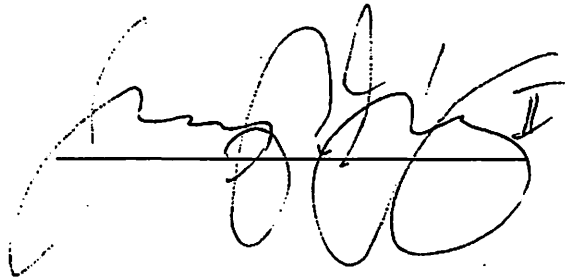
Susan M. Friedman
Notary Public

My commission expires: JANUARY 31, 2003

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CERTIFICATE OF SERVICE

I hereby certify that a true copy of the foregoing Affidavit was hand-delivered or mailed, postage prepaid, this 24th day of October, 2001, to all parties on the service list in this proceeding.

A handwritten signature in black ink, appearing to be "K. J. [unclear]", written over a horizontal line.

COMMONWEALTH OF VIRGINIA
STATE CORPORATION COMMISSION

NORTHERN VIRGINIA ELECTRIC)	
COOPERATIVE,)	
)	
Petitioner,)	
)	
vs.)	
)	
VIRGINIA ELECTRIC & POWER COMPANY,)	Case No.: PUE010512
d/b/a DOMINION VIRGINIA POWER,)	
)	
SMITHSONIAN INSTITUTION,)	
)	
AND)	
)	
U.S. GENERAL SERVICES ADMINISTRATION,)	
)	
Respondent.)	

AFFIDAVIT OF JAMES C. MOXLEY

James C. Moxley, for his affidavit, deposes and states as follows:

1. An essential feature of NOVEC's ability to provide reliable electrical service to NOVEC customers is the assurance of having adequate, convenient, and timely access to the statewide power delivery system. NOVEC is assured of electrical service availability by virtue of an Interconnection and Operating Agreement (the "Contract") that was originally developed in 1982 between Old Dominion Electric Cooperative (ODEC) and Virginia and Electric Power Company (Vepco) on behalf of NOVEC and the other ODEC member cooperatives in Virginia. This Agreement has been amended and superceded on numerous occasions with the most recent version dated July 29, 1997 and made effective January 1, 1998. This Contract contains provisions that assure that Vepco will make available to ODEC and its members, Vepco's transmission and distribution facilities, as needed, to transfer sufficient capacity and energy to each Interconnection point (delivery point). The Contract also contains provisions for establishing new delivery points.

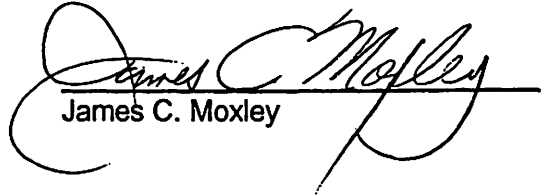
2. Delivery point need is based on several factors but convenience is essential. The Smithsonian delivery point was requested to provide NOVEC with a convenient way of serving the Smithsonian and is consistent with other delivery points that enable NOVEC to serve its electrical loads. For example, NOVEC serves a portion of the city of Herndon, VA with electrical capacity and energy delivered to the NOVEC distribution system from a delivery point developed with Dominion Virginia Power. The delivery point represented the most convenient means of serving the load within that portion of NOVEC's service territory. Establishment of this delivery point eliminated the need for building a NOVEC feeder system from an existing delivery point, including a possible additional substation in order to serve Herndon. The Herndon delivery point is approximately 5 miles from the Smithsonian site and is essentially identical to the type of delivery point requested for the Smithsonian.

3. A delivery point devoted to a single customer is also not unique. A major NOVEC customer facility in Prince William County is served by NOVEC from a Dominion Virginia Power delivery point that features two separate transmission lines. This delivery point was developed and constructed for the sole purpose of serving this single customer.

4. Attached hereto is the Joint Stipulation of Facts, filed on October 16, 2001, with the Commission in response to the Commission's order dated October 2, 2001. These facts set forth on behalf of NOVEC are true and correct to the best of my knowledge, information and belief.

5. NOVEC is ready, willing and able to provide electrical service to the Smithsonian facility. The most convenient and economical delivery point is the one requested from Vepco, pursuant to the Agreement. NOVEC is entitled to a delivery point pursuant to this Contract, and it is NOVEC's position that Vepco is obligated to provide the delivery point pursuant the provisions of the Contract.

5. The Affiant Saith Further Not.


James C. Moxley

STATE OF VIRGINIA

COUNTY/CITY OF Prince William to-wit:

Before me, a Notary Public in and for the State and County/City aforesaid, on the
23rd day of OCTOBER, 2001, personally appeared James C. Moxley, who, first being
duly sworn, says that the foregoing instrument is true and correct.


NOTARY PUBLIC

My Commission Expires: MAY 31, 2004

PENNSTUART

Since 1890

ATTORNEYS AT LAW

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Richmond, Virginia 23219

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Richmond, Virginia

All Attorneys Licensed in Virginia Except as Noted
Additional Bar Memberships:

'CA; 'DC; 'KY; 'MD; 'NC; 'TN; 'WV

October 17, 2001

G.R.C. STUART (RETIRED)
JOHN B. HEMMINGS (RETIRED)

RICHARD E. LADD, JR.^{VI}
W. BRADFORD STALLARD
RAMESH MURTHY^{VI}
JOANNE L. NOLTE
MARK E. FRYE^{VI}
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TIMOTHY W. GRESHAM^{VI}
H. ASHBY DICKERSON
BYRUM L. GEISLER
JILL MORGAN HARRISON^{V, VI, VII}

VIA UPS NEXT DAY AIR

Joel H. Peck, Clerk
Virginia State Corporation Commission
Document Control Center
1300 E. Main Street
Richmond, VA 23219

Re: Northern Virginia Electric Cooperative v. Virginia Electric
and Power Co., et al
Case No.: PUE010512
PS&E File No.: 4685-6

Dear Mr. Peck:

I enclose NOVEC's executed copy of the Joint Stipulation of Facts and Issues pursuant to the Commission's October 2, 2001 Preliminary Order ¶ 6.

NOVEC interprets the Commission's request for Joint Stipulation of Facts and Issues to request factual information. NOVEC does not interpret the request for a joint stipulation to encompass legal questions presented, and accordingly has not included these in the joint stipulation. If the Commission would like for NOVEC to submit legal questions presented, NOVEC would be happy to do so.

By copy of this letter, I am forwarding our executed copy of the joint stipulation to all counsel of record.

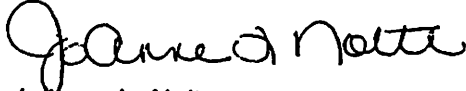
If you have any questions, please feel free to call me.

Joel H. Peck, Clerk
October 17, 2001
Page 2

Thank you for your assistance.

Sincerely yours,

PENN, STUART, & ESKRIDGE


JoAnne L. Nolte

JLN/mdl
Enclosure

cc: E. Duncan Getchell, Jr., Esq.
Kodwo Ghartey-Tagoe, Esq.
Steven E. Gordon, Esq.
John K. Lapiana, Esq.
Paul J. McNulty, Esq.
Sherry H. Bridewell, Esq.
Wayne Smith, Esq.
Patrick A. Toulme
bc: James P. Guy, II

COMMONWEALTH OF VIRGINIA
STATE CORPORATION COMMISSION

NORTHERN VIRGINIA ELECTRIC
COOPERATIVE,

Petitioner,

vs.

VIRGINIA ELECTRIC & POWER COMPANY,
d/b/a DOMINION VIRGINIA POWER,

SMITHSONIAN INSTITUTION,

AND

U.S. GENERAL SERVICES ADMINISTRATION,

Respondent.

Case No.: PUE010512

JOINT SUBMISSION

Counsel for NOVEC and counsel for Dominion Virginia Power represent that they join in the submission of this Joint Stipulation of Facts and Issues. Counsel for Dominion Virginia Power have executed this submission in counter-part, and Dominion Virginia Power's executed copy was filed with the Commission on October 16, 2001.

NORTHERN VIRGINIA ELECTRIC
COOPERATIVE

By Counsel

W. Bradford Stallard, Esq.
Eric R. Thiessen, Esq.
PENN, STUART & ESKRIDGE
P.O. Box 2288
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Phone: 276/628-5151
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JoAnne L. Nolte, Esq.
PENN, STUART & ESKRIDGE
801 E. Main Street, Suite 1110
Richmond, VA 23219
Phone: 804/819-1770
Fax: 804/819-1753

By: JoAnne L. Nolte
JOANNE L. NOLTE
Counsel for Petitioner

CERTIFICATE OF SERVICE

I hereby certify that I have mailed the foregoing Joint Stipulation of Facts and Issues via UPS Next Day Air to Joel H. Peck, Clerk of the Commission, State Corporation Commission c/o Document Control Center, 1300 E. Main Street, Richmond, VA 23219 and mailed a true copy of the foregoing to E. Duncan Getchell, Jr., Esq. and Kodwo Ghartey-Tagoe, Esq., McGuireWoods, One James Center, 901 East Cary Street, Richmond, VA 23219; Steven E. Gordon, Esq., Assistant U.S. Attorney, 2100 Jamison Avenue, Alexandria, VA 22314; John K. Lapiana, Esq., Assistant General Counsel, Smithsonian Institution, Washington, DC 20560; Paul J. McNulty, Esq., United States Attorney, Eastern District of Virginia, 2100 Jamison Avenue, Alexandria, VA 22314; and Sherry H. Bridewell, Esq., Senior Counsel and Wayne Smith, Senior Counsel, P.O. Box 1197, Richmond, VA 23218-1192 this 17th day of October, 2001,

JoAnne L. Nolte
JOANNE L. NOLTE

COMMONWEALTH OF VIRGINIA
STATE CORPORATION COMMISSION

COMMONWEALTH OF VIRGINIA, ex rel.

NORTHERN VIRGINIA ELECTRIC COOPERATIVE,

Petitioner,

v.

CASE NO. PUE010512

VIRGINIA ELECTRIC AND POWER COMPANY
d/b/a DOMINION VIRGINIA POWER,
SMITHSONIAN INSTITUTION, AND U. S.
GENERAL SERVICES ADMINISTRATION

Respondents.

**JOINT STIPULATION OF FACTS
AND LIST OF FACTS AND LEGAL ISSUES IN DISPUTE**

Pursuant to the Rules of Practice and Procedure of the State Corporation Commission and the Commission's Preliminary Order of October 2, 2001, Northern Virginia Electric Cooperative (NOVEC), and Virginia Electric and Power Company d/b/a/ Dominion Virginia Power ("Dominion Virginia Power"), by counsel, present to the Commission as set forth herein this Joint Stipulation of Facts and List of Facts and Legal Issues in Dispute ("Joint Stipulation").

By signing this Joint Stipulation, which may be signed in counterparts, NOVEC and Dominion Virginia Power do not waive any rights to assert that any jointly stipulated facts, or any other alleged fact, is not relevant to the legal issues in dispute in this case. Because this Joint Stipulation of Facts and List of Facts and Legal Issues in Dispute is

preliminary, the parties reserve the right to supplement it on reasonable notice as these proceedings develop.

I.

Joint Stipulation of Facts.

A. Parties.

Petitioner:

1. NOVEC is an electric cooperative organized and existing under Article 1, Chapter 9.1 §§ 56-231.15 to 56.231.37 of the Code of Virginia, which article is referred to as the "Utility Consumer Services Property Act."

Respondents:

2. Dominion Virginia Power is a Virginia public service corporation authorized to transact business as an electric utility in this Commonwealth.
3. The Smithsonian Institution was created by an Act of Congress for the "increase and diffusion of knowledge among men . . ." 20 U.S.C. § 41. The Smithsonian is constructing a National Air and Space Museum annex at Dulles International Airport.

B. Stipulated Facts.

1. The Smithsonian is currently being provided with temporary power for construction by Dominion Virginia Power.
2. NOVEC has made efforts to obtain specifications on the facility from the Smithsonian, but the Smithsonian has declined to provide such information.

II.

Factual Issues in Dispute.

A. NOVEC's Statement of Facts and Chronology of Events:

1. According to the map on file with the Commission, the overwhelming bulk of the load for the Smithsonian facility is within NOVEC's certificated territory.
2. All or virtually all of the facility buildings, including the "hangar area" are solely within NOVEC's certificated territory.
3. Upon information and belief, the facility buildings including the "hangar area" are the physical structures that will consume approximately 95% or more of the electricity supplied to the entire Smithsonian facility.
4. NOVEC is ready, willing, and able to supply electricity to the Smithsonian's facility.
5. NOVEC is ready, willing and able to distribute electricity to distribute electricity to the Smithsonian facility.
6. Dominion has denied NOVEC, through Old Dominion Electric Cooperative (ODEC), a delivery point requested pursuant to contract between ODEC, on behalf of NOVEC, and Dominion.
7. In 1996, NOVEC representatives learned that the Smithsonian planned to construct a National Air and Space Museum at its annex at Dulles International Airport.
8. NOVEC began its communications with the Smithsonian on or about August 6, 1996 to obtain specifications for the facility and appropriate

time lines for phases of construction so that NOVEC could develop and implement a plan for furnishing electric service to the new Smithsonian museum, because it was to be located in NOVEC's certificated territory. Information and documents in NOVEC's files establish that during 1996 NOVEC believed that over 85% of the facility was within NOVEC's service territory. Today NOVEC believes, based upon the information that it has received from Fairfax County that over 95% of the facility is within its certificated territory.

9. On about August 15, 1996, HOK Architects, Inc., the facility design engineering/architect firm under contract to the Smithsonian, sent a letter to NOVEC. This letter contained preliminary design information. Importantly this correspondence predicted that, "Mechanical and electrical load information will change as the design develops."
10. On or about August 21, 1996, NOVEC sent a letter to HOK providing initial rate information and service territory boundary information.
11. On October 9, 1996, Dominion, Old Dominion Electric Cooperative, and NOVEC discussed the planned Smithsonian Annex during a regularly scheduled quarterly meeting.
12. On November 8, 1996, NOVEC met with HOK at HOK offices in District of Columbia to discuss technical requirements of the project.

13. On November 21, 1996, NOVEC received a fax from the National Renewable Energy Laboratory (NREL) which advised NOVEC of a meeting to be held on December 11, 1996. The fax stated that, "The meeting will address which utility (NOVEC and Virginia Power both have service available at the site) can best serve the Smithsonian's National Air and Space Museum Dulles Center at Dulles International Airport. Of course, service reliability and energy costs are key factors to be considered. Construction is slated to begin on the 740,000 square foot facility in 1999. As I mentioned, a 1 MW Building Integrated Photovoltaic (BIPV) system is proposed for the site."
14. On December 11, 1996, NOVEC, NREL, and Smithsonian officials met at the Smithsonian L'enfant Plaza office in Washington D.C. At that meeting, NOVEC advised Smithsonian it was ready, willing, and able to provide service to the facility. NOVEC described the territory boundary issues. NOVEC informed the Smithsonian of its strongly held belief that it was the certificated provider of electrical service.
15. On December 20, 1996, NOVEC forwarded a letter to the Smithsonian again providing rate information and emphasizing NOVEC's obligation to serve all customers and provide all electrical loads within NOVEC's territory as defined by the Commission.
16. On or about July 10, 1997, representatives of NOVEC again met with the Smithsonian.
17. On November 17, 1998, NOVEC met with the Smithsonian in Washington D.C. NOVEC sent a confirmatory follow up letter dated November 17, 1998 to the

Smithsonian asserting its right to serve the facility and referencing the RGC Mineral Sands case.

18. On or about January 25, 1999 NOVEC received a letter from Dominion to the Smithsonian. NOVEC learned for the first time that Dominion had service facilities available in the area of the proposed facility and importantly that while the facility was in NOVEC's territory, two thirds of the site was in Dominion's service territory. Dominion's contentions were not accurate according to the information that NOVEC had obtained.
19. On November 22, 2000, NOVEC, through Old Dominion Electric Cooperative, sent a Cooperative Delivery Point Request dated November 17, 2000, to Dominion requesting a new delivery point consistent with the Network Operating Agreement between Old Dominion Electric Cooperative and Dominion. ODEC requested that Dominion respond to its request by December 8, 2000.
20. On or about February 7, 2001, Dominion advised NOVEC that Dominion intended to provide electrical service to the Smithsonian. NOVEC did not receive this information directly from the Smithsonian. Rather, NOVEC received a copy of a letter addressed to a Smithsonian representative from Dominion. This letter indicated that Dominion had received a February 1, 2001 request for electrical service from the Smithsonian and that in this February 7th correspondence, Dominion acknowledged that it would be in a position to provide service once it was able to "obtain all applicable permits, easements, or approvals required for the construction and placement of [the Dominion] facilities."

21. On or about April 6, 2001, NOVEC received a letter addressed to ODEC from Dominion denying the requested delivery point. The reasons cited for the denial included the assertion that the Smithsonian had requested that Dominion provide the electric service. Dominion further advised NOVEC, through ODEC, that the service arrangements between Dominion and the Smithsonian were being finalized.
22. Subsequent to April 6, 2001, Mr. Jim Moxley, Senior Vice President for Electric and Telecommunication Systems Development, of NOVEC contacted the Smithsonian to request building plans and specifications, to include, energy design requirements. Initially Mr. Moxley's request was made of Mr. Robert A. Weisman, Chief, Energy Management of the Smithsonian. Mr. Weisman referred Mr. Moxley to Mr. Justin Estoque. Mr. Estoque advised NOVEC that the Smithsonian counsel would not permit him to release any additional information to NOVEC.
23. NOVEC had several conversations with Dominion in an attempt to resolve the dispute. NOVEC sent letter to Dominion proposing various compromise arrangements to resolve the dispute between NOVEC and Dominion, culminating in NOVEC's request for a meeting between NOVEC, Dominion and the Staff of the Commission, which was held in June 2001.
24. By letter dated July 3, 2001, NOVEC advised Dominion that in the interests of meeting the Smithsonian's immediate need for temporary power NOVEC would permit Dominion to provide temporary service in NOVEC's service territory.

25. By letter dated August 1, 2001 ODEC, on behalf of NOVEC, rejected Dominion's denial of a delivery point as being contrary to the Network Operating Agreement.
26. NOVEC will suffer irreparable harm if Dominion is permitted to provide permanent power to the Smithsonian.
27. Granting a preliminary injunction will harm neither Dominion nor the Smithsonian.
28. A preliminary injunction maintaining the status quo--allowing continuation of temporary service, but prohibiting further development of permanent facilities--will not endanger the Smithsonian's construction schedule, and is in the interest of justice.
29. Contrary to Dominion's contentions, Dominion will not suffer any harm from a preliminary injunction maintaining the status quo.
30. A preliminary injunction will prevent Dominion from proceeding with expense that should not and need not be incurred by anyone at this point, thereby avoiding a waste of resources.
31. Dominion, knowing that there has been and is a continuing legal dispute with respect to electricity service to the Smithsonian facility, if it begins building permanent facilities, does so at its own peril.

B. Dominion Virginia Power's Statement of Facts and Chronology of Events:

1. The Smithsonian has in this proceeding expressed a preference for Dominion Virginia Power to provide it with electric service.
2. NOVEC did not object to Dominion Virginia Power's providing temporary power to the facility as evidenced by a letter from NOVEC dated July 3, 2001 sent to Edmond P. Wickham, Jr. of Dominion Virginia Power, attached as Exhibit 1.
3. Of paramount and practical importance to the Smithsonian is that the phased construction schedule of the Unvar-Hazy Center not be compromised. Only the timely completion of each of the project's phases will ensure that the Unvar-Hazy Center opens in December, 2003 -- the centennial of the first powered flight by the Wright Brothers on December 17, 1903. Meeting that date is a very significant concern of the Smithsonian for three reasons: (1) many individual and corporate donors who provide funding for the Center's construction expect the center to be completed by that date; (2) the project's critical path, which is the timeline for completion of various phases of construction, could be endangered by scheduling changes; and (3) the Museum plans to take advantage of the unique educational opportunities associated with the centennial of the Wright brothers' first flight. As discussed below, significant planning has been completed and related infrastructure installed in anticipation that Dominion Virginia Power would provide the site with electricity. Those plans would need to be re-examined and the infrastructure modified or replaced should the Commission issue an injunction, *pendente lite*, that will disrupt electricity service or if the

Commission holds that NOVEC should be the exclusive provider. The resulting impact would greatly endanger the scheduled opening of the Udvar-Hazy Center.

4. Specifically, the construction schedule is based, in part, upon the planned delivery and installation by Virginia Power of its first transformer during November, 2001. The installation will make permanent power available to the Smithsonian's construction contractor, Hensel Phelps Construction Company ("HPCC"), well beyond the current, and temporary, power capacity. To permit construction and start-up of mechanical and electrical equipment necessary for construction of the Center's buildings, HPCC must have this additional power, at the latest, by April 1, 2002. These tasks are on the construction project's critical path, and, as a result, must be performed on schedule in order to preserve the timeline established in the construction plan.
5. Similarly, Virginia Power has sized its transformers for the Smithsonian's building loads, and the concrete pads for the transformers also have been designed and installed in accordance with Dominion Virginia Power's requirements. Should the Commission conclude that NOVEC is the proper provider, it must confirm these calculations or re-size its transformers, and the Smithsonian may need to redesign the concrete pads for the transformers. This process could create additional delays to the start of electrical service to the building, threatening the construction completion dates. Likewise, ductbank for carrying service conductors has been designed and installed in accordance with Dominion Virginia Power's requirements. At a minimum, NOVEC must also confirm that the ductbank meets its requirements, and if it does not, time-consuming and

potentially costly changes to the ductbank must be made, again jeopardizing the construction timeline and the completion dates of the various phases. Dominion Virginia Power's lead time for new transformers of this size is six months. NOVEC's lead time is at least that long and it has not yet ordered the transformers.

6. The Smithsonian's primary concern is to ensure that the current construction schedule is not disrupted and that the Udvar-Hazy Center is open by December 2003. Failure to do so will result in monetary losses resulting from possible delay claims by the construction contractor, frustration of the expectations of individual and corporate donors to the Museum and the loss of intangible and unquantifiable educational opportunities for the National Air and Space Museum to publicly celebrate the centennial of a seminal historical event, the first powered flight by the Wright Brothers on December 17, 1903.
7. The granting of a temporary injunction either against the provision of temporary or permanent power or the construction of permanent facilities would harm the Smithsonian, Dominion Virginia Power, and the public interest.
8. Denial of a temporary injunction would not irreparably harm NOVEC.
9. John Caskey, the Dominion Virginia Power Account Manager for the Smithsonian Institution, including the museum annex under construction near Dulles Airport, visited the site July 19, 2001 to determine where the boundary between the service territories of NOVEC and Dominion Virginia Power crossed the Smithsonian site. He referred to service area map E51 that was signed on December 9, 1977. He also looked at a rough building site plan provided by the

Smithsonian. He was able to locate the southeast corner of the NOVEC territory, but could not identify where the east boundary line crossed the building site. From his rough estimates, it appeared that the boundary line went through the middle of the main hangar. However, it was difficult to locate the north/south boundary on the east side of the NOVEC territory because this boundary was not exactly parallel to the fence line on the west side of the area.

10. On July 23, 2001, he went back to the site with a surveyor equipped with a Global Position Satellite (GPS) receiver to refine his estimate of the location of the territory boundary relative to the building site. He felt that the best approach was to locate the corners of the NOVEC territory and then take a few GPS measurements from the actual building site. He was able to locate the northwest, southwest and southeast corners of the service area with a high degree of confidence. According to service area map E51, the northwest corner was where the fence line took an almost 90 degree turn to the west. The southwest corner was where the fence line crossed the creek. The southeast corner was where the east/west creek had a branch going to the north. The surveyor took GPS measurements at these three locations. Mr. Caskey also walked-off the distance between the southwest and southeast corners of the NOVEC territory and estimated this distance to be about 345 yards.
11. He and the surveyor were not able to locate the northeast corner of the NOVEC territory because the point is well within the airport's property and because there is no clear physical boundary to identify. They walked-off about 345 yards from the northwest corner and took a GPS measurement at that location. They also

took a GPS measurement about 265 yards from the northwest corner to represent the fact that the north/south boundary on the east side of the territory was not exactly parallel to the west side. They also took several GPS measurements where the buildings were being constructed. The surveyor then took all these measurements and provided Mr. Caskey a file with each data point and the corresponding latitude and longitude. He also provide a topographic map with the data points plotted on the map, attached as Exhibit 2.

12. The greater part of Smithsonian's parcel, the IMAX theater and the entire parking lot, are in Dominion Virginia Power's territory and that part of the hangar is also in that territory. It is not possible to calculate the particular percentage of the hangar area in each utility area because the northeast corner of the NOVEC service area has not been located on the ground.
13. In Paragraph 18 of its petition NOVEC indicates it is willing and "able" to provide service. However, NOVEC's ability to provide service is contingent on receiving a delivery point from Dominion. The closest NOVEC source is approximately 1.25 miles away. NOVEC has not begun to extend that line. In contrast, Dominion Virginia Power's facilities are adjacent to the Smithsonian property and its delivery point near the building is only about 1500 feet away from its existing three-phase overhead line. The Dominion Virginia Power three-phase line (circuit 450) is already being used to provide temporary service to the Smithsonian construction site. The Smithsonian is situated at the farthest point in a very narrow portion of NOVEC's territory. Dominion Virginia Power's territory bounds NOVEC's territory on three sides. Dominion Virginia Power has

facilities available for a normal and alternate service. NOVEC does not even have facilities available for a normal service.

14. The parcel just to the west of NOVEC's western boundary line was initially in NOVEC territory. NOVEC gave up the parcel because it did not have adequate distribution facilities in the immediate area to serve a customer at the end of its service territory. Dominion was already serving the Avion office park just to the south. The area given up by NOVEC was closer to its then existing facilities than the Smithsonian. A copy of the SCC order in Case No. (PUE830030 dated 6/3/91) granting the territory revision is attached as Exhibit 3.
15. NOVEC is unlikely to prevail on the merits of its claim.

III.

Legal Issues in Dispute.

The parties have not reached an agreement on the legal issues in dispute in this case. Thus, the parties present the following legal issues for consideration by the Commission at this stage in this proceeding:

A. NOVEC presents the following legal issues:

NOVEC believes that Dominion has set forth legal questions that are irrelevant to the proceeding that is currently before this Commission, namely a request for a preliminary injunction to maintain the parties in a status quo position. NOVEC is entitled to such an injunction, and any other questions of law are beyond the scope of the hearing scheduled for October 25, 2001.

B. Dominion Virginia Power presents the following legal issues.

Dominion Virginia Power disagrees that the legal issues presented in the case at large are irrelevant to the motion for a preliminary injunction. They are clearly relevant to NOVEC's likelihood of success on the merits. The issues in this proceeding include the following:

1. Whether the Commission has jurisdiction to enter an order declaring that Dominion Virginia Power has wrongfully and tortiously interfered with NOVEC's contractual rights, prospective contractual rights and potential economic relationships?
2. Whether the Commission has jurisdiction to declare that Dominion Virginia Power must pay damages on account of any claim of tortious interference?
3. Whether NOVEC has stated a claim upon which relief can be granted for tortious interference with any rights?
4. Whether the Commission has jurisdiction to resolve NOVEC's delivery point claim or whether that claim falls within the exclusive jurisdiction of the Federal Energy Regulatory Commission?
5. Whether the granting of a preliminary mandatory injunction is disfavored and is reserved for the most extraordinary cases?
6. Whether the balance of equities flowing from consideration of (1) possible irreparable harm to NOVEC, (2) harm to Dominion Virginia Power, (3) the lack of a likelihood of success on the merits for NOVEC and (4) the public interest weighs against the award of extraordinary relief to NOVEC?
7. Where it is established with respect to new construction on a parcel of land that (a) all points of use lie wholly or partially within Dominion Virginia Power's

territory on a parcel that itself lies mostly within Dominion Virginia Power's territory, (b) the new customer has not manipulated its land holdings or point of delivery to change service territories, (c) the customer desires service from Dominion Virginia Power, and (d) Dominion Virginia Power's facilities are the closest, and best equipped to provide prompt, reliable service, should Dominion Virginia Power have the right to serve that customer?

IV.

Joint Submission.

Counsel for NOVEC have authorized counsel for Dominion Virginia Power to represent that they join in this submission. Counsel for NOVEC are executing it in counterpart and will overnight it to the Commission.

Respectfully submitted,

VIRGINIA ELECTRIC AND POWER COMPANY
d/b/a DOMINION VIRGINIA POWER VIRGINIA
POWER

By: E. Duncan Getchell, Jr.
Counsel

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CERTIFICATE OF SERVICE

I hereby certify that I have filed with the Clerk of the Commission, Joel H. Peck, Clerk. State Corporation Commission, c/o Document Control Center, P.O. Box 2118, Richmond, Virginia 23218, an original and fifteen (15) copies of the foregoing and have also served it on all parties of record to this proceeding by first class, postage prepaid mail to the addresses shown below and have hand-delivered a copy of the same to counsel for the Staff on this 16th day of October, 2001.

JoAnne L. Nolte, Esq., PennStuart, P.O. Box 617, Richmond, Virginia 23218-0617; Kenneth Melson, First Deputy, Eastern District of Virginia, 2100 Jamieson Avenue, Alexandria, Virginia 22314; Paul J. McNulty, United States Attorney, Eastern District of Virginia, 2100 Jamieson Avenue, Alexandria, Virginia 22314; Steven E. Gordon, Assistant U.S. Attorney, 2100 Jamieson Avenue, Alexandria, Virginia 22314; John Ashcroft, United States Attorney General, U.S. Department of Justice, 950 Pennsylvania Avenue, N.W., Washington, D.C. 20530-0001; Stephen A. Perry, Administrator, General Services Administration, 1800 F. Street, N.W.,

Washington, D.C. 20405; Lawrence M. Small, Secretary, Smithsonian Institute, 1000 Jefferson Drive, S.W., Washington, D.C. 20560-0012; General Counsel, Smithsonian Institute, 1000 Jefferson Drive, S.W., Suite 302, Washington, D.C. 20560-0012; and to John F. Duttley, Senior Assistant Attorney General and Chief, Division of Consumer Counsel, Office of the Attorney General, 900 East Main Street, Second Floor, Richmond, Virginia 23219.

E. Norman Gattell, Jr.



Exhibit 1

Corporate Office
10323 Lymood Drive
Manassas, VA 20109

Mailing Address
P.O. Box 2710
Manassas, VA 20108
(703) 714-0500

Greenville Technical Center
5399 Wellington Road
Greenville, VA 20155

Leesburg Office
343 East Market Street
Leesburg, VA 20176

Minerva Office
14500 Minnerville Road
Woodbridge, VA 22193

Stafford Office
2430 Poplar Road
Fredericksburg, VA 22406

July 3, 2001

Mr. Ed Wickham
Director - Distribution Operations
Dominion Virginia Power
One James River Plaza
701 East Cary Street
Richmond, VA 23261-6666

Re: Smithsonian, your letter of June 28, 2001

Dear Mr. Wickham;

Thank you for your June 28, 2001 letter and for your offer to resolve the matter of electric service to the Smithsonian's Steven F. Udvar-Hazy Center. NOVEC has reviewed your offer for NOVEC to serve the portion of the South Riding development in Dominion Virginia Power's service area that is designated for future commercial development and which represents 2 to 3 MW of electric load. We conclude that we cannot accept your offer. However, we propose an alternate resolution.

According to the official State Corporation Commission (SCC) territory map of the area in question as well as the museum site plan information available to NOVEC, we have determined that approximately 85% of the museum facility load lies within the NOVEC's franchised service territory. NOVEC has apportioned the museum's electrical load using a total electrical load of about 6-7 MW, based on information obtained from Dominion Virginia Power since the actual technical requirements have not been made available to NOVEC from the Smithsonian. The portion of the load in NOVEC's service territory is therefore approximately 5+ MW while Dominion Virginia Power's portion is approximately 1 MW.

NOVEC is willing to compensate Dominion Virginia Power for the portion of the museum that seems to be in Dominion Virginia Power's territory, consistent with our recent discussions with the SCC about this issue. NOVEC has identified planned developments in its service territory that would represent approximately 1 MW of electric load that could be served by Dominion Virginia Power. The specific areas consist of approximately 100,000 square feet of planned retail development in the Parkway Crossing East, in the Potomac Mills area, plus 112 residential single family lots in the Stokely development in Prince William County. These two developments represent electric load in excess of 1 MW and they are currently in need of a service territory boundary adjustment.

NOVEC is concerned about the Smithsonian's immediate power needs to support its construction schedule. NOVEC is prepared to install permanent power cables

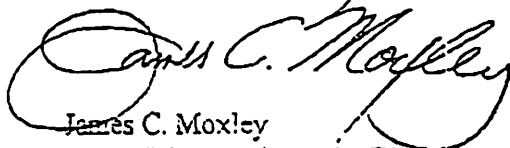
Equal Opportunity Employer

in the existing duct system as early as next week. However, the specific technical requirements have not been made available that would enable NOVEC to assess the transformer requirements. In addition, NOVEC anticipates that Dominion Virginia Power will provide the necessary delivery point to NOVEC as requested on November, 2000.

In the interim, and in the interests of meeting the Smithsonian's immediate need for temporary power to the construction site, NOVEC proposes to allow Dominion Virginia Power to provide temporary service in NOVEC's service territory until such time that the permanent power is required.

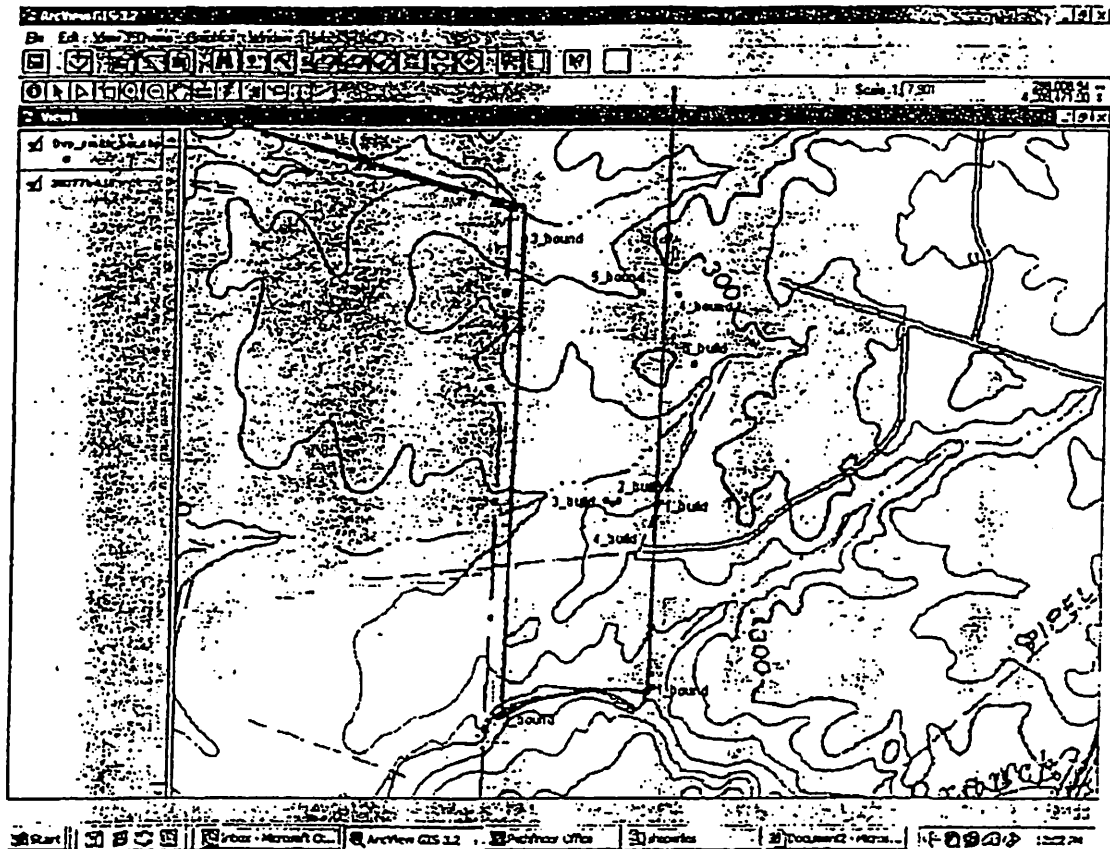
NOVEC looks forward to your response to our proposal.

Very truly yours,

A handwritten signature in black ink, appearing to read "James C. Moxley", is written over a circular stamp or seal.

James C. Moxley
Senior Vice President for Electric and
Telecommunication Systems Development

Cc: Mr. Keith Kaier, Dominion Virginia Power
Mr. Tim Faherty, SCC
Mr. Gil Jaramillo, NOVEC



red = best estimate of
territory border using
topography of original
territory map.

- 1 build = SE corner of Hanger
- 2 build = SW corner of Hanger
- 3 build = SW side of chiller plant
- 4 build = Center of chiller plant
- 5 build = NE side of IMAX theater

Tasky 7/24/01

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SCC-62

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STATE CORPORATION COMMISSION

Attachment E

1991 JUN 10 PM 2:51

AT RICHMOND, JUNE 3, 1991

APPLICATION OF

VIRGINIA ELECTRIC AND POWER COMPANY / CASE NO. 11655
AND
NORTHERN VIRGINIA ELECTRIC COOPERATIVE CASE NO. PUE830030

For revision to certificate under
the Utility Facilities Act

Came the applicants by letter of agreement and requested a
revision to territorial boundary Map E51 and Certificate E-E51.

Northern Virginia Electric Cooperative does not have
adequate distribution facilities in the immediate area to serve a
customer at the end of its service territory. Virginia Electric
and Power Company is already serving an adjacent office park
complex and has agreed to serve the customer. Accordingly,

IT IS ORDERED:

(1) That Map E51 and Certificate E-E51 be revised as
requested in the letter of agreement.

(2) That a copy of this Order with a copy of the revised
map and revised certificate be sent to Virginia Electric and
Power Company, in care of Mr. T. J. O'Neil, Vice President,
Regulation, P. O. Box 26666, Richmond, Virginia 23261; to
Northern Virginia Electric Cooperative, in care of Mr. Harry K.
Bowman, General Manager, P. O. Box 2710, 10323 Lomond Drive,
Manassas, Virginia 22110, and that a copy of this Order be sent
to the Commission's Division of Energy Regulation.

A True Copy
Teste:

William J. Bridge
Clerk of the
State Corporation Commission

GEO. E. PENN (1895-1931)
WM. A. STUART (1922-1976)

WM. W. ESKRIDGE
STEPHEN M. HODGES
W. CHALLEN WALLING^{VI}
WADE W. MASSIE^{VI, VII}
DANIEL H. CALDWELL
MICHAEL F. BLAIR
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ELIZABETH A. MCCLANAHAN^{II, III, IV, VI, VII}
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October 24, 2001

011030107

G.R.C. STUART (RETIRED)
JOHN B. HEMMINGS (RETIRED)

RICHARD E. LADD, JR.^{VI}
W. BRADFORD STALLARD
RAMESH MURTHY^{VI}
JOANNE L. NOLTE
MARK E. FRYE^{VI}
ELIZABETH R. WALTERS^{VI}
ERIC R. THIESSEN
LESLIE S. BLANCHARD^I
LISA FRISINA CLEMENT
ANDREW M. HANSON^{VI}
J. JASEN EIGE
DANIELLE L. SMITH^{VI}
FREDRICK A. ROWLETT
TARIO A. ZAIDI^{V, VI}
*NOT LICENSED IN VIRGINIA

VIA HAND DELIVERY

Joel H. Peck, Clerk
Virginia State Corporation Commission
Document Control Center
1300 E. Main Street
Richmond, VA 23219

Re: Northern Virginia Electric Cooperative v. Virginia Electric and Power Co., et al
Case No. PUE010512
PS&E File No. 4685-6

Dear Mr. Peck:

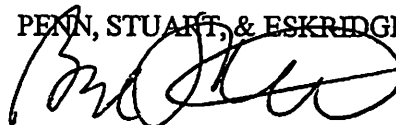
As counsel to NOVEC, enclosed please find an original and fifteen (15) copies of the Affidavits James C. Moxley, Peter G. Moore and Gilbert D. Jaramillo, in support of our Petition and in preparation for the Oral Argument scheduled for tomorrow.

By copy of this letter, I am forwarding executed copies of the Affidavits to all counsel of record.

If you have any questions, please feel free to call me. Thank you for your assistance.

Sincerely yours,

PENN, STUART, & ESKRIDGE



By: W. Bradford Stallard

WBS/cmr
Enclosure

DOCUMENT CONTROL
OCT 26 2001

Mr. Joel H. Peck
October 24, 2001
Page 2

cc: Chief Hearing Examiner Deborah V. Ellenberg (via Hand Delivery)
E. Duncan Getchell, Jr., Esq. (via facsimile and First Class Mail)
Kodwo Gharthey-Tagoe, Esq. (via facsimile and First Class Mail)
Steven E. Gordon, Esq. (via facsimile and First Class Mail)
John K. Lapiana, Esq. (via facsimile and First Class Mail)
Paul J. McNulty, Esq. (via facsimile and First Class Mail)
Sherry H. Bridewell, Esq. (via Hand Delivery)
Wayne Smith, Esq. (via Hand Delivery)
Patrick A. Toulme (via facsimile and First Class Mail)
James P. Guy, II (via facsimile and First Class Mail)

COMMONWEALTH OF VIRGINIA
STATE CORPORATION COMMISSION

NORTHERN VIRGINIA ELECTRIC)	
COOPERATIVE,)	
)	
Petitioner,)	
)	
vs.)	
)	
VIRGINIA ELECTRIC & POWER COMPANY,)	Case No.: PUE010512
d/b/a DOMINION VIRGINIA POWER,)	
)	
SMITHSONIAN INSTITUTION,)	
)	
AND)	
)	
U.S. GENERAL SERVICES ADMINISTRATION,)	
)	
Respondent.)	

AFFIDAVIT OF PETER G. MOORE

Peter Moore, after being duly sworn, deposes and states as follows:

1. My name is Peter G. Moore. I am a licensed and registered land surveyor in the Commonwealth of Virginia employed by Dewberry and Davis. Attached is a copy of my resume, attesting to my qualifications to perform boundary examinations and calculations.
2. I was asked to examine a parcel of land near Dulles Airport, where the Smithsonian is constructing a new facility that consists of a hangar/museum, theater and parking lot. I was asked to do this in conjunction with making a determination as to the location of the Smithsonian facility with reference to a certain boundary line demarcating the electric service territories of Dominion Virginia Power and Northern Virginia Electric Cooperative.
3. In addition to reviewing the site itself, I have also reviewed several maps, including drawings of the area, preliminary construction plans and drawings that contain information regarding the footprint of the buildings and their location, and a Virginia State Corporation Commission map

E51, originally dated December 1977, and last revised February 1997, which contains certain boundary lines between territories identified as belonging to NOVEC and Dominion.

4. I have reviewed the pleadings filed by the parties, including the Answer and Counter Petition of Virginia Electric and Power Company, and an Affidavit of John Caskey, a Dominion Virginia Power account manager.

5. Based upon my review of the information described above, including a review of the site, the maps and drawings described above, the affidavit of account manager Caskey, calculations I performed using the described data, and my knowledge, experience, and training as a licensed surveyor, I offer the following opinions to a reasonable degree of scientific or technical certainty.

6. The boundary line between the NOVEC and Dominion territories transects the parcel of land on which the Smithsonian is constructing the facility described above.

7. The buildings that comprise the facility, as depicted in the drawings I reviewed, are interconnected and transected by the boundary line. However, the line runs very near the front of the buildings (the eastern side of the facility). Based upon my calculations, it is my professional opinion that approximately 95% of the structures are within NOVEC's territory. The parking lot is principally within Dominion's territory.

8. The opinions contained in this affidavit are based upon the information discussed above. Moreover, there are certain limiting factors that preclude exact calculations. These qualifications include the quality and distortion of documents reviewed, scale variables, and conversion factors. In the event additional information is made available, the opinions expressed in this affidavit are subject to further review. However, even with these qualifications, the affect the variables would have on the figure expressed (95%) is no more than plus or minus five percent of the value.

Peter G. Moore

Peter G. Moore

STATE OF VIRGINIA

COUNTY/CITY OF Prince William, to-wit:

Before me, a Notary Public in and for the State and County/City aforesaid, on the
22nd day of October, 2001, personally appeared Peter G. Moore, who, first being
duly sworn, says that the foregoing instrument is true and correct.

Randy Curry
NOTARY PUBLIC

My Commission Expires: 2/28/2005

PETER G. MOORE, L.S., ASSOCIATE

1619 Summit Drive, Haymarket, VA 20169 / (703) 754-8803

HIGHLIGHTS OF QUALIFICATIONS

- Registered Land Surveyor (Virginia)
- 20+ years of surveying experience (field & office)
- Competent, reliable, and committed professional
- Responsible for multi-million dollar development projects
- Familiar with governmental agencies in Northern Virginia
- Represents firms with professionalism and confidence



EMPLOYMENT HISTORY

05/93 - Present	Registered Land Surveyor/Associate	DEWBERRY & DAVIS	Manassas, VA
01/91 - 05/93	Survey Party Chief	DOVE & ASSOCIATES	Fairfax, VA
11/90 - 01/91	Survey Party Chief/Computer	GARNETT WOMACK & ASSOCIATES	Manassas, VA
03/83 - 10/90	Survey Party Chief/Computer	LBA LIMITED	Fairfax, VA
05/81 - 03/83	Instrumentman/Rodman/Chainman	GREENHORNE & OMARA, INC.	Fairfax, VA

PROFESSIONAL REGISTRATION

Land Surveyor, #1927 - Virginia (1993)

AFFILIATIONS

Virginia Association of Surveyors - President, Bull Run Chapter
American Congress on Surveying & Mapping (ACSM) - Member
Prince William County Policy & Standards Committee
(Design, Construction & Standards Manual) - Member

PROJECTS

Tyson's Corner Center Modernization
Dulles Town Center
Prince William Institute/George Mason University
Disney's America
Dominion Valley (Waverly property)
Occoquan Overlook Subdivision
Braemar Subdivision
Kingsbrooke Subdivision
Westfields Land Development
Lake Ridge Land Development
GPS Services for FEMA Disaster Mitigation (New Jersey, North Carolina)
Davis Ford Road Realignment
Route 1/Route 123 Road Realignment
Spriggs Road Realignment

Continued...

DETAILS OF RELEVANT EXPERIENCE

SURVEY OFFICE/COMPUTING

- ***Office & Computing***

Practicing L.S. ...Responsible for multi-disciplined survey office...Checked field notes and prepared cut sheets for building and house stakeouts, brick points, sanitary and storm sewer, curb & gutter...Balanced traverses and prepared boundary hard-copies...Translated and rotated boundaries and prepared search ties for field crews...Solved state plane surveys and used polaris observation to justify azimuths...Performed court house research in Fairfax, Loudoun, Fauquier, Prince William and Stafford counties for boundary and zoning plats...Prepared and performed quality control checking on zoning plats, variance plats, subdivision plats, easement plats, preliminary development plans, site plans, boundary plats, ALTA/ACSM surveys, wall checks, house locations, as-builts, topo bases, etc...Prepared field crews for work...Prepared cost estimates for field work...Composed metes and bounds descriptions...Interacted with clients to monitor projects and resolve conflicts.

SURVEY FIELD

- ***Senior Party Chief***

Responsible for the largest renovation project in Northern Virginia-Tyson's Corner Center-as well as one of the largest boundary surveys by LBA, Limited (12 parcels combined into a 1,200± acre tract)...GPS experience and limited Trimble RTK field experience...Experience on residential and commercial projects from start to finish including original boundary work, field run topography, setting lot corners, rough grading, stakeout, curb & gutter, building stakeouts, and final as-built surveys...Highly experienced in the use of plane tables, alidades and state-of-the-art data collectors for field run topo...Personally completed and computed dozens of solar and polaris observations...Route surveying experience included establishing horizontal and vertical control for cross-section center profiles...Experienced on VDOT road improvements, including slope staking roadways with super-elevation...Topographic and boundary surveying background including preparing and executing boundary traverses and site preparation for photogrammetric surveying and mapping.

- ***Instrumentman/Rodman/Chainman***

Construction stakeout experience including establishing horizontal and vertical control; road and curve centerline with slope stakes; curb and gutter; public utilities; house and final lot; storm, sanitary sewer and water...Capital improvements as-built, house locations, and route surveying that included road profiles and cross-sections...Topographic and boundary surveying background has included preparing and executing boundary traverses and site preparation for photogrammetric surveying and mapping...Topographic surveying experience spans use of the plane table with alidade.

SEMINARS AND TRAINING

Magellan/Ashtech Technology Seminar – GPS/GIS Training (1/00)
 Trimble Navigation - RTK and GPS Training (3/94)
 POB Seminar - ALTA/ACSM Land Title Surveys (4/93)
 East Tennessee State University - Land Surveyor Exam Review (8/92)
 VMI - R. A. Marr School - Practical Hydraulics & Hydrology (3/92)
 VPI & SU - Surveyor Refresher & Professional Exam Review (3/91)
 POB Seminar - Improving the Accuracy of Field Measurements and
 Maintaining Your Field Equipment (4/88)

GEO. E. PENN (1895-1931)
WM. A. STUART (1922-1976)

PENNSTUART

Since 1890

ATTORNEYS AT LAW

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Richmond, Virginia 23218-0617

801 E. Main Street, Suite 1110
Richmond, Virginia 23219

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Facsimile 804/819-1753

Offices in Abingdon, Bristol and
Richmond, Virginia

All Attorneys Licensed in Virginia Except as Noted
Additional Bar Memberships:

'CA; 'DC; 'KY; 'MD; 'NC; 'TN; 'WV

October 24, 2001

011030107

G.R.C. STUART (RETIRED)
JOHN B. HEMMINGS (RETIRED)

WM. W. ESKRIDGE
STEPHEN M. HODGES
W. CHALLEN WALLING ^{VI}
WADE W. MASSIE ^{VI, VII}
DANIEL H. CALDWELL
MICHAEL F. BLAIR
WILLIAM M. MOFFET
MARK L. ESPOSITO
ELIZABETH A. McCLANAHAN ^{II, III, IV, VI, VII}
TIMOTHY W. GRESHAM ^{VI}
H. ASHBY DICKERSON
BYRUM L. GEISLER
JILL MORGAN HARRISON ^{V, VI, VII}

RICHARD E. LADD, JR. ^{VI}
W. BRADFORD STALLARD
RAMESH MURTHY ^{VI}
JOANNE L. NOLTE
MARK E. FRYE ^{VI}
ELIZABETH R. WALTERS ^{VI}
ERIC R. THIESSEN
LESLIE S. BLANCHARD ^I
LISA FRISINA CLEMENT
ANDREW M. HANSON ^{VI}
J. JASEN EIGE
DANIELLE L. SMITH ^{VI}
FREDRICK A. ROWLETT
TARIO A. ZAIDI ^{V, VI}
*NOT LICENSED IN VIRGINIA

VIA HAND DELIVERY

Joel H. Peck, Clerk
Virginia State Corporation Commission
Document Control Center
1300 E. Main Street
Richmond, VA 23219

Re: Northern Virginia Electric Cooperative v. Virginia Electric and Power Co., et al
Case No. PUE010512
PS&E File No. 4685-6

Dear Mr. Peck:

As counsel to NOVEC, enclosed please find an original and fifteen (15) copies of the Affidavits James C. Moxley, Peter G. Moore and Gilbert D. Jaramillo, in support of our Petition and in preparation for the Oral Argument scheduled for tomorrow.

By copy of this letter, I am forwarding executed copies of the Affidavits to all counsel of record.

If you have any questions, please feel free to call me. Thank you for your assistance.

Sincerely yours,

PENN, STUART, & ESKRIDGE



By: W. Bradford Stallard

WBS/cmr
Enclosure

DOCUMENT CONTROL

Mr. Joel H. Peck
October 24, 2001
Page 2

cc: Chief Hearing Examiner Deborah V. Ellenberg (via Hand Delivery)
E. Duncan Getchell, Jr., Esq. (via facsimile and First Class Mail)
Kodwo Ghartey-Tagoe, Esq. (via facsimile and First Class Mail)
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COMMONWEALTH OF VIRGINIA
STATE CORPORATION COMMISSION

NORTHERN VIRGINIA ELECTRIC COOPERATIVE,)	
)	
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Petitioner,)	
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vs.)	
)	
VIRGINIA ELECTRIC & POWER COMPANY, d/b/a DOMINION VIRGINIA POWER,)	Case No.: PUE010512
)	
)	
SMITHSONIAN INSTITUTION,)	
)	
AND)	
)	
U.S. GENERAL SERVICES ADMINISTRATION,)	
)	
Respondent.)	

AFFIDAVIT OF GILBERT D. JARAMILLO

Gilbert D. Jaramillo, after being duly sworn, deposes and states as follows:

1. My name is Gilbert "Gil" D. Jaramillo. I have been the manager of account services for NOVEC since September 8, 1999. I am a certified energy manager, and a certified energy procurement professional. My curriculum vitae is attached to this affidavit as Exhibit 1.
2. In my capacity as manager of account services, I study and formulate NOVEC's rate design, including studying the cost of energy distribution and generation, conducting load research, examining the cost of service through studies looking at revenue requirements, and project the prospective load of new customers. I work with prospective customers to anticipate, prepare and produce analyses of projected loads, and conduct a financial analyses regarding NOVEC's service to its customers.
3. I assist NOVEC in forecasting the utility's planning for future infrastructure, and planning for new growth areas within NOVEC's certificated territory. I also assist in formulating

NOVEC's long range plan for future build out and customer service pursuant to NOVEC's obligation to serve all customers within its certificated territory.

4. In 1996, NOVEC received preliminary information from the Smithsonian regarding the Smithsonian's proposed heating and cooling options for the Steven F. Udvar-Hazy Center to be constructed in Dulles, Virginia (the "Smithsonian facility").

5. According to the information that I received, the Smithsonian anticipated a seven (7) to ten (10) megawatt load. However, the Smithsonian subsequently provided information that the load would be slightly smaller, indicating that the load would be approximately five (5) megawatts.

6. To calculate the actual electric demand (kw) requirements that a prospective customer will have, NOVEC, pursuant to the well-established standards in the industry, applies a diversity adjustment to the total projected connected load. Also, to establish the amount of energy consumed over a typical billing period, a load factor is assigned to the prospective load that would best reflect its anticipated energy usage.

7. I have calculated the projected revenue that NOVEC will receive if it provides electricity to the Smithsonian facility based upon a five (5) megawatt load, and a load factor of 70%.

8. To a reasonable degree of professional energy management certainty, providing electricity to the Smithsonian facility would result in a gross revenue to NOVEC of approximately 1.4 million dollars (\$1,400,000.00) per year, based upon similar applicable rate schedules that NOVEC uses with other similarly situated customers.

9. Assuming a five megawatt load, and a load factor of 70%, NOVEC's yearly distribution revenue alone would exceed \$225,000 based upon applicable rate schedules that NOVEC uses with similarly situated customers.

10. Based upon the comparable electricity needs of other similarly situated customers, and cost of service studies, and based upon my own personal experience as a manager of account services for NOVEC since 1999, and my previous experience as a director of commercial and industrial accounts from 1995 to 1999, I project to a reasonable degree of energy management certainty that NOVEC will make a net profit from supply and distribution of energy to the Smithsonian facility in excess of one-hundred thousand dollars (\$100,000.00) each year it provides service to the Smithsonian facility.

11. While I have stated the above estimates to a reasonable degree of professional energy management certainty, these figures are necessarily inexact. They are projections based upon the information that the Smithsonian has provided NOVEC. Ordinarily, a large prospective industrial or commercial customer will, in addition to the preliminary information that the Smithsonian gave to NOVEC, provide a detailed "load letter," stating its anticipated electricity needs in greater detail, including projected heating and cooling electricity needs, motor needs for air handling and other internal environmental controls, motor sizes and loads, elevator loads, lighting requirements, both indoors and outdoors, computer loads (including main frame and network system loads), ordinary outlet loads, and, in the case of a museum, any special extra requirements for additional environmental controls.

12. Despite repeated requests, the Smithsonian has declined to provide NOVEC with a load letter or comparable data.

13. As discussed above, in addition to my management of specific accounts, my responsibilities require anticipation and planning for future needs for prospective customers within NOVEC's certificated territory.

14. This includes planning for and serving the anticipated needs of existing and new prospective customers within NOVEC's service territory pursuant to its obligation under Virginia law.

15. I participate and assist in NOVEC's future planning, including NOVEC's long range plan and NOVEC's formal and informal long and short range planning for future growth areas, including concerns for NOVEC's infrastructure and build out.

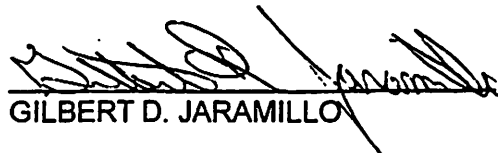
16. This planning is important to NOVEC's calculation of anticipated current and future fixed costs, which are spread out among NOVEC's customer base.

17. Allowing certain customers, especially large and desirable customers, to "drop out" from NOVEC's service territory would thwart formal and informal planning, and would also create havoc in NOVEC's long range and short range infrastructure planning. In addition, allowing certain customers, especially large and desirable customers, to "drop out" from NOVEC's service territory would adversely affect NOVEC's fixed costs, and potentially increase costs to NOVEC's remaining customers.

18. I have reviewed NOVEC's service territory in the Dulles area, and, based upon my experience as a manager of account services, my prior experience as director of commercial and industrial accounts, and my experience as a distribution supervisor engineer, I can state to a reasonable degree of professional energy management certainty that at least 95% of the energy consumed at the Smithsonian facility will be consumed by the facility's main buildings.

19. Less than 5% of the electricity consumed by the Smithsonian facility would be consumed by the nighttime lighting of the parking lot.


The Affiant saith further not.


GILBERT D. JARAMILLO

STATE OF VIRGINIA

COUNTY OF FAIRFAX - To Wit

Before me, a notary public in and for the state and county aforesaid, on the 23rd
day of October, 2001, personally appeared Gil Jaramillo, who, first being duly sworn, says that the
foregoing instrument is true and correct.


NOTARY PUBLIC

My Commission Expires:

Tricia M. Saunders
Notary Public
Commonwealth of Virginia
My Commission Expires Feb. 29, 2004

GILBERT D. JARAMILLO, C.E.M., C.E.P.

15 Ontell Ct.
Stafford, VA 22554
(540) 720-0767

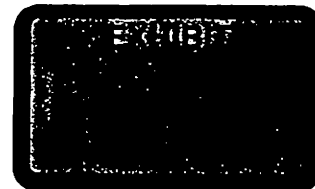
EDUCATION

George Washington University, Washington, D.C.

M.E.M., Environmental & Energy Management - June 1996

New Mexico State University, Las Cruces, N.M.

B.S.E.E., Power Systems - December 1987



SUMMARY

Over sixteen years of electric utility experience in the fields of energy procurement, electric operations, distribution engineering, transmission engineering, sales and marketing. Twelve years of direct supervisory experience. Broad experience in the areas of:

- Demand Side Management • Design Engineering • Contract/Technical Specification Writing
- Project Management • Energy Management • Natural Gas Marketing • Cost of Service/Rate Design

ACCOMPLISHMENTS

- Performed field inspections of customers' facilities that have resulted in demand savings of over 1.5 Megawatts.
- Developed and administered company's Key Account Program.
- Co-managed company's first in-house cost of service study
- Assisted in the development of alternative rate options for company's nonregulated customers.
- Developed and implemented standby generation program for C/I customers.
- Co-managed company's entry into Natural Gas Marketing which included initial budget planning, marketing, selling, buying, risk management and arranging for pipeline services.
- Managed company's URD Cable Replacement Program.

PROFESSIONAL EXPERIENCE

NORTHERN VIRGINIA ELECTRIC COOPERATIVE

1988 - present

Manager, Account Services

Manage the daily operations and activities of the Account Services Division which includes; Residential and Commercial Energy Auditing Program, Key Accounts Program, and Customer Service Marketing activities and publications. Manage company's new gas division, America's Energy which includes; Fuel Supply Procurement, Transportation, Retail Sales, Scheduling and Nominations. Manage company's rate design and tariff issues which include; Cost of Service, Commission Rate Filings, Load Research, Unregulated Customer Rate Negotiations, and Economic Development Rate Design.

PROFESSIONAL EXPERIENCE, Continued**Supervisor, Distribution Engineering**

Supervised the activities of the distribution engineering section. Reviewed the electrical design of new distribution facilities for residential, commercial and government customers.

Performed project management of system improvement activities. Assisted staff and right-of-way agents in securing easements. Assisted the system planning group with projections of load growth and facilities extension for system work plan.

Supervisor, District Operations Supervisor

Performed personnel administration within the section to provide required staffing, training, work assignments, performance appraisals and compliance with NOVEC policies and procedures. Analyzed and monitored the operations of the T & D system to maintain a reliable, efficient and safe electrical system. Directed power restoration activities. Administered the company underground cable locating program in accordance with the state of Virginia "Miss Utility" program.

EL PASO ELECTRIC COMPANY

1984 - 1988

Transmission Engineer

Provided project management assistance relative to transmission line projects. Interfaced with local communities and government agencies to successfully address their concerns before and after construction completion. Wrote contract specifications for transmission line projects. Assisted in the procurement of Transmission line materials. Steel and wood pole line design. Modeled various transmission structures on computer program SAPS to analyze loading limitations.

Assistant Engineer

Performed power flow and fault studies on distribution feeders. Performed fuse coordination studies. Used computer program CAPLAN to optimize capacitor placement along distribution feeders. Assisted Senior Engineer with voltage complaints, system disturbances and system improvement projects. Provided FORTRAN programming support.

Service Clerk

Operated company switchboard during night shift. Addressed customer's problems and requests during electrical outtages. Worked productively under pressure during severe outage conditions. Used distribution maps to direct power restoration efforts.

PROFESSIONAL ASSOCIATIONS AND CERTIFICATIONS

Association of Energy Engineers, Senior Member

Association of Professional Energy Managers

Certified Energy Manager

Certified Energy Procurement Professional

COMMONWEALTH OF VIRGINIA
STATE CORPORATION COMMISSION

COMMONWEALTH OF VIRGINIA, ex rel.
NORTHERN VIRGINIA ELECTRIC COOPERATIVE,

Petitioner,

v.

CASE No. PUE010612

VIRGINIA ELECTRIC AND POWER COMPANY
d/b/a DOMINION VIRGINIA POWER,
SMITHSONIAN INSTITUTION, and
U.S. GENERAL SERVICES ADMINISTRATION,

Respondents.

DECLARATION OF JUSTIN ESTOQUE

Pursuant to 28 U.S.C. § 1746, JUSTIN ESTOQUE declares as follows:

1. I am employed by the Smithsonian Institution as the project manager for construction of the Steven F. Udvar-Hazy Center, National Air and Space Museum, in Dulles, Virginia.
2. I submit this declaration at the invitation of Virginia Electric and Power Company.
3. The information set forth in this declaration is based upon my personal knowledge and information contained in the files and records of the Office of Facilities Engineering and Operations, Smithsonian Institution.
4. The Udvar-Hazy Center is being constructed to, among other things, prevent further deterioration of one of the world's most valuable and irreplaceable collections of aviation

and spaceflight artifacts. The Udvar-Hazy Center will provide the restoration facility capable of preserving the artifacts in the collection.

5. Because of the critical need for this facility, the Smithsonian seeks to complete and open the Udvar-Hazy Center and begin relocating its collections and functions from the other facilities as soon as the building can be occupied.

6. Accordingly, it remains of paramount and practical importance to the Smithsonian that the phased construction schedule of the Udvar-Hazy Center not be compromised. Only the timely completion of each of the project's phases will ensure that the Udvar-Hazy Center opens in December 2003 -- the centennial of the first powered flight.

7. Meeting the December 2003 date not only permits the Museum to take advantage of the unique educational opportunities associated with the centennial, but would also reflect the expectations of many individual and corporate donors who have provided all the funding for the Center's construction.

8. Significant planning has been completed and related infrastructure installed in anticipation that Virginia Power would provide the site electricity. Those plans would need to be re-examined, which could result in modification or replacement of the infrastructure should the Commission deem the Northern Virginia Electric Cooperative ("NOVEC") to be the provider of electricity. The resulting impact would greatly endanger the scheduled opening of the Udvar-Hazy Center.

9. Specifically, the construction schedule is based, in part, upon the planned delivery and installation by Virginia Power of its first transformer during November 2001.

10. The installation will make permanent power available to the Smithsonian's construction contractor, Hensel Phelps Construction Company ("HPCC"), well beyond the current, and temporary, power capacity. To permit construction and start-up of mechanical and electrical equipment necessary for construction of the Center's buildings, HPCC must have this additional power, at the latest, by the beginning of April 2002.

11. These tasks must be performed on schedule in order to preserve the

construction completion dates. A true and accurate excerpt of the construction schedule is attached to this declaration.

12. According to the construction schedule, the "early start" and "early finish" dates associated with at least one key activity requiring "power connections" are March 29, 2002 and April 4, 2002, respectively. "Early start" and "early finish" are the dates upon which an activity can begin and be completed in light of all activities that must precede it in the construction sequence. "Float" is the amount of time an activity can slip without delaying the early start of its successor activities in the construction sequence. These dates are premised upon the installation of the first transformer in November 2001. From that period until March 29, 2002, Virginia Power must still install and connect power lines to the grid and to the building's switchgear.

13. Virginia Power has sized its transformers for the Smithsonian's building loads, and the concrete pads for the transformers also have been designed and installed in accordance with Virginia Power's requirements. If another provider replaces Virginia Power, that provider must confirm these calculations or re-size its transformers, and the Smithsonian may need to redesign and re-install the concrete pads. This process will likely create additional delays to the start of electrical service to the building, threatening the construction completion dates.

14. Likewise, duct-bank for carrying service conductors has been designed and installed in accordance with Virginia Power's requirements. At minimum, if another provider replaces Virginia Power, that provider must also confirm that the ductbank meets its requirements, and if it does not, time-consuming and potentially costly changes to the ductbank must be made, again jeopardizing the construction completion dates.

15. In sum, the Smithsonian's primary concern is to ensure that the current construction schedule is not disrupted and that the Udvar-Hazy Center is open by December 2003. Failure to do so not only will result in monetary losses resulting from possible delay claims by the construction contractor, but also in the loss of intangible and unquantifiable educational opportunities for the National Air and Space Museum to publicly celebrate the

centennial of a seminal historical event, the first powered flight by the Wright Brothers on December 17, 1903.

I declare under penalty of perjury that the information contained in this declaration is true and correct.

Dated: Washington, D.C.
October 24, 2001


JUSTIN ESTOQUE

COMMONWEALTH OF VIRGINIA
STATE CORPORATION COMMISSION

NORTHERN VIRGINIA ELECTRIC COOPERATIVE,)	
)	
Petitioner,)	
)	
vs.)	
)	
VIRGINIA ELECTRIC & POWER COMPANY,)	Case No.: PUE010512
d/b/a DOMINION VIRGINIA POWER,)	
)	
SMITHSONIAN INSTITUTION,)	
)	
AND)	
)	
U.S. GENERAL SERVICES ADMINISTRATION,)	
)	
Respondent.)	

MEMORANDUM IN SUPPORT OF MOTION FOR PRELIMINARY INJUNCTION

Northern Virginia Electric Cooperative ("NOVEC"), by counsel, submits this memorandum in support of its motion for a preliminary injunction.

INTRODUCTION

NOVEC filed this motion for preliminary and permanent injunction in order to defend the valuable property right it possesses to provide service to the Smithsonian Institution's Steven F. Udvar-Hazy Center ("Smithsonian facility") being constructed in Dulles, Virginia. Under Virginia law, and the Commission's decisions in RGC Mineral Sands and Kentucky Utilities, NOVEC has the right and obligation to provide electricity to the Smithsonian facility. Virtually all of the Smithsonian facility's main buildings are in NOVEC's certificated territory. The overwhelming majority of electricity that the Smithsonian facility will consume will be in those buildings. Both the physical location of the main facility and the physical location of the bulk of the load are in NOVEC's service territory.

The General Assembly has specifically granted the Commission the power to temporarily enjoin a public service corporation's violation of law, including attempts to provide

electrical service outside of its certificated territory. The Commission's primary inquiry in determining whether to issue a preliminary injunction in this proceeding is whether it is likely that Dominion is violating or threatens to violate NOVEC's exclusive service territory by attempting to provide permanent service to the Smithsonian facility. Dominion is forging ahead with construction of facilities to provide permanent electric service to the Smithsonian facility within NOVEC's certificated territory, contravening NOVEC's property rights. These are precisely the circumstances under which the Commission is authorized—indeed obligated—to issue a temporary injunction pendente lite to maintain the status quo and respective positions of the parties until such time as the Commission considers all the evidence and may rule on the merits of this dispute.

NOVEC is also entitled to a preliminary injunction under traditional common law principles. NOVEC will be irreparably harmed if construction is permitted to continue, Dominion will suffer no harm by maintaining the status quo, NOVEC is likely to succeed on the merits, and the public's interest will be served by maintaining the status quo until this matter is resolved.

ARGUMENT

I. The Commission's Primary Inquiry in Determining Whether a Preliminary Injunction Should Issue Is Whether NOVEC Will Likely Succeed on the Merits in this Proceeding

In its memorandum, Dominion mistakenly treats NOVEC's petition for a preliminary injunction as one governed solely by common law equitable principles. This is not, however, a common law action. This is a proceeding before the Commission that NOVEC has brought to protect its franchise to serve a customer within its certificated territory. Unlike circuit courts, the Commission operates under plenary police power granted by the Virginia Constitution. Va. Const. IX, § 2. The Commission is expressly charged with the duty to regulate the "services . . . and facilities of . . . electric companies." Id. Unlike circuit courts, the General Assembly has expressly granted the "Commission authority to "promulgate rules and

regulations, [and] . . . to issue temporary and permanent injunctions," as well as to suspend or revoke any Commission-issued license or certificate. Va. Code Ann. § 12.1-13 (emphasis added).

In this proceeding, NOVEC is required only to show that its statutory right to a franchise is threatened or has likely been violated in order for the Commission to enter a preliminary injunction maintaining the status quo until the full merits of this matter can be heard and adjudicated. Under Virginia law,

When a statute empowers a court to grant injunctive relief, the party seeking an injunction is not required to establish the traditional prerequisites, i.e. irreparable harm and lack of an adequate remedy at law, before the injunction can issue. All that is required is proof that the statute or regulation has been violated.

Virginia Beach S.P.C.A., Inc. v. South Hampton Roads Veterinary Assoc., 229 Va. 349, 329 S.E.2d 10, 13 (1985); WTAR Radio-T.V. Corp. v. City Council for the City of Virginia Beach, 216 Va. 892, 223 S.E.2d 895 (1976) (petition need not contain allegation of "irreparable injury" where a statute provides the tribunal with authority to issue injunction).

Here, just as in Virginia Beach S.P.C.A., Va. Code Ann. § 12.1-13 specifically empowers the Commission to issue temporary and permanent injunctions. This law is consonant with Virginia's scheme of regulated monopolies that the General Assembly has mandated. The General Assembly has provided for exclusive certificated territories for all Virginia electric utilities, and the Commission has been charged with strict enforcement of those certificated territories in Va. Code Ann. §§ 56-265.3 and 56-265.4. The Commission-issued franchises that grant utilities certificated territories are valuable property rights entitled to the protection of the Commission and the courts. Town of Culpeper v. VEPCO, 215 Va. 189, 193-94, 207 S.E.2d 864, 867-868 (1974). Because Va. Code Ann. § 12.1-13 expressly grants the Commission authority to issue both temporary and permanent injunctions, and because Va.

Code Ann. § 56-6 specifically grants a party aggrieved by a public service corporation's violation of Title 56 a right to seek such an injunction, NOVEC is not required to show irreparable injury. Virginia Beach S.P.C.A., 229 Va. at 354, 329 S.E.2d at 13. "All that is required is proof that the statute or regulation has been violated." Id., 329 S.E.2d at 13.

NOVEC has alleged and submitted evidence that Dominion's construction of electric utility facilities to provide permanent service to the Smithsonian facility violates Va. Code Ann. §§ 56-265.3 and 56-265.4. Approximately 95% of the main structure of the Smithsonian facility lies within NOVEC's service territory. Moore Aff. ¶ 7. NOVEC has submitted, as Exhibit 1 to its petition, the most recent Commission map indicating NOVEC's entire service territory. The map shows that the main buildings that compose the Smithsonian facility are entirely or virtually entirely in NOVEC's certificated territory. In addition, the State Corporation Commission map showing area E51 shows that the main Smithsonian buildings are being constructed within NOVEC's certificated territory. See Exhibit 5 to NOVEC's petition. In addition, at least 95% of the electricity that the Smithsonian will consume will be consumed by the facility's main structure. Jaramillo Aff. ¶ 18. As we now show, under the Commission's precedent, these facts mandate that NOVEC is entitled to provide service to the Smithsonian facility.

II. Under Established Commission Precedent, Dominion's Threatened Permanent Service to the Smithsonian Facility Violates Va. Code Ann. §§ 56-265.3 and 56-265.4

In Petition of Prince George Electric Cooperative and Petition of RGC (USA) Mineral Sands, Inc., Case No. PUE960295 (SCC June 25, 1998), and in Petition of Kentucky Utilities Co. d/b/a Old Dominion Power Co., Case No. PUE960303 (SCC March 31, 1999), this Commission rejected attempts by utilities to provide service to facilities in other utilities' certificated territories. In both of these cases, the Commission rejected the "point of delivery" test, and held that Va. Code Ann. §§ 56-265.3 and 56-256.4 require "strong protection for the

exclusive service territories of utilities in Virginia." RGC Mineral Sands at 20; Kentucky Utilities at 20. The Commission held that "we find the cases adopting the point of use test are persuasive." RGC Mineral Sands at 17.

Thus, in this case—unlike in RGC Mineral Sands and Kentucky Utilities—the Hearing Examiner is not drawing on a blank slate. The Commission has set forth two detailed and well-considered opinions affirming the Code's requirement of exclusive service territories, and that, in resolving territories disputes with respect to service, the Commission's paramount consideration must be to protect the integrity of each utility's certificated territory. In this proceeding, NOVEC has asked the Commission to protect its certificated service territory, and to enjoin Dominion from providing permanent electrical service to facilities that are being constructed within NOVEC's exclusive territory.

The fundamental precept drawn from RGC Mineral Sands and Kentucky Utilities is that under the Utility Facilities Act, a utility cannot invade the service territory of another utility to provide service to a customer—whether new or already existing—without complying with the Act. The core principle of both RGC Mineral Sands and Kentucky Utilities is that Virginia's scheme providing for exclusive service territories should be enforced. Governed by this principle, NOVEC is more than likely to prevail in this proceeding.

In its memorandum in opposition to the injunction, Dominion vigorously attempts to distinguish RGC Mineral Sands and Kentucky Utilities on the basis that one of the Commission's considerations in rejecting the point of delivery test was that the test would permit customers to manipulate their land holdings in order to circumvent the Code and allow customer choice.

Dominion should not be permitted to obtain a desirable customer by denying NOVEC a delivery point, where, as here, Dominion is obligated under contract with Old

Dominion Electric Cooperative ("ODEC"), to give NOVEC a delivery point, then assert NOVEC's lack of a delivery point as a fact that redounds to Dominion's benefit. See Moxley Aff. at ¶ 1.

The difference in facts with respect to manipulation in this case compared to RGC Mineral Sands and Kentucky Utilities militates even more strongly in favor of enforcement for NOVEC in this case than they did for Prince George Electric Cooperative and Kentucky Utilities in the Commission's prior cases. As the Hearing Examiner found in RGC Mineral Sands, there may be some sympathy for a customer who attempts to manipulate land holdings in order to obtain the service it desires, although the Commission ultimately held that this is an improper consideration in determining which utility serves a customer under the Act. RGC Mineral Sands at 7-8.

However, there should be no sympathy for, and the Commission absolutely cannot countenance, attempts by a utility itself to manipulate delivery points in order to effectuate its own interests at the expense of the integrity of certificated territories. Otherwise, the Commission would reward the very "subterfuge" that it condemned in RGC Mineral Sands and Kentucky Utilities. Dominion's manipulation in this case is as blatant as the customers' manipulations in RGC Mineral Sands and Kentucky Utilities.

Because the Smithsonian's main buildings lie entirely or virtually entirely within NOVEC's certificated territory, RGC Mineral Sands and Kentucky Utilities are dispositive with respect to the question of which utility is entitled to provide service to the Smithsonian facility. The fact that a small percentage of the physical structure may extend to the boundary line, or that a very small portion of the main building may extend onto Dominion's territory, does not diminish the central holdings of RGC Mineral Sands and Kentucky Utilities, namely, that the primary physical location of a customers' point-of-use facility dictates which utility shall serve that customer. Under either the point of use test or the bulk of the load test that the Commission has discussed, NOVEC has the right to serve the Smithsonian facility. Because the

main buildings of the Smithsonian facility are situated either entirely or almost entirely within NOVEC's service territory, NOVEC has the right and obligation to provide electrical service to those buildings.

In the context of the Commission's requirement for strong protection of exclusive service territories, it has stated that it will consider the "practical realities" of each situation. In the context of the Commission's protection for exclusive service territories, certainly the practical realities here, i.e., that a small portion of the main building may extend onto Dominion's territory, calls for the Commission to permit NOVEC to apply electricity to the entire building.¹ Dominion, anticipating this issue, argues that the Commission's prior opinions indicate the Commission is unlikely to adopt the geographic load center test. There is no basis for this assertion. The Commission has never disavowed the bulk of the load test, and NOVEC submits that it is the most "practical" solution to this matter. It is the test that most comports with the Commission's precedent that point of use is the most important consideration in determining the delineation of a certificated territory. RG Mineral Sands at 17; Kentucky Utilities at 21.

Under the Commission's precedent, where the "practical realities" require, the bulk of the load test is a logical outgrowth of the point of use test, and is not in conflict with it. While Dominion attempts to denigrate the test, it is apparent that in appropriate circumstances it is the most logical basis to resolve territorial disputes. In Public Service Co. v. Public Utilities Comm'n, 765 P.2d 1015 (Colo. 1988), the court found that the bulk of the load test conflicted with the point of use test where a customer had multiple facilities that were geographically separated from one another. Id. at 1020. That is, where there are multiple facilities or buildings

¹If the Commission finds that the "practical realities" of this situation also make Dominion's service of the parking lot undesirable in light of the fact that the parking lot constitutes such a minuscule load, the bulk of the load analysis logically extends to also permit NOVEC to provide service to the parking lot.

spread out over a large geographic area, none of which are connected or integrated, one utility cannot invoke the bulk of the load test to subvert another utility's bona fide certificated territory.

However, that is not this case. The Smithsonian's facilities are physically interconnected and are part of one large complex. This is precisely the "practical" situation that calls for an extension of the point of use test to encompass a bulk of the load analysis. Indeed, in Public Service Co., the court found that it was proper to use the geographic load center test where a facility is "physically interconnected with a facility outside the exclusive territory," and "where a single facility straddles two service areas, where separate yet interconnected facilities are situated within two service areas, or where a previously unserved facility requires electrical service." Id. at 1022. Here, the Steven F. Udvar-Hazy Center's main building is almost entirely within NOVEC's certificated territory. The Center is an integrated and physically interconnected facility, and the practical reality is that only one utility will ultimately serve it. Under these circumstances, the Commission's precedent in RGC Mineral Sands and Kentucky Utilities virtually mandates application of a bulk of the load analysis to best effectuate the Code's dictate that certificated service territories are to be protected.

NOVEC has shown, based on both the facts and the law, that it is more than likely to prevail upon the merits of this proceeding. It has shown that, based upon the evidence now before the Commission, Dominion is attempting to invade its certificated territory to provide service to one of NOVEC's desirable customers. Accordingly, under the Commission's authority granted to it in Va. Code Ann. § 12.1-13, and pursuant to NOVEC's right under Va. Code Ann. § 56-6, 56-265.3 and 56-265.4, the Commission should enter a preliminary injunction maintaining the status quo until a full hearing can be heard to resolve this dispute.

III. NOVEC Is Entitled to a Preliminary Injunction Under Traditional Common Law Equitable Principles

While common law equitable principles do not control this matter, NOVEC is entitled to a preliminary injunction under those principles as well. Under common law, the four factors a court must consider in issuing a preliminary injunction are (1) the likelihood of irreparable harm to the plaintiff if the preliminary injunction is denied; (2) the likelihood of harm to the defendant if the requested relief is granted; (3) the likelihood that the plaintiff will succeed on the merits, and (4) the public interest. Rum Creek Coal Sales, Inc. v. Caperton, 926 F.2d 353, 359 (4th Cir. 1991).

Irreparable harm to the plaintiff and the harm to the defendant are the two most important factors. Id. After balancing those factors, as long as the balance "tips decidedly" in favor of the plaintiff, a preliminary injunction will be granted "if the plaintiff has raised questions going to the merits so serious, substantial, difficult and doubtful, as to make them fair ground for litigation and thus for more deliberative investigation." Id. (quoting Blackwelder Furniture Co. v. Seilig Mfg. Co., 550 F.2d 189, 195 (4th Cir. 1977)). In other words, where the harm to the plaintiff is substantial, the plaintiff's burden with respect to a showing on the merits is reduced. Id.

As NOVEC has already discussed, Virginia law and this Commission's precedent make its questions going to the merits far beyond just serious or substantial. NOVEC is unquestionably likely to succeed on the merits in this proceeding.

A. NOVEC WILL SUFFER IRREPARABLE HARM UNLESS THE INJUNCTION ISSUES

NOVEC will suffer irreparable harm if Dominion is permitted to move forward with its construction to provide permanent electric service to the Smithsonian facility in several

different ways, to wit: (i) NOVEC will suffer serious pecuniary damage that is not easily ascertainable and perhaps incalculable; (ii) NOVEC's planning for future growth within its territory will be damaged; (iii) the violation of NOVEC's franchise is, in and of itself, a type of harm the nature of which is "irreparable;" (iv) Dominion should be enjoined where, as here, it is arguing that its construction of facilities is itself a factor that the Commission should consider in determining which utility is better equipped to serve this customer; and (v) NOVEC faces the threatened permanent loss of a customer.

Under Virginia law, "[b]y the term 'irreparable injury' it is not meant that there must be no physical possibility of repairing the injury. All that is meant is that the injury would be a grievous one, or at least a material one, and not adequately reparable in damages." Calloway v. Webster, 98 Va. 790, 792, 37 S.E. 276, 277 (1900).

NOVEC will suffer significant monetary damages if it loses this customer to Dominion. Based upon conservative assumptions, the Smithsonian facility will result in gross revenue to NOVEC of approximately 1.4 million dollars per year. See Jaramillo Affidavit ¶ 8. Distribution revenue alone will exceed \$225,000.00 per year. Jaramillo Affidavit ¶ 9. These monetary damages are however estimates, and it is difficult to ascertain the exact damages NOVEC will incur if Dominion is permitted to move forward with the construction of the permanent facilities while this matter is pending.

Likewise, the harm that NOVEC will suffer because of its inability to make long or short term forecasting with respect to its obligation to provide service within its service territory as a result of the uncertainty posed by permitting Dominion to move forward with construction of permanent electrical infrastructure is a discreet, incalculable harm. Both of these harms are irreparable, as all that NOVEC must show in order to establish irreparable harm is that the harm posed "is incalculable—not incalculably great or small, just incalculable." Blackwelder, 550 F.2d

at 197. As Judge Learned Hand observed, "irreparability of harm includes the 'impossibility of ascertaining with any accuracy the extent of the loss.'" Id.

Under Virginia law, harm to NOVEC's franchise to provide service to its customers within its exclusive certificated territory is yet another independent, discreet harm that is "irreparable." The harm occasioned by the mere threat that Dominion will invade NOVEC's rights conferred by its certificate is of an irreparable nature. "[E]quity extends its protection not only to actual but to threatened invasion of rights conferred by franchise, and that an injunction is proper whether the invasion seeks to destroy the franchise or merely to participate in its exclusive privileges." Transportation Co. v. Woodfin, 196 Va. 747, 750, 85 S.E.2d 217, 219 (1955); Turner v. Hicks, 164 Va. 612, 617, 180 S.E. 543, 545 (1935)(same). Under Virginia law, equity extends to protect NOVEC from Dominion's threatened invasion of NOVEC's rights conferred by the franchise that this Commission has granted.

In addition, under traditional equitable principles, the irreparable injury requirement is satisfied where failure to grant preliminary relief "creates the possibility of permanent loss of customers to a competitor." Waste Mgt. Holdings, Inc. v. Gilmore, 64 F. Supp. 2d 523, 531 (E.D. Va. 1999) (finding that possibility of permanent loss of customers satisfied irreparable injury requirement); Multi-Chanel T.V. Cable Co. v. Charlottesville Quality Cable Operating Co., 22 F.3d 546, 551-552 (4th Cir. 1994) (same).

In attempting to develop an ad hoc test that favors it, Dominion has made NOVEC's case for preliminary injunctive relief. One of the five "factors" that Dominion contends that the Commission should consider to find that Dominion should provide power to the Smithsonian facility is Dominion's allegation that its "existing facilities are closer to the points of use" and that it is "better equipped" to provide service. Dominion's Mem. at 5. Here, Dominion asserts that its facilities, which are being built as the Hearing Examiner reads this memorandum, are a factor the Commission should consider in determining which utility should

provide service to the Smithsonian facility. Certainly, if Dominion asserts that its construction of facilities is a factor that should militate in its favor, the Commission must, in the interest of equity, halt construction immediately so that the status quo can be maintained until the Commission can fully adjudicate NOVEC's petition.

B. MAINTAINING THE STATUS QUO WILL NOT HARM DOMINION OR THE SMITHSONIAN

Maintaining the status quo will not harm Dominion at all. Dominion attempts to bootstrap its claim of harm to the Smithsonian's interest in opening the museum pursuant to the Smithsonian's schedule. See Dominion's Mem. at 4. Dominion states no independent harm whatsoever.

With respect to the Smithsonian, maintaining the status quo, i.e., halting Dominion's construction of permanent facilities (but not interrupting the Smithsonian's supply of temporary power) will not harm the Smithsonian or the public interest. The Smithsonian's interest, as reflected in its October 11, 2001 responsive pleading, is timely completion of the Center so that the Center will open December 2003—over two years from now.

There is absolutely no evidence before the Commission that a temporary injunction halting Dominion's construction of permanent facilities (and at the same time continuing to permit the Smithsonian to receive electricity so that it may continue construction of the Center itself) would endanger the scheduled opening of the Udvar-Hazy Center. NOVEC is ready, willing and able to provide permanent electricity to the Smithsonian facility at the time it becomes needed. See Moxley Aff. ¶ 5.

From the outset, Dominion has known that NOVEC asserted its right under Va. Code Ann. § 56-265.3 and 56-265.4 to serve this customer. Dominion should not be permitted to bulldoze its way around the Code's scheme of certificated territories, only to assert that its

service is now in the public interest after it has created the situation that has caused the purported "crisis."

The public interest that should be of paramount concern to the Commission is vigilant enforcement of the statutory scheme with whose protection the Commission has been charged. As the Commission held in RGC Mineral Sands, the Commission's decisions must ensure enforcement of the "Code's requirement of strong protection for the exclusive service territories of utilities in Virginia." RGC Mineral Sands at 20; see Kentucky Utilities at 21 ("we must decide cases involving service territory disputes in a way that is consistent with the significant protection that is afforded to territorial grants by Virginia law").

The considerations for enforcement of the Code to protect service territories have their own important policy basis that the Commission has repeatedly articulated. RGC Mineral Sands at 17-19; Kentucky Utilities 20-21. NOVEC and all other electric utilities operating in Virginia will be harmed if the Commission allows certain customers, especially large and desirable customers, to drop out of a utility's service territory in favor of another utility, thereby eviscerating Virginia's scheme of regulated monopolies with exclusive service territories. See Jaramillo Aff. ¶¶ 15-17.

Because the balance of harm between NOVEC and Dominion strongly favors NOVEC; because NOVEC is more than likely to succeed on the merits; because the Smithsonian will not be harmed; and because the public interest in this proceeding favors enforcement of NOVEC's certificated territory, the Commission should issue a preliminary injunction maintaining the status quo until this matter can be fully adjudicated on the merits.

C. DOMINION'S NEW AD HOC "TEST" AND OTHER ARGUMENTS
IGNORE THE COMMISSION'S PRECEDENT AND HAVE NO MERIT

The "test" Dominion has offered to resolve this dispute is nothing more than an ad hoc, self-serving collection of facts that Dominion apparently believes favors its service of the Smithsonian facility. Dominion's Mem. at 5. However, the substance of Dominion's answer, counter petition, memorandum, and affidavit are telling. These documents reveal the utter absence of factual or legal support for Dominion's position.

Dominion acknowledges that the Smithsonian parcel is transected by the certificate boundary line, with some of the parcel within Dominion's territory and some within NOVEC's territory. Dominion admits that the structure the Smithsonian is constructing is within NOVEC's territory. See Caskey Aff. ¶ 5. Dominion does not even attempt to allege (presumably because it cannot) that the majority of the facility, which will consume the bulk of the electricity load, lies within Dominion's territory. Rather, it alleges that the parking lot lies entirely within Dominion's territory and that the IMAX theater lies "mostly" within Dominion's territory. Caskey Aff. ¶ 5.

Dominion alleges that its facilities are closer than NOVEC's, and that it is better positioned to provide service to the Smithsonian because it is currently providing temporary power. This argument is disingenuous, because Dominion's own actions in denying a requested delivery point to NOVEC, and NOVEC's agreement to allow Dominion to provide temporary service, have resulted in this state of affairs. In the final analysis, Dominion's improper and aggressive practices should not be rewarded.

Dominion argues that its facilities are closer to the points of use and that it is therefore better positioned to serve the Smithsonian. Dominion fails to acknowledge that through a contractual arrangement with ODEC, it is obligated to provide a delivery point to

NOVEC. It improperly denied that delivery point when requested. It now wishes to exploit that improper denial by asserting that it is better positioned to provide electric service.

In any event, the Utility Facilities Act provides for an orderly process for a utility to obtain a certificate to operate in another utility's territory where it claims the existing certificate holder will render inadequate service. Under Va. Code § 56-265.4, the utility must apply to the Commission before it starts operating, and, when it does apply, it must still give the existing certificate holder "reasonable time and opportunity to remedy such inadequacy." Here, Dominion has simply ignored the Act. NOVEC has never been given any opportunity to serve this customer. Dominion's allegations of any inadequacy on NOVEC's part have no merit, and should be given no weight in this proceeding.

Dominion has submitted the affidavit of John Caskey. Caskey is a Dominion account manager for the Smithsonian. He does not attest to any qualifications as a certified land surveyor. He essentially describes actions he undertook with a surveyor equipped with a global position satellite receiver and concludes that he was unable to determine precisely where the boundary line lies. He concedes that it goes through the hangar, thereby acknowledging that a portion of the hangar is within NOVEC's territory. However, he goes on to argue that Dominion is best suited to serve the Smithsonian because it has infrastructure available to serve the complex. Of course, he, like Dominion, refuses to acknowledge that Dominion has the infrastructure in place because it denied the delivery point to NOVEC. Moreover, had Dominion not denied a delivery point to NOVEC, Dominion would have been unable to make this geographical convenience argument. NOVEC can quickly and conveniently provide service to the Smithsonian through the delivery point Dominion is contractually obligated to provide.

Perhaps the most irrelevant "fact" of all is inclusion in Caskey's affidavit of a Commission Order in Case No. PUE830030 granting Dominion a territory revision. This has absolutely nothing to do with this case, and was part of an agreement entered into over ten

years ago. These agreements are customary, as Dominion is undoubtedly aware, and as the Commission is aware, and result from a give and take process. Dominion would be well served to consider the implications of using a ten year old agreement in this manner, because it could lead to the refusal of electric cooperatives, such as NOVEC, to enter into such agreements, lest Dominion attempts to use them against cooperatives at a later date.

Finally, Dominion repeatedly asserts that the Smithsonian has requested that Dominion serve the facility. Until discovery is provided, NOVEC will not know the factual basis for Dominion's assertion that the Smithsonian favors it. However, it is telling that in its responsive pleading to NOVEC's petition, the Smithsonian states its major interest is in receiving power on a timely basis. It does not express the preference that Dominion assigns to it. In any event, under Virginia's scheme of regulated monopolies, the Commission has never allowed a customer's choice to override the certificated territorial boundaries that define the areas that electric utilities may serve with respect to distribution. It should not do so in this instance.

CONCLUSION

The evidence before the Commission at present establishes beyond a preponderance of the evidence that NOVEC is entitled to a preliminary injunction. Indeed, there is clear and convincing evidence that NOVEC will prevail under either the point of use test or the bulk of the load test. All or almost all of the Smithsonian facility is physically located in NOVEC's service territory, and virtually all of the electricity will be consumed in that facility. NOVEC is entitled to a preliminary injunction under Va. Code §§ 56-6, 56-265.3, and 56-265.4, and maintaining the status quo is the equitable course for the Commission to take.

NOVEC only asks the Commission to maintain the status quo while the Commission decides which utility should provide electric service to the Smithsonian facility. Dominion wishes to continue construction so that its arguments regarding convenience and

infrastructure will become self-fulfilling. Dominion should not be able to tip the scales in its favor by continuing with permanent construction. NOVEC has no desire to interrupt the Smithsonian's construction schedule or in any way impair construction of the Steven F. Udvar-Hazy Center. From Dominion's pleadings it is obvious, however, that it intends to use its construction of facilities for permanent service as a further means for arguing in favor of its position as the permanent provider of electricity to the Smithsonian facility.

Accordingly, the Commission should grant NOVEC's motion for a preliminary of temporary injunction, pendente lite, and enter an order maintaining the status quo prohibiting Dominion from performing permanent construction that will be wasteful and only serve to enhance Dominion's allegation that it is better positioned to provide service to the Smithsonian.

NORTHERN VIRGINIA ELECTRIC
COOPERATIVE

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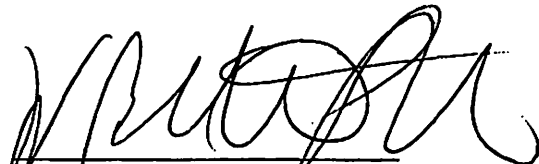
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CERTIFICATE OF SERVICE

I hereby certify that I have faxed and mailed a true copy of the foregoing this 25th day of October, 2001, to E. Duncan Getchell, Jr., Esq. and Kodwo Gharthey-Tagoe, Esq., McGuireWoods, One James Center, 901 East Cary Street, Richmond, VA 23219, via fax number 804/775-2061 and UPS Next Day Air; Steven E. Gordon, Esq., Assistant U.S. Attorney, 2100 Jamison Avenue, Alexandria, VA 22314, via fax number 703/299-3983 and regular first class mail; John K. Lapiana, Esq., Assistant General Counsel, Smithsonian Institution, Washington, DC 20560, via fax number 202/786-2653 and regular first class mail; Paul J. McNulty, Esq., United States Attorney, Eastern District of Virginia, 2100 Jamison Avenue, Alexandria, VA 22314 via regular first class mail; Sherry H. Bridewell, Esq., Senior Counsel and Wayne Smith, Senior Counsel, P.O. Box 1197, Richmond, VA 23218-1192, via fax number 804/371-9240 and regular first class mail; Joel H. Peck, Clerk of the Commission c/o Document Control Center, P.O. Box 2118, Richmond, VA 23218, via fax number 804/371-9654 and regular first class mail and James Patrick Guy, II, Esq., LeClair Ryan, Innsbrook Corporate Center, 4201 Dominion Boulevard, Suite 200, Glen Allen, VA 23060, via fax number 804/783-7681 and regular first class mail.


W. BRADFORD STALLARD

October 25, 2001
REPORT DATE

COMMONWEALTH OF VIRGINIA
STATE CORPORATION COMMISSION

HEARING DATE(S): October 25, 2001

IN RE: CASE NO. PUE010512

COMMONWEALTH OF VIRGINIA, ex rel. NORTHERN VIRGINIA ELECTRIC
COOPERATIVE, v VIRGINIA ELECTRIC AND POWER COMPANY d/b/a/
DOMINION VIRGINIA POWER, SMITHSONIAN INSTITUTION, and U. S.
GENERAL SERVICES ADMINISTRATION, For a Petition for Declaratory Judgment --
-and Motion for Injunction.

Deborah V. Ellenberg, Chief Hearing Examiner, **PRESIDING**

APPEARANCES:

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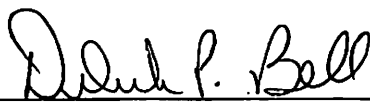
None

EXHIBITS: (1)

A - Proof of Process

DISPOSITION: Case Continued

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General Service Administration

Case PUE010512

The attached document was passed to the file at the hearing by Sherry H. Bridewell
(Counsel for the Commission), 10/25/01.

Final Order in Case No. PUE960303 Petition of Kentucky Utilities Company d/b/a Old Dominion Power
Company .



COMMONWEALTH OF VIRGINIA

1999 MAR 31 A 11: 29 STATE CORPORATION COMMISSION

At Richmond, MARCH 31 1999

PETITION OF

KENTUCKY UTILITIES COMPANY
d/b/a/ OLD DOMINION POWER COMPANY

CASE NO. PUE960303

For injunctive relief and/or
declaratory judgment against
Powell Valley Electric CooperativeFINAL ORDER

On November 21, 1996, Kentucky Utilities Company ("KU"), doing business in the Commonwealth as Old Dominion Power Company, filed a Petition requesting that the Commission enjoin Powell Valley Electric Cooperative ("PVEC") from selling or delivering electric power to Sigmon Coal Company, Inc. ("Sigmon") for use at mining operations in KU's Virginia service territory or declare that PVEC's provision of such service violates the Utility Facilities Act.¹

As discussed below, the Petition was assigned to a Hearing Examiner, who, after a hearing and briefs, granted PVEC's motion to dismiss on the basis that the Commission lacked jurisdiction over the matter. For the reasons discussed herein, we reject the Examiner's findings regarding our jurisdiction. We find that there is no basis for PVEC's assertion that we do not have the authority to decide this case. Further, we will grant KU's Petition as we find that PVEC's provision of electric service to Sigmon operations in KU's service territory in Virginia violates Virginia law.

¹ Va. Code § 56-265.1, *et seq.*

Background

PVEC is an electric cooperative incorporated in Virginia that provides retail electric service in southwestern Virginia and northeastern Tennessee. PVEC purchases its power at wholesale from the Tennessee Valley Authority ("TVA")² for retail distribution to its members.

KU is an investor-owned electric utility incorporated in Kentucky and Virginia. KU provides electric service in five counties in southwestern Virginia and in parts of Kentucky, including Harlan County.

Both PVEC and KU provide service in Lee County, Virginia. Lee County borders Harlan County, Kentucky, and is southeast of the Virginia-Kentucky border. The boundary between the Virginia service territories of PVEC and KU runs southeasterly from the state line into Lee County, and then northeasterly, to form a "V" shape immediately south of Calvin, Virginia. KU's service territory is in and to the north of the "V" and PVEC's service territory is immediately south of the "V."

The Sigmon mining operations are located on properties in Lee County and Harlan County, covering approximately 13,120 acres. Sigmon does not own these properties but has mineral leases that give it the rights to the coal and the surface where coal is mined. In Virginia, the area controlled by Sigmon spans the Lee County service territories of both KU and PVEC. Our jurisdiction over this matter addresses the retail electric service provided to Sigmon mining operations in Virginia and does not, of course, extend to service provided in Kentucky.

The material facts of this case are not in dispute.

In 1985, Sigmon acquired mineral rights to properties located near Calvin in Lee County and across the Virginia-Kentucky border in Harlan County. From 1985 to 1992,

² The TVA is an entity created by Congress pursuant to the Tennessee Valley Authority Act, 16 U.S.C. §§ 831 *et seq.* The sale of the TVA's surplus power is subordinate to its primary purposes of promoting the navigation, and controlling the floodwaters, of the Tennessee River system. *Tennessee Valley Authority v. Ashwander*, 78 F.2d 578 (5th Cir. 1935), *aff'd*, 297 U.S. 288 (1936) ("*Ashwander*").

KU exclusively served Sigmon's mining operations in Lee County from KU's Calvin substation and in Harlan County from KU's Keokee substation. The Calvin substation served no load other than Sigmon's mining operations within KU's Virginia service territory.³

PVEC also has provided service to Sigmon in PVEC's service territory at least since 1985. Specifically, PVEC furnished electricity to two mines in the "Belcher Mine" area, located in Lee County, Virginia. Sigmon suspended operations in the Belcher Mine area in 1994.⁴ Currently, the only activity in PVEC's service territory that requires electricity for Sigmon operations is at the "Harlan Seam mine." The mine itself is idled but electricity is required for the running of fans and pumping of water.⁵

In 1992, Sigmon decided to construct a new coal preparation plant ("Preparation Plant") located in KU's service territory near Calvin, Virginia (hereinafter, the "Calvin area"). In May of 1992, PVEC approached Sigmon about the possibility of serving additional load for Sigmon, including the Preparation Plant.⁶ PVEC proposed to furnish such electricity from a single, consolidated delivery point (the "Sigmon Delivery Point") that would be located in PVEC's territory immediately south of the PVEC/KU boundary.⁷

The Preparation Plant was placed into service in early January of 1993. Initially, KU served the plant. Sigmon installed a private distribution system and, on January 18, 1993, Sigmon disconnected the Preparation Plant's load from KU's system and connected it to PVEC's system. This marked the first time PVEC provided service to Sigmon for use in KU's service territory, a load of approximately 1 MW.⁸ PVEC's

³ KU's Keokee substation, located in Virginia, provided service to part of Sigmon's mining load as well as to the community of Keokee, Virginia.

⁴ Ex. RWM-5 at 11. The two mines in this area were closed in 1990; apparently, other activities associated with mining operations continued until 1994. *Id.*

⁵ Tr. at 181-82, 198-200, 203.

⁶ Ex. RWM-5 at 8-9.

⁷ *Id.* at 9-10.

⁸ Tr. at 60.

facilities in that area, however, were unable to handle the Sigmon load in addition to its preexisting load on the same PVEC circuit and, later in that month, Sigmon transferred part of its load back to KU.⁹

On May 11, 1993, KU formally requested PVEC to discontinue providing service to Sigmon. By letter dated May 20, 1993, PVEC sought an advisory opinion from the Commission's Staff whether such service was lawful. On July 21, 1993, Staff sent a letter stating that, based on a telecommunications case,¹⁰ PVEC's provision of service to Sigmon in KU's service territory did not violate Virginia law since PVEC would transport power and energy to a delivery point within PVEC's service territory.¹¹

As stated, PVEC experienced difficulties in serving the Sigmon load it took on in January of 1993. PVEC concluded that it needed to build a new substation in the Calvin Area in order to serve Sigmon's growing load and other customers previously served by another PVEC substation. PVEC and KU had discussed building such a substation since 1992. Such construction, however, could not commence unless KU agreed to supply the necessary transmission service since PVEC and the TVA have no transmission lines in that area.¹² KU states that the TVA contacted KU in December of 1993 to discuss building PVEC's new substation and that KU was informed that the substation was needed to serve projected residential and commercial loads, not Sigmon's mining operations in KU's service territory.¹³ On April 1, 1995, KU and the TVA negotiated an interconnection agreement that increased the amount of capacity that PVEC could deliver to the Calvin area by approximately 5 MW.¹⁴

In April of 1996, PVEC began constructing a new, high-capacity substation ("the Keokee Substation") at the northern boundary of its service territory located in closest

⁹ RMH-1 at 7; Tr. at 57-60, 145-47.

¹⁰ *Commonwealth ex rel. Citizens Tel. Coop. v. C&P Tel. Co. of Va.*, 1984 S.C.C. Ann. Rept. 354.

¹¹ Staff correctly stated in the letter that its finding did not represent a binding Commission adjudication.

¹² RMH-1 at 9-13; Tr. at 56-57.

¹³ RMH-1 at 10, 14-15.

¹⁴ Ex. RWM-5 at 14. See also Tr. at 60

proximity to the Sigmon mining operations in KU's service territory.¹⁵ The new substation is immediately south of the "V" that is formed by the PVEC-KU boundary. Also in 1996, Sigmon contracted for the construction of a 34.5 kV subtransmission line.¹⁶ That line runs northward from the boundary of KU's and PVEC's service territories to the Calvin area, and then across the Virginia-Kentucky state line to Sigmon's mining operations in Kentucky.

In July of 1996, construction of PVEC's Keokee Substation was largely completed and placed in service. The substation enabled PVEC to serve the entire remaining Sigmon load in Virginia and in Harlan County, Kentucky, a load of approximately 5 MW. PVEC's Keokee Substation serves as a wholesale delivery point for PVEC's receipt of power purchased from the TVA. PVEC delivers power from this substation to the Sigmon Delivery Point, from where it is transported over Sigmon's subtransmission line to Sigmon mining operations in KU's Virginia and Kentucky service territories. PVEC asserts that the Keokee Substation is approximately 300 feet from the Sigmon Delivery Point, but, according to KU, the distance is roughly 50 feet.¹⁷

On or about October 12, 1996, Sigmon was disconnected from KU's system and PVEC became the sole source of power for Sigmon's mining operations formerly served by KU. KU states that PVEC's "capture" of the Sigmon load resulted in completely idling KU's Calvin substation and also idling much of KU's Keokee substation.¹⁸

On November 21, 1996, KU filed the petition initiating this proceeding.

The Commission entered an order on December 13, 1996, in which it made PVEC a party to this proceeding and appointed a hearing examiner to conduct all further proceedings in this matter. The Commission directed the parties to file a stipulation of

¹⁵ Ex. RMH-1 at 14-15; Ex. RWM-5 at 9. Thus, both KU and PVEC have substations in the area referred to as the "Keokee" Substation.

¹⁶ Ex. RMH-1 at 16; Tr. at 172-73.

¹⁷ Tr. at 176, 236-37.

¹⁸ Tr. at 267-68.

agreed upon facts and a list of legal issues in dispute on February 21, 1997, and legal briefs on March 21, 1997.

On January 21, 1997, PVEC filed an Answer to the Petition.

After several extensions at the requests of both KU and PVEC, the Examiner directed the parties to file their joint stipulation of facts and list of legal issues in dispute by October 1, 1997, and to file briefs on the disputed legal issues by October 31, 1997.

On November 12, 1997, KU filed a motion to establish a procedural schedule for the filing of testimony and to schedule an evidentiary hearing.

On November 21, 1997, approximately a year after KU's Petition was filed, PVEC filed a motion to establish a procedural schedule and a motion to dismiss KU's Petition. PVEC asserted that the Commission lacked jurisdiction over this matter because the TVA is a party to the contract underlying the dispute and the TVA's participation "clothes the contract with an overriding federal interest that precludes state regulation."¹⁹ PVEC argued that because the TVA is free from state regulation and control, and Sigmon and PVEC are parties to a contract with the TVA, so too are Sigmon and PVEC free from state regulation or control that would interfere with the performance of the contract.

On December 12, 1997, the Examiner issued a Ruling taking the Motion to Dismiss under advisement and established a procedural schedule.

The hearing in this matter was held on March 12, 1998, before Hearing Examiner Howard P. Anderson, Jr. Representing KU were Kendrick R. Riggs and Richard F. Newell, and counsel for PVEC were William C. Carriger, Mark W. Smith, Donald M. Schubert, Calvin F. Major and David H. Stanifer. The Commission's Staff was represented by C. Meade Browder, Jr.

¹⁹ PVEC Motion to Dismiss at 3.

On October 19, 1998, the Examiner issued his Report. The Examiner noted that in a recently issued order,²⁰ the Commission had considered a case involving a similar situation. The Examiner stated that the primary distinction between the two cases is that, in this case, "Sigmon is purchasing its power from the TVA, a federal entity."²¹ The Examiner stated that under §§ 56-265.3 and 56-265.4 of the Code of Virginia, the certificated utility has an exclusive right, and duty, to serve customers within its service territory boundaries. He found that, in this case, unless the point of delivery test is applied,²² PVEC would be in clear violation of the Utility Facilities Act by providing power to a customer, Sigmon, for its use in another utility's service territory. The Examiner found that the TVA's authority to propose resale rate schedules "cannot be limited by state legislatures."²³ Further, the Examiner found that "enforcement" of the Utility Facilities Act in this case would "result in significant interference with, and perhaps nullification of the contract between the TVA, PVEC and Sigmon."²⁴ The Examiner therefore granted PVEC's motion to dismiss.

KU filed comments on the Hearing Examiner's Report taking exception to the Examiner's recommendation that PVEC's Motion to Dismiss be granted. KU argues that the Examiner's jurisdictional finding is "based on an erroneous understanding of the relationship of the parties to the contract, as well as a misinterpretation of applicable law."²⁵ KU states that there are two distinct contracts at issue; one between PVEC and Sigmon, and the other among PVEC, Sigmon and the TVA. KU states that the Examiner's conclusion that the Commission lacks jurisdiction over this matter rests on

²⁰ *Petition of Prince George Elec. Coop. and Petition of RGC (USA) Mineral Sands, Inc. and RGC (USA) Minerals, Inc.*, __ S.C.C. Ann. Rep. __, Case No. PUE960295, Document Control No. 980630278 (June 25, 1998) ("Prince George").

²¹ Hearing Examiner's Report at 10.

²² Under the point of delivery test, a utility may sell electric power to a customer as long as the delivery (or metering) point is located within that utility's service territory, even though the electric power is subsequently transported to, and consumed in, another utility's service territory. See *Prince George*, slip op. at 5.

²³ Hearing Examiner's Report at 11.

²⁴ *Id.*

²⁵ Comments of KU on the Hearing Examiner's Report at 6.

the erroneous view that Sigmon is buying power from the TVA. Pointing to several provisions in the three party contract, KU contends the plain language of the contract demonstrates it is PVEC, not the TVA, that is obligated under that contract to sell and deliver power to Sigmon. KU states that this case involves PVEC's ability to resell power, from whatever source it was obtained, for use outside of PVEC's service territory, not the earlier sale from the TVA to PVEC.²⁶

KU argues that there is no implied preemption in this case either as a matter of law or based on the facts of this case. KU first contends there is no implied preemption because it has long been recognized that the regulation of retail electric utility service territories is an area of traditional state concern and regulation. KU states that federal law is not preempted unless Congress's intent to preempt is clear and manifest, and neither the plain language of the TVA Act, nor its legislative history indicate such intent.²⁷ KU argues that implied preemption does not occur in this case because PVEC can comply with both the Utility Facilities Act and the TVA Act, so there is no conflict between the two statutes. Moreover, PVEC's compliance with Virginia's requirement of exclusive service territories does not create an impediment to achieving the goals of the TVA Act.

KU points out that PVEC has acquiesced to, and sought the protection of, the Commission's jurisdiction since the Utility Facilities Act was passed, and operates under certificates of public convenience and necessity granted by the Commission. KU notes that the TVA itself has recognized that its distributors are established and regulated by state, not federal, law. KU quotes from an affidavit submitted by a TVA Vice President, R. Larry Taylor, in an action filed against it in Alabama, in which he states that the TVA's distributors, including rural electric cooperatives, "operate under the laws of the

²⁶ *Id.* at 10-11.

²⁷ *See id.* at 23 n.18 (discussing legislative history).

States in which they do business and each has a defined geographic service area, as set forth under State law, in which it is the exclusive retail supplier of electricity.”²⁸

Beyond the jurisdictional issue, KU maintains that PVEC’s provision of service to Sigmon’s mining loads in KU’s service territory violates the Utility Facilities Act, duplicates existing facilities, and causes KU to suffer direct and immediate harm.

Staff filed Comments on the Report of the Hearing Examiner objecting to the Examiner’s jurisdictional finding. Staff states that PVEC and the Examiner mischaracterize the nature of KU’s petition. According to the Staff, KU is not asking the Commission to exert jurisdiction over a TVA contract. Instead, it is simply asking the Commission to define the legal parameters of electric utility retail service territories required by Title 56 of the Code of Virginia and enforced by the Commission.

Staff asserts that, “the Report is conspicuously absent of any direct legal authority to support its finding that the TVA Act preempts the Commission from enforcing the Facilities Act against [PVEC].”²⁹ Staff states that federal preemption is not presumed unless there are positive indications of such intent by Congress, and that neither the TVA Act nor its legislative history indicates any such positive indication.³⁰ Staff contends that there is no preemption of any kind in this case, whether express or implied. Citing two cases upholding state taxation of TVA distributors, discussed *infra*, Staff states that “[i]t is clear that the mere existence of a TVA contract cannot insulate a TVA distributor from all state regulations.”³¹

²⁸ *Id.* at 31-32, citing Ex. 7 to Ex. RMH-1 at 5. Further, Mr. Taylor states that the “degree of competition allowed in retail markets (i.e., service to ultimate customers) is in general considered a matter of State and local concern.” *Id.* at 3. He also states that “[r]estrictions on retail competition do constrain [purchasers’ of TVA power] ability to sell power (whether or not that power was originally purchased from TVA) to ultimate customers in the [purchasers’] service areas.” *Id.*

²⁹ Comments of Commission Staff on Hearing Examiner’s Report at 5.

³⁰ *Id.* at 6-7, citing *California Div. of Labor Sds. v. Dillingham Constr., Inc.*, 519 U.S. 316 (1997); *New York State Conf. of Blue Cross & Blue Shield Plans v. Travelers Ins. Co.*, 514 U.S. 645 (1995); *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218 (1947) (“*Rice*”).

³¹ Comments of Commission Staff on Hearing Examiner’s Report at 9.

Staff points out that the only reference to service territories in the TVA Act is found in §15d, 16 U.S.C. § 831n-4, which established geographic limits within which the TVA may sell surplus power, i.e., the "TVA fence." Staff states that Congress's intent in adding this provision when it amended the TVA Act in 1959 was to protect private utilities from TVA competition.³² Staff states that the fact that Congress determined the limits within which the TVA may sell power based on historical retail service territory boundaries of TVA distributors demonstrates that Congress recognized the states' authority over service territories of retail electric suppliers.

PVEC filed Comments to the Hearing Examiner's Report. PVEC maintains that the Examiner appropriately found that the Commission lacks jurisdiction over this matter because the contract underlying this dispute is a three party contract among PVEC, Sigmon and the TVA. PVEC argues that the Commission has no authority to regulate a contract to which the TVA is a party since the TVA is a federal corporation over which the Commission has no authority.³³ PVEC asserts that the Supremacy Clause of the United States Constitution³⁴ provides two different bases upon which to find that the Commission is preempted in this matter. First, PVEC contends that "under general preemption principles, the Supremacy Clause protects the contracting decisions of TVA that are made in accordance with the TVA Act from interference from state law."³⁵ Second, PVEC argues that the "Supremacy Clause grants TVA and its contracting parties intergovernmental immunity from the application of state law to TVA's contracting decisions."³⁶ PVEC urges the Commission to adopt the Examiner's recommendation that PVEC's Motion to Dismiss be granted.

On December 17, 1998, KU filed a motion requesting leave to file supplemental comments to address an issue, intergovernmental immunity, that KU states PVEC raised

³² *Id.*, citing *Hardin v. Kentucky Util. Co.*, 390 U.S. 1, 7 (1968) ("*Hardin*").

³³ Comments of PVEC to Hearing Examiner's Report at 3-4.

³⁴ U.S. Const. art. VI, cl. 2.

³⁵ Comments of PVEC to Hearing Examiner's Report at 8.

³⁶ *Id.* at 11.

for the first time in its comments. KU requested that its supplemental comments, filed with its motion, be admitted into the record or, alternatively, that PVEC's comments on this issue be stricken from the record.

On December 28, 1998, PVEC filed a motion to strike KU's December 17 motion; alternatively, it requested permission to file a response to the comments.

On January 7, 1998, KU filed a reply to PVEC's December 28, 1998 pleading, urging the Commission to deny PVEC's request to file further comments.

By Order dated January 14, 1999, the Commission granted KU's December 17, 1998 Motion, denied PVEC's December 28, 1998 Motion to Strike, and provided PVEC an opportunity to file supplemental comments addressing only the issue of intergovernmental immunity. PVEC filed such comments on January 22, 1999.

NOW THE COMMISSION, upon consideration of the record and the Hearing Examiner's October 19, 1998 Report, the comments and exceptions thereto, and the applicable statutes and case law, is of the opinion and finds that KU's petition should be granted. We find that we have jurisdiction over this matter and that PVEC's sale of electric power to Sigmon for use at its mining operations in KU's Virginia service territory violates the Utilities Facilities Act.³⁷

The threshold issue is whether this Commission has jurisdiction to decide this matter. As stated, the Examiner found that the Commission lacks jurisdiction over this dispute since it involves a "three party contract" among PVEC, Sigmon, and the TVA. The Examiner recognized that the Commission has jurisdiction under the Utility Facilities Act to determine the service territories of utilities operating within Virginia and

³⁷ Section 56-265.3 of the Utility Facilities Act requires a public utility to obtain a certificate of public convenience and necessity authorizing it to provide such service in a particular territory. Under § 56-265.4, no applicant for a certificate may operate in the territory of any holder of a certificate unless and until it is proved to the Commission's satisfaction that the service being rendered by the certificate holder is inadequate to the requirements of the public necessity and convenience. Further, the certificate holder must be given a reasonable time and opportunity to remedy any inadequacy before a certificate will be granted to the applicant.

that the TVA Act does not expressly preempt state territorial laws.³⁸ Nevertheless, the Examiner concluded that:

Enforcement of Virginia's Utility Facilities Act, in this instance, would result in significant interference with, and perhaps nullification of the contract between the TVA, PVEC and Sigmon. Based on the authority cited above and the TVA's federal authority to enter into contracts for the sale of its power, I find that the contract between the TVA, Powell Valley, and Sigmon Coal cannot be limited by this Commission.^[39]

We find the Examiner's analysis flawed in several respects.

The first flaw concerns the factual basis for the Examiner's conclusion that the Commission is preempted in this matter. The Examiner focused on the contractual relationships among PVEC, the TVA, and Sigmon. As stated, he characterized the transaction at issue as a sale of power from the TVA to Sigmon "pursuant to a contract between the TVA, PVEC and Sigmon."⁴⁰ That is wrong.

In fact, this dispute involves two contracts that set forth the relationships of these parties. By the express terms of both contracts, PVEC agrees to sell to Sigmon, and Sigmon to purchase, firm and interruptible power.

The first contract, dated March 1, 1996, is between only PVEC and Sigmon ("PVEC/Sigmon Contract"). This contract sets forth the terms and conditions under which firm and interruptible power and energy will be made available by PVEC for Sigmon's purchase and use at its coal mining, treatment, and loading facilities in Virginia. The TVA is not a party to this contract.

³⁸ Hearing Examiner's Report at 6.

³⁹ Hearing Examiner's Report at 11. The authorities referred to in the quoted language were cited by the Examiner apparently in support of the proposition that the "U.S. Supreme Court and the lower federal courts have held, based on the supremacy clause of Article VI of the United States Constitution, that the TVA's board's authority to propose resale rate schedules cannot be limited by state legislatures." *Id.* at 10-11. As discussed below, the TVA's authority to establish the rates for the sale of surplus power is not the issue in this case.

⁴⁰ Hearing Examiner's Report at 10.

The second contract, also dated March 1, 1996, is among PVEC, Sigmon and the TVA ("PVEC/Sigmon/TVA Contract"). This contract sets forth the terms and conditions under which PVEC will sell power, including economy surplus power ("ESP"), to Sigmon. It provides that, "the parties wish to agree upon the terms and conditions under which firm and interruptible electric power and energy will be made available by [PVEC] for the operation of [Sigmon's] said facilities."⁴¹ Section 2 of the contract states that, "[i]n addition to firm power, [PVEC] shall make available ESP Option C in such amounts as TVA, in its judgment, is able to supply, up to and including 7,100 kW."⁴² Thus, by the express terms of the contract, PVEC, not the TVA, is selling firm power and ESP to Sigmon.

Further, the PVEC/Sigmon/TVA Contract makes clear that the TVA is a party only for a limited purpose. The contract states that:

It is expressly recognized that [Sigmon] remains a customer of [PVEC] and is not a directly served customer of TVA. TVA is a party to this contract only because of the unique nature of ESP. [PVEC] retains responsibility for all power service and customer relations matters except as provided otherwise with respect to ESP.⁴³

The contract provides that the TVA, upon proper notice, may suspend the availability of ESP "at any time and from time to time."⁴⁴ The contract also provides that if the ESP provisions are terminated for any reason, the TVA shall cease to be a party to the contract and the contract shall be deemed to be exclusively between PVEC and Sigmon.⁴⁵ In addition, certain of the contract's provisions give the TVA certain operational rights concerning the delivery of ESP to the ultimate customers. For example, the contract

⁴¹ Power Supply Contract Among Powell Valley Cooperative, Sigmon Coal Company, Inc. and Tennessee Valley Authority ("PVEC/Sigmon/TVA Contract"), contained in Ex. RWM-5, Ex. 14 at 1.

⁴² *Id.* at 2.

⁴³ PVEC/Sigmon/TVA Contract, "Terms and Conditions," section 3.1. For example, PVEC has the sole responsibility for installing, operating, and maintaining any additional or replacement meters and associated facilities. *Id.*, section 2.3.1.

⁴⁴ PVEC/Sigmon/TVA Contract, ESP Attachment, section D.

⁴⁵ PVEC/Sigmon/TVA Contract, "Terms and Conditions," section 3.

gives the TVA (and PVEC) the right of access in, over, and across Sigmon's property as is "reasonably necessary or desirable" for installing, operating and maintaining meters and associated equipment,⁴⁶ and gives the TVA the right to communicate directly with Sigmon about matters relating to ESP.⁴⁷

Because the PVEC/Sigmon/TVA contract specifically states that Sigmon is PVEC's customer and makes clear that the TVA is a party only for a limited purpose, we cannot but conclude that this contract embodies PVEC's agreement to sell firm power and ESP to Sigmon. Therefore, contrary to the Examiner's conclusion, Sigmon is not purchasing power from the TVA. Rather, both contracts, by their terms, provide for PVEC's sale of power to Sigmon. The TVA's sale of ESP to PVEC does not enter into our analysis because the issue before us is not whether the TVA may lawfully sell surplus power to PVEC (that is, we are not concerned with the wholesale sale from the TVA to PVEC), but whether PVEC may sell such power to Sigmon outside of PVEC's certificated service territory (*i.e.*, whether the retail sale from PVEC to Sigmon is lawful).

With respect to PVEC's legal analysis, we find that PVEC provides no authority to support its assertion that the Supremacy Clause bars the Commission's review of this dispute. As discussed, PVEC argues: (1) that the Commission is preempted by the TVA Act; and (2) that PVEC is shielded from state regulation by virtue of its participation in a contract to which a federal entity is a party (*i.e.*, its intergovernmental argument).

First, we disagree with PVEC that we lack jurisdiction over this matter on the basis of implied preemption.⁴⁸ Implied preemption may occur when: (i) there is an explicit conflict between federal and state laws; (ii) compliance with state law and federal law is impossible or the state statute forms an obstacle to the accomplishment and execution of Congressional objectives; (iii) Congress has enacted a scheme of federal

⁴⁶ *Id.*, section 2.4.

⁴⁷ *Id.*, section 3.2.

⁴⁸ The Examiner correctly found that the TVA Act does not expressly preempt state territorial laws. Hearing Examiner's Report at 6.

regulation so pervasive that one may reasonably infer that Congress left no room for States to act; or (iv) there is an implicit barrier to state regulation in the federal law.⁴⁹ Based on our review of the Utility Facilities Act and the TVA Act, we find no basis upon which to infer implied preemption in this case.

The TVA Act grants to the TVA Board authority to sell surplus power not used in its operations to retail electric providers (the TVA “distributors”) and “to include in any contract for the sale of power such terms and conditions, including resale rate schedules, and to provide for such rules and regulations as in its judgment may be necessary or desirable for carrying out the purposes of this Act.”⁵⁰ The Act also places limitations upon the geographic area in which the TVA may sell its power, often referred to as the “TVA fence” or “TVA wall.”⁵¹

The Constitution of Virginia and Titles 12 and 56 of the Code of Virginia authorize the Commission to regulate the service of electric cooperatives, such as PVEC, in the Commonwealth.

While it is clear that the TVA has jurisdiction over the rates, terms, and conditions for the sale of surplus TVA power, we find that it is equally clear that Congress did not intend that the TVA Act supplant or displace traditional state regulation of retail electric utilities, including state territorial law. Rather, ample authority establishes that Congress intended that the TVA Act merely supplement state regulation of retail electric providers. Significantly, for example, Congress specifically requires the TVA to give entities desiring to purchase TVA power “ample time to fully comply with any local law now in existence or hereafter enacted providing for the necessary legal authority” prior to entering into a contract with the TVA for the sale and purchase of such power.⁵²

⁴⁹ *Pacific Gas and Elec. Co. v. State Energy Resources Conservation & Development Comm’n*, 461 U.S. 190, 203-05 (1983) (“PG&E”); *Jones v. Rath Packing Co.*, 430 U.S. 519, 525-26 (1977); *Florida Lime & Avocado Growers, Inc. v. Paul*, 373 U.S. 132, 142-43 (1963); *Rice*, 331 U.S. at 229-230; *Hines v. Davidowitz*, 312 U.S. 52, 67 (1941).

⁵⁰ 16 U.S.C. § 831i.

⁵¹ 16 U.S.C. § 831n-4.

⁵² 16 U.S.C. § 831k.

In addition to the express language of the statute, the TVA Act addresses the sale of surplus power only insofar as it provides the TVA authority to sell such power and to establish the rates, terms and conditions for sales of surplus power that "in its judgment may be necessary or desirable for carrying out the purposes of this Act."⁵³ Other than the TVA's authority to establish the rates, terms and conditions for the surplus power, the Act is silent with respect to any other manner of regulation of the service of TVA's distributors, including the determination of service territories. Therefore, determinations regarding the geographic areas within which TVA distributors may provide retail service must be made with reference to state law, as is the case for all retail electric providers.

The regulation of the service of retail electric providers has long been recognized to be one of the functions associated with the police powers of the states.⁵⁴ The United States Supreme Court recognized the states' authority to determine retail service territories, including territories of TVA distributors, in an early TVA case, stating that "[w]hether competition between utilities shall be prohibited, regulated or forbidden is a matter of state policy."⁵⁵ Further, as stated earlier, the TVA itself recognizes that decisions concerning the areas that surplus power may be sold by TVA distributors to ultimate customers are a matter of state concern.⁵⁶

Moreover, there is a strong presumption that federal law does not preempt areas traditionally subject to the police power of the states.⁵⁷ In an early TVA case in which the Supreme Court clarified that the TVA may lawfully sell its surplus power as long as it is done in an appropriate way, the Court stated that it must assume that such sales will

⁵³ 16 U.S.C. § 831i.

⁵⁴ See *PG&E*, 461 U.S. at 205-06 (1983); *Central Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n of New York*, 447 U.S. 557, 569 (1980).

⁵⁵ *Tennessee Electric Power Co. v. Tennessee Valley Authority*, 306 U.S. 118, 141 (1939) (where state statute did not confer upon public utilities the exclusive right to provide service in their territories, competition of the TVA did not constitute an invasion of the utilities' charter or franchise rights so as to give them standing upon which to challenge the constitutionality of the TVA Act).

⁵⁶ See *supra* n. 28 and accompanying text.

⁵⁷ See *New York State Conf. of Blue Cross & Blue Shield Plans v. Travelers Ins. Co.*, 514 U.S. 645 (1995); *Gregory v. Ashcroft*, 501 U.S. 452 (1991); *Rice*, 331 U.S. at 229-231.

“be consistent with the foundation principles of our dual system of government and must not be contrived to govern the concerns reserved to the States.”⁵⁸ As Staff and KU point out, courts have found no conflict between state authority to impose taxes on TVA distributors, notwithstanding the TVA’s jurisdiction over the rates, terms and conditions charged by such distributors.⁵⁹ Indeed, the Commission assesses gross receipts taxes upon PVEC for its sales within Virginia. Apparently, under PVEC’s view, electric suppliers can freely circumvent Virginia’s requirement of exclusive service territories simply by purchasing their wholesale requirements from the TVA. We do not believe that Congress intended to provide electric providers the means to achieve such manipulation of state law.

Further, PVEC’s compliance with the Utility Facilities Act does not frustrate the purpose and objectives of the TVA Act; nor does the TVA Act form an implicit barrier to state regulation. PVEC’s compliance with state law, restricting its sales of power purchased from the TVA to within its service territory, is not inconsistent with the TVA Act’s limitation on the areas in which the TVA may sell its surplus power. Nor, based on the facts before us, does PVEC’s compliance with state law preclude the TVA from entering into a contract with PVEC for the sale of power. While it is true that PVEC’s compliance with Virginia’s requirement of exclusive service territories will limit PVEC to selling power purchased from the TVA (or any wholesale supplier) to within its service territory, nothing in the TVA Act requires or permits the TVA to orchestrate the capture of others’ retail load for its distributors.

⁵⁸ *Ashwander*, 297 U.S. at 338 (holding that the TVA did not exceed its constitutional powers in selling electricity produced at its dams in excess of that which the TVA created in the course of executing its governmental functions, or in acquiring transmission lines in order to sell such power).

⁵⁹ See *City of Arab v. Cherokee Elec. Coop.*, 673 So.2d 751, 753-55 (Ala. 1995) (TVA distributors created and operating under Alabama law are not exempt from state taxation by virtue of their contracts with the TVA); *North Georgia Electric Membership Corp. v. City of Calhoun*, 450 S.E.2d 410 (Ga. 1994), *cert. denied*, 514 U.S. 1109 (1995) (Electric supplier not exempted from state taxation by virtue of relationship with the TVA).

PVEC's argument, carried to its logical conclusion, would have federal law override state law any time the application of state law would impede or preclude TVA distributors from selling power purchased from the TVA. Federal law does not support this conclusion, and such a result would be entirely inconsistent with the 1959 amendment to the TVA Act that, in essence, froze the areas in which TVA power could be sold to protect investor owned utilities from competition from the TVA.⁶⁰

We agree with the Staff and KU that the cases relied upon by the Hearing Examiner uphold only the TVA's exclusive jurisdiction over determining the rates, terms and conditions of the sale of surplus power and its freedom from state regulation or control when engaging in activities in furtherance of its legitimate statutory purposes, including authority to enter into contracts with private companies and utilities. As discussed above, the issue before us is not whether the TVA may establish the rates, terms and conditions for the resale of surplus power, but whether PVEC's sale of power, regardless of the source, is lawful when made to a customer whose load is located in KU's service territory. No party in this proceeding questions the TVA's authority to establish the rates for the sale of its surplus power.⁶¹

PVEC's second argument is that "[t]he Supremacy Clause grants the TVA and its contracting parties intergovernmental immunity from the application of state law to TVA's contracting decisions."⁶² PVEC asserts that, under the doctrine of intergovernmental immunity, the Commission cannot take any action that would directly

⁶⁰ *Hardin*, 390 U.S. at 7 ("[I]t is clear and undisputed that the protection of private utilities from TVA competition was almost universally regarded as the primary objective of the [1959] limitation [in § 831n-4]."). See also *Alabama Power Co. v. Tennessee Valley Authority*, 948 F. Supp. 1010, 1014, 1021-22 (N.D. Ala. 1996). Moreover, KU cites legislative history indicating Congress's intent that state law be respected with regard to the distributors' service territories. KU Comments to Hearing Examiner's Report at 23. n. 18. For example, Congress intended that the TVA and its distributors would invoke the TVA Act's provision with "extreme caution" in order that they "not encroach on" the service territories of investor owned utilities. *Id.* (citing 1959 U.S.C.C.A.N. 2000, 2008).

⁶¹ The Commission has long recognized that it has no authority to alter or limit the rate schedules propounded by the TVA Board. See *Application of Powell Valley Electric Cooperative*, Case No. PUA870069, Document Control No. 871110227 (Nov. 9, 1987).

⁶² Comments of PVEC on the Hearing Examiner's Report at 11.

regulate, interfere with, or place a limitation on the TVA's contracting decisions.⁶³ The authorities relied upon by PVEC involve state attempts to directly regulate or exert control over federal government programs or policies, or employees of the federal government acting within the scope of their governmental functions.

This argument is also unavailing. The purport of the doctrine of intergovernmental immunity is to preclude direct state regulation of the federal government, without the federal government's express consent.⁶⁴ The Commission's decision will not result in directly regulating or exerting control over the TVA. As discussed, this case is about PVEC's sale of power to Sigmon, not the TVA's previous sale of power to PVEC, and our decision to limit PVEC to providing retail service in its certificated service territory will regulate only PVEC.

PVEC cannot, and does not, provide any legal support for its assertion that the TVA's immunity extends to PVEC simply because of its participation in a contract to which the TVA is a party. The Supreme Court has stated that the federal government's immunity from state regulation does not extend to those who merely contract to furnish supplies or render services to the government.⁶⁵ Rather, intergovernmental immunity may be conferred only "upon the United States itself or an agency or instrumentality so closely connected to the Government that the two cannot realistically be viewed as

⁶³ *Id.* at 11-19.

⁶⁴ See *Hancock v. Train*, 426 U.S. 167, 178-80 (1976); *Johnson v. Maryland*, 254 U.S. 51, 57 (1920). We note that the Supreme Court has observed that this "doctrine" has been poorly understood and inconsistently applied. *United States v. New Mexico*, 455 U.S. 720, 580, 589 (1982) (doctrine of intergovernmental immunity "has been marked from the beginning by inconsistent decisions and excessively delicate distinctions.") ("*New Mexico*"); *United States v. City of Detroit*, 355 U.S. 466, 473 (1958) (the area of intergovernmental tax immunity is a "much litigated and often confused field") ("*Detroit*").

⁶⁵ See *New Mexico*, 455 U.S. at 734 (contractors doing business with the federal government under an "advanced funding" procedure are not exempt from state tax because contractors cannot be termed "constituent parts" of the federal government and their relationship with the government was created for a limited, carefully defined purpose); *United States v. Boyd*, 378 U.S. 39, 48 (1964) (rejecting Government's claim that government contractors were tax exempt because they were federal agents); *Penn Dairies, Inc. v. Milk Control Comm'n*, 318 U.S. 261, 270-71 (1943) (intergovernmental immunity will not be extended beyond the federal government itself and governmental functions performed by its officers and agents) (citations omitted).

separate entities."⁶⁶ PVEC clearly is not an instrumentality of the federal government and the fact that PVEC entered into a contract to which a federal entity is a party does not magically transform it into a federal entity. Moreover, immunity will not be conferred even if the regulation has an effect on the federal government or if the federal government would shoulder the economic burden, as long as the regulation is not discriminatory.⁶⁷ The enforcement of the Utilities Facilities Act in this case will not discriminate against the federal government or PVEC since all retail electric providers in the Commonwealth are allowed to provide service only within their service territories, regardless of the identity of their supplier.

Turning to the merits of this case, although the parties dispute certain details concerning the history of Sigmon's service, the material facts of this case are not in dispute. Based on these facts, the result required by Virginia law is clear and unequivocal.

Under the Utility Facilities Act, only an electric provider that has applied for and obtained a certificate of public convenience and necessity is allowed and, indeed, has the responsibility to provide electric service to a customer requesting service within a particular service territory. In *Prince George*, the Commission addressed a similar situation. In that case, a customer sought to purchase power from an electric provider ("Utility A") other than the utility certificated to provide service in the area in which the customer's mineral processing plant was located ("Utility B"). To this end, the customer purchased a strip of land 4,380 feet by 30 feet that extended into the service territory of Utility A. Utility A delivered the power to a metering point the customer owned on the

⁶⁶ *New Mexico*, 455 U.S. at 735.

⁶⁷ See *Detroit*, 355 U.S. at 471-74 (the federal government's immunity from state taxation is not violated by a state statute imposing a tax on a party using tax exempt real property of the federal government in a business conducted for profit, as long as it does not discriminate against the federal government or those with whom it deal); *United States v. State Corp. Comm'n of Virginia*, 345 F. Supp. 843, 846-48 (E.D. Va. 1972), *aff'd*, 409 U.S. 1094 (1973) (State Corporation Commission not precluded by doctrine of intergovernmental immunity from imposing same rate schedule on the Pentagon as local residential subscribers, even though the United States will pay substantially more. (citations omitted)).

30 foot strip of land within Utility A's service territory; from there, the power was delivered through the 4,380 foot corridor over the customer's privately owned distribution line to the customer's plant in Utility B's service territory. The customer argued that Utility A's provision of service did not violate the Utility Facilities Act since the electricity was delivered to a point within Utility A's service territory prior to its delivery to the customer's plant in Utility B's service territory.

The Commission disagreed. We found that the relevant provisions of the Virginia Code, §§ 56-265.3 and 56-265.4, "provide for exclusive service territories that should be afforded significant protection."⁶⁸ The Commission found that if customers are allowed to manipulate delivery points to avoid the electric supplier for their area, the utility would be left with an obligation to serve its entire service territory, but with no assurance that it would be allowed to do so. The Commission stated that "[s]uch circumstances make planning for and serving the remaining customers more difficult and can increase costs for both the utility and its remaining ratepayers."⁶⁹ The Commission explained that although it was not adopting an absolute test and would consider the practical realities of each situation, we intended to "ensure that our decisions enforce the Code's requirement of strong protection for the exclusive service territories of utilities in Virginia."⁷⁰

We find that the facts of this case weigh even more strongly against allowing a customer to switch electric providers through manipulating its delivery point than was the case in *Prince George*. In *Prince George*, the customer seeking to avoid the service provider for its area was a new customer with new load; therefore, the incumbent utility would not have suffered economic detriment due to a loss of existing revenue. In this case, Sigmon was an existing customer of KU. PVEC constructed facilities to serve Sigmon that duplicated existing facilities of KU. KU states that the migration of KU's Sigmon load to PVEC resulted in idling KU's Calvin substation and at least half of its

⁶⁸ *Prince George*, slip op. at 16.

⁶⁹ *Id.* at 18.

⁷⁰ *Id.* at 20.

Keokee substation and connecting transmission capacity. KU states that the loss of Sigmon's load is costing it approximately \$1 million per year. KU also states that if the Commission decides in favor of PVEC, PVEC will have an incentive to "cherry pick" more of Sigmon's lucrative mining loads, potentially resulting in \$6 to \$8 million of lost revenues in Virginia alone.⁷¹ Further, KU states that the loss of its mining revenues would strand roughly \$7.3 million KU has invested in transmission and substation facilities to serve mining operations.⁷²

Moreover, if Sigmon is allowed to avoid its electric provider based on manipulation of its delivery point, the protection and certainty that the Utility Facilities Act was designed to provide to territorial grants would be diminished, if not significantly eroded. Indeed, this case illustrates the concerns the Commission expressed in *Prince George*.⁷³ Here, KU had been serving a large customer, Sigmon, for a number of years and loses Sigmon to a new supplier, PVEC, with the concomitant loss of revenue and wasteful idling of facilities. Then, shortly thereafter, PVEC finds out that it is unable to meet Sigmon's entire demand, and KU is required to take back part of Sigmon's load, only to again lose that same load at a later time. This is the very kind of uncertainty that the Utility Facilities Act is intended to prevent.

We recognize that PVEC has invested large amounts of monies into serving the facilities at issue and a decision in favor of either party will result in a deleterious financial impact on the other. As discussed in *Prince George*, however, we must decide cases involving service territory disputes in a way that is consistent with the significant protection that is afforded to territorial grants by Virginia law. If the situation were reversed, *i.e.*, if KU was serving customers in PVEC's territory, the law would compel a similar finding in favor of PVEC, protecting the integrity of its service territory.

⁷¹ KU states that this amount of revenue is equal to approximately 15 to 20 percent of the total Virginia jurisdictional revenue and will directly impact KU's remaining customers in the form of higher rates. Ex. RMH-1 at 23.

⁷² Comments of KU on Hearing Examiner's Report at 4.

⁷³ See *Prince George*, slip op. at 18.

We expect service to Sigmon in the KU service territory to be transferred to KU within 30 days of the date of the issuance of this Order. Within 45 days of the issuance of this Order, the parties shall file a joint report with the Commission certifying that such transfer has been completed.

KU requested that the Commission fine PVEC for its actions. We decline to do so. Accordingly,

IT IS ORDERED that:

- (1) KU's petition for injunctive relief and/ or declaratory judgment is granted.
- (2) PVEC's motion to dismiss is denied.
- (3) Within 30 days of the issuance of this Order, PVEC shall transfer service provided to Sigmon in KU's service territory to KU and within 45 days of the issuance of this Order, and PVEC and KU shall file a joint report with the Commission certifying that such transfer has occurred.

AN ATTESTED COPY hereof shall be sent by the Clerk of the Commission to: Kendrick R. Riggs, Esquire, Ogden, Newell & Welch, 500 West Jefferson Street, Louisville, Kentucky 40202; Calvin G. Major, Esquire, Goddin, Major, Schuman & Hyman, 1313 East Main Street, Suite 339, Richmond, Virginia 23219; Carlos Smith, Esquire, William Carriger, Esquire, and Mark W. Smith, Esquire, 400 Krystal Building, One Union Square, Chattanooga, Tennessee 37402; David H. Stanifer, Esquire, P.O. Box 203, Tazewell, Virginia 37879; C. William Waechter, Jr., Esquire, Williams, Mullen, Christian & Dobbins, P.O. Box 1320, Richmond, Virginia 23210-1320; Louis R. Monacell, Esquire, Christian & Barton, 909 East Main Street, Suite 1200, Richmond, Virginia 23219-3095; Walter Marston, Esquire, Hazel & Thomas, P.O. Box 788, Richmond, Virginia 23206; John F. Dudley, Senior Assistant Attorney General, Division of Consumer Counsel, the Office of Attorney General, 900 East Main Street, Second Floor, Richmond, Virginia 23219; and the Commission's Divisions of Energy Regulation, Economics and Finance, and Public Utility Accounting.

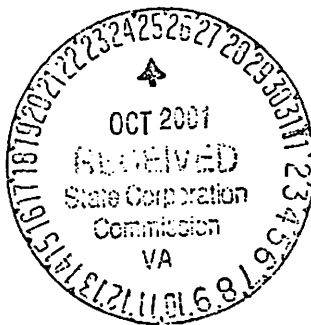


Joel H. Peck
Clerk of the
State Corporations

Case PUE010512

The attached document was passed to the file at the hearing by Sherry H. Bridewell (Counsel for the Commission), 10/25/01.

Order on Petitions for Declaratory Judgment in Case No. PUE960295 for Prince George Electric Cooperative



COMMONWEALTH OF VIRGINIA

JUN 25 1998 STATE CORPORATION COMMISSION

AT RICHMOND, JUNE 25, 1998

PRINCE GEORGE ELECTRIC COOPERATIVE

For declaratory judgment

and

CASE NO. PUE960295

PETITION OF

RGC (USA) MINERAL SANDS, INC.

and

RGC (USA) MINERALS, INC.

For declaratory judgment

ORDER ON PETITIONS FOR DECLARATORY JUDGMENT

On October 30, 1996, Prince George Electric Cooperative ("Prince George")¹ filed a petition requesting that the Commission declare that a proposed sale of electricity by Virginia Electric and Power Company ("Virginia Power" or the "Company") to RGC (USA) Mineral Sands, Inc. ("RGC")² would violate Virginia law and Prince George's property rights under a certificate of public convenience and necessity issued by the Commission.

¹ Prince George is an electric cooperative certificated to serve certain parts of the Counties of Sussex, Prince George, Dinwiddie, Surry, Southampton and Isle of Wight, Virginia.

² RGC (USA) Mineral Sands, Inc., ("RGC Sands") is a Delaware corporation authorized to transact business in Virginia. RGC Sands is a wholly-owned subsidiary of Associated Minerals (USA) Holdings, Inc., a Delaware corporation, which is a wholly-owned subsidiary of RGC (USA) Investments, Inc., a Nevada corporation. RGC Sands constructed and operates the mineral processing plant at issue in this case through its division RGC (USA) Mineral Sands, Inc.-Virginia. RGC's corporate structures are not germane to our decision in this case; therefore, we will refer to the various entities collectively as "RGC."

On November 18, 1996, RGC filed a counter petition, requesting that the Commission declare that Virginia Power has the right and the duty, pursuant to its certificate of public convenience and necessity, to sell electricity to RGC at RGC's delivery and metering point located within Virginia Power's certificated service territory.

The basic facts of this case are not in dispute. In the fall of 1995, RGC purchased a parcel of real estate (hereinafter, "Parcel A"), approximately 37 acres, that is wholly within the service territory of Prince George. Subsequently, it constructed a mineral processing plant on this site. RGC requested Virginia Power to be its electric provider and Virginia Power agreed, contingent on certain conditions being met. RGC then sought Prince George's permission to permit Virginia Power to serve RGC's plant since the plant is in Prince George's service territory. Prince George refused.

In the summer of 1996, RGC purchased another parcel of real estate (hereinafter, "Parcel B") that extends into Virginia Power's service territory. Parcel B is a strip of land approximately 30 feet wide that is contiguous to and extends south from Parcel A for a distance of approximately 4,380 feet. Parcel B is predominantly situated within Prince George's service territory; the boundary between the service territories of Virginia Power and Prince George lies approximately 4,000 feet south of the common boundary of Parcels A and B and approximately 380 feet north of the southern boundary of Parcel B. Parcel A and Parcel B share a common boundary for a distance of 35.56 feet; no public road, street or other property not owned by RGC separates Parcel A and Parcel B. Approximately 99.6% of the total land area of both parcels lies within Prince George's service territory; the remaining .4% lies within Virginia Power's service territory.

RGC began purchasing electricity from Virginia Power on May 7, 1997, subject to certain conditions.³ Virginia Power delivers the electricity to a meter that the Company owns, located in its service territory.⁴ The electricity flows from Virginia Power's meter over distribution facilities that RGC constructed, owns and operates to RGC's mineral processing plant.

The only issue in controversy is whether Virginia Power's sale of electricity to RGC violates the Utility Facilities Act under which certificates of public convenience and necessity are issued in Virginia. In her report issued on November 24, 1997, the Chief Hearing Examiner concluded that since the electric energy would be provided to RGC at a delivery point in Virginia Power's service territory, Virginia Power has the right and the obligation to provide electric service to RGC. For the reasons discussed below, we do not agree with the Hearing Examiner's findings and recommendations and will grant Prince George's petition.

Background

As stated above, Prince George filed its petition on October 30, 1996, and RGC filed its counter petition on November 18, 1996. On December 13, 1996, the Commission issued an order for notice and hearing. The Commission consolidated both petitions for review, appointed a hearing examiner to conduct further proceedings, and

³ The conditions are: (1) Virginia Power's agreement to provide the requested service is contingent upon the final outcome of any proceeding challenging the Company's right to provide the service; (2) RGC's execution of a service agreement with a minimum term of 15 years and a contract minimum demand; and (3) RGC's agreement to reimburse Virginia Power in full for all costs incurred for facilities should such facilities become useless in the event of a successful challenge to Virginia Power's provision of the service.

⁴ The meter is located approximately 50-100 feet north of the southern boundary of Parcel B.

made Virginia Power a party to this proceeding. Additionally, the Commission directed the parties to file a stipulation of agreed facts and legal issues in dispute and briefs.

On February 7, 1997, Old Dominion Electric Cooperative ("ODEC"), Prince George's electric supplier, filed a Motion to Intervene. The Motion was granted by the Hearing Examiner.

On February 24, 1997, the parties filed a Joint Stipulation of Facts, a List of Legal Issues in Dispute ("Joint Stipulation") and their briefs. On March 17, 1997, the parties filed a Supplemental Joint Stipulation of Facts and List of Additional Legal Issues in Dispute. Virginia Power also filed a brief, stating that it does not support or oppose either Prince George's petition or RGC's petition. The Company also stated that the petitions filed in this case raise an important policy question that needs to be resolved.

On June 24, 1997, Prince George filed a Motion for Leave to Amend its Petition for Declaratory Judgment. It stated that, on March 18, 1997, Virginia Power and RGC entered into an agreement for RGC's purchase of electricity from Virginia Power and that the transaction commenced on May 7, 1997. Prince George sought to amend its petition to request that the Commission find the aforesaid agreement null and void and that Virginia Power be permanently enjoined from selling electricity to RGC that would be consumed at any point within Prince George's service territory. The Hearing Examiner allowed Prince George to amend its petition.

On November 13, 1997, Kentucky Utilities Company d/b/a Old Dominion Power Company ("KU") filed a Motion to Take Judicial Notice of Additional Legal Authorities. KU stated that it is an interested party because it is involved in a proceeding currently before the Commission, in Case No. PUE960303, that involves issues similar to those

presented in this case. KU requested that three additional legal authorities that were not cited in the briefs filed by the parties in this case be considered, asserting that they are relevant to the issues in this case.

The Hearing Examiner's Report

On November 24, 1997, Chief Hearing Examiner Deborah V. Ellenberg issued her Report. The Hearing Examiner stated that although the Virginia Code provides for exclusive service territories under §§ 56-265.3 and 56-265.4, the concept and application of exclusive service areas are not challenged in this case. She framed the threshold question in this case as "whether the Commission, as a matter of policy, defines the territorial boundaries by point of delivery or point of use;" i.e., whether the right to serve a particular customer is based on the location of a facility to which the electric power is delivered or at which it is actually consumed.

The Hearing Examiner described three analyses that have been used to determine which utility should serve a customer in situations similar to RGC's; i.e., (i) the point of use test, (ii) the point of delivery test, and (iii) the geographic load center test. Under the point of use test, the location of the facilities consuming the electricity is the primary factor. The point of delivery test focuses on the point at which the electricity is delivered. Under this analysis, a utility may be allowed to sell electric power to a customer, as long as the delivery (or metering) point is situated within that utility's service territory, even if the electricity is subsequently transported into another utility's service territory. Under the geographic load center test, the utility that serves the majority of a customer's load generally is designated the provider for the entire load.

The Hearing Examiner considered certain cases from other jurisdictions provided to her by the parties that endorsed the point of use test and found that these cases generally were decided on the basis of certain policy concerns.⁵ The Examiner identified the policy concerns that support the point of use test to include protecting the rights of certificated providers against encroachment; deterring the manipulation of the system by large customers with greater resources and the circumvention of exclusive territorial service grants; protecting residential customers from higher rates resulting from the departure of larger customers; and discouraging the duplication of facilities and waste of resources.

The Hearing Examiner found that the cases from other jurisdictions where the point of use test was adopted involved existing customers who sought to change to a different electric supplier. She found further that these policy concerns cited above are not as persuasive in a situation, such as here, where the customer has never been served by the utility certificated to serve the area where the power will be consumed. She stated that "[s]ince RGC is a new customer, there is no duplication of facilities or wasted resources resulting from RGC constructing its own distribution line and taking service from Virginia Power."⁶ She also found that RGC's reasons for acquiring private property are not relevant if there are no adverse public consequences.

The Hearing Examiner further discussed telecommunications precedent that supports the application of the point of delivery test. She relied upon a Fourth Circuit case that involved a telephone subscriber that owned contiguous property in North

⁵ See Hearing Examiner's Report at 7-9.

⁶ Id. at 9.

Carolina and South Carolina.⁷ The subscriber wished to locate its privately-owned switching equipment in North Carolina so that it could interconnect with a carrier in that state, even though its 300 privately-owned telephones were located in South Carolina. The Fourth Circuit found that the subscriber could lawfully do so because individuals have a federal right to use telephone equipment in a way that is privately beneficial as long as it is not publicly detrimental. The Hearing Examiner also relied upon a Commission case in which three residential customers whose homes were located in the certificated service territory of one telephone company were allowed to interconnect their privately-owned equipment on their own property to network interface devices in another telephone company's certificated service territory, using either hard wire or cordless phones to make the connection.⁸ The Hearing Examiner concluded, citing Citizens, that "this Commission has already determined that one utility can provide service to delivery points located within its service territory even when the customers are using the service within the certificated territory of another utility."⁹

In addition, the Hearing Examiner viewed recent regulatory and legislative developments relating to the restructuring of the electric industry as supporting the application of the point of delivery test in the circumstances of this case. She noted that the General Assembly clearly supported customer responsive arrangements that do not result in public detriment when it, for example, enacted § 56-235.2 of the Code of Virginia to allow utilities to offer special rates, contracts or incentives when certain

⁷ Fort Mill Telephone Co. v. FCC, 719 F.2d 89 (4th Cir. 1983) ("Fort Mill").

⁸ Commonwealth of Virginia, At the relation of Citizens Telephone Co. v. The Chesapeake and Potomac Telephone Co. of Va., Case No. PUC840026, 1984 SCC Ann. Rep. 354 ("Citizens").

⁹ Hearing Examiner's Report at 10.

criteria are met. The Hearing Examiner also noted the increasing number of rate design and service options that have often resulted in utilities' attracting customers that might have otherwise located elsewhere or pursued energy alternatives. Based on these considerations, the Hearing Examiner found that "[g]ood reason . . . exists to maintain the policy established in the Citizens case and continue to allow customer choice within the parameters of our existing statutory framework."¹⁰

The Hearing Examiner concluded that Virginia Power has the right and, indeed, the obligation to provide service to RGC's metering point located within Virginia Power's service territory. Her recommendation, however, was not based on the single fact that the meter was in Virginia Power's service territory. Rather, her analysis was strongly influenced by her findings that: (i) RGC would have been a new customer for Prince George and there would have been no reduction in Prince George's existing revenue stream; (ii) no duplication of facilities would result; (iii) no public road, street or other property not owned by RGC separated Parcel A and Parcel B; and (iv) in her view, granting RGC's petition would not result in direct, substantial or immediate injury to Prince George. The Hearing Examiner also concluded that Prince George and ODEC did not construct facilities to serve RGC; therefore, no costs would be incurred that are directly attributable to the loss of RGC as a customer that could create stranded costs.

Comments on and Exceptions to the Hearing Examiner's Report

Comments on the Hearing Examiner's Report were filed by Prince George, ODEC, KU, RGC and Virginia Power.

¹⁰ Id. at 11.

Prince George urges rejection of the Hearing Examiner's findings and recommendations. It contends that what is at issue is "whether the integrity of exclusive service territories granted under the [Utility Facilities] Act will be preserved or whether certain individuals and businesses will be able to select their utility without regard to where the energy will be consumed."¹¹

As an initial matter, Prince George asserts that the Hearing Examiner's Report omitted certain important facts. By way of example, it states that the facilities constructed by Virginia Power to serve RGC duplicated facilities Prince George had built that could have served Parcel A.¹²

Prince George argues that the approach recommended by the Hearing Examiner has been rejected by several other jurisdictions that require exclusive service territories and that have concluded that adoption of the point of delivery test would not advance public policy objectives. Prince George contends that the policy concerns identified by the other jurisdictions are essentially the same concerns embodied in Virginia's system of exclusive service territories and also apply in this case.¹³ Prince George also contends that the recent legislative and regulatory activities related to the restructuring of the electric industry cannot be construed as support for the elimination of exclusive service territories in Virginia.

Prince George asserts that the Fort Mill and Citizens cases relied upon, at least in part, by the Hearing Examiner have no precedential value in deciding this case. More

¹¹ Prince George Comments at 2.

¹² *Id.* at 5-6.

¹³ Prince George asserts that other jurisdictions have found that the point of delivery test undermines the doctrine of regulated monopoly because it allows customers to manipulate the point of delivery, thus

specifically, it argues that the Fourth Circuit's decision in Fort Mill turned on the customer's right under federal telecommunications law to use its telephone equipment in ways that are privately beneficial without being publicly detrimental and that to translate this right into support for the point of delivery test in Virginia "stretches the bounds of credulity."¹⁴ Prince George further argues that, even if Fort Mill is deemed to be on point, the test applied by the Federal Communications Commission ("FCC") (i.e., private benefit and no resulting public detriment) cannot be met in this case, since RGC's private benefit would be outweighed by the public detriment that would result from undermining exclusive service territories.

Prince George contends that Citizens must be considered as limited to the specific facts of that case. Further, it argues that in view of the "overwhelming repudiation" of the point of delivery test in states that have statutory schemes similar to Virginia's with respect to regulating public utilities, "it is inconceivable that the Commission could have intended its holding in a case involving three residential customers to have the far-reaching implications ascribed to it by the Chief Hearing Examiner."¹⁵ Prince George asserts that the decision in Citizens should be taken for no more than what it was--the Commission's "allowing several residential telephone customers to do as they wished when neither utility involved objected."¹⁶

creating the need for duplicative facilities, and impairs the ability of utilities to discharge their duty to meet the needs of existing customers and to anticipate future needs and growth.

¹⁴ Prince George Comments at 13.

¹⁵ Id. at 15-16.

¹⁶ Id. at 16.

Further, Prince George argues that the Hearing Examiner's finding that Virginia Power's provision of service to RGC would not injure Prince George or result in public detriment is contrary to the evidence. Prince George states that much of its service territory is rural in character, includes substantial amounts of undeveloped land and has several thousand miles of shared territorial boundaries; therefore, "[i]t is unknown how many opportunities those shared boundaries might afford to existing or new customers to create a contrivance such as that created by RGC."¹⁷ Prince George also states that it has had a legal obligation to provide electric service to the area in which Parcel A is located for nearly fifty years and that it has been required to plan and maintain the capability, and incur costs, to deliver such service as might at any time be needed at that location in order to meet its obligation. It argues that to allow another utility to provide service to an area not certificated to it "renders it impossible for the utility with the obligation to serve such areas to accurately forecast and plan for load growth and thereby negates one of the benefits afforded the public by the doctrine of regulated monopoly."¹⁸

ODEC also urges the Commission to reject the Hearing Examiner's approach. It points out that the Hearing Examiner's view differs from other jurisdictions with similar regulatory schemes that have addressed the same or similar situation. ODEC contends that the Hearing Examiner's rationale that the point of delivery test should be applied based on the distinction that RGC would be a new customer is short-sighted and fails to take into account the sound public policy considerations that underlie the doctrine of regulated monopoly. ODEC asserts that the Hearing Examiner's approach fails to take

¹⁷ Id. at 19.

¹⁸ Id. at 20.

into account the fact that Prince George will need to construct distribution lines to serve the area surrounding Parcel B, resulting in duplicated facilities and wasted resources. ODEC argues that the Report appears to assume that serious obstacles exist that would prevent similar situations from arising in the future, but there is no reason to believe that the repetition of RGC's situation would be difficult.

Additionally, ODEC states that Virginia Code § 56-234.3 requires utilities to plan, forecast and build to meet future load, which necessitates large expenditures and capital outlay. ODEC contends that the adoption of the “new customer point of delivery test”¹⁹ would make it difficult for utilities to fulfill their statutory duty because utilities will be unable to forecast future load accurately. ODEC argues that the Hearing Examiner’s recommended approach will inevitably lead to the construction of facilities that will not be fully utilized, with the result of driving up the cost of service for the remaining customers who would have to bear the responsibility for fixed costs that would have been spread over a larger customer base.²⁰ ODEC further argues that adoption of the point of delivery test for new customers would unfairly disadvantage customers who do not have the resources to locate near a territorial boundary or construct their own distribution lines. ODEC asserts that the point of delivery approach would violate the spirit of § 56-234 because it would result in special treatment for new customers and, in effect, would create an undesirable differentiation between border-area and non-border-area customers. For example, ODEC contends that some customers will attempt to manipulate the system to find ways to become “new” customers which would foster a “balkanization of electric

¹⁹ ODEC Comments at 7.

²⁰ Id. at 7-8.

utility service arrangements [that] will almost certainly create friction and concern within the customer pool.”²¹

Further, ODEC takes issue with the Hearing Examiner’s reasoning that the new customer point of delivery test should be adopted in light of the General Assembly’s desire to support expanded customer responsive arrangements in the electric utility industry. ODEC argues that this consideration “inappropriately anticipates and preempts the results of current legislative and regulatory processes.”²² ODEC states that the proper role for the Hearing Examiner is to decide cases solely on the basis of current law.

ODEC also contends that the Citizens case does not support the point of delivery test in this case, raising essentially the same arguments as Prince George. In addition, ODEC argues that Citizens is inapposite since the Commission in that case found that there would be no direct, substantial and immediate harm to the utility from which the customers migrated. In contrast, ODEC asserts, Prince George and ODEC have suffered a direct, substantial and immediate injury in the loss of approximately \$650,000 in annual revenues Prince George would have received had RGC become a customer. ODEC also asserts that granting RGC’s petition would result in public detriment in terms of the impact on utilities’ ability to carry out their statutory duty to plan, forecast and build to serve anticipated load.²³

KU filed comments requesting that the Commission adopt the point of use analysis for resolving disputes between electric suppliers under the Utility Facilities Act.

²¹ Id. at 9.

²² Id. at 10.

²³ Id. at 12-14.

Alternatively, it requests that the Commission limit the application of the point of delivery test to situations where the customer is not already served by the utility certificated to serve the area where the electric energy will be consumed. KU argues that the holding of the Citizens case should not be extended to electric utilities. KU also argues that the point of delivery test is “seriously flawed.”²⁴ Specifically, KU asserts that adopting the point of delivery approach “eviscerates what the Virginia Supreme Court recognized as a ‘property right . . . entitled to protection by the courts.’”²⁵

KU contends that adoption of the point of delivery test would limit the Commission to considering only the location of the meter in territorial disputes, a matter that could be manipulated by the customer. It asserts that the Commission should base its decision in these disputes on facts that cannot be manipulated by the customer, such as the proximity of existing distribution lines to the area to be served, which supplier was first serving the area, the age, adequacy and dependability of existing facilities, and the prevention of the duplication of facilities supplying service to the area.

RGC filed comments arguing that the Hearing Examiner’s findings and recommendations in her Report are appropriate and should be adopted by the Commission. Also, RGC states that any precedent established by this case may apply only to the limited circumstances where a new customer owns contiguous property situated within the service territory of more than one utility and any policy implications may be limited to such circumstances.

²⁴ KU Comments at 4.

²⁵ Id., citing Town of Culpeper v. Virginia Electric and Power Company, 215 Va. 189, 194 (1974).

Virginia Power filed comments stating that it neither supports nor opposes the conclusions reached by the Hearing Examiner.

NOW THE COMMISSION, upon consideration of the record and the Examiner's November 24, 1997 Hearing Report, the comments and exceptions received thereto, as well as the applicable statutes and rules, is of the opinion and finds that Prince George's petition for declaratory judgment should be granted and RGC's counter petition should be denied. While we commend the Chief Hearing Examiner for her diligence and Report, we cannot adopt her findings and recommendations, for the reasons discussed below.

The Hearing Examiner correctly found that the two relevant Code sections are §§ 56-265.3 and 56-265.4 of the Code of Virginia. Section 56-265.3 provides that a public utility may not furnish public utility service within the Commonwealth unless it first obtains a certificate of public convenience and necessity authorizing it to provide the service in a particular service territory. Va. Code § 56-265.4 provides that:

[N]o certificate shall be granted to an applicant proposing to operate in the territory of any holder of a certificate unless and until it shall be proved to the satisfaction of the Commission that the service rendered by such certificate holder in such territory is inadequate to the requirements of the public necessity and convenience; and if the Commission shall be of opinion that the service rendered by such certificate holder in such territory is in any respect inadequate to the requirements of the public necessity and convenience, such certificate holder shall be given reasonable time and opportunity to remedy such inadequacy before any such certificate shall be granted to an applicant proposing to operate in such territory.

Thus, § 56-265.3 requires that a public utility cannot provide service in a particular territory unless it first obtains a certificate of public convenience and necessity.

Such a utility also incurs certain duties and obligations.²⁶ Further, § 56-265.4 precludes utilities from operating in another utility's service territory unless the incumbent utility is providing inadequate service. Even then, the incumbent utility is afforded an opportunity to cure the inadequacy.

We find that §§ 56-265.3 and 56-265.4, read together, provide for exclusive service territories that should be afforded significant protection. Moreover, Commission and court decisions underscore the fact that Virginia law provides for a high degree of protection of territorial grants. For example, the Virginia Supreme Court has stated that the exclusive right to serve is a "franchise" and "a valuable property right" that "is entitled to the protection of the courts."²⁷

We do not agree with the Hearing Examiner's conclusion that case law supports the application of the point of delivery test in this case. As discussed, the Hearing Examiner relied, in part, on the Fort Mill and the Citizens cases. The Fort Mill and Citizens cases involved situations where customers of a telephone company wanted service from a telephone company other than one in whose certificated area the customers resided. The Fourth Circuit concluded in Fort Mill that individuals have a federal right²⁸ to use telephone equipment in ways that are privately beneficial if such use does not result in public detriment, and it is apparent that the decisions in these two cases were based, at least in part, on the existence of this federal right.²⁹ None of the parties has suggested that customers of electric utilities have a comparable federal right. Moreover,

²⁶ See, e.g., § 56-234 of the Code of Virginia.

²⁷ Culpeper, 215 Va. 189, 194.

²⁸ Fort Mill, 719 F.2d at 92.

²⁹ Although the Commission did not rely specifically on Fort Mill in the Citizens case, the Fort Mill case

the Citizens case, by its own terms, is carefully limited to telephone service. Contrary to the Hearing Examiner's view, we find that the Commission in Citizens did not establish the point of delivery test as the general policy of the Commission for all utilities.

With respect to the cases from other jurisdictions, while the Commission is not bound by the decisions of other states, our review of these cases indicates that there is little support for the point of delivery test.³⁰ In fact, we have not been made aware of any jurisdiction with a statutory scheme similar to Virginia's, providing for exclusive service territories, that has adopted the point of delivery test.

Contrary to the Hearing Examiner's conclusion, we find the cases adopting the point of use test are persuasive. In reaching their conclusions, these cases discuss and compare both the point of use and the point of delivery tests.³¹ These analyses make clear

was discussed by the Commission and it applied a test similar to the one the Fourth Circuit applied in Fort Mill. Citizens, 1984 SCC Ann. Rep. 354, 355-56.

³⁰ The Hearing Examiner considered Public Service Company of Colorado v. Colorado Public Utility Commission, 765 P.2d 1015, 99 P.U.R.4th 549 (Colo. 1988); Great Lakes Carbon Corporation v. Arkansas Public Service Commission, 31 Ark. App. 54, 788 S.W.2d 243, 114 P.U.R.4th 382 (1990); Central Illinois Public Service Company v. Illinois Commerce Commission, 202 Ill. App.3d 567, 148 Ill.Dec. 61, 560 N.E.2d 363 (1990), appeal denied, 136 Ill.2d 542, 153 Ill.Dec. 371, 567 N.E.2d 329 (1991); Lee County Electric Cooperative v. Marks, 501 So.2d 585 (Fla. 1987); Re Lukens Steel Company, 57 P.U.R.4th 524 (Pa. PUC 1984); Union Telephone Company v. Tipton Telephone Co. P.U.R.1933C 285 (Ind. PSC 1932); and In re: Establishment of Service Territory Boundaries Between Iowa Electric Light and Power Co., and D.E.K. Rural Electric Coop., Docket No. SPU-79-11 (Iowa SCC, 1981) Proposed Decision and Order (Issued March 20, 1981) and adopted by the Iowa State Commerce Commission on May 13, 1981, Docket No. SPU-79-11 ("D.E.K."). In all of these cases, with one exception, the state public utility commissions applied the point of use test. The one exception was the D.E.K. case in which the Iowa State Commerce Commission applied what the Iowa Supreme Court later characterized as the geographic load center test. See O'Brien County Rural Electric Cooperative v. Iowa State Commerce Corporation, 352 N.W.2d 264, 267-69 (Iowa 1984). None of these cases supports the point of delivery test and the Hearing Examiner distinguished these cases in large part because RGC was a new customer. The substance of these cases cannot be dismissed on this basis. Further, in a case involving a "new customer," the state public utility commission, and later the Mississippi Supreme Court, found that the point of use analysis was appropriate. See Capital Electric Power Assoc. v. Mississippi Power & Light Co., 218 So.2d 707 (Miss. 1968), 78 P.U.R.3d 242, 247-49, reh'g denied.

³¹ See, e.g., Public Service Company of Colorado, 765 P.2d 1015, 1019-21; Central Illinois Public Service Company, 202 Ill.App.3d 573-74, 148 Ill.Dec. 61, 65-66, 560 N.E.2d 363, 367-68; Great Lakes Carbon Corporation, 31 Ark. App. 54, 60-62, 788 S.W.2d 243, 246-248; Lee County, 501 So.2d 585, 586-87.

that, in contrast to the point of use approach, the point of delivery test allows the essence of exclusive service territories to be destroyed by customers that can manipulate delivery points to avoid the supplier for their area. The utility is then left with an obligation to serve its entire territory, but with no assurance that it will be allowed to do so. Such circumstances make planning for and serving the remaining customers more difficult and can increase costs for both the utility and its remaining ratepayers.

Nor do we find support for the adoption of the point of delivery test based on recent legislative and regulatory activities that were intended to expand customer choice. The Hearing Examiner found that, in light of the potential restructuring of the electric industry, including the General Assembly's support for customer responsive arrangements, and since the Code does not prohibit a private citizen from operating its own distribution line for private use, the Commission should be reticent to deny customer choice where the law currently allows it.³² In our view, current legislation that allows expanded customer choice in certain prescribed ways³³ does not eliminate the requirement of exclusive service territories.

Finally, we find that the point of delivery test, even with the limits and restrictions the Hearing Examiner would impose, does not comport with the protection afforded to certificated service territories by Virginia law. The law is designed to provide protection and certainty for service territories that the Examiner's approach does not recognize. Specifically, for example, if RGC is allowed to move its delivery point in order to be

³² Hearing Examiner's Report at 11-12.

³³ E.g., § 56-235.2 of the Code of Virginia.

served by Virginia Power by purchasing a 4,000 foot strip of land, why should a customer not be allowed to achieve the same result upon acquiring an 8,000 or a 20,000 foot strip of land? Moreover, in this case, Prince George would continue to have the obligation to serve properties on both sides of the 4,000 foot strip. It could not be certain, however, that it would be allowed to provide service to these areas since, for example, a customer adjacent to the strip could rent or buy part of the RGC strip or perhaps space on, or an interest in, RGC's poles to run its own line to obtain service from Virginia Power.³⁴

We must decide this case in a manner that is consistent with, and effectuates, the policy established by the General Assembly of ensuring and maintaining the integrity of service territories embodied in the Utility Facilities Act. In view of the significant protection afforded territorial grants in Virginia, we find that Virginia Power cannot provide electric service to RGC's mineral processing plant. Although we appreciate RGC's desire to be served by Virginia Power,³⁵ we cannot countenance RGC's achieving this goal by purchasing a strip of land approximately 30 feet wide and almost a mile long in order to reach into Virginia Power's service territory to place the meter. We cannot allow the parties to use this device to do indirectly what clearly cannot be done directly. While we do not here adopt any absolute test and will always consider the practical

³⁴ We do not address here what activities might require RGC to be considered a public utility.

³⁵ According to the Joint Stipulation at 5, Virginia Power estimated its annual cost of providing electricity to RGC at approximately \$543,379, in comparison to Prince George's estimated annual cost of \$650,536. Thus, apart from any other differential in costs, RGC would have saved approximately \$107,157 on an annual basis if it were allowed to purchase its electricity from Virginia Power. We encourage all utilities to take advantage of the tools available to them, such as the availability of special rates, contracts or incentives under § 56-235.2 of the Code of Virginia, to demonstrate greater flexibility and become more competitive. The Code's requirement of exclusive service territories may protect utilities in situations such as the one involved here, but it does not and cannot protect utilities from customers choosing to locate in another service territory or state that offers lower rates or from generating their own electricity.

realities of each situation, we intend to ensure that our decisions enforce the Code's requirement of strong protection for the exclusive service territories of utilities in Virginia.

Accordingly, IT IS ORDERED that:

- (1) RGC's petition for declaratory judgment is denied.
- (2) Prince George's petition for declaratory judgment is granted insofar as we have determined that Virginia Power cannot provide electric service to RGC for its mineral processing plant.
- (3) Virginia Power and Prince George, in consultation with RGC, shall submit to the Commission's Division of Energy Regulation within 30 days of the issuance of this Order a plan detailing how and when Prince George will begin providing service to RGC.

AN ATTESTED COPY hereof shall be sent by the Clerk of the Commission to:

C. William Waechter, Jr., Esquire, Williams, Mullen, Christian & Dobbins, P.O. Box 1320, Richmond, Virginia 23210-1320; Kendrick R. Riggs, Esquire, and Allyson K. Sturgeon, Esquire, Ogden, Newell & Welch, 1200 One Riverfront Plaza, Louisville, Kentucky 40202; Louis R. Monacell, Esquire, Christian & Barton, 909 East Main Street, Suite 1200, Richmond, Virginia 23219-3095; Walter Marston, Esquire, Hazel & Thomas, P.O. Box 788, Richmond, Virginia 23206; Thomas B. Nicholson, Senior Assistant Attorney General, Division of Consumer Counsel, Office of Attorney General, 900 East Main Street, Second Floor, Richmond, Virginia 23219; Karen L. Bell, Esquire, Virginia Electric and Power Company, P.O. Box 26666, Richmond, Virginia 23261-6666; Evans B. Brasfield, Esquire, Hunton & Williams, Riverfront Plaza, East Tower, 951 East Byrd Street, Richmond, Virginia 23219-4074; Patrick A. O'Hare, Esquire, 411 East

Franklin Street, Suite 600, P.O. Box 788, Richmond, Virginia 23218; and the
Commission's Divisions of Energy Regulation, Economics and Finance, and Public
Utility Accounting.

A True Copy
Test:

William J. Bridge

Clerk of the
State Corporation Commission